Access to justice and civil legal aid reform:

A socio-legal analysis of the experiences of litigants in person in the family and civil courts

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by

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ABSTRACT

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The Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO) removed legal aid from family and civil matters without ensuring that the fundamentally adversarial justice system could accommodate those litigants who would no longer be eligible for publicly funded representation. This decision to remove legal aid was taken despite the dearth of empirical evidence about the experiences of what have come to be known as litigants in person (LIPs). The lack of empirical evidence, which remains post-LASPO, is the chief motivation for this thesis, which examines the extent to which LIPs are able to navigate through the complex family and civil procedure rules to gain effective access to the courts.

In order to achieve this objective the author interviewed 36 LIPs who appeared in family and civil courts in a major North West City in England. Being premised on the need to provide a 'voice' for LIPs, the project takes a socio-legal and qualitative approach to this data whilst also being underpinned by the themes of access to justice; procedural justice and proportionate justice.

The thesis confirms that LIPs face barriers to accessing justice throughout all stages of family and civil proceedings, but these barriers are compounded by the reforms made to legal aid entitlement. LIPs now face new challenges in the form of the compulsory requirement to attend mediation information assessment meetings and the restricted nature of legal aid eligibility for the domestically abused. Further, at a time when early legal advice is more crucial than ever, the slowness of the legal profession to adapt to modern litigants' needs has led to a newcomer being welcomed to the legal services market offering access to justice, but at the risk of exploitation. Conversely, in the absence of legal aid, it is the legal profession and judiciary who hold the key to access to justice for LIPs. By providing them with a voice and sufficient control when litigating, it is possible to ensure that LIPs can achieve effective access to the courts as well as procedural fairness.

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Kerry Ann Barry, Liverpool August 2017

PREFACE

The empirical research referred to throughout this thesis was conducted between July 2015 and October 2015.

The law is stated up to 17th August 2017.

Chapter one

Introduction

The withdrawal of legal aid from family and civil matters has led to a growth in litigants who appear in court without representation. There is limited evidence about how these so called litigants in person (LIPs) experience the family and civil court processes. The purpose of this thesis is, therefore, to provide a socio-legal and qualitative exploration of the access to justice implications of withdrawing public funding for legal advice and representation from the perspective of LIPs.

This preliminary chapter provides the setting for the analysis contained within the rest of the thesis. It begins by outlining the contemporary nature of the research. This involves an explanation of the reasons why legal aid was withdrawn and the scale of the reforms introduced to the public funding of both litigation and advice giving. The impact on the numbers of LIPs and the availability of advice is outlined before examining the scarcity of qualitative research analysing the experiences of LIPs following legal aid reform. The chapter continues by defining the term LIP adopted for this research, as well as the socio-legal emphasis of the study. The chapter concludes by summarising the analysis contained in the remaining chapters of the thesis.

1. Research context

In April 2013 the Legal Aid, Sentencing and Punishment of Offenders Act (LASPO) introduced major reforms to the funding of civil claims by reducing the areas of law encompassed within the legal aid scheme.[1] The Government's declared aim in reforming legal aid was:

> to develop an approach which provides access to public funding for those who need it, the protection of the most vulnerable in our society, the most efficient performance of the justice system and compliance with our legal obligations.[2]

[1] sch 1 pt 1.
[2] MOJ, *Proposals for the Reform of Legal Aid in England and Wales* (Cm 7967, 2010) [1.7].

However, there is no doubt that the additional aim of 'achieving substantial savings' had a significant influence on decision making.[3] The reforms were introduced in order to make estimated savings of £350 million in 2014–15.[4] This was reportedly necessitated by the fact that legal aid was costing over £2 billion per annum, or, more specifically, £39 per head of the population.[5] This figure was highlighted by the Government as being much larger than the recorded costs in New Zealand of £8 per head of population, or in France and Germany, which amounted to only £5 per head.[6] Nonetheless, comparisons with New Zealand appear disingenuous as this Commonwealth country has a 'no fault' litigation scheme for clinical negligence claims.[7] As a result, this area of law would not be included in cost calculations. Comparisons with continental jurisdictions, such as France or Germany also appear misleading, as such countries have an inquisitorial system. In these nations judges are more actively involved in the investigation of the case, which requires less input from lawyers.[8] For this reason, there is merit in Lady Hale's assertion that access to the courts and access to lawyers cannot be considered in isolation, but rather the total amount spent on lawyers and judges must also be taken into account. Taking this approach would, therefore, reveal a legal aid system that is not as expensive as it appears.[9]

This viewpoint is supported by the fact that although the expenditure on civil legal aid amounted to the sum of £941 million in 2010-11, this represents only 44 per cent of the annual legal aid budget in that year and a six per cent fall in expenditure since 2000-01.[10] Notwithstanding these figures, it would appear that the desire to reduce public expenditure on civil litigation funding was so strong that the Government's reform proposals were pursued despite the discord expressed by over 90 per cent of respondents during the consultation.[11]

[3] ibid 3.
[4] ibid [1.4].
[5] MOJ, *Reform of Legal Aid in England and Wales: the Government Response* (Cm 8072, 2011) 3.
[6] ibid.
[7] Injury Prevention, Rehabilitation, and Compensation Act 2001. The estimated volume reduction in Personal Injury and clinical negligence claims, due to reforms, is expected to be in the region of 6,460. See MOJ, *Reform of Legal Aid in England and Wales: Equality Impact Assessment* (EIA) (21 June 2011) 126.
[8] Lord Neuberger, 'Justice in an Age of Austerity Justice' (Tom Sargant Memorial Lecture, 2013).
[9] Lady Brenda Hale, 'Equal Access to Justice in the Big Society' (Sir Henry Hodge Memorial Lecture, 2011).
[10] House of Commons Justice Committee, *Government's proposed reform of legal aid* (Third Report) (2010–11, HC 681-I) 9.
[11] MOJ (n. 5) [41].

This costs saving exercise has been achievable by severely restricting the availability of legal aid.[12] Funding has been withdrawn from a wide range of areas of legal practice including clinical negligence cases (unless they involve neonatal brain injuries), debt and housing claims (unless possession or eviction from the home is involved), education (unless it is a special educational needs matter) and private family matters (unless there is evidence of domestic violence or child abuse).[13] It appears that the reduction of legal aid in these areas has produced the savings benefits that the Government envisioned. Reporting in 2014, the National Audit Office found that the Government was, in fact, close to making savings of over £300 million.[14]

1.1. The consequences of reducing legal aid

Controversy arises not only due to the costs savings to be made from restricting civil legal aid, but also because restricting access to public funding is regarded as the reason for an explosion in the number of LIPs. At the time of the reforms the Civil Justice Council (CJC), predicted that the number of LIPs would increase on a 'considerable scale', so that 'such litigants will be the rule rather than the exception'.[15] This forecast was accepted by the Government when stating that 'even if there is no conclusive evidence of this', there was a 'likelihood of an increase in volume of litigants-in-person as a result of these reforms and thus some worse outcomes materialising'.[16]

The anticipated increase in the number of LIPs was further supported by an estimated volume reduction in legal aid clients of 623,000.[17] The National Audit Office has since confirmed that there have been significant reductions in the numbers being granted legal aid. Between 2013 and 2014 the number of matters expected to be approved by the Legal Aid Agency, had the reforms not been implemented, was estimated at 685,459. That figure dropped to an estimated 384,964 when the reforms were taken into account. In fact, the actual number of

[12] Kaganas explores other reasons for the LASPO reforms in Felicity Kaganas, 'Justifying the LASPO Act: Authenticiy, necessity, suitability, responsibility and autonomy' (2017) 39(2) JSWFL 168.
[13] LASPO 2012 (n. 1). Exceptional case funding is available when refusal of legal aid would result in human rights' breaches under LASPO, s.10 (3). Examination of this scheme is outside the remit of this thesis.
[14] National Audit Office, *Implementing reforms to civil legal aid*, (2014-15 HC 784) 4.
[15] CJC, *Access to Justice for litigants in person (or self-represented litigants) A Report and Series of Recommendations to the Lord Chancellor and to the Lord Chief Justice* (November 2011) [15].
[16] MOJ (n. 5) [140].
[17] MOJ (n. 7) Table 4, 125.

matters approved in 2013-14 was 300,496, a figure that was seventeen per cent less than predicted.[18]

Nonetheless, the true impact of LIPs on the court system will depend on whether people decide to pursue claims, despite being unable to afford legal representation, or whether they decide not to pursue their claim irrespective of its meritorious nature. The English and Welsh Civil and Social Justice Survey (CSJS) found that, despite 32 per cent of respondents reportedly having experienced a civil justice problem, sixteen per cent of these problems involved respondents taking no action to seek a resolution.[19] These so called 'lumpers'[20] may mean that LIPs will have less of an economic impact on the court system.[21] However, it raises important questions about the accessibility of justice. This is particularly apposite in respect of women, ethnic minorities and those people with disabilities who are disproportionately affected by legal aid reforms, due to the removal of legal aid provision from private family law, immigration law and clinical negligence. These are the areas of law that represent greater demands on the legal aid budget by these groups of people.[22] In fact, the number of private family law cases between April and June 2014 dropped by nineteen per cent compared with the figures for the same quarter in 2013. This trend has been repeated in respect of civil cases. Between April and June 2014 the courts dealt with thirteen per cent fewer civil claims than in the previous quarter.[23] The extent to which these reductions are due to the removal of civil legal aid and the 'lumping' of claims is unquantifiable, but, it is at least arguable that there is likely to be a correlation between the two events.

Whether those with civil justice problems decide to proceed unrepresented or become 'lumpers' will be greatly influenced by whether free advice and assistance is available, as not only is the scope of legal aid reduced, but there has been a drastic cut in government funding for advice agencies such as Citizens' Advice. These cuts mean that advice agencies lost financial assistance through the removal of legal aid for social welfare issues, which is estimated to amount to £89 million, as well as reductions in local authority funding. In the

[18] National Audit Office (n. 14) Figure 2, 2.
[19] Pascoe Pleasance et al, *Civil Justice in England and Wales 2009: Report of the 2006-9 English and Welsh Civil and Social Justice Survey* (Legal Services Commission, 2010).
[20] Hazel Genn, *Paths to Justice: What people do and think about going to law* (Oxford, 1999).
[21] Graham Cookson, *Unintended Consequences: the cost of the Government's Legal Aid Reforms: A Report for The Law Society of England & Wales* (November 2011).
[22] MOJ (n. 7) [1.7], [2.243] and [7.10].
[23] *Court Statistics Quarterly* (April to June 2014) 2.

period 2010 – 2011 an estimated £220 million was provided for the advice sector, which was likely to reduce to between £180 million and £160 million in 2015-16. This lead to a total loss to advice agencies of £129 million through the reduction in these two sources of financial assistance.[24]

The reduction in funding is reportedly already having a negative impact. A study on advice-giving charities in Liverpool observed that agencies are struggling to meet the 'ever growing' need for advice, as evidenced by 86 per cent of respondents reporting an unmet need for advice services. Agencies have been forced to offer a lower level of service, using generalist advisers rather than specialists, during shorter office hours and for a narrower range of matters.[25]

The impact of this lack of funding is compounded by a ten per cent reduction in the fees paid to family and civil legal aid lawyers,[26] which the Government has acknowledged will lead to the risk that there will be fewer solicitors and barristers prepared to undertake legally aided work.[27] Furthermore, fees for legally aided work have not increased in line with inflation since 1998-99, which amounts to a 34 per cent reduction in real terms.[28] These facts have sparked fears that there will be 'advice deserts'[29] or, conversely, if lawyers do remain in legally aided areas they will be inexperienced or poorly qualified.[30]

So far as the former fear is concerned, the National Audit Office has provided statistics reinforcing the belief that advice deserts will be a consequence of legal aid changes. In the period 2013-14 there were fourteen local authorities that had no face-to-face providers based in the area starting any legal aid-funded work. In a further 39 local authorities, legal aid providers started fewer than 49 pieces of legal aid work per 100,000 people.[31] Moreover, twelve per cent of those lawyers with legal aid contracts did not start any legal work in 2013-

[24] The Low Commission, *Tackling the advice deficit: A strategy for access to advice and legal support on social welfare law in England and Wales* (January 2014) [1.15].
[25] Jennifer Sigafoos and Debra Morris, *The Impact of Legal Aid Cuts on Advice-Giving Charities in Liverpool: First Results* (Charity Law & Policy Unit, University of Liverpool, June 2013).
[26] The Community Legal Service (Funding) (Amendment No 2) Order 2011.
[27] MOJ (n. 5) 58 [233].
[28] National Audit Office (n. 14) [3.20].
[29] Owen Bowcott, 'Legal Aid Cuts 'will create advice deserts'', *The Guardian* (1 April 2013) www.theguardian.com/law/2013/apr/01/legal-aid-cuts accessed on 15 April 2014.
[30] Liberty, *Liberty's Response to the Ministry of Justice Proposals for the Reform of Legal Aid* (February 2011).
[31] National Audit Office (n. 14) [3.23].

14. As the National Audit Office explains, these statistics can have a profound effect on those with civil or family law disputes as those who cannot afford to travel outside their area to gain legal aid will have no alternative provision available to them. This is not a situation that is repeated for criminal legal aid, as if there are no active legal aid providers then the Public Defender Service will ensure that a lawyer employed directly by the Legal Aid Agency is provided to the defendant.[32]

Fears concerning the quality of lawyers who remain in the legal aid sector are not novel, as this was a likely consequence highlighted by Cappelletti and Garth in 1978 when explaining that:

> In market economies, the inescapable fact is that without adequate compensation, legal services for the poor tend to be poor. Few lawyers will provide such services, and those who do, tend to perform them in a substandard fashion.[33]

The argument that the quality of legal advice will diminish, is supported by evidence from the Legal Aid Agency's quality assurance processes, which recognise that almost one in four providers fails to meet the quality threshold.[34] Further, there appears to have been realisation of the fear that lawyers will move away from areas of law no longer underpinned by legal aid. The CJC reported in 2014 that the reforms had been the impetus for some lawyers to move away from legal aid work altogether. The effect of the reforms was, therefore, likely to be detrimental to issues involving social welfare law and family law. This would subsequently impact on judicial recruitment to these specialisms, if lawyers no longer practised in these areas of law.[35] The reduction in the number of lawyers dealing with previously legally aided work is compounded by the fact that the number of not-for-profit organisations providing legal advice fell from around 3,226 in 2005[36] to only 1,462 in 2015.[37]

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[32] ibid [3.25].
[33] Mauro Cappelletti and Bryant Garth, 'Access to Justice: The Newest Wave in the Worldwide Movement to Make Rights Effective', (1978) 27 *Buff L Rev* 181.
[34] House of Commons Committee of Public Accounts, *Implementing reforms to civil legal aid* (thirty sixth report) (2014-15 HC 808) [6].
[35] CJC, *Response to Justice Committee inquiry: Impact of changes to civil legal aid under the Legal Aid, Sentencing & Punishment of Offenders (LASPO)Act 2012* (April 2014) 4.
[36] MOJ, *Survey of Not for Profit Legal Advice Providers in England and Wales* (2015) 7.
[37] ibid 3.

1.2. LIPs: The available evidence

Having predicted that the consequence of reducing the scope of legal aid would be an increase in the number of litigants appearing in court without representation, it may have been thought that the Government would advocate an in-depth empirical analysis of the experiences of LIPs when appearing in the family and civil courts. However, the Government did not make such a proposal. Rather, the Ministry of Justice (MOJ) conducted a literature review,[38] in order to inform the Government's consultation exercise on legal aid reform. This highlighted that the only major study in England and Wales on LIPs was Moorhead and Sefton's empirical study on behalf of the Department for Constitutional Affairs (DCA) in 2005.[39] This report was relied on to implement the latest legal aid reforms, despite the fact that it was conducted in only four courts in first instance family and civil cases and involved interviews with a mere eleven unrepresented litigants.

It is arguable that this should have been supplemented by additional evidence before the legal aid reforms were introduced in order to ascertain a fuller understanding of the impact that a lack of public funding has on those who litigate in person. In fact, the data for the report was collected as early as 2002 to 2003 and involved cases commencing in 2000. This was scarcely a sufficient time period for the Legal Aid reforms in 1999 to impact on those no longer financially eligible for free legal representation.[40]

Nevertheless, the report does provide important insights into some of the issues relevant to LIPs through the observation of cases and interviews with judges and lawyers representing the other side. It has now been complemented by a report commissioned by the MOJ to 'provide evidence of the experiences and support needs of LIPs in private family law cases' in 2013, prior to the introduction of LASPO.[41] This report does have a larger sample base as it involved interviews with some ninety seven LIPs.[42] Notwithstanding, there remains a gap

[38] Kim Williams, *Litigants in person: a literature review* (MOJ, 2011).
[39] Richard Moorhead and Mark Sefton, *Litigants in person: Unrepresented litigants in first instance proceedings* (DCA Research Series 2/05, March 2005).
[40] CJC (n. 15).
[41] Liz Trinder et al, *Litigants in person in private family law cases* (MOJ Analytical Series 2014) 124 1.
[42] ibid 7.

in the available evidence on the extent to which a lack of legal aid and, as a result legal representation, affects the experiences of LIPs in the family and civil courts post LASPO.[43]

2. Research aim

It is the knowledge gap concerning the experiences of LIPs in family and civil matters post LASPO, together with the cuts in legal aid and the budget of advice agencies which provides the impetus for this thesis. The aim of the research is to explore how LIPs gain access to justice without public funding in a system that is traditionally adversarial and underpinned by legal representation. Emphasis is placed on the difficulties encountered by LIPs when commencing proceedings, where advice is sought when finances are not available to consult a lawyer and the barriers to accessing justice identified by LIPs.

At the outset it is important to define the term 'LIP' as they are not a homogenous group. LIPs can encompass a wide range of people including those who have received no advice whatsoever, those who have sought advice from the internet or advice agencies and those who have, at some stage, received legal services from a solicitor. The term 'in person' 'may also refer to a spectrum of possibilities, ranging from the well supported and well advised, through to those who have never consulted anyone'.[44] MacFarlane's 2013 empirical study of LIPs in Canada, which involved interviews with 283 LIPs, identified that 53 per cent of the sample had been represented by counsel earlier in their action.[45] This finding is replicated by Trinder et al who report that around half of the LIPs in their study had received legal representation or advice at some stage during their case.[46]

Not only have there been definitional problems with regard to LIPs, but there has also been debate on the appropriate term to use. The CJC preferred the term 'self-represented litigant' as this failed to imply that advocacy by a lawyer was needed for representation to exist, or

[43] Recent reports include: Amnesty International, *Cuts that hurt: The impact of legal aid cuts in England on access to justice* (London 2016); Toynbee Hall, *Sleepless nights: Accessing justice without legal aid* (November 2015); Robert Lee and Tatiana Tkacukova, *A study of litigants in person in Birmingham Civil Justice Centre* (CEPLR Working Paper Series 02/2017).
[44] John Dewar et al, *Litigants in person in the Family Court of Australia: A report to the Family Court of Australia* (Research Report No. 20, 2000) 7.
[45] Julie MacFarlane, *The National Self-Represented Litigants Project: Identifying and Meeting the Needs of Self--Represented Litigants* (Final Report, May 2013) 31.
[46] Trinder et al (n. 41) 11.

that a lack of representation implied a deficiency.[47] However, this term has been rejected by the Master of the Rolls, Lord Dyson. Practice guidance stipulates that the term LIP should continue to be the sole term used 'to describe individuals who exercise their right to conduct legal proceedings on their own behalf.'[48] In accordance with this practice guidance, the term 'LIP' is the phrase adopted in this thesis. It will be used to describe anyone who appears at any stage of proceedings without legal representation, whilst recognising that the amount of legal assistance that the litigant has received may well vary enormously. Unfortunately, in the absence of accurate data on how much legal assistance a litigant has received,[49] this would appear to be the most appropriate definition. It is a description that complies with the Equal Treatment Bench Book's classification of LIPs. This states that the term 'encompasses those preparing a case for trial or hearing, those conducting their own case at a trial or hearing and those wishing to enforce a judgment or to appeal' without representation.[50]

3. Research strategy

This research is socio-legal in nature, as it seeks to explore how LIPs navigate through the family and civil courts without legal representation. The focus goes beyond doctrinal analysis to consider the real world impact of the government's policy to withdraw legal aid from a wide range of family and civil matters. The examination is qualitative in nature in order to allow for a more in-depth analysis of the challenges faced by the participants, which is led by their experiences. In this respect the empirical research consists of interviews with 36 LIPs in one location in the North West of England. Interviewing was the chosen method as it allows for data generation to provide a voice for those likely to be affected by the reforms to the family procedure rules (FPR) and civil procedure rules (CPR) following the introduction of LASPO.

Whilst the remit of the project was to explore the experiences of LIPs in both the family and civil courts, only two of the interviewees were representing themselves in a civil matter. The

[47] CJC (n. 15).
[48] Terminology for LIPs, Practice guidance issued by the Master of the Rolls (March 2013) www.judiciary.gov.uk/publications-and-reports/guidance/2013/mor-guidance-terminology-lips accessed on 1st December 2016.
[49] The MOJ's Court Statistics Quarterly for April to June 2014 20 does explain that legal representation status reflects whether the parties' legal representative has been recorded on the file. Therefore, the fact that the file is blank does not necessarily mean that the party is a litigant in person.
[50] Judicial College, *Equal Treatment Bench Book* (2013) 1.

reason for this shortfall was that the interviewees were introduced to the author through the Personal Support Unit (PSU), which is an independent charity whose aim is to 'support people going through the court process without legal representation'.[51] Whilst the branch of this charity, which operates in the court building from which the author was conducting her research, deals with both family and civil matters the majority of its customers require assistance with family issues. This was, therefore, reflected in the research sample. As a result, the main focus of this project is on family cases. However, civil matters arising from the interviews with LIPs involved in such cases are discussed when relevant.

The author felt that it was important to include the experiences of those who have been involved in civil matters, as the only research in this jurisdiction relating to civil proceedings is Moorhead and Sefton's 2005 report.[52] This project, therefore, provides a valuable insight into how civil litigants engage with the court process post LASPO. There is, however, a need for further research in order to explore how LIPs in civil matters navigate through the procedural and legal requirements of the court system post LASPO.

The commitment to examining the consequences of the reforms to litigation funding from the perspectives of LIPs is reflected in the fact that the analysis is based solely on the issues identified by interviewees. This was achievable by using a constructivist grounded theory approach to analysing the empirical data as a means of providing an inductive understanding of the themes emerging.[53] These themes not only form the basis of the law discussed in the following chapters, but the accounts of the interviewees are threaded through the analysis to provide a richer insight into the salient matters affecting LIPs when they attend court without legal representation.

Whilst the research provides an important understanding of the concerns highlighted by LIPs its value is limited to this objective. Due to the qualitative nature of the data and the lack of a representative sample, it cannot be used to provide broad generalisations regarding the typical LIP. It does, however, offer the impetus for discussion and further research on how the traditionally lawyer-centric court system can be adapted to become more LIP friendly. This

[51] www.thepsu.org/about-us/what-we-do/ accessed on 11.07.16.
[52] Moorhead and Sefton (n. 39).
[53] Kathy Charmaz, *Constructing grounded theory: A practical guide through qualitative analysis* (SAGE 2006).

is an objective that is fruitless without the opinions of LIPs being heard. It is the purpose of this research to provide such a voice.

4. Thesis structure

Having explained the foundations of the research, the rest of the thesis continues to discuss the law and procedural aspects of appearing in court which affect LIPs underpinned by the accounts of the interviewees who engaged in the project.

Chapter two outlines the procedure adopted to select the research sample and collection of data, as well as the methodology employed for analysis. The socio-legal context of the research is outlined, together with the reasons for adopting a qualitative approach and the nature of such an enquiry. The chapter continues by charting the strategies employed in order to carry out the research. The theory underpinning the research is then explained. This involves an examination of the meaning of 'access to justice' and how this term is defined for the purposes of the analysis of the interview data and resulting themes discussed throughout this thesis. The final aspect of the strategy discussed deals with the constructivist grounded theory methodology explaining how coding and the techniques of constant comparison and theoretical saturation were used to analyse data. The chapter concludes by discussing how the ethical requirements which underpin empirical research were satisfied to protect participants.
Chapter three considers the problems encountered by LIPs when commencing proceedings. The chapter begins by examining the requirement for applicants in the family court to attend a mediation meeting before litigation can be initiated. In particular, the reasons why mediation is an inappropriate mechanism for solving many family disputes is discussed as well as possible solutions. The allegation by interviewees that opposing LIPs can be vexatious is explored along with the legal routes to tackling such behaviour.

The chapter then turns to the issue of why litigants decide to proceed without legal representation. This, unsurprisingly, incorporates the obvious reasons attached to finances and lack of public funding, as well as the subjective issues of previous negative experiences with lawyers and perceptions about the seriousness of the dispute. More surprising is the fact that despite having to proceed alone, LIPs identify a number of advantages to finding themselves in this predicament. The chapter, therefore, concludes by discussing this issue

and the connections with established theories and empirical research on the requirements of procedural justice in the courts.

Chapter four focuses on where LIPs seek advice and assistance when they cannot afford the services of the legal profession or have decided to forego their support. The discussion begins by examining the types of online help available and the extent to which LIPs are able to glean valuable assistance from websites contained therein. The remainder of the chapter is concerned with the sources of face to face advice, which commences by considering the impact that the removal of legal aid has had on the police and court staff, which are two of the locales that LIPs frequent in order to gain free advice.

The chapter is, thereafter, devoted to analysing the role of McKenzie Friends (McFs), who have emerged as a new source of legal advice beyond the legal profession. Firstly, the role of the PSU is analysed through the evidence generated from interviewees for this project, which provides an insight into the amount of support and assistance that is provided by this organisation and the extent to which it can help to fill the gap left by the withdrawal of legal aid.

Secondly, the growth of McFs, who charge for their services and have been granted rights of audience by the judiciary, is examined. The discussion begins by outlining the legal status of these assistants as well as detailing the empirical evidence and relevant case law relating to their everyday practices and behaviour. This evidence is then compared to the statement provided by one of the interviewees for this project in order to afford a voice for the LIP, which has hitherto been absent from deliberations on the future of McFs.

Having examined the available evidence about McFs the chapter considers the recommendation to remove the rights of these assistants to charge for their services[54] and the implications this would have for effective access to justice. Alternatively, the compromise position of allowing McFs to charge for their services, subject to regulation, minimum qualifications and a code of practice is presented. The chapter ends by examining the manner

[54] Lord Chief Justice of England and Wales, *Reforming the courts' approach to McKenzie Friends: A Consultation* (February 2016) (Consultation).

in which the legal profession can adapt their practices as a means of widening access to justice and reducing the need for new entrants to the legal services sector.

Chapter five analyses the extent to which LIPs can achieve effective access to justice once they are proceeding with their matter in court and the barriers inherent in the court system that can hinder such access. This examination involves consideration of the contrasting manner in which novice and experienced LIPs engage with the court process. So far as the former are concerned, the discussion focusses on the manner in which language used in the courtroom and on documentation can isolate LIPs. The inability to prepare for and understand the crucial nature of fact finding hearings which determine safeguarding issues is also addressed.

A particular feature of the analysis is the impact that the restrictive eligibility criteria for legal aid has on victims of domestic violence. This results in victims of domestic violence having to represent themselves in court in front of their abuser, as well as often being cross-examined by them. Analysis of this issue is afforded prominence due to its contemporary nature, as it arises from the LASPO reforms.

Chapter six continues with the themes of effective access to justice and the barriers that exist once matters proceed to court. However, the emphasis shifts to consideration of how legal actors can facilitate or obstruct access to justice for LIPs. The discussion begins by detailing the changing nature of civil procedure, which is now underpinned by proportionality and a culture of rule compliance. The potential effect this may have on LIPs and its adoption in the family jurisdiction is then considered. Next, the statements of interviewees are analysed in order to determine the extent to which lawyers and LIPs comply with timetables set by the judiciary. The professionalism with which lawyers negotiate and communicate with LIPs is then discussed as a means of determining the impact of the relationship with the opposing lawyer on the LIP.

Having considered the role of the lawyer in facilitating justice the discussion examines how the judiciary can enable justice for LIPs. This involves outlining the role of the judge in family and civil matters before once again examining the interviewees' statements in order to assess how judicial strategies used in the courtroom can affect their ability to access justice.

Finally, the experiences of LIPs when they appear before lay magistrates is investigated in order to determine what impact having a procedure involving both lay adjudicators and LIPs has on the latter's perceptions of justice.

Chapter seven is the concluding chapter, which brings together the underpinning themes of access to justice; barriers to justice; proportionate justice and procedural justice to reflect on the main challenges faced by post-LASPO LIPs. Whilst there are pre-existing barriers to effective access to the courts, such as language and procedural complexities, the restrictive nature of legal aid entitlement has introduced new obstacles throughout each stage of proceedings. MIAMS and the eligibility criteria for victims of domestic violence have failed to achieve their objective of ensuring conflict free settlements and protection for vulnerable LIPs in the court room. The withdrawal of legal aid has also led to a growth of McFs who may increase access to justice, but their unregulated and unqualified status requires safeguards to be introduced. Finally, it is possible to provide a justice system that is regarded by LIPs as procedurally fair. This requires a commitment by lawyers, the judiciary and magistrates to ensure that LIPs are given the opportunity to have their voices heard and retain control so that they consider themselves valued parties to the proceedings. The chapter ends by explaining the limitations of the methodology employed and thereafter the direction for further research.

Chapter two

Methods and approaches to investigating the experiences of LIPs

1. Introduction

The purpose of this chapter is to provide an understanding of the methodological approaches adopted in order to explore the experiences of LIPs in family and civil courts. The research is qualitative in nature and has a socio-legal context. Thus, the emphasis is not merely on the social aspects of appearing in court without a lawyer, but rather to combine this with legal theories regarding 'access to justice', procedural justice and the reinterpretation of 'justice' in the family and civil courts. This enables the research to analyse the experiences of LIPs within a modern civil justice setting, through a socio-legal lens.

Both Moorhead and Sefton in their 2005 report,[1] and Trinder et al in their more recent study in 2014,[2] used qualitative research methods to explore the implications of litigants appearing in person in family and civil proceedings. However, at the time of commencing the present research the only qualitative report available about LIPs in the English justice system was contained in Moorhead and Sefton's study. It was this sparseness in evidence about the experiences of LIPs that provided the inspiration for conducting further qualitative research. It was not until the second year of the present study that Trinder et al released the findings of their research. Consequently, the purpose of the evidence conducted in respect of this thesis, is not to verify or disprove hypotheses contained within these previous reports, but rather to gain further insight into the 'lived experiences'[3] of LIPs.

Whilst the publication of Trinder et al's report may have called into question the necessity for further research into the experiences of LIPs, the continued validity of additional inquiries is confirmed by the nature of the evidence generated in support of their findings. Trinder et al's research was conducted prior to the introduction of LASPO, which removed legal aid from

[1] Richard Moorhead and Mark Sefton, *Litigants in Person: Unrepresented litigants in first instance proceedings* (Department for Constitutional Affairs 2005).
[2] Liz Trinder et al, *Litigants in person in private family cases* (Ministry of Justice 2014).
[3] Matthew B Miles and A Michael Huberman, *An expanded sourcebook qualitative data analysis* (2nd edition, SAGE 1994) 10.

the majority of civil matters in April 2013. As such, this research provided excellent and wide ranging insights into the experiences of LIPs, involving the interviewing of 117 participants as well as observations and case analysis. However, it could not address the impact of the major changes introduced by LASPO.[4] The importance of these reforms resides in the fact that they were expected to impact not only on the functioning of the civil court system, but also on the types and experiences of LIPs.[5]

The present qualitative inquiry, therefore, aims to assist in filling the remaining gap in knowledge about how LIPs engage with the family and civil court process by providing a contemporary and methodologically rigorous analysis. That there remains a requirement for such research is also acknowledged by Trinder et al who recommend that 'follow up independent research is needed to examine the impact of the legal aid reforms on the types and experiences of LIPs'.[6] Hence, the timing of the present research is pertinent, as although there have been previous inquiries into the experiences of LIPs, there remains a shortage of qualitative assessment providing a contemporary analysis of how LIPs perceive the family and civil court process.[7] Consequently, there is an unequivocal evidential foundation to support the necessity and appropriateness of the present qualitative inquiry into the experiences of LIPs post LASPO. It is the purpose of this research to provide a voice for LIPs in order to reveal the access to justice implications of the wide scale removal of public funding and the manner in which equality of arms can be improved.

1.1. Profile of interviewees

A total of 36 semi-structured interviews were conducted between July and October 2015 with litigants who had appeared without representation in the civil or family courts in a city in the North West of England. The research sample consisted of sixteen interviewees involved in proceedings where they were opposed by another LIP.[8] Eighteen of the interviewees were in proceedings where the other side was represented by a lawyer.[9] Only one of the interviewees

[4] Trinder et al (n. 2) 1.
[5] Ibid 125.
[6] ibid.
[7] Recent reports include: Amnesty International, *Cuts that hurt: The impact of legal aid cuts in England on access to justice* (London 2016); Toynbee Hall, *Sleepless nights: Accessing justice without legal aid* (November 2015); Robert Lee and Tatiana Tkacukova, *A study of litigants in person in Birmingham Civil Justice Centre* (CEPLR Working Paper Series 02/2017).
[8] Trinder et al (n. 2) refer to these as Semi-represented cases.
[9] ibid. Referred to as Non-represented cases.

had a McF advising the other side and a further interviewee was in ex-parte proceedings. Such is the small scale nature of the research that statistical analysis of a representational nature is impossible. This is confirmed by the fact that the sample was drawn from a single court building, which may produce a less heterogeneous sample. However, it is interesting to note that there are almost the same number of interviewees involved in proceedings with legal representation as there are without such assistance. This contrasts with Trinder et al's sample which involved 'predominantly semi-represented rather than non-represented'[10] cases. This increase in the number of non-represented matters is unsurprising given the extensive narrowing of the scope of legal aid.[11] It should also be noted that of the 36 interviewees, 34 were involved in family matters and only two in civil proceedings. As a result, the analysis that follows focuses mainly on family proceedings.

There was an almost equal split of male and female interviewees, although this was by chance rather than design. Of the 36 interviewees 19 were female and 17 were male. The majority of interviewees fell within the younger age ranges of 18 – 30 (10 interviewees) or 31 – 40 (10 interviewees). Only six interviewees were between the ages of 51 – 60 and a mere two were between the ages of 61 – 70. Only nine interviewees were unemployed and of the 27 who were in employment, seven of these had a professional role.

So far as ethnicity is concerned, only two of the interviewees were not white and British. Both of these were British but one was of Jamaican origin, whilst the other was born in Pakistan. Hence, the sample provides no specific data regarding the experiences of LIPs from ethnic minority backgrounds as it is mainly limited to those who are White British and speak English as a first language.

Whilst interviewees had a lack of legal representation in common they had received varying amounts of legal advice from a range of sources both before commencing and during proceedings. The manner in which LIPs engaged with available help varied according to their willingness and ability to acquire legal advice and assistance. In this respect, there were

[10] ibid 225.
[11] In the period 'July to September 2016, neither party had legal representation in 33 per cent of private law cases, an increase of 12 percentage points from July to September 2013', Ministry of Justice, *Family Court Statistics Quarterly, England and Wales* (July to September 2016) 14.

three categories of LIP that emerged from the data. Firstly, 'new uninformed' LIPs were those who had not been involved in proceedings before and who were usually desperately in need of assistance. Seventeen of the interviewees fell within this category. These LIPs were more likely to be unemployed and, if female, to have been the subject of domestic violence. Secondly, those categorised as 'competent to instruct legal assistance' had been involved in proceedings for some time and had thus learned the rules of procedure from past experiences. These twelve interviewees were more able to recognise and find sources of legal advice and assistance than those new to the process. Lastly, seven interviewees were categorised as 'self-reliant' due to the fact that they had decided to forego legal assistance. This was a decision made either due to a belief that the matter was straightforward or because of a previous bad experience with lawyers. Further examination of these categories is provided in chapter five when the barriers to accessing justice that are inherent in the court system are analysed.[12] One aspect that united all interviewees was that they had all represented themselves in civil or family matters within the few months preceding their interview, and thus the evidence collected post-dates the LASPO reforms.

The remainder of this chapter will outline the data analysis techniques employed within this research, as well as describing more fully the socio-legal and qualitative methodological approach adopted. In addition, the legal theory underpinning this research as well as the practical and ethical considerations that were involved in conducting the research will be explained.

2. The Research Design

The aim of this project was to explore the experiences of LIPs in the family and civil courts in order to generate an understanding of how they make sense of family and civil law and procedure. The impact that a lack of legal representation may have on their ability to navigate the often complex family and civil procedural rules was a particular focus of the research. There are a variety of empirical research methods that can be used for this purpose, but, as will be outlined, the methodology chosen had both a socio-legal and qualitative focus.

[12] See 154.

2.1. Adopting a socio-legal framework

There is no universally agreed definition outlining what socio-legal studies entail,[13] and, to some extent, the term 'socio-legal' has become 'a notoriously ill-defined and contested term'.[14] The inability to provide an all-embracing definition arises from the fact that academics have used the term to encompass a broad range of objectives. One defining feature of socio-legal research, however, appears to be that it involves a fundamental shift in the study of law beyond a strictly doctrinal focus to consider, what Roscoe Pound referred to as, 'law in action.' As Pound explains, this is to be distinguished from 'law in books', so that the emphasis is on the potential mismatch between what the law states and its actual relevance to societal attitudes. Thus, the question is whether the law reflects what happens in society, leading to the warning that legal texts should not acquire a status of sanctity.'[15]

Pound's recognition, as early as 1910, that the law in books often differs from how it operates in action continues to underpin socio-legal studies today. Whilst his focus was on law's inability to remain abreast of societal changes and thus remain relevant, it is the issue of acknowledging that law must be considered within its societal context that has led to many socio-legal studies. As Cownie explains, 'one could accurately characterise the dominant mode of academic law as 'concerned with doctrine and with placing those doctrinal materials in their social context'.[16] It is the concept of law being considered in its societal setting that underlies the purpose of this project. Whilst a strictly doctrinal approach would consider the changes to legal aid alongside the court's interpretation of 'access to justice' and 'proportionate justice', this research goes beyond these matters to analyse the impact and experiences of this legal policy and laws on the individuals who are affected. In line with many socio-legal scholars, the emphasis of the project is shifted from concern with the 'internal consistency of the law and the inter-relationship of different legal rules' to the use of the social sciences to assist in achieving an understanding of the 'realities of the law in action' and the wider social effects of law.[17] That this is a fundamental aspect of socio-legal studies is supported by Webley's assertion that:

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[13] D R Harris, 'The development of socio-legal studies in the United Kingdom' (1983) 3(3) Legal Studies 315.
[14] Richard Collier, '''We're all socio-legal now?" Legal Education, Scholarship and the "Global Knowledge Economy" – Reflections on the UK Experience' (2004) 26 Sydney L Rev 503.
[15] Roscoe Pound, 'Law in books and law in action' (1910) 44 Am L Rev 12.
[16] Fiona Cownie, *Legal Academics: Culture and Identities* (Hart Publishing 2004) 197-8.
[17] D R Harris, 'The development of socio-legal studies in the United Kingdom' (1983) 3(3) Legal Studies 315.

> Just as the common lawyer learns to understand the law by focusing on a small number of important and relevant precedent bearing cases, so the qualitative researcher sets out to understand individuals' experiences of law, legal meaning, and the justice system and their relationship with it.[18]

In taking this approach, the research follows a long tradition of socio-legal academics who have studied the 'real world' impact of laws and legal policy on those who use the civil courts and tribunals.[19] The project's aim, therefore, is to provide an understanding and interpretation of the experiences of LIPs by linking empirical research with the quest to uncover 'law's reality'.[20] The legitimacy of such an approach is supported by Ehrlich's assertion that the 'centre of gravity of legal development lies not in legislation, nor in juristic science, nor in judicial decision, but in society itself'.[21]

In accordance with a 'law in action' approach to socio-legal study, the meaning of 'socio' in this research, does not engage sociology as a means of substantive analysis of the law, but rather seeks to use it as a tool for both the collection and analysis of data,[22] as well as a means of gaining a greater understanding of the social effects of law and legal policy. The approach, therefore, can best be described as one of 'law in society'.[23]

2.2. Employing a qualitative methodology

The decision to adopt a qualitative mode of enquiry was based on the ontological and epistemological positions that historically underpin this research methodology. Quantitative methods of enquiry are rooted in a positivist paradigm. This postulates that the study of society can be subjected to scientific analysis in order to produce an objective reality,[24] which is to be found separately from the subjective understandings of individuals.[25] This can then

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[18] Lisa Webley, 'Qualitative approaches to empirical legal research' in Peter Cane and Herbert M Kritzer (eds) *The Oxford Handbook of Empirical Legal Research* (OUP 2010) 948.
[19] Examples include: John Baldwin, *Small claims in the county courts in England and Wales* (Clarendon Press 1997), Hazel Genn, *Paths to Justice : What people do and think about going to law* (Hart Publishing 1999); Hazel Genn et al, *Tribunals for diverse users* (Department for Constitutional Affairs 2006); Moorhead and Sefton (n.1) and Trinder et al (n.2).
[20]Dermot Feenan, *Exploring the 'socio' of socio-legal studies* (Palgrave Macmillan 2013) 5.
[21] Eugen Ehrlich, *Fundamental Principles of the sociology of law* (Transaction 1936) Foreword.
[22] Reza Banakar and Max Travers *Theory and method in socio-legal research* (Hart Publishing 2005) xi.
[23] Roger Cotterrell, 'Law and Community: A New Relationship?' in M. D. A. Freeman (ed), *Legal Theory at the End of the Millenium: Current Legal Problems* (OUP 1998) 376.
[24] Auguste Comte, *System of positive polity* (Burt Franklin 1968).
[25] Émile Durkheim, *The Rules of Sociological Method* (Free Press 1966).

be tested and replicated using scientific criteria.[26] Positivist methods assume that the collection of data involves an 'unbiased and passive observer who collected facts, but did not participate in creating them'.[27] Contrastingly, qualitative research is underpinned by interpretivism, which, rather than using scientific methods of enquiry to determine a testable truth, seeks to discover how the 'social world is interpreted, understood, experienced or produced.[28]

As the focus of this research was to determine the subjective understandings and experiences of LIPs then the most appropriate research method was one that took a qualitative, interpretivist approach. The purpose of the project was to analyse the subjective experiences of LIPs rather than provide an account of the prevalence or statistical distribution[29] of this phenomenon. Thus, using a qualitative methodology was intended to provide a 'deeper' understanding than could possibly be obtained from using a purely quantitative methodology.[30] The benefit of adopting a qualitative methodology rests with its ability to enable the researcher to use data to provide 'thick descriptions'[31] of the social world being studied, which as Miles and Huberman explain, 'are vivid, nested in a real context and have a ring of truth.'[32] In this respect, the adoption of a qualitative methodology complements the socio-legal aspect of this research, as they both seek to uncover the experiences of participants in their natural social environment.

3. The research strategy

Having explained the socio-legal and qualitative nature of the study, this section, outlines the strategies employed in order to gather and analyse the empirical data.

3.1. Doctrinal issues: Legal policy and common law

As previously highlighted, the project's aim is to explore the experiences of LIPs in the family and civil courts and, in particular, how they make sense of the procedural and legal

[26] David Silverman, *Interpreting Qualitative Data* (4th edition, SAGE 2011).
[27] Kathy Charmaz, *Constructing grounded theory: A practical guide through qualitative analysis* (SAGE 2006) 5.
[28] Jennifer Mason, *Qualitative Researching* (SAGE 1996).
[29] Jane Lewis and Jane Ritchie, 'Generalising from Qualitative Research' in Jane Ritchie and Jane Lewis (eds) *Qualitative Research Practice: A guide for social science students and researchers* (SAGE 2003) 277.
[30] Silverman (n. 26) 22.
[31] Miles and Huberman (n. 3).
[32] ibid.

issues that this necessarily entails. However, the legal nature of the study does not merely derive from the fact that the members of society being explored are engaging with a legal institution. It is the legal policy of curtailing the remit of civil legal aid and the impact that this may have on a LIP's ability to access justice that provides the legal foundation for this study. This involves an examination of how access to justice is defined as well as the obstacles that can bar such access. When examining these barriers particular focus is placed on how and whether LIPs perceive the family and civil process to be procedurally fair and how this relates to theories of procedural justice. In addition, the recent focus on 'proportionate justice' following Lord Justice Jackson's programme of reforms in the civil justice system,[33] necessitates an analysis of how the consequential stringent approach to rule compliance impacts on LIPs' ability to access justice.

To achieve these objectives the analysis is underpinned by reference to relevant statutory provision and case law. In particular, the CPR and FPR are examined throughout this thesis, in order to understand the processes which LIPs must comply with.

3.1.1. Defining access to justice

It is important to provide the reader with an understanding of how the phrase 'access to justice' is used throughout the remainder of this thesis, as it is the foundational basis for the analysis of LIPs' experiences contained in subsequent chapters. It is a term that finds its roots in the 1970s when the Florence Project on Access to Justice was conducted.[34] This study culminated in a four volume comparative report on the barriers and solutions to accessing justice throughout the world, including both civil and common law jurisdictions. In order to identify whether the legal systems were equally accessible to all and delivered just results, the Project introduced the concept of taking an 'access to justice approach' to the objectives of the legal system.[35]

At the time when the decision to withdraw public funding from family and civil matters was made, Liberty cautioned that the Government's aim to reduce the expenditure of the MOJ, by reforming legal aid entitlement, would be 'at the expense of access to justice for those ill-

[33] Lord Justice Jackson, *Review of Civil Litigation Costs: Final Report* (The Stationery Office 2009).
[34] Mauro Cappelletti and Bryant Garth (eds), *Access to Justice: A World Survey* (Milan: Sitjoff and Noordhoff Alphenaandenrijn, 1978).
[35] ibid 49.

equipped to navigate the justice system alone'.[36] Whilst it is difficult to dispute this allegation, there appears to have been less discussion about how access to justice is to be defined. This section, therefore, seeks to determine how this term should be used when making the assertion that withdrawing legal aid from litigants who wish to pursue an action in the family and civil courts will lead to the denial of access to justice.

3.1.2. In search of a universal meaning

Despite its common usage, there is no consensus on what 'access to justice' entails or how it should be defined. This problem was identified by the Legal Services Board (LSB), which has a regulatory obligation to improve access to justice. [37] As part of that duty, the LSB sought to provide a definition for access to justice. A search of Lexis discovered 151 different Acts of Parliament that used the term and a review of Hansard found frequent use of the expression. Yet, there was no attempt to provide a definition within any of the Acts of Parliament or Hansard.[38] It is somewhat perplexing that Parliament has deemed it unnecessary to define what access to justice entails when it is advocated in so many statutes. This suggests that the phrase is regarded by Parliament as having a consistent and well understood meaning, which requires no elaboration. It would seem then that we, therefore, recognise access to justice when we see it, or at least realise when it is denied.

Nevertheless, to assume that the term 'access to justice' is used in a uniform manner to espouse identical values would be erroneous. As Sackville argues, part of the attraction to the term is the fact that it lacks a specific definition. This, therefore, enables it to be 'capable of bearing different meanings, depending on the perspectives or values of the commentator'.[39] This is emphasised by the fact that the *Government's Proposals for the Reform of Legal Aid in England and Wales* consultation document contained the statement that 'the Government strongly believes that access to justice is a hallmark of a civil society', whilst at the same time advocating proposals for the widespread removal of legal aid.[40] As Bass argues, 'there is nothing transcendent in the access to justice perspective' as it merely

[36] Liberty, *Liberty's response to the Ministry of Justice Proposals for the Reform of Legal Aid* (February 2011) 12.
[37] Legal Services Act 2007, s.1 (1) (c).
[38] LSB, *Evaluation: How Can We Measure Access to Justice for Individual Consumers, A Discussion Paper* (September 2012) [3.8].
[39] Ronald Sackville, 'Some Thoughts on Access to Justice' (2004) 2 NZJPIL 85.
[40] Ministry of Justice (MOJ), Proposals for the Reform of Legal Aid in England and Wales (Cm 7967, 2010) [1.2].

'offers a way of examining an issue, of articulating and valuing certain goals and processes, and of ordering a range of possible responses'.[41] This provides a possible explanation for why access to justice is used in a manner that does not also proffer a specific definition.

There appears merit in Bass's assertion that access to justice involves the achievement of a goal, namely the goal of opening the door of justice that many often find 'closed or at least too stiff to move on its hinges.'[42] The phrase, therefore, carries with it an implicit promise that that there is a genuine prospect that justice is an achievable goal.[43] What do we mean then when we talk of achieving the goal of justice? Friedman argues that at its basic level it is to ensure that there is a realistic and practical way of turning a claim into a reality and of pursuing a complaint, which involves 'empowering the poor and downtrodden to give them the tools and weapons' necessary to proceed.[44] Thus, as the Civil Justice Council (CJC)[45] asserts, the impact of the reduction of legal aid depends on the precise definition given to access to justice. Whilst there can be theoretical access to justice, because those who can afford the expense of going to court are free to do so, it is those that do not have the financial means to seek legal assistance that find it difficult to pursue such access.[46]

3.1.3. Access to justice as a means of accessing a court of law

The above statements conflate access to justice with access to the courts, which is the interpretation espoused by the Florence Project. Whilst accepting that the words 'access to justice' were difficult to define, the report focussed on access to a legal system under which 'people may vindicate their rights and/or resolve their disputes under the general auspices of the state.[47]

The importance of protecting the right to access the justice system was recognised long before the Florence Project. One of the earliest proclamations of this right was contained within the Magna Carta, which states 'to no one will we sell, to no one deny or delay right or justice'. The importance of not only having legal rights, but also the ability to enforce those

[41] Julia Bass, *Access to Justice Committee: Report to Convocation* (June 2003) 7.
[42] Lawrence M Friedman, 'Access to justice: social and historical content' in M. Cappelletti and B. Garth (eds.) *Access to Justice* (Amsterdam: Sijthoff & Nodhoff 1978).
[43] Ronald Sackville, 'Access to justice: towards an integrated approach' (2011) 10 The Judicial Review 221.
[44] Lawrence M Friedman, 'Access to Justice: Some Historical Comments' (2010) 37 Fordham Urb LJ 3.
[45] The CJC is an advisory body with powers under the Civil Procedure Act 1997, s.6 (3) (b) to keep the civil justice system under review, and to consider how to make that system more 'accessible, fair and efficient'.
[46] CJC, *Response to Justice Committee inquiry: Impact of changes to civil legal aid under the Legal Aid, Sentencing & Punishment of Offenders (LASPO)Act 2012* (April 2014).
[47] Cappelletti (n. 34) 6.

rights was further endorsed some five centuries later when Holt LCJ declared in *Ashby v White* that:

> If the plaintiff has a right, he must of necessity have a means to vindicate and maintain it and a remedy if he is injured in the exercise or enjoyment of it, and, indeed it is a vain thing to imagine a right without a remedy; for want of right and want of remedy are reciprocal.[48]

Access to justice, therefore, involves access to the legal system and this has traditionally been interpreted as involving access to the courts. As Lord Diplock explained in *Attorney General v Times Newspapers Limited*:

> In any civilised society it is a function of government to maintain courts of law to which its citizens can have access for the impartial decision of disputes as to their legal rights and obligations towards one another individually and towards the state as representing society as a whole.[49]

The question that arises, therefore, is how access should be defined when asserting that there should be access to courts for the litigation of disputes.

3.1.4. Effective access to justice

The authors of the Florence Project argued that for access to justice to be satisfied the legal system must be equally accessible to all and lead to results that are individually and socially just.[50] However, they conceded that complete equality of arms in the form of 'the assurance that the ultimate result depends only on the relative merits of the opposing positions' was a utopian ideal.[51] For this reason, such an approach should not be advocated as the differences between parties can never be totally eradicated.[52] Whilst this realistic view was espoused in the 1970s, it remains apposite at a time when legal aid has been withdrawn from most areas of civil law and the lowering of expectations regarding access to justice is a possible

[48] (1702) 2 Ld Raymond 938.
[49] [1973] 3 All ER 54, 71.
[50] Cappelletti (n. 34) vol 1, 6.
[51] ibid 10.
[52] ibid.

consequence. The resources needed to eradicate the barriers that impede access to justice and ensure that both the rich and poor alike have equal opportunity to access justice, the most obvious of these barriers being a lack of legal representation, are simply no longer available from the Government. In fact, the requirement for the State to provide total equality of arms is unsupported by case law. The duty of the State is thus fulfilled 'as long as each side is afforded a reasonable opportunity to present his or her case under conditions that do not place him or her at a *substantial* disadvantage vis-à-vis the adversary'.[53]

As an alternative and more achievable goal, Cappelletti and Garth suggest that what is required is the narrower obligation of 'effective access to justice'. They declare this to be the 'most basic human right of a modern, egalitarian legal system, which purports to guarantee, and not merely proclaim, the legal rights of all.[54] They do not, however, provide a definition of 'effective' access, but rather suggest that as perfect equality is unobtainable, effective access consists of determining how far one wishes to 'push toward the utopian goal, and at what cost.'[55]

Whilst it is true that all of the barriers that litigants face in proceeding with a legal dispute can never be truly eradicated,[56] access to justice must at least ensure that litigants have the opportunity to assert their legal rights, which ultimately should include access to a court of law. Effective access to justice, it is submitted, involves guaranteeing that litigants, who have a meritorious claim, can proceed through the civil justice system irrespective of issues such as their financial wellbeing, educational background or legal awareness. This no doubt involves receiving assistance from judges, lawyers or advice agencies to ensure that justice is available to all parties in proceedings. In this respect the optimism of Jerome Frank remains pertinent. The judicial process may not be capable of being made perfect, as it 'is a human process, involving inherent human failing and weaknesses', but 'its substantial betterment is nevertheless possible'.[57] This betterment must include ensuring that litigants, without

[53] *Steel and Morris v United Kingdom* [2005] All ER (D) 207 (Feb) [62] (emphasis added).
[54] Mauro Cappelletti and Bryant Garth, 'Access to Justice: The Newest Wave in the Worldwide Movement to Make Rights Effective', (1978) 27 Buff L Rev 181.
[55] Cappelletti (n. 34) 10.
[56] ibid.
[57] Jerome Frank, *Courts on Trial Myth and Reality in American Justice* (Princeton University Press 1973).

representation, can navigate through the civil justice system in order to obtain justice irrespective of means.[58]

Effective access to justice, therefore, requires the assisting of litigants to proceed with their claim through the civil justice system with the accompanying resources required to understand their legal rights and responsibilities and to competently present their case. It is a definition that endorses Dewar et al's interpretation of access to justice which advocates that LIPs should be afforded a 'meaningful opportunity to be heard'.[59] Further, it is supported by the fact that protection under Article 6 (1) of the European Convention on Human Rights (ECHR) refers to litigants having 'effective access to court'.[60]

An approach to access to justice that extends beyond mere access to the court building to incorporate assistance in navigating through the judicial system to ensure 'effective' access, obviously involves the question of how much assistance is enough. How much resource should the government be required to provide for LIPs to ensure that they have effective access? As this does not involve an obligation to provide public funding,[61] the answer will always lead to the necessarily vague response that it depends on the facts of each case, the needs of the LIP and what is at stake.[62] However, this should not lead to a diminution in the value of advocating such an objective. Consequently, the purpose of this thesis is to determine the extent to which the LIPs, who participated in this study believe that they were able to achieve access to justice. For this project access to justice is defined as 'effectively accessing the family and civil courts in the manner that LIPs believe enables them to have a fair process and just outcome'.

3.1.5. A barrier approach to access to justice

In determining whether LIPs have been able to effectively access the family and civil courts the project adopts a barrier approach to interpretation. This was the ground breaking approach to improving access to justice adopted by the Florence Project. This method involves the identification and removal of those barriers that stand in the way of citizens

[58] ibid.
[59] John Dewar et al, *Litigants in person in the Family Court of Australia: A report to the Family Court of Australia* (Research Report No. 20, 2000).
[60] *Airey v Ireland* (App. no. 6289/73) - [1979] ECHR 6289/73.
[61] ibid [26].
[62] *Steel* (n. 53) [61].

achieving access to the justice system.[63] This barrier approach methodology was further developed in the early 1980s by Felstiner et al, who advocated a dispute perspective model of access to justice, which focused on the transformation of disputes.

This model identified how experiences transform by going through the stages of recognising an experience as injurious (naming), transforming this experience into a grievance (blaming) and finally identifying someone as being responsible (claiming). The theory sought to identify the barriers faced during each stage of this dispute resolution pyramid with a view to clarifying the reasons why it consisted of most people naming, whilst few managed to reach the top of the pyramid by claiming.[64]

In adopting the pyramid model, Galanter uses the metaphor of the legal iceberg to explain the different stages at which litigants may leave the dispute resolution process. This iceberg consists of adjudication at the peak followed by litigation, appended settlement systems, private settlement systems, exit remedies/self-help, and at the very bottom lies inaction or 'lumping it'.[65] As this model illustrates, removing barriers to access to justice involves ensuring that more people are able to reach the top of the pyramid/iceberg. There can be little doubt that the pyramid at present does not have an 'optimal shape',[66] especially for those who are forced to litigate in person, but as Friedman asserts, the finite nature of resources necessitates that unlimited access is an unworkable option. The pyramid, as he states, 'must remain a pyramid rather than become a square'.[67]

The importance of determining the optimal dimensions of the pyramid has increased significantly in view of the number of LIPs who will now embark on the transformation of a dispute without any legal assistance. Without the necessary support to identify whether a claim has legal merit, there is the risk that litigants will either proceed with unmeritorious claims or struggle to proceed with a justified legal action. Such struggle may ultimately conclude in litigants 'lumping' their claim.

[63] Cappelletti (n. 34) 10.
[64] WLF Felstiner et al, 'The Emergence and Transformation of Disputes: Naming, Blaming and Claiming …' (1980-81) 15 Law and Society Review 631.
[65] Marc Galanter, 'Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change' (1974) 9 Law and Society Review 95.
[66] Friedman (n. 44).
[67] ibid.

The inequality of the adversarial process, which appears to provide a neutral legal system was highlighted by Galanter's categorisation of litigants who are 'haves' and those who are 'have nots'. Galanter describes how the 'haves' in the form of 'repeat players' are able to gain advantage over the 'have nots' who enter the adversarial system as 'one shotters'.[68] This distinction would appear to acquire renewed importance with the growth of LIPs in the civil courts. The problem is one that is relevant to both LIPs who are confronted with the challenge of a money claim against repeat players, in the guise of insurance companies or large corporations, as well as those who wish to pursue claims through the family courts.

Those LIPs who are opposed by institutional repeat players have the task of pursuing a claim against an organisation that has the tactical advantage of having developed expertise, which permits them ready access to specialists.[69] They are also able to build up a bargaining reputation which they can use as a resource to ensure a favourable settlement.[70] A further strategic benefit is that insurance companies have the ability to calculate their gains over a series of cases rather than be exclusively concerned with the one particular case the LIP is involved in.[71] For the LIP the only priority is to minimise any loss in their sole claim.[72]

Notwithstanding the fact that cases in the family court are now more likely to consist of both sides being 'one shotters',[73] Galanter's distinction remains pertinent in situations where a LIP faces a 'one shotter' who has legal representation. This is due to the fact that the lawyer, as Galanter identifies, is also a repeat player who knows the rules of the game in the form of the procedural rules and applicable laws, which often elude the LIP. Therefore, the lawyer gains, for his 'one shotter' client, a tactical advantage over the 'one shotter' LIP.[74] This places the lawyer in a stronger bargaining position when negotiating a settlement with a LIP, who may not be aware of the true extent of their legal entitlement or the full consequences of reaching a settlement.

[68] Galanter (n. 65).
[69] ibid.
[70] ibid.
[71] ibid.
[72] ibid.
[73] In the present research sample 16 out of the 36 interviewees were in a dispute involving litigants in person on both sides.
[74] Galanter (n. 65).

It is with all of these issues in mind that the ensuing chapters analyse the manner in which interviewees have been able to effectively access the family and civil courts and the barriers that may impede such access. Whilst it is accepted that there may be other hurdles that exist, those discussed are limited to the barriers identified by the interviewees. This ensures that a voice is given to those who are directly affected by the 'emasculation' of legal aid provision.[75]

3.2. Procedural issues: Interviewing as a method of enquiry

Moving from theoretical to practical considerations, the method of interviewing, described by Barbour as the 'gold standard'[76] of qualitative research, was chosen as the most relevant method to adopt due to its ability to capture the thoughts and feelings of the interviewee. The types of interviews available to researchers have been described as a continuum by Bryman[77] or a 'family' by Rubin and Rubin,[78] which begin with structured through to semi-structured and then unstructured interviews.[79] It is the semi-structured and unstructured types of interview that are more suited to a qualitative project, due to their greater flexibility.[80]

In order to direct the participants to the salient issues to be discussed, an interview schedule was implemented. However, this was merely to provide a guide to ensure all relevant topics were covered. The issues to be explored included such matters as whether litigants had received any legal assistance for their claim; why they had felt it necessary to initiate proceedings; how they had engaged with the procedural aspects of their case; how they had dealt with the requirements of the hearings; and, what relationship they had had with the legal personnel involved in their case. The schedule was, however, flexible enough to enable any LIPs to discuss issues that had not been expected, and, as such, its purpose was not to pre-determine which questions or topics were or were not relevant to the project's aims. In this way, the use of a semi-structured interview enabled a level of depth and complexity that would not have been available had a fully structured, quantitative style interview schedule

[75] *Wright v Michael Wright Supplies Ltd and Another* [2013] EWCA Civ 234 [2] (Ward LJ).
[76] Rosaline Barbour, *Introducing qualitative research: A student's guide to the craft of doing qualitative research* (SAGE 2008) 113.
[77] A Bryman, *Quantity and Quality in Social Research* (Routledge 2001).
[78] Herbert J Rubin and Irene S Rubin, *Qualitative Interviewing: The art of hearing data* (SAGE 2011).
[79] Bryman (n. 77).
[80] Rosalind Edwards and Janet Holland, *What is Qualitative Interviewing?* (Bloomsbury 2013) 3.

been adopted.[81] Yet it retained some structure to provide a guide as to which questions should be asked to glean information relevant to the inquiry. This method was particularly useful when conducting the first few interviews, as it operated as a handy aide memoire. Later on the guide was often used merely to glance at, at the end of the interview, to ensure there was no obvious omission from the conversation.

As the reasons for adopting a semi-structured interview approach to gathering data have been explained, the remainder of this section will discuss the challenges encountered when recruiting a sample of participants, as well as the dynamics involved in the interview process.

3.2.1. Gaining access to participants

The researcher gained access to potential participants through the production of a leaflet which called for anyone who had been a LIP in the civil or family courts in the past few months to get in touch with the researcher. The researcher already had links with the PSU through her status as a core volunteer for the organisation. Permission was, therefore, requested and granted from the PSU for volunteers, providing legal information to LIPs, to bring the leaflets to the attention of their customer once their consultation had ended.

Participants expressed to the PSU that they would prefer to take part on the same day as they appeared in court, in order to save time and the expense of travelling back to be interviewed. The researcher, therefore, spent most days between the end of July and the beginning of October 2015 at the court building. Those participants who expressed an interest in participating in the project were introduced to the researcher usually before they appeared in court that day or after they had received other help from the PSU. The interviews then took place after their court hearing or consultation in a court witness room. This mimics the approach taken by Trinder et al when undertaking their research on LIPs. They explain that in four of the courts members of the research team were introduced to possible participants by the usher prior to the hearing.[82] In the present study all interviews were audio-recorded, following the participant's consent, in order to assist in transcription, as well as provide

[81] Bridget Byrne 'Qualitative interviewing' in Clive Seale (ed) *Researching society and culture* (2nd edition, SAGE) 179-92.
[82] Trinder et al (n. 2) 60.

verbatim accounts to enrich the subsequent written analysis. The length of time of the interviews ranged from between twenty and ninety minutes.

One problem encountered by the researcher was that some litigants agreed to be interviewed, but expressed that a later date would be more convenient, as they had prior engagements following their court hearing. Despite making appointments, none of these interviewees arrived in order to take part in the project or contacted the researcher to communicate their decision to withdraw. This may have been because they had reflected on the issue and decided not to take part or due to the fact that they had forgotten.

The unwillingness of interviewees to attend beyond the confines of the court hearing date led to the researcher deciding to forego any attempt to engage in focus groups with LIPs and to rely solely on the data produced from the interviews. This means that the project lacks triangulation through the use of different sources of information as a method of enabling greater validity. However, it is argued that this does not necessarily undermine the validity of the study. This is supported by Lewis and Ritchie's contention that despite the quantitative requirement of validity of measurement applying to qualitative research, the focus for the latter type of enquiry relates more to the 'validity of representation, understanding and interpretation'.[83] Thus, 'an account is valid or true if it represents accurately those features of the phenomena that it is intended to describe, explain or theorise'.[84] The engagement with grounded theory techniques is, therefore, intended to ensure that the project's findings accurately reflect the phenomenon under study as perceived by the study population.[85]

3.2.2. The interview dynamic

The interview process by its very nature has been described as involving asymmetries of power.[86] It is the possibility of a power hierarchy when interviewing that leads many researchers to argue that interviewers should be reflexive about their 'positionality' in relation to the interviewee as this may shape both the interview and its interpretation.[87] As Denzin and Lincoln explain:

[83] Lewis and Ritchie (n. 29) 273.
[84] Martyn Hammersley, *What's wrong with ethnography!* (Routledge 1992) 69.
[85] Lewis and Ritchie (n. 29) 274.
[86] Edwards and Holland (n. 80) 78.
[87] ibid 79. They define this as relating to 'social status and identity'.

> All research is interpretive, it is guided by the researcher's set of beliefs and feelings about the world and how it should be understood and studied. Some beliefs may be taken for granted, invisible, only assumed, whereas others are highly problematic and controversial.[88]

It is through engaging with these beliefs, feelings and values that the credibility of findings can be enhanced,[89] because the researcher's own characteristics can affect what they see and how they interpret it.[90] Bearing in mind this need for reflexivity, to ensure greater objectivity, the researcher in the present project was aware that the participants being recruited were from the same socio-economic background as her. Having grown up on a council estate, the researcher was able to share a cultural membership with many of the interviewees. This mutuality of backgrounds meant that participants were more willing to engage in the project, especially when they heard that the researcher had the same accent as them and could relate to the areas of the city in which they reside. It also meant that the researcher had an insight into their world view and perspectives. The sharing of this common characteristic meant that there was an '"awareness and sensitivity" to the participants "social and cultural location" which enabled the researcher to reflect constructively on their experiences'.[91]

The sharing of a common dialect and accent meant that a rapport was very easy to achieve, which allowed the interviewees to speak more freely. It also meant that the researcher was able to word questions in a language that the interviewees would understand and relate to. In these respects the researcher was "both 'inside' the culture and participating in that which she [was] observing".[92] However, the researcher was mindful not to allow the fact that she was an 'insider' determine the interpretation of the findings. Every effort was made to ensure it

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[88] Norman K Denzin and Yvonna S Lincoln, *The SAGE Handbook of Qualitative Research* (3rd edition, SAGE 2005) 22.
[89] Lena Aléx and Anne Hammarström, 'Shift in power during an interview situation: methodological reflections inspired by Foucault and Bourdieu' (2008) 15(2) Nursing Inquiry 169.
[90] Earl Babbie, *The Practice of Social Research* (12th edition, WADSWORTH 2010) 302.
[91] Val Gillies and Pam Alldred, 'The ethics of intention: research as a political tool' in *Ethics in qualitative research* Tina Miller et al (eds) (2nd edition SAGE 2012) 54.
[92] Ann Oakley 'Interviewing women: a contradiction in terms', in H. Roberts (ed.) *Doing Feminist Research*, London: Routledge 1981) 53.

was the voice of the participants that was emerging from the data and not what the researcher assumed was their voice.

Although the researcher has received a higher education and now resides in a more affluent locality, the same rapport was not achievable with the few interviewees who derived from a higher socio-economic background. In this respect, the researcher remained to an extent an outsider and deeper insights were more difficult to elicit during the interview process.
Other reflexive issues that arose in interpreting the findings derived from the fact that the researcher has a legal background, which has involved working daily with lawyers in a legal practice. In addition, the researcher has encountered LIPs through volunteering for the PSU. In this respect, the researcher expected LIPs to struggle with the court process as they would lack the necessary legal skills. The researcher also holds a passionate belief in access to justice for all and the availability of state funded legal assistance and representation.

By recognising all of these personal characteristics the researcher intended to avoid bias when asking questions and interpreting the data generated from the study. That the researcher should be aware of issues of bias is recognised by Pope and Mays who have warned that: 'qualitative research is an interpretative and subjective exercise, and the researcher is intimately involved in the process, not aloof from it'.[93] Efforts were, therefore, made to ensure that questions did not lead interviewees to answer in a manner that the researcher had predicted. Further, when coding data and developing themes the researcher was mindful of the issue of bias and made concerted efforts to ensure that the themes emerging were truly reflected in the data rather than forcing the researcher's 'own preconceptions about what a particular experience means'.[94]

Despite these efforts, bias has the potential to pervade all qualitative studies, and, whilst being difficult to eliminate totally, it is something that the researcher must constantly seek to minimise. The interviewees volunteering for this project were chosen using a purposive sample through introduction by PSU volunteers. There are two possible sources of bias using this approach. Firstly, the volunteers may select interviewees according to the facts of their

[93] Catherine Pope and Nicholas Barron Mays, *Qualitative research in health care* (3rd edition, BMJ Publishing Group 2006).
[94] Charmaz (n. 27) 67.

case, especially if they have had a particularly harrowing experience in court. They may believe, mistakenly, that these are the most important cases that should be involved in the research, bearing in mind their likely view that all LIPs struggle with the process. Secondly, those who do agree to partake may not be typical or representative, as they may want to sign up because they have strong opinions about the subject of the research.[95] This is likely to include those who have had a fraught experience and, therefore, want to air their grievances to someone who is willing to listen sympathetically. This was a potential drawback to interviewing participants shortly after they had attended a hearing as they may be quite emotional due to the fact that they have not had the opportunity to take time to reflect on what had occurred. Conversely, those who were too emotional to speak shortly after they had attended a hearing did not participate in the research and so their testimony could not form part of the analysis. This may mean that important information regarding the struggles that interviewees encounter when attending hearings is not collected, which may indicate that the impact of court hearings is greater than that reported in the research. Additionally, it should also be noted that the participants for this study had received assistance from the PSU and so their experiences may be more favourable than those who have not been able to access this type of guidance.[96]

In order to address the issue of selection bias, volunteers were requested to give leaflets to all clients that they interviewed rather than trying to choose which interviewees they considered relevant. However, the issue of bias in a self-selected population is impossible to eliminate, and it is for this reason that the final analysis contained within this research does not seek to make generalisations about the findings, but is limited to the sampled population.[97] That this accords with the aims of most qualitative studies is supported by Webley's assertion that, 'qualitative researchers are not concerned that these people or situations should be statistically representative, because they do not seek to reach findings that are generalizable to an entire population'.[98]

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[95] Jane Ritchie et al, 'Designing and selecting samples' in Jane Ritchie and Jane Lewis (eds) *Qualitative Research Practice: A guide for social science students and researchers* (SAGE 2003) 123.

[96] A weakness also acknowledged by Amnesty (n. 7) who also gained participants via not-for-profit organisations. See also Robert Lee and Tatiana Tkacukova, *A study of litigants in person in Birmingham Civil Justice Centre* (CEPLR Working Paper Series 02/2017) 5.

[97] Ma. Dolores C. Tongco, 'Purposive Sampling as a Tool for Informant Selection' (2007) 5 Ethnobotany Research & Applications 147.

[98] Webley (n. 18) 934.

Bearing this restriction in mind, the next section considers the analytical methods engaged to interrogate the interview data.

3.2.3. Analysis of data

A major criticism of qualitative research is that it can often lead to anecdotal evidence,[99] owing to the 'elusive and ethereal' nature of qualities when compared to their scientific counterpart of quantities.[100] It is for this reason that a clear methodology is imperative when embarking on qualitative research. It is, therefore, the purpose of this section to outline the theoretical basis of constructivist grounded theory together with the procedures implemented in order to analyse the interview data.

3.2.3.1. Using a grounded theory methodology

Glaser and Strauss's grounded theory methodology for the analysis of social research was ground breaking when first introduced as it involved inductive rather than deductive reasoning. Theory would be 'grounded' in the data to enable the 'discovery' of theory from data' rather than the traditional approach of using *a priori* assumptions and theories in an effort to determine whether the data generated matched the expectations of the researcher.[101] It was the inductive nature of grounded theory and its emphasis on the emergence of theory from the data that led to the adoption of this approach to analysis. The lack of information on LIPs post LASPO meant that the researcher could analyse this issue by solely examining the interview data rather than seeking to test themes that had been contained in previous reports pre-LASPO. It should be noted, however, that this project is not intended to produce theory. It is more appropriate to describe the objective as one of finding 'themes that provide an insight into the phenomenon being explored'[102] or 'map individual's categories of experience'.[103] That this is appropriate for grounded theory is supported by Birks and Mills, who argue that theme construction is a legitimate use of the methodology provided the author of the research does not make claims about developing theories that cannot be sustained.[104]

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[99] Silverman (n. 26) 47.
[100] Ian Dey, *Qualitative data analysis: A user-friendly guide for social scientists* (Routledge 1999) 11.
[101] Barney G Glaser and Anselm L Strauss, *The discovery of grounded theory: Strategies for qualitative research* (Aldine Transaction 1967) 29.
[102] Melanie Birks and Jane Mills, *Grounded theory: A practical guide* (2nd edition, SAGE 2015) 30.
[103] Carla Willig, *Introducing Qualitative Research in Psychology: Adventures in Theory and Method* (OUP 2001) 80.
[104] Birks and Mills (n. 102) 176.

3.2.3.2. Coding and categorising data

A core feature of constructivist grounded theory is the coding of data through the use of the techniques of constant comparison and theoretical saturation. In accordance with the underlying inductive philosophy of grounded theory, coding involves fragmenting the empirical data,[105] as a means of defining what the researcher sees within that data.[106] This involves engaging in data collection and analysis simultaneously in an iterative process that uses the comparative methods of comparing data with data, data with codes, codes with codes, codes with tentative categories, and categories with categories.[107] This process is continued until theoretical saturation is achieved whereby gathering more data about a theoretical category reveals no further insights.[108]

The task of coding the data for this project began with transcribing an initial nine interviews in order to engage in line by line coding. These codes were then compared in order to generate tentative categories. An example of such a category was 'communicating with the represented lawyer'. Codes such as 'bullying' and 'isolating' had emerged from the data and so when further interviews were conducted questions were asked, if relevant, about their relationship with any lawyers involved in the process. At a later stage in the analysis, the previous reports on LIPs were consulted in order to investigate whether there had been any information on the relationship between LIPs and the lawyers for the represented party. The process of transcribing, coding and categorising whilst interviewing continued, until theoretical saturation was reached.

The researcher utilised the computer software package NVivo 10 as an 'analytic support'[109] for coding the interview data, as well as a means of assisting in the writing of memos. The use of memos is an important feature of grounded theory,[110] and was utilised by the researcher whilst both collecting and analysing data. The procedures outlined have been observed in an attempt to combat bias and anecdotal interpretations of the data. By engaging

[105] Kathy Charmaz, 'Constructionism and the Grounded Theory Method' in J A Holstein and J F Gubrium (eds) *Handbook of constructionist research* (The Guildford Press 2008).
[106] Charmaz (n. 27) 187.
[107] Kathy Charmaz and Antony Bryant, 'Grounded theory and credibility' in David Silverman (ed) *Qualitative Research* (3rd edition, SAGE 2011) 292.
[108] Charmaz (n. 27) 189.
[109] Amanda Coffey and Paul Atkinson, *Making Sense of Qualitative Data* (SAGE 1996).
[110] Charmaz (n. 27) 188.

with constant comparative methods of data analysis and being reflexive about the researcher's position when examining data, concerted efforts have been made to improve the trustworthiness[111] of the project's findings. This has also included searching for negative cases or 'outliers' as a means of testing the accuracy of interpretations and ensuring a deeper understanding of the themes emerging from the data,[112] which is an integral component of grounded theory.[113] However, no qualitative enquiry can ever claim to be totally value free, and in this respect all that the researcher can do is have an open mind to any potential prejudices that can invade interpretation. In line with a constructivist approach, it is argued that the researcher's transparency as to her 'assumptions, biases and values' has, as far as possible, enabled a 'neutral and non-judgemental' approach[114] to interpretation. The research, therefore, provides a valuable insight into the subjective experiences of those LIPs who took part in the project. The findings are intended to advance the existing knowledge base about LIPs in the family and civil courts.

4. Ethical Approval

Before embarking on qualitative research the researcher applied for and obtained ethical approval from the School of Law and Social Justice's Ethics Committee at the University of Liverpool. The main requirement of all researchers who engage in qualitative research is that they must behave in an ethical manner. This has been defined as 'a set of moral principles, rules or standards, governing a person or profession'.[115] There are a number of key elements enshrined within these moral principles, which include the necessity to ensure voluntary participation, informed consent and confidentiality. It is these three vital elements of ethical research that will be discussed in this section, as well as how they were satisfied by the researcher.

All interviewees who agreed to participate in the research project did so voluntarily. This was ensured by advising participants that they were under no obligation to take part in the project. This was stated initially by the PSU and again when they met the researcher. They

[111] Yvonna S Lincoln and Egon G Guba, *Naturalistic Inquiry* (SAGE 1985).
[112] Miles and Huberman (n. 3) 129.
[113] Willig (n. 103) 71.
[114] Rachel Ormston et al, 'The foundations of qualitative research' in Jane Ritchie and Jane Lewis (eds) *Qualitative Research Practice: A guide for social science students and researchers* (SAGE 2003) 8.
[115] Marilyn Lichtman, *Qualitative research in education: A user's guide* (SAGE 2012) 51.

were informed that the research was being carried out as part of a PhD project and that it had no connection with the PSU or indeed their entitlement to receive further free legal information from the organisation. This statement was reiterated at the interview stage if participants decided to proceed. Participants were also advised that the decision about whether to partake in the project or decline would not be relayed back to the PSU. By providing this information it was made clear to participants that there was no obligation to participate in the research and refusing to do so would have no detrimental effect upon them.

A further issue with regard to voluntariness was whether participants felt obliged to proceed with the interview because they had agreed to do so before they went into their hearing. Those participants who agreed to take part in the project before entering court were told that if they were still interested in participating then they should come to the court witness room after their hearing. The researcher refrained from approaching participants to ask them if they still wanted to engage in the study after they had been in court, so that there would be no suggestion that they were unduly influenced into proceeding with an interview due to their prior agreement. Although, as a PSU core volunteer the interviewer had never given legal advice to clients, as the organisation only offers legal information, no participants had previously received help from the interviewer. This was to ensure that there could be no question of conflict of interest by unduly influencing participants to engage in the project.

Interviews only took place once informed consent had been received from the participants. Informed consent has been defined by Berg as involving the 'knowing consent of individuals to participate as an exercise of their choice, free from any element of fraud, deceit, duress, or similar unfair inducement or manipulation'.[116] With this in mind, all participants were told that the research was being carried out for a PhD project and may lead to publication of its results. All participants were handed a 'Participant Information Sheet for Clients' which explained the purpose of the research, as well as issues of voluntariness and confidentiality. The contents of this sheet were also read to participants before the interviews began to ensure that there had been requisite understanding. Upon reading this information to the participant, their signature was requested on a 'Participant Consent Form', but only after the contents of the form had been read to them and they had indicated their understanding. All interviewees were advised that they had the right to withdraw from the process at any time without any

[116] Bruce L Berg, *Qualitative research methods for the social sciences* (6th edition, Pearson 2007) 78.

questions being asked and that if they did not want to answer any questions during interviews then they could simply decline.

Confidentiality has been defined as applying to the situation when a researcher can identify a particular participant's responses, but undertakes to refrain from doing so publicly.[117] For the purposes of this project all participants were advised, before embarking on the interview process, that any information that could lead to their identification would be removed before the results were published. This undertaking was fulfilled by removing all identifying features when transcribing the interviews, so that there was no possibility of identities being included during the writing up process. All interviews were categorised as 'Interview' followed by the respective number of the interview, and any identifying names of people, streets or land marks were removed.

Confidentiality was also respected by conducting the interviews in private court witness rooms which were not accessible to members of the public, and so conversations could not be overheard. Bearing in mind the good rapport the researcher achieved with participants due to their common social background, the researcher had a heightened awareness of the need for confidentiality. This was important as participants invariably felt more comfortable to speak freely than they possibly would have done with an outsider.

A further ethical feature of qualitative research is the requirement to do no harm to participants. The researcher is aware that interviewing LIPs can involve the discussion of quite sensitive and possibly distressing issues. When such issues arose the researcher reminded participants that they did not have to discuss these matters at all and especially if it caused them any distress. On two occasions the researcher brought the interview to an end early, because she could detect that the participants were becoming quite emotional and that continuing may heighten their distress. In both of these cases the researcher spoke with the participants following the interview to ensure their wellbeing. In addition, the participants were reminded of the confidential nature of their discussion and whether they still consented to the inclusion of the sensitive information.

[117] Babbie (n. 90) 67.

5. Conclusion

The purpose of this chapter has been to provide a detailed account of the methodology adopted by the researcher when conducting this independent empirical inquiry into the experiences of LIPs in the family and civil courts. The timing of the research is apposite bearing in mind the dearth of empirical information about the phenomenon of LIPs in the family and civil court system post LASPO. This research is, therefore, intended as an initial step in filling the gap in knowledge that remains following the insightful report of Trinder et al in 2014.

As explained, the project adopted both a socio-legal and qualitative methodology in order to investigate the real life impact of the reduction in legal aid for family and civil matters on those who appear before the courts without legal representation. This strategy enabled the legal policies of restricting legal aid and the reformulation of the meaning of justice in the civil courts to be examined in their social context rather than taking a purely doctrinal approach. In this way it extended beyond law in the books to discover the law in action.[118] Using a grounded theory methodology employing constant comparative methods of analysis also improved the overall trustworthiness[119] of the final analysis. As a result, this small scale study of 36 interviewees in the family and civil courts of a major North West city in England seeks to provide an insight into the experiences of LIPs. The resultant themes that emerge from analysis are intended to promote discussion as to how LIPs can achieve access to justice in a civil court system that for most people can no longer be accessed through publicly funded legal assistance.

The remaining chapters will discuss the legal issues surrounding the withdrawal of legal aid and the rise of LIPs, as well as the findings and conclusions drawn from the qualitative research, which has formed an integral part of this thesis.

[118] Pound (n. 15).
[119] Lincoln and Guba (n. 111).

Chapter three

Hurdles and perceptions: The challenges encountered by LIPs when commencing proceedings in the family court

1. Introduction

This chapter examines the initial stages of proceedings encountered by LIPs when deciding to proceed with a matter in the family court. It firstly considers the law regarding the requirement to attend a Mediation Information and Assessment Meeting (MIAM) in order to discuss the suitability of mediation rather than court proceedings to reach a settlement. The failure of litigants to engage with mediation beyond this initial meeting is discussed along with the need for better education and information, as a means of encouraging a change of culture. The chapter then progresses to consider why many LIPs do not proceed to mediation, having particular regard to claims of vexatious litigation. The law in relation to such behaviour is then outlined and applied to testimony provided by interviewees as a means of determining whether vexatiousness is a legitimate concern, together with the possible remedies for such behaviour.

Having considered why mediation often fails, the chapter examines why LIPs decide to proceed to litigation without legal representation. This involves consideration of the impact of a lack of legal aid, as well as the LIP's previous experience with members of the legal profession and their understanding of the role such professionals play in family proceedings. As part of this analysis, there is an appraisal of the perceived benefits that LIPs encounter, such as control and self-worth, when deciding to proceed without a legal advocate and how these advantages relate to theories of procedural justice. Despite appearing in court alone, it may well be that LIPs are able to glean a sense of fairness from the proceedings, irrespective of the difficulties they encounter.

This chapter, and those that follow, will examine both legal and procedural issues in a manner that allows the precise words of the interviewees to be interwoven into the analysis. It is hoped that by adopting this technique the reader can develop a real understanding of the

challenges that LIPs encounter when commencing proceedings in the family and civil courts, as well as the theoretical bases which underpin the research.

2. Mediation before litigation

This section examines the emphasis that is now placed on litigants in family proceedings settling disputes through mediation rather than commencing court proceedings. There are two reasons why it is important to consider this issue. Firstly, the promotion of mediation underpins the compulsory requirement for all applicants in family matters to attend a MIAM before litigation can be commenced. As a consequence, it is now an integral part of family proceedings. Secondly, there is a lack of evidence about the effect of this policy of compulsory MIAM attendance from the viewpoint of LIPs.[1] Trinder et al's report pre-dated the introduction of this requirement and is, therefore, unable to provide a contemporary insight into how LIPs engage with this prerequisite to litigation. The experiences of LIPs outlined in this section illuminates the impact of the policy to promote mediation on LIPs and raises questions about the fairness and expediency of such a policy.

2.1. The introduction of MIAMs

The procedure that must be followed in order to commence proceedings in private family matters has undergone significant change in recent years. There has been a fundamental shift towards promoting alternative dispute resolution (ADR) methods in an effort to encourage parties to negotiate a settlement without resorting to the courts for a determination. The first step towards driving a change in culture from court proceedings to ADR was in 1997, when MIAM attendance became a requirement before public funding would be awarded.[2] Family Mediation has been defined as a 'process in which an impartial third person, the mediator, assists couples considering separation or divorce to meet together to deal with the arrangements which need to be made for the future'.[3] However, the requirement is not to submit to mediation *per se*, but rather to a particular assessment; the

[1] Evidence regarding the experiences of LIPs is included in the qualitative study undertaken by Anna Bloch et al, *Mediation Information and Assessment Meetings (MIAMs) and mediation in private family law disputes: Qualitative research findings* (Ministry of Justice Analytical Series 2014).
[2] Legal Services Commission Funding Code 11.42 and 11.51; introduced under the Access to Justice Act 1999, s.8.
[3] Lord Chancellor's Department, *Looking to the future: Mediation and the Ground for Divorce* (White Paper, CM 27990 1995) [5.4].

MIAM. The purpose of the MIAM, which consists of a short meeting with a mediator,[4] is twofold. Firstly, it is intended to convey information about mediation, in order for clients to determine whether it is an appropriate strategy for them. Secondly, it enables mediators to assess the clients' suitability for a mediated approach to their dispute.[5]

Whilst requiring those who wish to pursue claims with the aid of public funding to attend a MIAM ensured a greater interest in mediation,[6] as a form of dispute resolution, the removal of legal aid following the introduction of LASPO led to a decline in those parties attending MIAMs.[7] This was despite the fact that the Government had deliberately retained legal aid for attendance at a MIAM, whilst at the same time removing legal aid from private family matters that do not involve domestic violence or child sexual abuse.[8] The retention of legal aid for attendance at a MIAM highlights the Government's commitment to mediation rather than members of the public resorting to self-representation in the courts. This was expressed in the Government's Response to the Consultation on the legal aid reforms when stating that, 'the Government will encourage the use of alternatives to court to avoid the need for people to represent themselves. Maintaining legal aid for family mediation will provide an incentive for parties to pursue that route'.[9]

However, this was not the outcome, as the removal of legal aid from all private family matters meant that there was no longer an incentive for solicitors to refer clients to the MIAM procedure. With the removal of legal aid, there was no opportunity for the solicitor to benefit from the financial incentive of receiving legally aided instructions should the MIAM fail and the client ultimately require proceedings to be commenced.[10] It was, after all, this lawyer involvement that had been the mediators' main source of contact with potential clients.[11] This was compounded by the fact that the Family Justice Review (FJR)

[4] FPR 3A PD 3.6 para 3.
[5] Bloch (n. 1) 25.
[6] In the financial period 2011 to 2012 there were 31, 338 assessments compared to 22,758 in the financial period 2006 to 2007. See MOJ, *Legal Aid Statistics in England and Wales, Legal Services Commission 2013–14* (MOJ Statistics Bulletin 2014) 21, Figure 15.
[7] The figures for those attending assessments fell to 13,354 in the financial period 2013 – 2014. See ibid.
[8] LASP0 2012, sch 1 pt 1.
[9] MOJ, *Reform of Legal Aid in England and Wales: the Government Response* (Cm 8072, 2011) [73].
[10] Bloch (n. 1) 1; House of Commons Justice Committee (HCJC), *Impact of changes to civil legal aid under Part 1 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012* (Eighth Report) (2014–15, HC 311) [124] – [143].
[11] ibid.

in 2011 had only recommended that attendance at a MIAM should be encouraged by the court. This was to be achieved through the introduction of a Pre-action Protocol under which the parties would be 'expected to explore the scope for resolving their dispute through mediation before embarking on the court process.'[12] The fact that it was an expectation rather than an obligation meant that the anticipated rise in those submitting their claims to mediation did not occur.[13]

To redress the balance, the Children and Families Act 2014 was introduced. Section 10 (1) provides that 'before making a relevant family application,[14] a person must attend a family mediation information and assessment meeting'. This provision makes it clear that mediation is no longer to be regarded as an expectation, but, rather, as an enforceable requirement. To ensure observation of this measure, the court is required to appoint a Gatekeeper,[15] when proceedings are issued, who is tasked with checking that a MIAM has been attended, or, if an exemption has been applied for,[16] that it is valid.[17] Should a MIAM have not been attended, the Gatekeeper will direct the applicant to attend before matters can proceed in court.[18]

The commitment to mediation is not confined to the requirement to attend a MIAM. FPR 1.4 (1) requires the court to actively manage cases. This includes encouraging the parties to use a non-court ADR procedure, should the court consider this appropriate and to facilitate such use.[19] In addition, active case management includes helping the parties to settle the whole or part of the case[20] and encouraging the parties to co-operate with each other in the conduct of proceedings.[21] In this respect, the initial hearing in a private family matter will be the First Hearing Dispute Resolution Appointment (FHDRA), at which the judge and a

[12] FJR: *Final Report* (November 2011) [3.5] and [4.1].
[13] Bloch (n. 1) [141].
[14] 3A PD 3.6 paras 11 and 12 state that this relates to private law proceedings relating to children. In particular under 12 (1) (a) it includes child arrangements orders and other orders with respect to a child or children under the Children Act 1989, s. 8.
[15] 12B PD 12.1 para 9.2 states that this will be a legal advisor or district judge based at the court.
[16] The exemptions are contained within FPR 3.8 and relate to disputes involving domestic violence, urgent applications and previous court proceedings within the 4 months preceding the application.
[17] 12B PD 12.1 para 9.4.
[18] ibid.
[19] FPR 1.4(1) (f).
[20] FPR 1.4(1) (g).
[21] FPR 1.4(1) (h).

Cafcass officer[22] 'will seek to assist the parties in conciliation and in resolution of all or any of the issues between them'.[23] Further, the proceedings in private family cases can be adjourned if the court considers that ADR is appropriate, so that the parties can gain information about that process and, if applicable, enable the non-court ADR to take place.[24] There can be little doubt that ADR, in private family matters, now lies at the heart of settling disputes between parents regarding the future care of their children.

2.2. MIAMs and the LIP

As the interviews for this research took place between July and October 2015, the evidence was collected both post LASPO 2012 and post the Children and Families Act 2014. Thus, the applicant interviewees were compelled to attend a MIAM before they could issue proceedings in the family court. As the participants were being interviewed for the purposes of this research, their MIAM had not concluded in a mediated settlement. In fact, the majority of interviewees did not proceed to mediation at all and merely attended an initial MIAM. Only two[25] out of the twenty interviewees, whose cases warranted compulsory attendance at a MIAM, actually proceeded to mediation. Of the remaining eighteen interviewees, some fourteen of these pointed to the fact that the MIAM did not result in mediation, because the respondent refused to attend. This supports the evidence provided by Bloch et al's report. Conducting qualitative interviews with mediators and litigants in 2013, post LASPO, but before the introduction of compulsory MIAMs for applicants in 2014, they found that the main reason for matters not proceeding to mediation was non-attendance or rejection by one of the parties.[26] Denial of the appropriateness of mediation was the reason for failure in respect of the two interviewees that did proceed to an interview with both parties present. For Interviewee 10, the other party refused to co-operate or fill in the required documentation and for Interviewee 23, the other party's enthusiasm for mediation waned once *'he didn't like what he was hearing'.*

[22] Cafcass is the acronym used for the Children and Family Court Advisory and Support Service. They represent children in family court cases and are tasked with ensuring that 'children's voices are heard and decisions are taken in their best interests'. They are independent of the courts, social services, education and health authorities and all similar agencies. See www.cafcas.gov.uk/about-cafcass.aspx accessed on 22.09.16.
[23] 12B PD 12.1 para 14.11.
[24] 12B PD 12.1 para 6.3.
[25] Interviewees 10 and 23.
[26] Bloch (n. 1) 35.

The validity of the respondent's refusal to attend is underpinned by the fact that only the applicant can be compelled to appear at a MIAM. As far as the respondent is concerned, attendance is an expectation and not an enforceable requirement.[27] The non-mandatory requirement for prospective respondents to attend a MIAM accords with the Family Mediation Council's Code of Practice which states that, 'participation in mediation is voluntary at all times and participants and the mediator are always free to withdraw'.[28] Mandatory mediation has also been rejected in the civil courts. In *Halsey v Milton Keynes* the view espoused was that mediation should be voluntarily entered into with the courts' facilitation and encouragement rather than through compulsion.[29]

2.2.1. MIAMs as a tick box exercise

Although there is no compulsion for both parties to submit to mediation, the fact that applicants in family proceedings have to attend a MIAM before they may litigate can, nevertheless, have negative implications. Several interviewees referred to the futility of having to attend a MIAM when knowing that the other side would not. To this extent, in accordance with the findings of Bloch et al, attendance at the MIAM was regarded as a 'hurdle' to overcome before proceeding to the main objective of court proceedings.[30] Interviewee 34's description of his reasons for attending a MIAM was a typical response, '*I only went to mediation, because I needed the form to take to court'*.[31] Interviewee 25 explained how when the other side did not turn up she then *'obviously got the thing signed off'* and issued proceedings. These statements emphasise the interpretation by LIPs that a MIAM is something to be ticked off on the list of things to be done, before the real goal of litigation can be commenced rather than being a legitimate means of resolution. This supports Moorhead and Sefton's findings that LIPs only tried mediation because it was a gateway to legal aid.[32] It seems this interpretation persists except that now it is the door to litigation.

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[27] 12B PD 12.1 para 5.3.

[28] General Principles for mediators and mediation; Code 5.2. http://www.familymediationcouncil.org.uk/us/code-practice/general-principles/ accessed on 19.06.16.

[29] [2004] EWCA Civ 576 [9] (Lord Diplock).

[30] Bloch (n. 1) 12.

[31] This is a reference to section 14 of Form C100. The form is used to apply for a child arrangements order. Section 14 is where a Mediator certifies that the prospective applicant is exempt from attendance at a MIAM or confirms that the applicant attended such a meeting.

[32] Richard Moorhead and Mark Sefton, *Litigants in Person: Unrepresented litigants in first instance proceedings* (DCA Research Series 2/05, March 2005) 175.

2.2.2. MIAMs as a source of cost and delay

A further problem for applicants who are over the means tested threshold for legal aid, is that the cost of attending a MIAM can be prohibitive. Interviewees referred to the '*financial strain'*[33] this caused them as they were required to pay a fee of £180 plus VAT for an initial MIAM.[34] For one interviewee the bill was as high as £300.[35] When it is considered that those interviewees who had to pay for a MIAM did so despite the other party failing to attend or, once persuaded to attend, refused to co-operate, it is understandable that they failed to appreciate the merit of such a meeting. As Interviewee 3 states, '*We were offered mediation, and I had to pay £300. It is all the cost of everything, but if you are the one bringing the kids up you cannot afford to do that'.* For these interviewees, they not only had to pay to attend a MIAM that they knew would not yield results, but they then had to find the court fee of £215 to commence litigation in respect of child arrangements.

There is also evidence that once an applicant has had a negative experience with a MIAM they become reluctant to engage in the future. Interviewee 21 explained how the last time she brought proceedings her ex-partner attended the MIAM, but refused to participate and so now that she was the respondent she also would not co-operate. '*It got offered on the first time round, which came to no agreement and then on this time round it was put forward, at the cost, I think, of £250 per session. He agreed to it, I didn't. I did it last time and he didn't agree to anything, so I wouldn't do it again'.* A negative experience coupled with a lack of understanding as to why mediation is required can entrench litigants' views that mediation is not a productive exercise.

As referred to above, legal aid has been maintained for family mediation and, in fact, if one party is entitled to legal aid, the other party's fees for mediation are also covered.[36] This provides the parties with a financial incentive to attend a MIAM, although there was no evidence from this research to suggest that this fact was either known or considered by the parties when deciding whether or not to attend a MIAM. The evidence provided from the interviews for this research highlights that there are many LIPS who do not perceive any benefits to engaging in mediation, which has been described elsewhere as providing 'a

[33] Interviewee 28.
[34] Interviewees 10 and 20.
[35] Interviewee 3.
[36] 3A PD 3.6 para 29.

flexible, speedy and cost effective way to resolve disputes'.[37] Negative views about mediation are hardly surprising given that applicants must engage in a process with the knowledge that the fixed views of a respondent will mean that they will refuse to mediate. This will lead to additional delay and costs being incurred, and no benefit to the applicant. The futility of forcing parties to mediate was highlighted by Lord Dyson in *Halsey* when he acknowledged that compelling parties to mediate would 'achieve nothing except to add to the costs to be borne by the parties, possibly postpone the time when the court determines the dispute and damage the perceived effectiveness of the ADR process'.[38]

This is further supported by Bloch et al who reported that 'compelled' clients:

> Were often sceptical that mediation could help them, tending to assume that legal representation was the preferable route. While they felt compelled to try mediation, which they perceived as their only option, they were not engaged with it as an effective means to reach a lasting resolution[39]

It is the ineffectiveness of attempts to persuade LIPs to engage in mediation that has led Hunter to question the policy of encouraging demand for mediation and call for more creative measures to be introduced to meet demand for family separation assistance.[40] Correspondingly, Maclean argues that mediation is an additional service for the resolution of disputes warning that it should not be used as a replacement for legal information and advice.[41]

Nevertheless, there was limited evidence from the present study that applicants did want to mediate, in an attempt to avoid court proceedings, despite the other side's refusal. Interviewee 8 explained that, '*I am coming to court, but I would rather just sit down and talk to them, and sort it out myself'.* However, these were usually male interviewees who had been denied access to their child(ren) and who knew that the mother was hostile to

[37] Bloch (n. 1) 20.
[38] *Halsey* (n. 29) [10].
[39] Bloch (n. 1) 20.
[40] Rosemary Hunter, 'Inducing demand for family mediation – before and after LASPO' (2017) 39 JSWFL 189.
[41] Mavis Maclean, 'New ways to seek legal information and advice on family matters in England and Wales: From professional legal services to Google and private ordering' in Maclean et al (eds) *Delivering family justice in the 21st century* (Bloomsbury 2017).

negotiating child arrangements. They were, therefore, exasperated by the other party's refusal to mediate a solution. In this respect, a mediated solution was very unlikely. Nevertheless, it may be that there are more LIPs willing to engage in mediation than the present study suggests. Lee and Tkacukova's study found that the majority of the litigants they surveyed reported that they would have preferred to settle the matter outside of court through negotiation.[42] Further, Barlow et al report that some litigants favour mediation because it is regarded as a more suitable method of dispute resolution, involves lower costs and keeps solicitors out of the settlement process.[43]

2.3. Promoting mediation

The evidence provided by the interviewees highlights the fact that more education is needed about mediation if compulsory attendance at a MIAM by the applicant is to remain a requirement. In the past when solicitors referred suitable clients for mediation they could explain its purpose and the likely benefits.[44] Now that legal aid has been removed this referral service has obviously reduced,[45] and so the first time that LIPS become aware that they have to attend mediation is often when they go to court to initiate proceedings. At that point, the interviewees for this research, who attended court without receiving legal advice, were given a 'court pack' which contained details of local mediators and were told they had to attend before proceedings could be commenced.[46] It is not surprising that LIPs regard this as a formality rather than a legitimate means of settling their dispute without resorting to court proceedings.

One further concern is that if lawyers are not being contacted and, thus not referring LIPs to mediation, LIPs will learn about mediation from other sources which may not provide accurate information. This is evidenced by Interviewee 28 who learned about mediation through a fathers' rights organisation. "*I phoned Fathers for Justice, a man said, 'Go to mediation'. And I told him what my ex was like and he went, 'She won't turn up'. Which, well she never turned up. He said, 'That will probably go in your favour'*". Not only does

[42] Robert Lee and Tatiana Tkacukova, *A study of litigants in person in Birmingham Civil Justice Centre* (CEPLR Working Paper Series 02/2017) 11.
[43] Anne Barlow et al, *Mapping paths to family justice: Resolving family disputes in neo-liberal times* (Palgrave Socio-legal Studies 2017) 86 – 87.
[44] HCJC (n. 10) 54 [142].
[45] ibid.
[46] ibid [144] (Sir James Munby).

this advice fail to explain to the Interviewee what mediation is and how it may be of benefit, but it also provides him with a false impression that being the only party to attend mediation will somehow provide him with the 'moral high ground'[47] due to his willingness to attend.

One method of educating the public about the potential benefits of mediation would be to implement the Family Mediation Task Force's recommendation that MIAMS should be free for a period of one year for all parties who are contemplating legal proceedings and not just those who are financially eligible for legal aid. This would enable litigants to learn about mediation and increase understanding and awareness of this process.[48] Although this suggestion was rejected by the MOJ, it has subsequently been endorsed by the House of Commons Justice Committee[49] and the evidence contained within the present study strongly suggests that there remains a need for accurate information about MIAMs and the potential benefits of mediation for appropriate cases. There is, therefore, merit in the assertion that free MIAMs are an important means of not only disseminating information about mediation, but also of driving a culture change towards this type of ADR.[50]

Even if information about mediation does become more widespread, there remains an important knowledge gap for LIPs. If they cannot afford to consult with a lawyer before attending mediation, they will not receive any legal advice regarding their legal position and whether they are reaching an agreement that would correspond with their legal entitlement should proceedings be initiated. In family proceedings, which will involve financial issues as well as disputes regarding child arrangements, this is an important deficit, as any settlement reached can have profound effects not only on the parties, but also on the children of the family. The lack of legal advice, following the removal of legal aid, remains a feature due to the fact that mediators are not permitted to engage in this activity. The 'neutrality principle' means that mediators 'may inform participants of possible courses of action, their legal or other implications, and assist them to explore these, but must make it clear that they are not giving advice'.[51] Much, therefore, depends on how mediators

[47] Bloch (n. 1) 20.
[48] Family Mediation Task Force, *Report* (June 2014) 17 [43].
[49] HCJC (n. 10) 59 [158].
[50] ibid 58 [156].
[51] Family Mediation Council (n. 28) Code 5.3.

interpret this principle, as to whether LIPs will be informed about what legally they would be likely to achieve had they proceeded to court.

However, as the evidence acquired for this study does not contain any information regarding an attempt at mediation beyond the initial MIAM, the role of mediators in relaying legal information or advice is outside the remit of this research. Nevertheless, support for the argument that there remains a legal advice gap is found in Hitchings and Miles qualitative study before the LASPO reforms. They found that the solicitors who were also mediators in their sample complied with the requirement to remain neutral when giving information without stepping into the realm of advice giving.[52]

For the purposes of the present study, the only conclusion that can be made is that there is a genuine need for more advice and information about MIAMs and mediation and that the lack of legal advice for those who cannot afford to pay raises important concerns about whether parties fully understand what is at stake should they decide to enter into a mediated settlement. As Briggs LJ has stated, early mediated settlements are pointless unless they are 'a reliable prediction of the just outcome in court'.[53] Hence, in order for LIPs to receive a just resolution of their claim they must have access to early legal advice and assistance so that they know the possible outcomes of their case. Only by receiving this advice can LIPs fully engage with a mediator to find a mutually acceptable and fair resolution to their dispute**.** Whilst there is free legal advice available during mediation in the form of 'Help with Family Mediation' this is means tested and limited to £150 for advice and £200 for drawing up a consent order (financial issues).[54] For those over the legal aid threshold, legal advice during mediation is yet another cost to be incurred.[55] MacLean and Eeklaar argue that a solution to the lack of legal advice in mediation is to allow mediators to offer legal advice either by allowing lawyer mediators to offer advice or legally training mediators to

[52] Emma Hitchings and Joanna Miles, 'Mediation, financial remedies, information provision and legal advice: the post-LASPO conundrum' (2016) 38(2) JSWFL 175.
[53] Briggs LJ, *Civil Courts Structure Review: Interim Report* (December 2015) [2.23].
[54] Civil Legal Aid (Remuneration) Regulations 2013 sch1 pt 1 Table 3 (e).
[55] Possible solutions to the legal advice mediation gap are discussed in Anne Barlow, 'Rising to the post-LASPO challenge: How should mediation respond?' (2017) 39(2) JSWFL 203.

provide this service.[56] In this respect mediation is not being used to replace law but law is being expanded into mediation.[57]

2.3.1. Promotion not compulsion

Should a MIAM fail to proceed to a mediated settlement due to one of the parties refusing to attend, the first hearing in court will, as explained above, be a FHDRA. At this hearing, absent any safeguarding issues, there will be an attempt to facilitate a settlement between the parties or at least reduce the contentious issues between them. Interviewees for this study, who had no such safeguarding issues, did explain how the FHDRA often consisted of a Cafcass officer and a legal advisor, who tried to encourage the parties to negotiate.[58] However, none of these hearings resulted in successful resolution of their dispute, which at least suggests that even if the other party had attended the MIAM this would not have proceeded to mediation.

This raises the question of whether compulsory MIAMs should still be a feature of family litigation. If a conciliated agreement is attempted at the FHDRA, forcing the applicant to attend a MIAM before they can proceed to this stage appears to be unnecessary duplication. This research highlights, that this often results in additional expense as well as feelings of frustration and additional stress when one party fails to attend or participate: '*I went three times to mediation, but my ex-partner never went at all, it was quite stressful to be honest'*.[59] It remains true then that ADR methods 'do not offer a panacea',[60] but rather, can be a useful adjunct to court proceedings should the parties be willing to participate, having been fully informed of its benefits and shortfalls. It is, however, this latter requirement of information that still needs to be addressed if mediation is to grow in popularity, and reach its objective of settling family disputes in a manner that preserves an amicable relationship between the parties.

[56] Mavis Maclean and John Eekelaar, *Lawyers and mediators: The brave new world of services for separating families* (Hart Publishing 2016) 148.
[57] Adrienne Barnett, 'Family law without lawyers – A systems theory perspective' (2017) 39 JSWFL 223.
[58] In accordance with 12B PD 12.1 para 14.8.
[59] Interviewee 30.
[60] *Halsey* (n. 29) [16].

As explained, the best method of achieving this appears to be the provision of free MIAMs for all litigants irrespective of means.[61] However, increasing the number of mediated settlements should no longer be underpinned by a policy of forcing applicants to attend MIAMs. This compulsory requirement should be abolished, so that it becomes a voluntary option to pursue for those wishing to avoid court proceedings. Support for this argument is provided by the fact that at present the cost and delay in bringing proceedings due to having to attend a MIAM cannot be justified when an applicant knows that the other party is adamant in their unwillingness to participate. It is a delay that impacts on both the applicant and any children of the family, who during this time are likely to be having little or no time spent with one of their parents. Any change in culture must be promoted by using a carrot rather than stick approach and on the understanding that mediation is not appropriate in all cases.[62] As Cobb explains there are a large number of people for whom mediation is unsuitable. Amongst these he lists those with learning disabilities, parties with mental illnesses as well as those dependent on alcohol and drugs. Additionally, those involved in relationships where there is a power imbalance may find that mediation becomes impossible due to the potential for abusive behaviour.[63]

One reason why MIAMs are failing to result in mediation is because not all courts have embraced the change in culture towards mediation through the use of MIAMs. Although all of the interviewees in the present study, who were required to attend a MIAM before commencing proceedings, did attend this initial meeting, such compulsory requirement is not adhered to by all family courts. Figures obtained by National Family Mediation suggest that in the period 2014-15 only 5,000 MIAMs were conducted despite there being a total of 112,000 private law applications.[64] This suggests a lack of commitment by all family courts to ensuring that MIAMs take place before proceedings are commenced. This is despite their requirement to do so under the FPR.[65]

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[61] Barlow et al, *Mapping paths to family justice, Briefing paper and report on key findings* (University of Exeter June 2014).
[62] ibid 25.
[63] Stephen Cobb, 'Legal aid reform: Its impact on family law' 35 (2013) JSWFL 3.
[64] National Family Mediation, 'Government divorce policy failing as separating couples head straight to court' (11 April 2016). http://www.nfm.org.uk/index.php/about-nfm/news/605-government-divorce-policy-failing-as-separating-couples-head-straight-to-court accessed on 28.09.2016.
[65] 12B PD 12.1 para 9.2.

The court in which the present interviews took place may, therefore, be atypical in its commitment to MIAMs. In this respect the evidence collected for this project provides data from a court that systematically requires MIAMs to take place rather than from a court which may have a more lax inconsistent approach. This data, therefore, provides a clear indication that even when courts do embrace the change in culture, towards encouraging mediation rather than litigation, the number of MIAMs that result in actual mediation remains limited. This provides further support for the argument that compulsory mediation for applicants should be abandoned.

2.4. Failing to mediate and the vexatious claim

As all of the interviewees who attended a MIAM did not proceed to mediation, due to non-attendance or non-co-operation at the initial meetings by the other party, the data was examined to provide an insight into why mediation is perceived as an unpopular means of resolving family disputes. A consistent theme was that interviewees believed that the non-attending party was being 'vexatious' and so compromise was impossible; '*It was a vexatious claim really, because there had been domestic violence, and so he brought the case and I am now the respondent'.*[66] This replicates the findings of Barlow et al who reported that for twenty per cent of their participants mediation was not possible due to their ex-partner's refusal to participate. This arose from a lack of emotional readiness to communicate with each other as things 'felt too raw'.[67] Barlow argues that mediation needs to adapt to effectively deal with higher conflict cases which must include high quality training for mediators on how to deal with conflict.[68]

In the present study there were two main reasons why interviewees construed the other party as being vexatious. The first of these was that false allegations were being made. These were made either to avoid the other party having a child arrangements order or to undermine the parenting skills of the parent the child lives with; usually the mother. In respect of the former situation, Interviewee 14 explains how he successfully argued for a non-molestation order to be removed as '*she put a lot of false information in to stop me seeing my son at Christmas'.* So far as the latter position is concerned, Interviewee 11 explains how she had

[66] Interviewee 10.
[67] Barlow et al (n. 43).
[68] Barlow (n. 55).

to *'do drug tests and everything. He told all kinds of lies about me, trying to make me out to be a bad mother'.*

The second reason why mediation was considered inappropriate was because the motivation for bringing the proceedings by the non-attending party was jealousy. This stemmed from the fact that the interviewee had now '*moved on*'[69] from their relationship. Interviewee 6 explained how proceedings had been ongoing for three and a half years, as she was being constantly brought to court by the children's father as a means of spending more time with the child, despite his drug and alcohol dependency. *'It is a question of causing me as much aggravation as possible, because I have moved on with my life and so, unfortunately, it has been a lengthy process spanning years. He is a bitter ex'.*

These viewpoints illustrate how acrimonious disputes can become between parents when trying to agree child arrangements in respect of their children in circumstances where relationships have broken down. However, it is doubtful whether these cases are truly vexatious. Although an interviewee may believe that the other side is using the child as a '*weapon*' by refusing to allow them to spend time with the child[70] or by making child arrangement applications to the court,[71] it will no doubt be argued by the other side that they have a genuine reason to refuse to agree child arrangements. There is, therefore, potential merit in their case. Thus, the claim could not legally be described as being vexatious in character despite being regarded as such by the aggrieved interviewee. This is supported by the legal definition of 'vexatious litigation'. Bingham LCJ, describes the hallmark of such a claim as having 'little or no basis in law' which subjects the other party to 'inconvenience, harassment and expense out of all proportion to any gain likely to accrue to the claimant'.[72] Whilst the testimony of the above interviewees does not satisfy this definition of vexatious litigation, there were some interviewees who appeared to be able to claim that the litigation was either vexatious in nature or that they were being subjected to 'persistent and habitual litigious activity'.[73] The latter has been described as involving a party suing 'the same party repeatedly on essentially the same cause of action … thereby imposing on defendants a

[69] Interviewee 24, 10 and 6.
[70] Interviewee 9.
[71] Interviewee 3.
[72] *Attorney General v Barker* [2000] 2 FCR 1 [19].
[73] ibid [22].

burden of resisting claim after claim'. Thus the 'essential vice' of this activity is 'keeping on and on litigating when earlier litigation has been unsuccessful and when on any rational and objective assessment the time has come to stop'.[74]

Interviewee 22 described how she had been in the court process for seventeen years following her initial divorce proceedings as her ex-husband was making persistent applications and complaints. She explained that this was done as a means of control and abuse, as she had successfully gained a child arrangements order for her children to live with her:

> *When it didn't go his way, revenge, of course application to the General Medical Council, to the Home Secretary … That I send my money to terrorists, whatever he can think of'. This application is so vague that I don't understand what they want. What is it that they are seeking, just to be in circles, just to bring me back and forth? Because every day I spend in court costs me at least £500, because I am self-employed and have to pay an agency to look after my business.'*

This statement highlights the anguish and financial expense that LIPs can cause when they constantly bring unfounded proceedings against a previously successful party. In fact, this Interviewee had been legally represented in earlier proceedings which had caused her to incur legal expenses in excess of £320,000, pushing her towards bankruptcy.

It is not only financial losses that vexatious or habitual litigation causes, but in family proceedings there can be a detrimental impact on the child(ren) of the family. Interviewee 17 had been involved in child arrangements proceedings for eight years, due to his ex-partner's reluctance to accept the order of the court that their child should live with the Interviewee. '*I have an order and everything has been fine for a couple of weeks and then it all goes pear shaped and then I have had to come back and do it all over again.* It is the constant applying to the court to vary the child arrangements order that has had a negative effect on his son, '*it has got to the point where enough is enough. It has affected my son, my son didn't want to live with his mum no more'.* In this respect, the child is adversely

[74] ibid.

affected by the litigation, because he is not being allowed to settle into a day to day routine with the parent who has a child arrangements order requiring the children to live with them due to the constant threat of litigation which may undermine this.

What is striking about these two cases is the effect that a lack of legal representation can have on both the applicant and the respondent. Being denied legal advice leads to a situation whereby the applicant has no information about whether there is any legal merit to their claim, and so far as the respondent is concerned, they are totally uninformed about how to bring such behaviour to an end in their own and their child(ren)'s interests. As Moorhead and Sefton explain, part of the lawyer's role is to persuade clients to accept the legal process and judgments made in a manner that can also validate that client's moral judgment and self-esteem,[75] so that persistent claims are minimised. For these interviewees their ex-partners have had no such 'buffer',[76] and so proceedings have been pursued doggedly for years on end. In this sense the lawyer can act as a filter[77] for meritless claims, but without their advice litigants may pursue cases, which are inherently weak, leading to poorer outcomes due to solicitors not having an opportunity to discourage the claimant from bringing the case.[78]

2.4.1. Legal solutions to vexatious claims

There are a number of legal actions available to parties in order to prevent persistent litigation. Situations which involve repeated applications for child arrangements under s.8 of the Children Act 1989 can be dealt with by virtue of an order under s. 91(14) of the same Act. This provision enables the court to make an 'order that no application for an order under this Act of any specified kind may be made with respect to the child concerned by any person named in the order without leave of the court'. The Act is silent as to when such an order should be made, although it has been clarified that it, 'is a power which the court should exercise with great care and sparingly, because it is inevitably denying to a party his inalienable right to bring proceedings in the court and to be heard in matters which affect his children.'[79] Nevertheless, it is a useful weapon[80] that will be used by the court if it is

[75] Moorhead and Sefton (n. 32) 89.
[76] ibid.
[77] The Judicial Working Group on Litigants in person: *Report* (July 2013) [3.46].
[78] Moorhead and Sefton (n. 32) 221.
[79] *B v B (residence order: restricting applications)* [1997] 2 FCR 518; 525 (Butler-Sloss LJ).

determined to be in the best interests of the child to interfere with 'the fundamental freedom of a parent to raise issues affecting the child's welfare before the courts'.[81]

Such an application is not only relevant when multiple applications have been made, as the courts have been willing to make orders under s.91(14) in proceedings which would not fall under the description of 'oppressive or semi-vexatious'.[82] What matters is that, taking account of the paramount consideration of the child's welfare under s.1 (1) of the Children Act 1989, it is in the child's best interests to prevent any further unmeritorious applications.[83] The balance between the welfare of the child and the right of a parent to unrestricted access to the court falls squarely in favour of the child's welfare considerations.[84]

Interviewee 17 would appear to have a *prima facie* case to argue for a s.91(14) order to be made to protect his son from the further stress that his parents being involved in litigation is obviously causing him. The effect that such litigious behaviour can have on a respondent is explained eloquently by Interviewee 3 when asking, '*How long is this going to go on for? It is like you are being bullied into giving up your child and if you don't you are just going to keep getting dragged around everywhere*'.

In respect of those interviewees who claimed that the applications being made were vexatious due to false allegations or jealousy these would fall outside the remit of s. 91(14). They appear to fall within Butler-Sloss LJ's description of the 'substantial minority of cases where the bitterness between the parties inevitably is detrimental to the child',[85] but is not sufficient to require an order to prevent further litigation. What such cases require is legal advice in order to temper the allegations made and to advise on the importance of providing sufficient evidence. If a lawyer was involved in the proceedings, the lack of an evidential basis for allegations should mean that such issues would not be brought before the court, thus saving unnecessary delay and further deterioration in the parties' relationship.

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[80] ibid.
[81] ibid 526 (Waite LJ).
[82] *Re P (a child) (residence order: child's welfare)* [1999] 2 FCR 289 [40] (Butler-Sloss LJ).
[83] ibid.
[84] ibid.
[85] *Re H* (*child orders: restricting applications*) [1991] FCR 896, 899 (Butler-Sloss LJ).

This important gatekeeping function of lawyers was recognised by the FJR which states that 'unrepresented LIPs, who do not have access to good legal advice, can and do issue proceedings and persist with those proceedings when they would not have done so had they had proper legal advice at the outset'.[86] This view is supported by Assy, when arguing that an efficient solution for dealing with vexatious litigants may be to require them to proceed only with the benefit of legal representation.[87] As Hunter explains, the lawyer's role is paramount in 'translating difficult issues of hurt, revenge and confusion into identifiable (and justiciable) legal dispute'.[88] Without lawyers there is no one to provide LIPs with realistic expectations about litigation outcomes.[89]

2.4.1.1. Civil restraint orders

The family courts have separate powers beyond s. 91(14) of the Children Act 1989[90] to make a number of civil restraint orders to prevent applications which are totally without merit. In respect of the evidence gathered for the present research the most appropriate would be a limited civil restraint order. This may be issued when a party has made two or more applications that are unmeritorious.[91] The effect of such an order is similar[92] to that under s. 91(14) of the Children Act. It will restrain an applicant 'from making any further applications in the proceedings in which the order is made without first obtaining the permission of a judge identified in the order'.[93] However, it is not limited to children issues, and, as such, would benefit respondents in the position of Interviewee 22, who was being subjected to a myriad of applications following her divorce, which were designed to cause her as much distress and financial loss as possible.

The main problem for LIPs is that, just like these interviewees, they may have no inclination that these powers exist and so are unlikely to request the court to take these proactive steps

[86] FJR (n. 12) [4.177].
[87] Rabeea Assy, 'Revisiting the Right to Self-Representation in Civil Proceedings' (2011) 30 CJQ 267.
[88] Rosemary Hunter et al, *The changing face of litigation: unrepresented litigants in the Family Court of Australia* (Law and Justice Foundation of New South Wales, August 2002) 121.
[89] Mavis Maclean and John Eekelaar, '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.
[90] 4B PD 4.8 para 1.1.
[91] 4B PD 4.8 para 2.1.
[92] The main difference is the number of unmeritorious applications that must have been made before the order is made. As explained, s 91(14) orders can be pre-emptive, whereas a limited civil restrain order cannot be made until there have been two previous applications which are totally without merit.
[93] 4B PD 4.8 para 2.2.

to prevent litigation which wastes court resources and is contrary to the interests of the children of the family.[94] Interviewee 15, who became involved in proceedings when social services contacted him in order to safeguard his daughter's welfare, provides evidence of this. Having received a child arrangements order for the child to live with him, he was trying to settle his daughter into a regular routine, both at home and in a new school. Despite this, the child's mother was constantly bringing applications to vary the child arrangements order. This led to the Interviewee remarking, '*After six months she has brought us back and it is going through that process again. She is in my custody until she is 18 or 16, but [Mother] is just going to keep bringing me back all the time and I have got to keep fighting. I wanted to know, can I put a stop to her bringing me back all the time, with her not letting her settle?'* It is this lack of knowledge that makes it imperative that judges are willing to use their inherent jurisdiction[95] to protect LIPs from persistent litigation pursued by applicant LIPs. As explained in *Bhamjee v Forsdick and others (No 2),* the court's requirement to deal with cases justly and proportionately involves:

> Allotting to them an appropriate share of its resources (while taking into account the need to allot resources to other cases). This objective is thwarted and the process of the court abused if litigants bombard the court with hopeless applications. [96]

As proceedings are now more likely to involve LIPs on both sides, and as the evidence provided by interviewees shows that bitterness and anger often features as the reason for litigation, it is submitted that judges should be more willing to consider the possibility of the above orders in an attempt to prevent fruitless and divisive litigation. In fact, there is a duty on the court to record any applications that are dismissed in circumstances where they are made totally without merit. In recording such details the court should also consider whether a civil restraint order is an appropriate sanction.[97]

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[94] 4B PD 4.8 para 5.1 provides that 'the party or parties to the proceedings may apply for any civil restraint order'.

[95] *Bhamjee v Forsdick and others (No 2)* [2003] EWCA Civ 1113 [54]. This case sets out the requirements for the three different types of civil restraint order which comprise of Limited, Extended and General Civil Restraint Orders.

[96] ibid [15] (Brooke, Dyson LJJ). This was stated in respect of civil restraint orders under the CPR (Now 3C PD 3.11), but the FPR are identical under 4B PD 4.8.

[97] FPR, pt 18.13.

The monitoring of unmeritorious applications is particularly important if proceedings have been ongoing for years. Interviewee 17 explained that over the eight years that proceedings had been pursued by his ex-partner, he had been before five different judges. This highlights how important it is for records to be kept on file detailing whether applications have been totally without merit, so that steps can be taken by the court, on behalf of respondent LIPs, to bring proceedings to an end. In Interviewee 17's case, the lack of court intervention had prolonged the instability for both himself and his son, and for Interviewee 22 it had led to almost financial ruin.

2.4.2. Abusive behaviour

The behaviour of those who bring persistent litigation against the same opponent falls squarely within Moorhead and Sefton's definition of the 'difficult or obsessive' litigant.[98] In addition, they extend this definition to include those who behave in an 'abusive and/or uncooperative manner'.[99] Not only were the former identified in this project, but there was evidence of the latter behaviour, by an opposing LIP when attending court. One of the main problems highlighted was the shouting of abuse by the other LIP. Interviewee 35 explains that this was contained by the judge, '*he will hold his mouth for so long and then he will go again. I have had two judges when the cases were really serious and they tore a strip off him for the way he carries on'*. However, it can seriously impact on the LIP's ability to give oral evidence before the court. This is shown by Interviewee 19's evidence about what would typically happen in court: '*Every time I said something about the children, he would then make it about us and it was sort of steering away from what we were actually there for … he kept going round in circles and making it about us and not the children and it was just frustrating'.*

Even though Interviewee 35 felt that the judges dealt with her ex-partner's abusive behaviour, when asked how often she spent time with her children she replied that, '*It is whenever he says. It is all under his control'.* This emphasises the detrimental effect that the behaviour of a LIP can have over another LIP's ability to present their case effectively before the court and gain a favourable outcome for their children. It is the LIP's disruptive behaviour that distracts the other LIP from being able to relay the salient issues to the court

[98] Moorhead and Sefton (n. 32) 80.
[99] ibid.

and so these are not addressed by the judge. This ultimately leads to insufficient progress being made in the matter; a situation that could be alleviated with legal advice and representation.

Although both of these interviewees were female there appeared to be no gender distinction with regard to this type of behaviour as Interviewee 34 explained how his ex-partner *'just hurled a load of abuse at me'*. Whilst Interviewee 34 relayed that this '*was fine because I was calm and I was never going to react*', this is not generally the response of LIPs. Many of the interviewees who had had disruptive LIPs on the other side explained how they would often be lured into answering the allegations made by their ex-partner.[100] *'I think I ended up answering back to defend myself. It is difficult, because it is your natural reaction to defend yourself, isn't it?'*[101]

Interviewee 24's behaviour in court by allowing himself to *'rise to it'* led to both him and his ex-partner being spoken to after the hearing: *'it was basically telling us both to shut up.'* Interviewee 28 explains how difficult it is to remain composed when facing an ex-partner who is being abusive in court, '*when they asked me what I had to say I tried to answer her lies and then the judge just went it is not about what you say about it. I felt like I wanted to interrupt him every time he opened his mouth and it is probably the worst thing'.* As this Interviewee indicates, LIPs are often aware that their behaviour in court is inappropriate and yet it is the emotional involvement that leads to them acting this way. Interviewee 3 explains that:

> *the solicitor can stay calm, but because you are representing yourself and it is your situation you are getting emotionally involved as well and when there are times when you have got to be quiet and everything sometimes you are not, because it is actually happening to you. It is your life and you don't know how to act professionally, because it is not what you are experienced in doing.*

[100] Interviewees 28, 24, 26, 5 and 3.
[101] Interviewee 26.

This inability to stay '*calm and collected'*[102]and maintain '*emotional objectivity'*[103] is one of the reasons why legal representation is so important in the court room. It has been described as providing an 'emotional buffer'[104] or 'emotional distance' which affords a 'vital breathing space' for the parties, thus encouraging compromise and settlement.[105]

However, legal representation alone does not guarantee that LIPs will refrain from behaving disruptively. Interviewees identified that the obstructive party on the other side was sometimes legally represented. Interviewee 29 explains how his ex-partner had a lawyer, but nevertheless was '*arguing with the judge over decisions*' and Interviewee 8 was alarmed by his ex-partner's behaviour despite being represented. '*I thought she was terrible when we were in there, she couldn't handle it'.* For Interviewee 27 his ex-wife's behaviour was so bad that '*on that day the judge asked her to leave that courtroom, because she was shouting out again. She had done that on a number of occasions when we had been in court'.* This evidence suggests that inappropriate behaviour due to emotional involvement is not limited to LIPs and is, therefore, an inherent feature of family proceedings irrespective of the litigant's status.

A further reason identified, for what might be termed as obstructive behaviour, was linked to the fact that the LIP was confused by the process. This was due to a lack of information or explanation of the procedure. Interviewee 16 explains how she was '*petrified'* by the idea of Cafcass being involved and so refused to agree to them preparing a section 7 report:

> *The judge took all power off me and said, if you do not agree to Cafcass doing this report then I am going to put your children into social care while we do it… I felt as a mum a bit threatened, because they are your children and these people you are getting told that you have got to make them available for interviews and they are going to be going in the schools and stuff like that. It was really frightening.*

[102] Interviewee 5.
[103] ibid.
[104] Liz Trinder et al, *Litigants in person in private family law cases* (Ministry of Justice Analytical Series 2014) 55.
[105] Chris Bevan, 'Self-represented litigants: The overlooked and unintended consequence of legal aid reform' 35 (2013) JSWFL 43.

Whilst, no doubt, the mother's attitude would have been regarded as obstructive, it was a lack of information and understanding that led to her wanting to prevent the involvement of an outsider into the family.[106] It is likely that this misunderstanding could have been dealt with by giving the litigant early information about why Cafcass was being asked to get involved, and its role. This highlights the importance of good communication between the judge and the LIP.

It is the lack of communication between the court and the LIP that led to Interviewee 4 persisting with her application to set aside a bankruptcy order. Whilst the court could, quite justifiably, regard her continuous applications as vexatious, it was a lack of knowledge about why the order had been made that was the reason for her persistence. As she explains, '*I felt her [judge's] irritation, I asked her to explain why she was making me bankrupt. She then said, "I told you on 26th January". But she did not tell me personally, she told [Solicitor]. I felt that she should have queried why I was asking again and should have repeated, because I am a LIP.'* This not only emphasises the wasted resources than can arise through LIPs not understanding why an order has been made, as this Interviewee had now attended three hearings on the same issue, but also the problem that can arise if a LIP has previously been represented at a hearing and has then decided to appear alone, especially if it is a complex case, as in this instance.

With the growth of unbundled services,[107] rather than clients being retained by solicitors from the beginning of a matter to the end, this is an issue that is likely to arise more frequently and is a problem that the courts will need to take into account when cases involve LIPs. Further, the evidence presented here may suggest that although LIPs are often regarded as being obstructive, this may be due to a lack of information and understanding, rather than through obsession, hostility or a disregard for the unmeritorious nature of their case.[108] If so, then this can possibly be remedied through early advice and information in an effort to save valuable court resources. The withdrawal of legal aid from most family and civil matters, however, means that for many LIPs, such early advice from a solicitor is no

[106] Trinder et al (n. 104) 31.
[107] The term 'unbundling' was created by Forrest S Mosten in his article entitled 'Unbundling legal services and the family lawyer' (1995) 28 Fam LQ 421. It is used to describe the situation when a solicitor is instructed on a limited retainer to deal with a particular issue or issues rather than dealing with the claim from start to finish. These are discussed in more detail in chapter four.
[108] Moorhead and Sefton (n. 32) 79.

longer available. As will be discussed in chapter four, the financial inability to instruct a solicitor means that for many LIPs, securing legal advice is often an unsurmountable problem.

Irrespective of the unavailability of publicly funded early legal advice, the approach suggested in *Bhamajee v Forsdick and others (No 2)* should, in the majority of cases, be sufficient to deal with such perceived obstructive behaviour. The guidance provided in this case was that:

> Judges must, as always, listen to his case carefully and be astute to see whether there is any point of legal merit in what he is saying to them. And if they are unable to help him, they must give their reasons clearly, in language he will understand.[109]

So far as those who are confused by the law or procedure are concerned (as was the situation for Interviewee 4) explaining why there is no remedy available to them should be sufficient to bring the matter to a close, which was the view espoused in *Bhamajee*.[110]

3. Litigating without representation

This section considers the reasons why LIPs might commence proceedings without legal representation. This extends beyond the issues of cost to incorporate feelings of disillusionment with the legal profession and the belief that instructing an advocate is an unnecessary expense.

3.1. An issue of cost

As legal aid has practically disappeared from family and civil matters it comes as no surprise that many litigants resolve to proceed without representation. The statements provided by interviewees support the evidence contained in previous reports that being unrepresented is closely linked to a financial inability to fund legal advice and representation. Moorhead and Sefton identified the main cause for being unrepresented as the cost of legal representation coupled with ineligibility for legal aid.[111] This reason was

[109] *Bhamjee* (n. 95) [4].
[110] ibid.
[111] Moorhead and Sefton (n. 32) 16.

also cited by Dewar et al (over 75 per cent of respondents),[112] and MacFarlane (90 per cent of respondents).[113] More recently, Trinder et al reported that only one quarter of their participants had *chosen* to proceed alone[114] rather than being forced to do so because of a lack of funds. Further, they explained the problems with ineligibility resulted from being over the means tested threshold, being unable to pay the assessed contribution towards the provision of legal aid, legal aid being granted exclusively for pre-trial matters, or the grant of funds for legal aid becoming exhausted.[115]

Although the majority of interviewees in this project were no longer entitled to legal aid because of the LASPO reforms, two interviewees fell within the present criteria for public funding. However, in accordance with the findings in these previous reports, their income meant that they failed the financial means test which barred them from receiving public funding. At the time that these interviews were conducted, the upper limit for disposable monthly income, which is the amount above which there is no entitlement to legal aid, was a mere £733.00.[116] For Interviewee 3 this meant that, because she was £8 over the limit, she was unable to receive legal aid to assist her in proceedings that involved allegations of child sexual abuse where her ex-partner was legally represented. Interviewee 36 was similarly over the financial threshold, which meant that she now had to proceed with an application for special guardianship of her grandchild against a legally represented local authority which was opposing the application. In fact, as the child was also legally represented, the grandparent was the only party without legal advice or assistance. These are matters in which the outcome for the applicants and the children, who are the subject of those proceedings, will have a profound effect, and as such it is questionable whether these litigants can present their cases fairly against legally represented opposition.

Such is the power imbalance in these proceedings and the importance of the outcome, that it is submitted that legal aid should always be available in matters where child abuse is alleged or special guardianship is applied for. Yet, at present, non-means tested public funding is

[112] John Dewar et al, *Litigants in person in the Family Court of Australia: A report to the Family Court of Australia* (Research Report No. 20, 2000) 33.
[113] Julie MacFarlane, *The National Self-Represented Litigants Project: Identifying and Meeting the Needs of Self-Represented Litigants* (Final Report, May 2013) 39.
[114] Trinder et al (n. 104) 33.
[115] ibid 13 – 15.
[116] Legal Aid Agency, *Civil Representation Guide to determining financial eligibility for certified work* (April 2015 v1).

limited to public law proceedings involving matters such as care orders and supervision orders,[117] despite the fact that an unsuccessful application for special guardianship can lead to a child being removed from its biological family. Nevertheless, it has been held by the Court of Appeal (CA) that denying legal representation to one of the parties in private family matters does not breach Article 6 rights to a fair hearing or Article 8 rights to a family life under the ECHR. The appointment of a guardian for the child and the judge or justice's clerk's involvement in assisting the LIP during any necessary cross-examination has been held to be sufficient to ensure a fair hearing.[118] Thus, the appointment of a guardian in respect of Interviewee 36's case and the assistance of the judge when being cross examined for Interviewee 3 is intended to ensure fairness. Due to the inequality of arms, however, it is doubtful whether this leads to LIPs, in these types of proceedings, having a fair opportunity to present their case. As Briggs LJ has stated:

> A misconception is to think that the unfairness to [LIPs] inherent in practice and in procedure can be satisfactorily addressed at trial (or at some significant interim hearing) simply by the patience, courtesy and investigative court-craft of the experienced judge. In many cases, if not the vast majority, it will by then be too late, because the cumulative hurdles which [LIPs] will by then have failed satisfactorily to overcome will have left them with insuperable disadvantages by the time they get to trial or to a hearing.[119]

Thus, help, beyond the assistance of the judge or other court personnel, is imperative if LIPs are to achieve effective access to justice. This is a matter to which we return in chapters five and six.

Interviewees who could not afford to instruct a lawyer expressed dismay at the potential cost involved in obtaining legal advice, which for many was beyond their expectations. Interviewee 15's and 13's views were typical: '*I think he said £2,000 and then more every*

[117] Legal Aid Agency, Scope of family proceedings under LASPO https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/444189/scope-family-proceedings-laspo.pdf accessed on 29.09.16.
[118] *Re K and H (Children)* [2015] EWCA Civ 543 [52].
[119] Briggs (n. 53) 56.

time he came to court and we just couldn't afford that, so I had no choice but to do it myself'.[120] *'I didn't have the funds, £250 for half a day (laughs).*[121] The figures quoted are beyond the scope of many litigants who are merely in receipt of welfare benefits or are on a low working income. Whilst some interviewees '*couldn't afford a solicitor at any stage*'[122] of the proceedings, others initially had representation, but funds had now run out. They, therefore, had no option, but to resort to litigating in person.[123] The fact that there are 'partial representation patterns'[124] amongst LIPs mirrors the findings of Hunter et al[125] and, subsequently, Trinder et al. It is the patterns reported by the latter, which were mainly identified from the testimony of the interviewees. These consisted of those who began with a lawyer, but became unrepresented and those receiving assistance outside court and then appearing alone in court.[126]

A concerning feature is the amount of debt some of these interviewees incurred as a means of receiving legal assistance.[127] Interviewee 14 used his redundancy money to initially pay for legal advice, but this had now been depleted and so he was representing himself. He did, however, owe a debt to the solicitors who represented him, which had led to '*paying a solicitor on a monthly basis a large amount of my income. At least, 40 or 50% of it goes to them each month on a payment plan'.*[128] Being left in debt was a familiar story relayed by many of the interviewees who referred to borrowing money from family,[129] '*If my mum wasn't there I wouldn't have had £500 to go and see the solicitor there and then.*[130] For Interviewee 12 access to the courts involved using credit cards to their maximum limit in order to fund representation. The fact that many LIPs do attempt to fund representation, and incur significant debt as a result, refutes any allegation that they enter into self-representation lightly. In fact, a consistent theme for such interviewees was that they had

[120] Interviewee 15.
[121] Interviewee 13.
[122] Interviewee 28.
[123] Interviewee 35 explained, '*I had a solicitor at first and I have spent a lot of money. I have spent like three and a half thousand pounds, erm, it is more than that'.* See also Trinder et al (n. 104) 15; MacFarlane (n. 113) 121.
[124] Hunter et al (n. 88).
[125] ibid.
[126] Trinder et al (n. 104).
[127] Melissa Smith et al, *Self-Represented Litigants: An Exploratory Study of Litigants in person in the New Zealand Criminal Summary and Family Jurisdictions* (July 2009) 42.
[128] Interviewee 10 was also paying off her solicitor's fees at £150 per month. Interviewee 17 incurred solicitors' fees in the sum of £9,000 over an eight year period.
[129] Interviewees 11, 12 and 17.
[130] Interviewee 26.

done much soul searching before deciding to continue alone. '*I have lent money off everyone, and it is just that I have had to represent myself. I took that decision last week. It was a hard decision to make'.*[131] This finding is consistent with the view espoused by Moorhead and Sefton that 'most unrepresented litigants appear to do so because they cannot afford, or feel they do not need, lawyers, not because they have a psychotic disregard for the interests of justice'.[132]

3.2. Preferring to 'go it alone'

Not all of the interviewees bemoaned the fact that they could not afford assistance from a legal professional. Instead these LIPs decided to forego legal representation. Of the seven interviewees who decided to proceed without legal assistance, and were thus categorised as 'self-reliant',[133] six stated that the reason for proceeding without a lawyer was linked to legal representation in the past, which had resulted in a negative experience. '*I wasn't overly happy with the outcome. That is why this time round, both financially and from my previous experience I just chose to come to court myself'.*[134] Whilst this Interviewee simply blamed his legal representation for the negative outcome of his case, others were scathing in their views of solicitors calling them '*parasites*'[135] who often delayed matters in order to make more money irrespective of the best interests of the child involved.[136] Such was the disillusionment with solicitors, that some interviewees expressed the view that they could actually afford a solicitor, but because of their past experience had decided to forego their help on this occasion. '*To be honest with you, at the time, I could afford it, but having spent £1,100 and getting nowhere. I was expecting to pay £3,000 or £4,000, and I may still not have got anywhere.'*[137]

The view that instructing solicitors leads to delay was reiterated by Interviewee 22 who was concerned by the lack of attention her previous solicitors had paid to her case, '*They had documents on their desk for months that they never shared with me and I only found out the hard way on the hearing date. What was the point? All these cheques are going for what?'*

[131] ibid.
[132] Moorhead and Sefton (n. 32) 265.
[133] See chapter two, 18 and chapter five 155.
[134] Interviewee 21.
[135] Interviewee 28.
[136] Interviewees 17 and 12.
[137] Interviewee 2.

These findings replicate those cited in previous studies, which report that some litigants made a conscious decision to avoid lawyers due to mistrust[138] or previous bad experience.[139] As with the testimony of Interviewee 2 and 22, this was often due to a lack of understanding about why their case has not proceeded as quickly as they expected or not followed the direction that they would have anticipated. This may be due to unrealistic expectations by LIPs about the pace that matters will proceed or a failure to appreciate that their case is one of many that the legal advisor is dealing with. Irrespective of the reasons for dissatisfaction, these are issues that legal advisers should explain to clients to avoid them becoming disillusioned with their services.

Being disgruntled with the service provided by solicitors, litigants decide to proceed alone in order to have more control over the progression of their case rather than delegating power to a lawyer.[140] There is also evidence from previous reports that litigants may pursue cases despite being advised by lawyers of their unmeritorious nature. Dewar et al outline that the reason for being unrepresented may involve a 'wish to use the Court as a forum to air grievances, to seek revenge or as an instrument of harassment.'[141] This was also a feature identified by Moorhead and Sefton who contend that, although the numbers of such 'obsessive/difficult' litigants were very small, they 'posed considerable problems for judges and court staff'.[142] Notwithstanding, this project, in accordance with Trinder et al's study, found no evidence to suggest that the interviewee LIPs were any more likely to bring unmeritorious actions than those who were represented.[143] Indeed, using Hunter et al's categorisation of LIPs, which consists of the 'vexatious' (those showing a flagrant disregard for the jurisdiction of the family court), 'procedurally challenged' and 'vanquished' (those who are overwhelmed by the court system),[144] Trinder et al found that almost all of the unrepresented litigants in their study fell somewhere between the procedurally challenged and vanquished.[145] The same conclusion applies to the interviewees for this project. None of those interviewed exhibited any behaviour or made any statements that would intimate that they were pursuing their claim irrespective of its known merits or legal advice to the

[138] Moorhead and Sefton (n. 32) 20.
[139] Smith et al (n. 127) 11.
[140] Macfarlane (n. 113) 86.
[141] Dewar et al (n. 112) 12.
[142] Moorhead and Sefton (n. 32) 245.
[143] Trinder et al (n. 104) 32.
[144] Hunter et al (n.88) 105.
[145] Trinder et al (n. 104) 25.

contrary. However, as noted earlier in this chapter, some of the LIPs who they were opposing appeared to display such behaviour.

In accordance with previous reports, there appeared to be a consensus of opinion amongst some '**self-reliant LIPs'**, who had chosen to proceed without representation, that their case was not complex enough to require legal assistance. In this sense it was not 'real law'[146] and they could 'do just as good a job themselves'.[147] Whilst interviewees agreed that if the matter was concerned with *a residence application, a divorce application or a finance ancillary relief or anything along those lines or children given to this person or that person'*[148] they would not take the risk of proceeding unrepresented, this was not the case if the child arrangements application was to spend time with the child. A number of these interviewees believed that they had the ability to contest these types of application.[149] *If I had robbed a bank or something, like if I was here for something serious then I think I would get a solicitor.'*[150]

The belief that a solicitor was unnecessary was particularly strong if the interviewee was prepared to agree to a child arrangements order provided the other party could satisfy any safeguarding concerns that had been raised: '*I didn't feel I needed a barrister, because it wasn't something that I was going to be fighting against hard. If he can provide the evidence then that is half the battle'.*[151] Contrastingly, Interviewee 26 explained how '*the next thing he wants is to have 50/50 contact, and I certainly won't be coming on my own, because I am going to heavily defend it'.* This would, therefore, lead to the engagement of a lawyer for assistance and representation.[152] There is evidence then that LIPs delay instructing lawyers and will be more inclined to engage their services when child arrangements may be severely curtailed.

Whilst these interviewees were unequivocal in their belief that legal representation would be of no real benefit at present, there were interviewees who were unsure about the value of

[146] Dewar et al (n. 112) 12.
[147] Moorhead and Sefton (n. 32) 20.
[148] Interviewee 21, 22.
[149] Interviewees 34, 26, 25, 14 and 6.
[150] Interviewee 25.
[151] Interviewee 26.
[152] A view also held by Interviewee 14 who was '*looking to use a solicitor because I don't feel confident dealing with 50/50 residency, as it is not something that I have dealt with before'.*

legal representation. Amongst these were two interviewees who needed legal advice and representation, but lacked an insight into why this was a priority for them. Interviewee 32 was accused of attacking his ex-partner with a knife, but rejected the need for a solicitor because he had admitted the attack in the family court although he denied using any weapon. Despite being able to afford a solicitor, he insisted that this was unnecessary. '*I am thinking, why do I have to get a solicitor? I have admitted what I have done, so I don't have to get a solicitor'*. Taking account of the fact that this matter was about to proceed to a fact finding hearing for which the other side had representation and this Interviewee had severe dyslexia, there was a clear inequality of arms which necessitated legal assistance. Although Interviewee 30 remarked, '*Do I need a solicitor here? I don't know*', it was clear that due to his '*ignorance of the ways of the courts*',[153] he did need assistance to enable someone to take control of the proceedings that had so far been adjourned on multiple occasions.[154] This evidence highlights the fact that whilst some LIPs may reject legal assistance due to their distrust of solicitors, others are confused about whether the expense of legal representation presents them with any advantage. This is caused by a lack of understanding of the court process and underlines the need for early legal advice for LIPs. It is only with this advice that litigants can realistically make an informed cost benefit analysis about whether or not to seek and engage legal representation.

3.3. The perceived benefits of litigating in person

Although the interviewees discussed in the last section preferred to proceed without a lawyer, even those interviewees who wished to be represented, but lacked sufficient funds, highlighted some benefits that came with self-representation. This section considers how, despite the barriers to effective access to justice that LIPs can encounter when litigating, they still identify a number of positive aspects to appearing alone.

3.3.1. Telling it in your own words

A number of interviewees indicated that an important aspect of having to represent oneself was that the judge would hear evidence that was in their own words,[155] which was

[153] Interviewee 30.
[154] This was also an issue for Interviewee 24 who questioned, '*what is the point of a solicitor?'* despite being the subject of numerous unfounded allegations that had led to months of delay and had prevented spending time with his child.
[155] A feature also observed by Trinder et al (n. 104) 18, Dewar et al (n. 112) 54 and MacFarlane (n. 113) 48.

something, they believed, judges preferred. 'C*oming from me it looks better. If you are using a solicitor the judge is hearing from the solicitor. He wants to hear from yourself as well, because no one else can show the amount of care and commitment to the judge.*[156] The view that the judge would prefer to hear directly from a LIP, who was the only person able to *'get the message across'*[157] was reiterated by several interviewees.[158]

What is disconcerting about this evidence is that the interviewees appear to consider that the most important issue in the case is getting their side of the story across to the judge to prove their loving relationship with their child rather than emphasising the salient factual and legal issues to be determined. This is summed up by Interviewee 5's explanation about why it is important to give to the judge your *'perspective in your words'. 'A person representing themselves can show how much the baby means and how much he loves them, and that is one of the best things.'*

Several interviewees, therefore, regarded solicitors as '*middle men*'[159] whose only purpose was to put their views to the judge in a manner that the lawyer '*thinks sounds better'*[160] rather than provide any other relevant skill or expertise. Interviewee 33 summed up the tension between needing legal representation, whilst wanting to have their say, '*If I could have a solicitor I would have one. I think, it is just that balance of getting over what I need to say, but also being properly represented'.* In this regard, litigants understand the significance of being represented, but having their voice heard is equally valuable to them.
This evidence suggests that members of the public have a distrust of the legal profession's ability to adequately relay the salient issues to the judge. This may be linked to the language used by lawyers, which does not correspond with how members of the public communicate. As will be examined in chapter five, the language used by the judiciary and lawyers can have an alienating effect on LIPs. It is, therefore, not surprising that LIPS should determine that they are best equipped to relay their views to the court.

[156] Interviewee 34.
[157] Interviewee 5.
[158] Interviewees 34, 33, 24, 17, 5 and 6.
[159] Interviewee 6.
[160] ibid.

The requirement for the court to pay attention to the LIP's opinions, which are relayed to the judge in their own words, accords with Lind and Tyler's 'Group Value' theory of procedural justice. This theory postulates that procedural justice depends on the procedure giving a voice to the individual, which allows for due weight to be given to value expression and consideration of expressed ideas as well as treating people in a polite and dignified manner.[161] Thus the effect of having one's voice heard and the decision maker giving due consideration to the values being expressed is such that it is more important than whether it produces a positive outcome for the litigant.[162]

Investigating the effect of voice, research by Lind et al[163] sought to confirm whether this had an instrumental effect, (i.e. that its value derives from the fact that it would lead to a better decision)[164] or non-instrumental effect, (i.e. that its value lay in the fact that the person had had their voice heard, irrespective of its effect on the decision).[165] By comparing the effect of 'pre-decision voice', 'post decision' voice and 'no-voice' in a group task, they found that the importance of control through voice had both an instrumental and non-instrumental aspect. Unsurprisingly, their experiment found that 'pre-decision' voice, which involved the possibility of influencing the decision, led to a greater perceived fairness than 'post decision' and 'no voice' situations. The surprising aspect was that even though those in the post decision voice group were told that their opinions would not change the ultimate decision, which had already been made, they judged the process as fairer than having no voice at all. Being given the opportunity to voice one's opinions, affects procedural fairness even if this is purely symbolic in nature.[166]

It is, therefore, to be expected that LIPs should place emphasis on being able to speak to the judge directly rather than having their voice diluted by using legal representation. However, research concerning procedural justice has usually been premised on the idea that it will be a lawyer in an adversarial system who provides the voice for the litigant rather than the

[161] Edgar Allen Lind, and Tom R Tyler, *The Social Psychology of Procedural Justice* (Plenum Press, New York 1988).
[162] ibid.
[163] E Allen Lind et al, 'Voice, Control, and Procedural Justice: Instrumental and Non-instrumental Concerns in Fairness Judgments' (1990) 59 (5) Journal of Personality and Social Psychology 952.
[164] Gerald S Leventhal, 'What should be done with Equity Theory? New Approaches to the Study of Fairness in Social Relationships' in K Gergen, M Greenberg, and R Willis (eds), *Social Exchange: Advances in Theory and Research* (New York: Plenum Press 1980).
[165] Lind and Tyler (n. 161).
[166] ibid.

litigant themselves.[167] It would seem that a perception of procedural fairness still subsists even if it is the litigant who speaks to the judge rather than a skilled professional. Many LIPs believe they have had a voice despite the lack of legal representation.

This accords with Thibaut and Walker's theory of procedural justice as a LIP retains maximum process control whilst the decision control is vested in the third party judge.[168] It is this model of process control remaining with the litigant and decision control with the judge that is most likely to result in distributive justice.[169] The question that has to be considered, however, is whether LIPs have the necessary resources to exercise process control and, if not, how this can be facilitated. It is this question that underpins the issue of whether LIPs can achieve access to justice and for that reason will be discussed in chapters five and six where the barriers to achieving access to justice once proceedings are commenced are examined.

3.3.2. The importance of telling the truth

Interviewees who could not afford legal representation identified that a further benefit to being denied legal representation was that they could now tell the judge the truth. For a number of interviewees[170] this was one of the most important aspects of their case. Telling the truth meant that they lacked fear when going into court because what they were saying would be regarded as *meaningful* to the judge.[171] This linked to the previously mentioned benefit of expressing their views in their own words, as what was said would be '*from your own mouth*'.[172] Interviewee 18 explained the importance of not appearing with a solicitor in the following terms:

> *I am telling the truth and so it is easy for me. I am not lying; I am not making things up, I have got nothing to hide. So I was confident everything was going to be alright. I think you need a solicitor if you are covering stuff up, if you don't want to tell the truth.*

[167] John Thibaut and Laurens Walker, 'A Theory of Procedure' (1978) 66 California Law Review 541.
[168] ibid.
[169] ibid.
[170] Interviewees 31, 24, 19, 18, 2 and 1. See also Moorhead and Sefton (n. 32) 190 and Smith et al (n. 117) 46.
[171] Interviewee 31.
[172] ibid.

Truth was, therefore, connected to the importance of speaking to the court in your own words without the use of a solicitor as an intermediary. This was regarded by the interviewees as enabling them to earn the respect of the judge. '*I would say the advantage is you get more respect from the judge, I think for not having a lawyer with you and the fact that you have done the research and are doing it all yourself*'.[173] Appearing without representation was, therefore, regarded as a means of gaining the judge's respect and sympathy. This interpretation was expressed by interviewees referring to the view that the judge appeared to '*warm to me, you could just see that he genuinely saw me*',[174] as well as being impressed by their manner in court. '*I didn't argue, I spoke politely, whereas she had the solicitor. The solicitor spoke down to the judge, she was arguing with the judge over decisions, so I think the judge saw me for what I am and her for what she actually really is.* '[175]

Again, the association was made by interviewees between appearing in court alone and being truthful. This contrasts to appearing with a solicitor who is only needed if a litigant is being dishonest:

> *The judge knows that the solicitor just lies, because that is what solicitors are there for. Whether you are guilty or not of a crime, your solicitor is going to lie for you. The judge is wise to that. I have turned up on my own and I haven't got time to sit there and make lies up. So I think it is better to go on your own than it is to go with a solicitor'.*[176]

This statement not only makes a connection between honesty and appearing without representation, but also highlights, once again, the negativity that many LIPs feel towards lawyers[177] and their lack of understanding about the role of lawyers in court proceedings.

This further indicates the importance of funding early legal advice. By receiving instructions from litigants at the initial stage of proceedings, solicitors can explain the

[173] Interviewee 15.
[174] Interviewee 2.
[175] Interviewee 29.
[176] ibid.
[177] This was a particular feature of Dewar et al's research, Dewar et al (n. 112) 37.

importance of law and facts rather than issues of truth. They can also explain how their qualifications and experience can enhance the manner in which matters are relayed to the court. In addition, the difference between civil and criminal proceedings can be discussed, as matters concerning 'truth' and 'guilt' are more appropriate in the latter type of proceedings. As all of these interviewees had never been in civil courts before their family dispute arose, it is likely that their only exposure to the courts and the role of solicitors has been through the portrayal of criminal cases in the media. Perhaps more importantly, the views of these LIPs provide a salutary warning to the legal profession that they must improve their public image. This requires urgent attention if solicitors are to successfully encourage the remaining litigants who can afford to pay for legal advice to engage their services.

A troubling aspect of the interviewees' testimony was that the belief that the most important aspects of a case is telling your story in your own words in a truthful manner to gain the judge's respect had been obtained from experienced LIPs and support groups providing advice on the internet. Interviewee 15 explains how he sought advice from someone who had been a LIP who advised him that '*you get a lot more respect from the judge if you are on your own*'. Further, Interviewee 28 was advised by a fathers' rights group that '*judges prefer for you to stand on your own two feet really than hide behind a solicitor*'. This underlines the importance of legal advice for LIPs, so that they can receive impartial assistance on what are the relevant factors which they should present to the court. In addition, it highlights the dangers that can arise when advice is freely available on the internet without any guarantee that the advisor has the requisite legal expertise and knowledge. These are issues that will be addressed in the next chapter when considering how and where litigants gain advice and assistance in the absence of public funding.

3.3.3. A question of control

A benefit to being unrepresented identified by LIPs, irrespective of whether they would have been able to afford to pay for legal assistance or not, was the fact that they maintained control over their case. This was particularly significant when deciding what should be contained in any statements requested by the court, as interviewees preferred to have the final word as to what should be included:

> *Last time the solicitor was doing all of that for me. You don't have to add that, because it is not relevant, even though I personally felt that it was relevant. This time round, because I haven't had anyone to draw up my statement I did it myself. I quite liked that, because I got every point across that I wanted that I felt was relevant to the case'.*[178]

Thus, LIPs are not always prepared to defer the decision about what to include in their statements to a third party, irrespective of the latter's legal knowledge and expertise. This is because they perceive the statement as being a method of letting the judge know the true facts of the case, in their words, irrespective of relevance.

Once again this relates to the procedural justice requirements of litigants which requires the judge to hear evidence in their own words as a means of having their voice heard. It was the fact that the solicitor was not prepared to include all of the points that Interviewee 17 suggested, that led to his disillusionment with the solicitor he instructed when he was entitled to legal aid. However, he expressed satisfaction with his last solicitor due to the fact that he was willing to prepare the required statement in accordance with his instructions.

As well as the contents of statements, further issues arose in respect of negotiation and the documents that should be presented to the court. Interviewees expressed the view that not having a solicitor had the advantage of being able to negotiate on behalf of one's children. '*Lawyers 'don't know my kids and I don't want them fighting their cause when they don't know enough about them*'.[179] An additional advantage was that the LIP would retain full '*control about what you want to present in the court and what has been presented to the court from the other side*'.[180]

If some LIPs believe that they are in an advantageous position, because they can decide what material is relevant and present their evidence without a third party curtailing what they are permitted to present, it is hardly surprising that judges express the view that LIPs increase court time and judicial involvement.[181] However, the perception of justice being

[178] Interviewee 21.
[179] Interviewee 10.
[180] Interviewee 22.
[181] National Audit Office, *Implementing reforms to civil legal aid*, (2014-15 HC 784) 14 [1.21].

connected to retaining control supports Thibaut and Walker's theory of procedural justice. According to this theory, 'the freedom of the disputants to control the statement of their claims constitutes the best assurance that they will subsequently believe that justice has been done regardless of the verdict'.[182] This is a view supported by Lane, who argues that procedural justice includes 'a sense of control over some portion of the justice process: presentation of one's case; opportunity to show what one is worth'.[183] In accordance with Lane's analysis, these litigants believed the process benefitted them, because they retained a sense of control over a portion of the justice process. For these interviewees this involved having control over both the presentation of their case and the opportunity to attain self-worth and pride.[184]

3.3.4. Endorsing self-worth and pride

It was the feeling of self-worth and pride in what they were able to achieve as LIPs that a number of interviewees[185] expressed as being an unexpected positive consequence of appearing in court without legal assistance. '*I did that thing myself and so we all need to pat each other on the back.*'[186] This statement highlights the fact that pride arose from being able to prove to themselves that they could proceed through the court process without legal representation. '*I am actually quite proud I haven't had to deal with solicitors and I have done this myself.*'[187] In the same sense, interviewees took pride in the fact that they were '*battling*'[188] to gain a child arrangements order and that reports from Cafcass were portraying their parenting skills in a positive light.[189]

It is acknowledgment by the judge or representatives from other agencies of the skills interviewees possessed, in preparing and presenting their cases, that led to their increased sense of self-worth; giving them the impetus to continue in the absence of legal assistance:

[182] Thibaut and Walker (n. 167).
[183] Robert E Lane, 'Procedural Goods in a Democracy: How one is treated versus what one gets' (1988) 2 (3) Social Justice Research 177.
[184] ibid.
[185] Interviewees 33, 17, 15, and 14.
[186] Interviewee 11.
[187] Interviewee 17 and Interview 15.
[188] Interviewee 14.
[189] ibid.

> '*It is quite a monumental thing that I have taken on, but it is best done on my own, because people have started to compliment me saying that I was very articulate myself, both written and verbally and I sort of felt then that I could certainly produce something and have it count'.*[190]

This emphasises the importance of ensuring that LIPs are treated by members of the court in a manner that enables them to feel that their contribution to a case is valued in order to have a perception that procedural justice is being dispensed.[191] As Lane argues, there are four procedural goods which ensure that a procedure is fair. Amongst these is the requirement to treat a person with dignity, which is defined as 'self-respect, personal control and an understanding of the procedures that determine relevant outcomes'. For these LIPs despite the problems encountered with the legal process it was important that they maintained self-respect and control in order to gain a sense of justice.

Whilst judges may consider that the contents of statements and witness testimony contain irrelevancies, this research suggests that this is not done in a vexatious or obstructive manner, but indicates that, from the LIP's point of view, there are genuine reasons for their inclusion. The challenge faced by the family court judiciary is how they can allow LIPs to feel that they have achieved procedural justice, through addressing the issues they consider to be imperative, whilst also adhering to the principles of proportionate justice.[192] As such principles require cases to be dealt with justly[193] in a manner that deals with cases expeditiously and fairly,[194] whilst allotting to them an appropriate share of the court's resources and having regard to the need to allot resources to other cases,[195] this is no easy feat. However, judges can no longer adopt the role of passive arbiter[196] in a modern court system where LIPs are becoming the norm. Rather, as active case managers,[197] it is imperative that they guide LIPs towards the salient issues to be addressed in court and the reasons why non-relevant information does not further their case and will not be

[190] Interviewee 33.
[191] Thibaut and Walker (n. 167).
[192] These are issues we return to in chapter six.
[193] Overriding Objective FPR 1.1
[194] FPR 1.1 (2) (a).
[195] FPR 1.1 (2) (e).
[196] Richard Moorhead,'The passive arbiter: Litigants in person and the challenge to neutrality' (2007) 16 Social & Legal Studies 405.
[197] FPR 1.4.

addressed.[198] This must be done in a way conducive to LIPs being treated in a dignified manner and given a 'voice' which allows them a 'meaningful opportunity to be heard'[199] and to have appropriate 'control' of their claim. This will, in turn, help to ensure that the outcome may be regarded as just.[200]

3.4. Procedural justice and LIPs: An achievable objective?

The fact that LIPs believed that there were benefits to pursing their litigation without legal representation has important implications for procedural justice theory. It confirms that despite the absence of a lawyer it is possible for an LIP to experience procedural fairness in an adversarial system. This is quite a surprising result when one considers the analogy Trinder uses of the courtroom being similar to a play where the lawyers are actors and the litigants merely the audience. One would expect that when the audience become the actors procedural fairness would be unobtainable.[201] Recent qualitative evidence supports this expectation. Lee and Tkacukola's examination of LIPs in Birmingham Civil Justice Centre reported that the profile of participants was one of potential vulnerability, low incomes, less likely to be in stable relationships and ill equipped educationally for the task of self-representation.[202] Accessing legal information was particularly problematic. Seventy one per cent attended court with no form of support[203] and only nine per cent accessed information from a relevant source.[204] Similarly, the family law practitioners in Thomas' report declared that 'without a working knowledge of the legal system, litigants in person do not know what is required of them in court proceedings' and 'struggle to narrow down the issues they wish to raise in court'.[205]

The findings of these studies support Thibaut and Walker's procedural justice theory which is premised on litigants placing procedural control in the hands of their lawyers and

[198] This can form part of the duty under FPR 1.4(2)(c)(i) to actively manage cases by deciding promptly which issues need full investigation and which do not, as well as, under FPR 1.4(2)(m), giving directions to ensure that the case proceeds quickly and efficiently.
[199] Dewar et al (n. 112) 10.
[200] Kees Van den Bos et al, 'How Do I Judge My Outcome When I Do Not Know the Outcome of Others? The Psychology of the Fair Process Effect' (1997) 72 Journal of Personality and Social Psychology 1034.
[201] Trinder et al (n. 104) 53.
[202] Lee and Tkacukova (n. 42) 7.
[203] ibid 8.
[204] ibid 10.
[205] Linden Thomas, *The "Lottery" of Justice: Exploring some of the consequences of the Legal Aid, Sentencing and Punishment of Offenders Act 2012* (CEPLR Working Paper Series 03/2016).

decisional control in the presiding judge. This provides the litigant with sufficient input in the proceedings through having a 'voice'.[206] In turn, this ensures that the litigant regards the process as fair irrespective of the outcome. Hence, fairness of the procedure becomes the means by which the fairness of the outcome is determined.[207] Additionally, if the procedure is adjudged as fair then the litigant is more likely to regard the legal authority as legitimate which in turn influences compliance with the order made'.[208] It can be seen then that the importance of this 'fair process effect'[209] cannot be overstated as without it the legitimacy of both the outcome and the authority of the court is at stake. Indeed, Galligan argues that procedural fairness rules possess a 'dignitarian value' that should be judged according to how well they achieve the goal of procedural justice.[210] In this respect, procedural justice has a value in its own right which extends beyond rights based entitlements.[211] So whilst not allowing LIPs the same amount of time as their lawyer opponents to speak in court is unlikely to breach their Article 6 right to a fair trial, it would no doubt violate their procedural justice needs. Taking such an approach, the issue that must be addressed is what criteria should apply in order to achieve procedural justice for LIPs now that lawyers no longer ensure process control.

3.4.1. The procedural justice criteria

Fortunately the 'fair process effect' of fair procedures leading to legitimacy and compliance irrespective of outcome applies irrespective of the gender or ethnicity of the litigants involved.[212] As a result, it is much easier to develop a set of procedural fairness rules because those adopted will depend on the issue to be addressed rather than the characteristics of the litigants involved.[213] Procedural fairness does not depend on the litigant who appears before the court. This is important when considering the criteria that would apply to LIPs. So is the finding that procedural fairness becomes more crucial when litigants are in a stressful and high conflict situation. As they are in a situation where they

[206] Thibaut and Walker (n.167).
[207] Tom R Tyler, *Why people obey the law* (Yale University Press 1990) 107.
[208] ibid 103.
[209] Ronald L Cohen, 'Procedural Justice and Participation' (1985) 38 Human Relations 643.
[210] D J Galligan, *Due process and fair procedures: A study of administrative procedures* (Clarendon Press Oxford 2012) 80.
[211] ibid 86.
[212] Tom R Tyler and Yuen J Huo, *Trust in the Law: Encouraging Public Cooperation with the Police and Courts Through*' (Russell Sage Foundation 2002).
[213] Tom R Tyler, 'What is procedural justice? Criteria used by citizens to assess the fairness of legal procedures' (1988) 22 Law & Society Review 103.

can feel lost and confused they rely more heavily on procedural justice to make sense of the process.[214] From a family law perspective, there is evidence that for respondent fathers, who are likely to be at a disadvantage in the proceedings, perceptions of fairness become the paramount determinant when assessing the fairness of outcomes.[215] Thus, the less understanding about the procedure they have the more likely they are to question the legitimacy of the outcome and continually bring the issue back to court.[216] The implication for family proceedings is that 'new uninformed' LIPs must be given sufficient assistance and information to understand the court process. Being confused and unsure they are more likely to rely on the fairness of the procedure to assess the fairness of the outcome. It also provides an insight into why so many of the interviewees in the present study had been in family proceedings repeatedly. Violation of procedural justice expectations may have undermined the legitimacy of the court and its orders leading to continual child arrangement applications.

The phenomenon of LIPs in the civil and family courts means that the criteria required for procedural justice to occur has to be written with their requirements in mind. Tyler has provided some assistance with this by developing four key procedural justice principles for achieving fairness in court settings.[217] Firstly, participation, (also known as voice) as this study has demonstrated, enables LIPs to 'tell their side of the story' and to participate in the proceedings provided 'the judge sincerely considered their arguments before making their decision'.[218] Having a voice in the process requires parties to have the information and materials necessary to participate[219] Daly and Tripp's research highlights the importance of receiving early legal information. They found that if litigants did not have procedural information they judged the fairness of the process according to the outcome.[220] Van den Bos confirmed this finding, adding that what matters is whether procedural information or

[214] Liesbeth Hulst et al, 'On Why Procedural Justice Matters in Court Hearings Experimental Evidence that Behavioral Disinhibition Weakens the Association between Procedural Justice and Evaluations of Judges' (2017) 13 Utrecht Law Review Volume 13, Issue 3, 2017.
[215] Gary B Melton and E Allan Lind (1982) Procedural Justice in Family Court: Does the adversary model make sense? (1982) 5 Child & Youth Services 65.
[216] ibid.
[217] Tom R Tyler, 'Procedural Justice and the Courts' (2007) 44 Court Review: The Journal of the American Judges Association 217.
[218] ibid.
[219] John M Greacen, 'The court administrator's perspective: Research on "procedural justice" – what are the implications of social science research findings for judges and courts?' (2008) Future Trends in State Courts 1.
[220] Joseph P Daly and Thomas M Tripp, 'Is outcome fairness used to make procedural fairness judgments when procedural information is inaccessible? (1996) 9 Social Justice Research 327.

outcome information is received first.[221] Hence, those LIPs, such as 'new uninformed' who have not been able to participate in the court process through a lack of knowledge, will judge its fairness on the basis of the decision. Bearing in mind Lee and Tkacukova's finding that participants struggled to access relevant legal information and those who did failed to do so at an earlier enough stage in their proceedings,[222] this could result in 50 per cent of litigants being disillusioned with the court system.[223] The benefit of following Tyler's procedural justice principles, therefore, is that judges are in a 'win-win' situation as both parties whether they 'win' or 'lose' will regard the outcome as fair.[224]

Secondly, neutrality requires judges to be transparent and open about the rules being employed and to explain how they are being applied.[225] Zorza argues that neutrality does not equate to passivity. A passive judge leaves it to the parties to get their evidence and does not engage the parties, leaving the balance of the system to ensure neutrality. However, a neutral judge creates an environment in which the relevant facts are uncovered by engaging with the parties and ensuring that each side gets their side of the story across.[226] This definition of neutrality is much more appropriate when LIPs are in the courtroom. Thirdly, respect requires all those involved in the court process; judges, lawyers and court staff to treat LIPs in a courteous and polite manner that confirms that their concerns and problems are being treated seriously.[227] Lastly, LIPs must believe that they can trust the adjudicator.[228] To a large extent this involves non-verbal skills such as judges indicating to LIPs that they are listening to them by maintaining eye contact and nodding to show that views have been heard.[229] As will be explained in chapter six, the interviewees in the present study confirmed that good communication skills equated to procedural fairness.[230]

[221] Kees Van den Bos and H A M Wilke, 'Procedural and distributive justice: What is fair depends more on what comes first than on what comes next' (1997) 72 Journal of Personality and Social Psychology 95.
[222] Lee and Tkacukova (n. 42) 9.
[223] Greacen (n. 219).
[224] ibid.
[225] Tyler (n. 217).
[226] Richard Zorza, 'The Disconnect Between the Requirements of Judicial Neutrality and Those of the Appearance of Neutrality when Parties Appear Pro Se: Causes, Solutions, Recommendations, and Implications' (2004) 17 Georgetown Journal of Legal Ethics 423.
[227] Tyler (n. 217).
[228] ibid
[229] Greacen (n. 219).
[230] See 228.

Support for Tyler's procedural justice criteria is evidenced by Brems and Lvyrsen's contention that the European Court of Human Rights should adopt the criteria 'at the level of its own proceedings and in evaluating how human rights are investigated at the domestic level'.[231] LaGratta and Bowen have also suggested that Tyler's procedural rules should underpin procedural fairness in the criminal justice system.[232] So far, however, the criteria has not received attention from a civil or family justice perspective. The recent MOJ report, *Transforming our Justice System* declares that the justice system will have 'people's needs and expectations at its heart'[233] at the same time as being silent as to the procedural justice needs of LIPs. If the civil and family courts are to provide a procedurally fair system for LIPs to settle their disputes then Tyler's procedural justice criteria must be at its heart. Whilst academics have written guidance about how to enable LIPs to achieve Tyler's four objectives,[234] it is important that the views of LIPs are received. It is after all their perceptions that matter. In California this objective has been achieved by surveying LIPs[235] for their opinions and forming LIP focus groups.[236] This has ultimately led to a strategic plan being developed to train the judiciary in procedural justice techniques which include procedural justice theory, verbal and non-verbal communication and how to implement procedural fairness.[237] Whilst at the domestic level the Equal Treatment Bench Book provides guidance for judges when LIPs appear before them,[238] this is written from the perspective of lawyers. It is, therefore, not fit for purpose. This study, therefore, takes an initial step towards determining LIPs' procedural justice needs from their perspective.[239] However, more research is needed to ascertain what processes are needed to achieve Tyler's criteria for the growing number of LIPs. This requires a commitment from the government similar to that accepted in California so that a procedural justice framework for LIPs[240] in

[231] Eva Brems and Laurens Lavrysen, 'Procedural Justice in Human Rights Adjudication: The European Court of Human Rights' (2013) 35 Human Rights Quarterly 176.
[232] Emily Gold Lagratta and Phil Bowen, *To be fair: Procedural fairness in the courts* (Criminal Justice Alliance 2014).
[233] MOJ, *Transforming our justice system* (September 2016) 5.
[234] Douglas Denton, 'Procedural Fairness in the California Courts' (2007) 44 Court Review 44; Tyler (n. 207); Greacen (n. 209).
[235] David B Rottman, *Trust and confidence in the California courts: A survey of the public and attorneys* (2005)
[236] Public Agenda and Doble Research, *Trust and confidence in the California courts: Public court users and judicial branch members talk about the California Courts* (2006).
[237] Center for Court Innovation, *Improving Courtroom communication: A Multi-year effort to enhance procedural justice* (2015).
[238] Judicial College, *Equal Treatment Bench Book* (2013) 4-1.
[239] This is discussed in detail in chapters five and six.
[240] Tyler (n. 217).

civil and family courts can be created. Just as teachers require training in how to ensure that their students engage in learning so must judges be trained to assist LIPs engage in the courtroom. Whilst this will necessitate further resources, as the research outlined above proves, the cost will be far greater if LIPs regard the process as unfair. Research has shown that LIPs can recall their experiences in court several decades later and if these are unfavourable the lack of legitimacy results in non-compliance and recurring litigation.[241] It can no longer be taken for granted that courts are procedurally just. The advent of LIPs means that it must be ensured. Not by judges or lawyers deciding what LIPs need but by putting the voice of LIPs at the forefront of a procedural fairness agenda.

4. Conclusion

This chapter has examined how LIPs encounter the initial stages of litigation. Particular attention has been paid to the requirement to attend a MIAM by all applicants in family proceedings due to the paucity of empirical data examining this issue from the viewpoint of LIPs. The cost and delay encountered by applicants through being compelled to attend a MIAM when the other party is entrenched in their view that they do not wish to act in a conciliatory manner has been discussed, together with proposals for reform. The reasons why MIAMS fail to proceed to mediation have been examined, as well as the suggestion that MIAMs should be both free for all litigants as well as being a voluntary option for both applicants and respondents.

Due to the allegation, by interviewees, that failure to mediate results from vexatious litigation, the law in respect of vexatious and unreasonable behaviour has also been considered. It is important for members of the judiciary to be alert to the dangers of vexatious litigation in order to bring such behaviour to a swift conclusion by using their inherent jurisdiction and the powers provided to them to invoke civil restraint orders. In this manner, children who are the subject of proceedings are not involved in protracted family matters which have no real prospect of success. This ensures that their sense of uncertainty and unease in respect of the child arrangements with their parents is not prolonged.

[241] Rottman (n. 235) 5.

Moving from MIAMS to matters affecting LIPs when initially commencing litigation, this chapter has considered the reasons why LIPs proceed without legal representation. These extend beyond issues concerning the removal of legal aid to include matters relating to past experiences with lawyers and knowledge about the benefits of using a lawyer to proceed through the civil justice system. Despite the pitfalls of proceeding in court without a lawyer, LIPs perceive there to be a number of benefits to proceeding alone. Supporting Tyler and Huo's research,[242] there was no correlation between identifying advantages to litigating in person and educational attainment or procedural competence. Both interviewees who were well educated and capable as well as those who had limited schooling and struggled with the process, identified benefits to not having legal representation.

These advantages enable LIPs to regard the process as having elements of fairness by providing them with a voice and control over the proceedings in accordance with theories of procedural justice. This has important implications for how cases are heard in the family court and whether the current process can provide procedural justice in a court system underpinned by legal representation. The theories of procedural justice introduced in this chapter, along with the barriers to justice and the definition of justice within the family and civil courts, provide the foundations for this thesis and will remain a constant theme throughout the following chapters.

Now that the initial stages involved in commencing proceedings have been examined the next chapter investigates where assistance and advice beyond the solicitors' office is being sought by LIPs and the implications this has for the court service and other government departments, as well as the legal services sector itself.

[242] Tyler and Huo (n. 212).

Chapter four

Of friends and foes: The changing nature of advice seeking post LASPO

1. Introduction

This chapter explores where LIPs, who have decided to proceed with their claim through the family and civil court system, seek and attain legal advice and assistance. In an effort to avoid incurring legal expenses, interviewees sought legal assistance from both online and face to face providers. The chapter therefore begins by exploring how LIPs engage with the internet to gain practical and legal advice before considering the extent to which the police and court office personnel are being consulted to offer guidance and support.

Remaining with the subject of 'in court' guidance, the work of the PSU is examined as a means of providing a unique insight into the type of assistance offered by this organisation and the benefits LIPs acquire from engaging their services. The chapter then explores the growth of McKenzie Friends (McFs),[1] who are increasingly charging for their assistance, against the background of the recent Consultation[2] on McFs and its fee prohibition recommendation. The views of one of the interviewees for this study, who engaged the services of a McF, are analysed. This provides a voice for LIPs, as a means of addressing the dearth of empirical research about McFs from their clients' perspective.[3]

Finally, the chapter discusses how the legal profession can adapt, by adjusting the manner in which it offers its services, as a means of further widening access to justice for impecunious LIPs.

[1] The term 'McKenzie Friend' derives from the case of *McKenzie v McKenzie* [1970] 3 WLR 472. Mr McKenzie's assistant, an Australian Barrister, had been denied permission to help him as he was not on the record as his legal adviser. The CA confirmed that LIPs are entitled to receive appropriate support in court.

[2] Lord Chief Justice of England and Wales, *Reforming the courts' approach to McKenzie Friends: A Consultation* (February 2016) (Consultation).

[3] There is one report on McKenzie Friends that includes the views of their clients. Leanne Smith et al, '*A study of fee-charging McKenzie Friends and their work in private family law cases'* (June 2017).

2. Online advice and assistance

Recent reports have highlighted the importance of online service provision for those who wish to pursue claims without instructing lawyers.[4] It is hardly surprising then that interviewees in the present study also used this as a method for advice. The accessibility and reliability of websites offering legal advice and assistance has become imperative due to the recent commitment to developing an online court.[5] Whilst this court is initially to be only for small claims,[6] it may be extended beyond this remit if it has a positive impact on the cost and delay of pursuing litigation. The ability of LIPs to engage with online assistance is, therefore, crucial for the future development of the civil justice system and the LIP's ability to comply with its procedures. Although the present study focusses predominantly on family litigation, the ability to access online resources is no less important and is a vital skill for LIPs to acquire in the absence of face to face assistance. With this in mind, this section considers how interviewees engaged with the internet in order to obtain legal advice and assistance.

2.1. Online forums

Interviewees described how they turned to the internet as a source of support for presenting their case in court, as they could not afford the assistance of lawyers. It was where many of the interviewees found initial help about the criteria and steps required in order to bring proceedings to court and which forms to use. [7]

The majority of these interviewees did not know of any specific websites that they should use in order to identify reliable sources of information. Instead, most reported using search engines to address a particular question or problem they had:

> *You can just put in 'how to represent yourself in the family court'. You get such a lot of information, people like myself just put on everything they have learned, everything that they have done, what mistakes they have made and you can learn quite a lot.*[8]

[4] Liz Trinder et al, *Litigants in person in private family law cases* (Ministry of Justice Analytical Series 2014); The Low Commission, *Tackling the advice deficit: A strategy for access to advice and legal support on social welfare law in England and Wales* (January 2014).
[5] Briggs LJ, *Civil Courts Structure Review: Final Report* (Judiciary of England and Wales 2016).
[6] ibid [6.54].
[7] Interviewees 1, 14, 18 and 36.
[8] Interviewee 2.

The majority of LIPs, who had consulted the internet, identified engagement with forums as the main source of support they received online. Many explained how they used the forums as a method of understanding legal terminology they had not understood when in court. Interviewee 21's method of finding information was typical:

> *I would type in a question that I was wondering about and when I went on it, it just directed me to all different forums and there was all different people's experiences. I tried to remember the terminology and then I'd come out of court and I'd have a little look, what did he mean by this?*

For male interviewees, important forums used were those designed specifically for fathers such as fathers' rights campaign groups. Many men explained how this support was invaluable as it dealt with the court procedure from a male perspective. Interviewee 19 explains that this source of assistance was particularly important if the child(ren)'s father had or was applying for a child arrangements order for the child to live with them, '*because it is not usually this way round where the dad has got the kids and the mum hasn't'.* As well as providing help online these groups also allowed fathers to phone them for free advice, '*you can also phone them up as well and speak to them, which I have done on multiple occasions. They have listened to my story and told me where to go and what to do and how to proceed'.* Being able to speak to someone about their concerns and to receive advice is no doubt an invaluable source of support for male LIPs.

The evidence received from the interviews suggests that the main advantages of online forums are that they not only allow the user to identify LIPs who have appeared in court before, so that they can learn from their experiences, but they can also search for solicitors and campaign groups offering free advice. However, as these forums can be contributed to by any member of the public, the accuracy of the advice contained therein may be questionable. This was a reason why Interviewee 9 did not find the internet very useful. '*There is loads of advice online, but half of the time they conflict with one another so you don't know what is for the best'.* This is a view echoed by Sir James Munby, who, when discussing the availability of information about mediation, remarked that, 'One of the problems is that we have too much material. Every agency in the system has stuff on its website ... There is no

coherent strategy. There is no obvious port of call'.[9] This appears to be analogous to the problem encountered by LIPs when trying to gain valuable advice on all aspects of court procedure from internet sources.

2.1.1. The accessibility and reliability of online resources

Whilst forums may lead to misinformation, the one website that offers accurate procedural information is the MOJ's website,[10] which provides information concerning family and civil procedure and the appropriate forms to use. However, in accordance with Trinder et al's findings,[11] the majority of LIPs either did not know about this website or had never used it. The few who had used it found it, '*a little bit hard to understand, because it comes out with all this legal stuff*'[12] and so this led to a requirement '*to keep reading over it again and again'*.[13] For Interviewee 19 the website was of little use, as she *'went on to that website and to be honest it looked quite scary, so I clicked right off it again'.*

It is perhaps unsurprising that LIPs had these views with regard to the MOJ's website, as it contains the family and civil procedural rules without any annotated explanation for lay people. The testimony of these interviewees is disconcerting, as the FPR and CPR apply indiscriminately to all litigants whether they are represented or not.[14] In these circumstances, it is imperative that LIPs are not only aware that the MOJ website can be trusted to gain sight of the rules, but also that they are understandable. Yet, the ability of LIPs to understand these rules is questionable bearing in mind the legalistic language used and the sheer number of the procedural rules and practice directions involved. Despite being 'originally designed to bring about an overall simplification, the current Rules, Practice Directions, Guides and other procedural materials are now collected in a White Book of just under 7,000 pages'.[15] It is, therefore, predictable that LIPs will struggle to comply with these procedural requirements. This is evidenced by Richard Chapman DJ's extra-judicial remarks that:

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[9] House of Commons Justice Committee, *Impact of changes to civil legal aid under Part 1 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012* (Eighth Report) (2014–15, HC 311) [144].
[10] https://www.justice.gov.uk/courts/procedure-rules accessed on 13.10.16.
[11] Trinder et al (n. 4) 89.
[12] Interviewee 25.
[13] Interviewee 10.
[14] *Dinjan Hysaj v Secretary of State for the Home Department, Reza Fathollahipour v Bahram Aliabadibenisi and May v Robinson* [2014] EWCA Civ 1633 [44].
[15] Briggs LJ, *Civil Courts Structure Review: Interim Report* (Judiciary of England and Wales 2015) [2.14].

> Now Judges like me are spending more and more of our time having to deal with litigants who simply do not know the law, have never heard of the Civil Procedure Rules 1998 or the Family Procedure Rules 2010 and have breached most of the case management directions.[16]

Whilst it is reported that the judiciary is innovating to improve its 'procedures and resources for the ever increasing number of LIPs', it is clear that the latter's lack of knowledge continues to create additional work for judges.[17] Such is the impact of having to assist LIPs in the family court that the Lord Chief Justice regards it as a source of low morale amongst members of the judiciary.[18]

Not only must LIPs be made aware of the CPR and FPR and how to find them online, but the rules must also be written in a manner intelligible to the lay person. Contrary to the view stated in the 'Handbook for LIPs' that, the rules are 'fairly straightforward to read and understand, and so can be followed by a litigant without legal assistance,'[19] many of the interviewees struggled with the language used to express the rules of the court. As will be discussed in chapter five, the language used in the rules, documentation and by the lawyers involved in the matter can create often unsurmountable barriers to access to justice for LIPs.

The emergence of a family and civil justice system that will feature LIPs more frequently than legally represented individuals means that the time has now come for the rules and practice directions of the court to be written in a manner that uses informal and plain language. As Lord Justice Briggs has argued, 'the removal of Latin and legal jargon and the use of short sentences' is not sufficient.[20] Whilst Briggs LJ argues that the CPR Committee should liaise with those who have a day to day experience and understanding of the way in which LIPs approach the courts,[21] the author would go further and recommend that the CPR Committee liaises with former LIPs, so that they can provide a real insight into the problems that are encountered. The family and civil courts are created for ordinary members of the

[16] Richard Chapman, 'Solicitors can help litigants in person prepare for their day in court', *Law Society Gazette* (5 April 2012) www.lawgazette.co.uk/65048.article accessed on 13.10.16.
[17] Judiciary of England and Wales, *Lord Chief Justices Report 2015* (2016).
[18] ibid 20.
[19] Edward Bailey et al, *A Handbook for Litigants in Person* (March 2013) [4.5].
[20] Briggs (n. 5) [5.47].
[21] ibid.

public to access, which is a right protected by law.[22] LIPs should, therefore, have an instrumental role to play in ensuring that the rules do not prevent such entry. Only by listening to the voices of those who have experienced the family and civil courts, rather than those who have assisted them, can the civil justice system truly reflect the needs of the ordinary members of society. Liaising with voluntary groups that have helped LIPs may lead to the same complex language being used. Those who volunteer to help citizens navigate through the family and civil procedures have been immersed in the legal language used. This may impede their ability to recognise the complexity of words used as well as whether the language adopted can be readily understood by most LIPs. It is argued that real understanding for the problems encountered by LIPs requires their input regarding the proposals for reform.

A number of interviewees decided not to use the internet as a source of information. This was usually for two distinct reasons. Firstly, litigants explained how the information online was *limited*,[23] and *not very helpful*[24]. '*I don't think there is enough information out there. Basically it is a case of, legal aid has stopped for family and that is the end of it. Maybe I am not looking in the right places, maybe they are there. I don't know.*[25] This highlights the need for a concerted effort to inform LIPs of reliable and informative websites that they can use for legal and procedural assistance. However, it is not just a lack of relevant online information that leads to non-engagement. The second reason for failing to use websites was due to the interviewee's inability to understand the information. This was because of their educational needs, which meant that they had limited reading ability[26] and would find the information confusing.[27] One interviewee explained that he did not have access to a computer due to limited finances.[28] These are all legitimate reasons why support for LIPs cannot simply take the form of self-help websites or manuals. In fact, despite the production of a handbook for LIPs,[29] only one interviewee had heard of the guide, although they did

[22] *Bremer Vulkan Schiffbau und Maschinenfabrik v South India Shipping Corp Ltd* [1981] A.C. 909, 977; *R v Brown (Milton)* [1998] 2 Cr App Rep 364, 369.
[23] Interviewee 36.
[24] Interviewee 33.
[25] Interviewee 7.
[26] Interviewee 24 and 32.
[27] Interviewee 32.
[28] Interviewee 24.
[29] Bailey et al (n. 19).

describe it as being helpful when filling in forms.[30] There, is therefore, still a need for efforts to be made post LASPO to ensure that LIPs are advised of relevant websites and manuals that can assist them with family and civil court procedures and also that they are written in a language that they can understand and engage with. Whilst this will assist computer literate LIPs there is a pressing need to ensure that resources are available for those unable to access online materials. As the Government has acknowledged, many members of the public remain digitally excluded due to a lack of computer skills or the resources to be able to connect to the internet. [31] This view is supported by a recent report of the Office for National Statistics which highlights that nine per cent of adults and 22 per cent of disabled adults in the UK have never used the internet.[32] It would seem, then that there are likely to be many LIPs, like Interviewees 24 and 32, who require assistance to engage with digital advice and/or an alternative means of receiving legal help.

2.2. Improving accessibility

For those LIPs able to access the internet, there have been attempts to take a more consolidated approach to the resources available in order to prevent services being unnecessarily duplicated and to improve access to advice and guidance. The Civil Justice Council's (CJC) annual National Forum on Access to Justice for LIPs meets yearly to achieve this objective. Its fourth meeting involved '130 judges, lawyers, advice workers, academics, regulators, civil servants and others to discuss progress made on improving access to justice for [LIPs'].[33] It does not, however, involve those who need to be able to understand any changes that are made; the LIPs. The LIP Support Strategy Advisory Council has also been created in order to produce 'better arrangements to enable [LIPs'] to 'be clear about support options available to them, to get practical support and information more easily, and to find routes to free or affordable pieces of legal advice'.[34] It is hoped that such efforts will ensure that LIPs are provided with comprehensive and consistent guidance on where to find

[30] Interviewee 11.
[31] Cabinet Office, Government Digital Service, *Government Digital Inclusion Strategy* (4 December 2014) www.gov.uk/government/publications/government-digital-inclusion-strategy/government-digital-inclusion-strategy#what-this-strategy-is-about accessed on 09.06.17.
[32] Office for National Statistics, '*Statistical bulletin: Internet users in the UK: 2016'* www.ons.gov.uk/businessindustryandtrade/itandinternetindustry/bulletins/internetusers/2016 accessed on 09.06.17.
[33] CJC, *Fourth National Forum on Access to Justice for Litigants in Person: Summary* (8 December 2015).
[34] www.atjf.org.uk/uploads/4/1/8/1/41811233/litigant_in_person_support_strategy_advisory_council_-expressions_of_interest.pdf accessed on 22.10.16.

information and advice rather than having to trawl the internet without any particular strategy.

It is imperative that such guidance now directs LIPs to 'Advicenow's' website. This is an independent website run by the charity 'Law for Life: the foundation for Public Legal Education', which provides 'accurate information on rights and the law'.[35] It is, therefore, a valuable source of information on where to find advice and support as well as providing guides on what is needed to represent oneself in court.[36] For the LIPs who took part in this project these strategies came too late, it is, therefore, crucial that every effort is made to ensure that LIPs are directed to the available advice and assistance at an early stage in their proceedings. In this respect, publicity for these services should be a commitment adopted by the Government. Considerable financial savings have been made by withdrawing legal aid from family and civil matters.[37] Some of these savings should be used to advise LIPs of the services still available to them. In this regard, the undoubted reduction in access to justice can, to some extent, be abated. To remove legal aid from LIPs and then provide them with no clear guidance as to how to access available online assistance is an indefensible situation, which requires urgent attention. Whilst the Government's digital inclusion strategy is to be applauded as a means of improving the digital divide,[38] the results of this project suggest that there should be a policy in relation to LIPs. They are a proportion of the population who have a specific need to be able to engage with online resources which the strategy fails to acknowledge.[39]

This research is not the first to highlight the inadequacy of online advice and support. Trinder et al recommended that a single authoritative 'official' website be established for LIPs to refer to for accurate and trusted information.[40] The Low Commission also suggested that there should be a 'one-stop national helpline and website, providing a comprehensive

[35] http://www.advicenow.org.uk/about-us accessed on 14.02.17.
[36] www.advicenow.org.uk/guides/how-get-help-if-you-are-representing-yourself-court-or-tribunal accessed on 13.10.16.
[37] In November 2014 the National Audit Office estimated that the annual spending reduction in civil legal aid stood at £268 million. See National Audit Office, *Implementing reforms to civil legal aid* (2014-15 HC 784) 6.
[38] Department for Culture, Media & Sport, *UK Digital Strategy* www.gov.uk/government/publications/uk-digital-strategy/2-digital-skills-and-inclusion-giving-everyone-access-to-the-digital-skills-they-need accessed on 09.06.17.
[39] ibid.
[40] Trinder et al (n. 4) 107.

advice service for the general public'.[41] Yet, three years after the introduction of LASPO, there is no official website. LIPs remain uncertain about how to access online support and guidance or the quality of the information contained therein. In the absence of this source of early advice, the evidence of LIPs outlined above indicates that their ability to access justice is restricted.

3. Receiving face to face advice

Having considered the availability of online assistance, this section considers two of the important locations attended by interviewees in order to receive face to face advice; the police station and the court office. The reason why LIPs perceive the police station to be a possible source of advice is discussed before exploring why the distinction made between legal 'advice' and 'information' makes the court office an unlikely provider of assistance.

3.1. Reaching out to the arm of the law

An unexpected finding emerging from the data was that LIPs regarded the police as an appropriate initial source of advice.[42] In the knowledge that they were not entitled to legal aid and did not have the financial means to instruct a solicitor, a number of interviewees explained that calling the police was their first reaction to problems arising in their relationship.[43] The main reason for involving the police was to gain advice and reassurance following the removal of a child.

Whereas traditionally a solicitors' office would, no doubt, be the first place to go when a parent did not return a child,[44] the interviewees felt that their only option was to attend a police station. For these interviewees, being unaware of the distinction between civil and criminal matters, the other parent not returning a child was akin to abduction and, therefore, an offence. '*Her Dad wouldn't give her back. I went to the police and they said it is not*

[41] The Low Commission (n. 4) ix.
[42] There are no figures available for how often disputants seek the advice of the police in respect of family law issues. Pascoe Pleasance et al reported that between 2006 and 2009 only 8.3% of problems, for which respondents tried to obtain information, were referred to the police. However, these problems were not limited to family law matters. Pascoe Pleasance et al, *Civil Justice in England and Wales 2009: Report of the 2006-9 English and Welsh Civil and Social Justice Survey* (Legal Services Commission, 2010) 56, Table 30.
[43] Interviewees 14, 18, 26, 29 and 8.
[44] Pascoe Pleasance (n. 42) 55, found that seeking the advice of a solicitor was the most popular means of obtaining information for dispute resolution.

kidnapping. It is nothing to do with the police. I went to them because I didn't know what to do'.[45]

This demonstrates how the police were being contacted in situations where a solicitor would normally be instructed in order to reinstate the child arrangements order. In the absence of a solicitor, the parties involved the police as a means of preventing the other party from gaining child arrangements with their child or to get advice about what their legal options were. '*They rang the police saying I was harassing them and the police said I wasn't harassing them, because I was only asking them about my child.*[46] The police were being used as an intermediary in the absence of a legal adviser who usually adopts this role. For Interviewee 14 attendance at a police station to seek advice was his first reaction when he realised that he did not ask the court how to enforce the child arrangements order. '*I had spoken to the police and discussed what happens with the enforcement order, you know they can put an arrest in there if she was to breach it several times*'.

The statements of these interviewees suggest that litigants are communicating with the police regarding family matters on a more regular basis than they would have done before the removal of legal aid. This has important implications for police resources if they are used to cover family issues previously dealt with by the legal profession. It would seem then, as predicted by Cookson,[47] that LIPs are seeking alternative sources of advice, in the absence of legal aid,[48] which may be generating a 'significant knock-on cost to the public purse.'[49] The evidence contained within this project suggests that this consequence is occurring both in respect of the police and the courts through more regular attendances at police stations and, as explained next, at court offices for legal advice and assistance.

3.2. The court office as a source of advice

It was a lack of financial means to pay for advice that meant that the court office was also one of the first locations attended by LIPs in an effort to seek assistance. This finding supports Moorhead and Sefton's verdict that 'the bulk of participation took place via the court office

[45] Interviewee 26.
[46] Interviewee 8.
[47] Graham Cookson, *Unintended Consequences: the cost of the Government's Legal Aid Reforms: A Report for The Law Society of England & Wales* (November 2011).
[48] ibid [4.2.9].
[49] ibid [6.3.1].

not the court room'.[50] It was at the court office that interviewees were handed a court pack containing forms and accompanying information. Interviewees explained how, on being given this pack they were informed by the court office personnel that advice would not be provided,[51] but they were alerted to the services of the PSU who would be able to assist them. '*I rang the court and they said, well we can't really give advice, you know you need to speak to someone else and then they mentioned the PSU'*.[52] The court office was, therefore, sign posting sources of advice, rather than being a provider.

3.3. Distinguishing between legal advice and assistance

The stance taken by the court office that they do not offer advice is supported by the *Court's Charter*. A clear distinction is made between 'legal advice' and 'legal information', by stating that, 'We can give you forms and offer guidance on how to complete them, but we cannot give you legal advice or tell you what to say.[53] However, the evidence provided by interviewees suggests that although the wording of the *Charter* indicates that help will be provided in deciding which forms to use and how to complete them, this is not what happens in practice. Instead, the court office merely pointed interviewees to other sources to provide this assistance. This may be due to a reduction in the amount of staff available to provide this service, as well as a lack of expertise. In 2016 Speak up for Justice provided a report concerning the *impacts of government reforms to legal aid and court services on access to justice.* This involved a survey of those working in the justice sector, but particularly those working in the courts. The report found that more than half of those surveyed felt that their workload had increased since 2010. This resulted from the cuts in staffing that had taken place, as well as an increase in the volume of their work. Moreover, the cuts in staffing in the last two to three years had resulted in the loss of experienced permanent staff and an increase in the use of temporary and agency workers.[54] There is no doubt that this would have an impact on the staff willing and, perhaps, able to offer LIPs assistance with form filling and general information about the court system. It is not surprising then that help was not offered to the interviewees who presented at the court office for advice and assistance.

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[50] Richard Moorhead and Mark Sefton, *Litigants in person: Unrepresented litigants in first instance proceedings* (DCA Research Series 2/05, March 2005) 255.
[51] Interviewees 18, 20, 21, 28, 29, 32 and 7.
[52] Interviewee 20.
[53] Courts' Charter – Family Courts www.childrenneedfamilies.co.uk/court-forms/aj25_1106.pdf accessed on 15 March 2017.
[54] Speak up for Justice, *Justice denied: Impacts of government reforms to legal aid and court services on access to justice* (TUC October 2016).

So far as the distinction made in the *Charter* between legal advice and legal information is concerned, MacFarlane's report found that this was a constant source of complaint and frustration for both LIPs and the court staff. MacFarlane regarded the distinction as both unfair and unworkable, as well as leading to inconsistent decisions.[55] Trinder et al's research identified that the distinction between legal advice and legal information meant that some court staff no longer provided forms for LIPs, so that such litigants had to not only discover for themselves which forms to use, but also how to find them.[56] This was in contrast to the earlier evidence contained in the reports of both Moorhead and Sefton[57] and Dewar et al,[58] where court personnel were prepared to offer advice. At a time when increased numbers of LIPs are presenting to the court office without legal representation, the amount of support provided to them is, therefore, diminishing.

Whilst the interviewees in the present project were given a legal pack with numerous forms and instructions, they were not given any further help by the court. In particular, the pack contains a number of different forms, the relevance of which depends on the facts of the case. This meant that interviewees were given a whole host of forms, but no indication of which ones to fill in or how. This lack of assistance begs the question of how LIPs, especially those with low literacy and/or computer skills, are meant to identify the relevant forms to complete in order to gain access to the court. For the interviewees in this project, as described below, help was available through the PSU. However, such assistance is not available in all courts, as the PSU only operates in thirteen cities. [59] LIPs who attend a court centre which does not have a PSU office will no doubt struggle to receive assistance with form filling, which may further impact on the court system if ultimately completed incorrectly.

Failing to provide LIPs with forms also highlights the problem of distinguishing between what is legal advice and legal information. Is it legal 'advice' to tell a LIP which form to use or is that merely legal 'information'? So far as the court is concerned it appears that this is legal advice, but one could equally argue that this is merely information and it is far removed

[55] Julie Macfarlane, *The National Self-Represented Litigants Project: Identifying and Meeting the Needs of Self-Represented Litigants* (Final Report, May 2013) 11.
[56] Trinder et al (n. 4) 40.
[57] Moorhead and Sefton (n. 50) 201.
[58] John Dewar et al, *Litigants in person in the Family Court of Australia: A report to the Family Court of Australia* (Research Report No. 20, 2000) 58.
[59] www.thepsu.org/our_network/ accessed on 18 August 2016.

from telling LIPs what to write in the form, which is more akin to venturing into the realm of advice giving.

Support for the latter interpretation can be found in the approach taken in other jurisdictions where there has been an effort to guide the judiciary and court staff on how to make determinations between advice and information. In the USA, Greacen has provided practical guidance in the form of a list of five general principles that court staff should keep in mind when answering questions and eleven guidelines for staff to use in responding to questions. These include quite simple, but helpful suggestions, such as answering questions that start with 'Can I' or 'How Do I' but refusing to answer questions that begin with 'Should I'. These guidelines have now been adopted by a number of courts in the USA and have influenced practice within Canadian courts.[60]

Applying this guidance, it is submitted that court forms should be identified by court staff as a matter of legal information on the proviso that they are merely informing litigants that they 'can' use the form and not that they should. This would certainly correspond with the approach taken by the Australian Government Productivity Commission in its 2014 report on Access to Justice. Its recommendation is that court staff, 'must only offer procedural advice, without overstepping into the realm of legal advice'.[61] It is arguable that identifying the appropriate form to complete would fall within the definition of 'procedural advice'. In fact, as forms are the 'first resource requested'[62] by LIPs, their provision should be 'the foundational task of every program that begins to provide assistance for persons representing themselves'.[63]

This is an opinion supported by the findings of Advicenow's survey on the views of the judiciary and LIPs on the information needs of the latter. Their report identifies the need to assist LIPs in identifying, obtaining and correctly filling in court forms[64] as well as 'radically'

[60] John M Greacen, 'Legal information vs. legal advice Developments during the last five years' (2001) 84 Judicature 198.
[61] Australian Government Productivity Commission, *Access to Justice Arrangements Productivity Commission Inquiry Report Volume 1* (No. 72, 5 September 2014) 506.
[62] John M Greacen, *Resources to Assist Self-Represented Litigants: A Fifty-State Review of the "State of the Art", Michigan State Bar Foundation* (June 2011) 4.
[63] ibid.
[64] Law for Life, *Meeting the information needs of litigants in person, Law for Life's Advicenow project* (June 2014) 3. See also the views of members of the judiciary regarding redefining assistance with choosing the

simplifying the language used in such forms.[65] Advicenow recommends that LIPs should be at the centre of legal information production, so that effective materials are produced, filling in gaps in the topic areas already covered. Additionally, there should be investment in training those who write legal information for those without legal expertise, so that they can provide such information in an effective and understandable manner.[66] There is no doubt that placing LIPs at the heart of the production of legal information is a sensible way to ensure that those who use the forms and guidance can adequately understand their requirements.

It is submitted that the distinction between procedural advice and legal advice is one that should be adopted by Her Majesty's Courts and Tribunals Service (HMCTS) staff when dealing with LIPs, so that the latter can be provided with clear directions as to the civil court process. Support for this view can be found in Lord Woolf's *Access to Justice* interim report in which he endorses the recommendation by the Civil Justice Review that court staff should be able to advise on 'the remedies open to any litigant in relation to a particular claim, the procedure for pursuing those remedies and the precise manner in which court forms should be completed'.[67]

However, Lord Woolf's enthusiasm for widening the support offered by HMCTS staff is moderated in his final report, as he merely states that court staff 'will provide information and help litigants on how to progress their case'.[68] Although this does not go as far as his original suggestion, Lord Woolf proposes that court staff should undertake legal training in the form of the Institute of Legal Executives' qualifications.[69] This would be an appropriate way of ensuring that members of the court staff acquire the skills and expertise to confidently provide assistance to LIPs on the civil procedure requirements of their case. At the very least, it would enable them to point out the correct form for LIPs to use. Nonetheless, with the cuts that have occurred to the staffing of court offices, such a commitment seems unlikely despite the benefits it would entail.

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correct form as 'legal help' in MOJ, *Alleged perpetrators of abuse as Litigants in person in private family law: The cross-examination of vulnerable and intimidated witnesses* (MOJ Analytical Series 2017) 2.

[65] ibid 5.

[66] ibid.

[67] Lord Woolf, *Access to Justice: Interim Report* (June 1995) ch.17 [16].

[68] Lord Woolf *Access to Justice: Final Report* (July 1996) Section I [9] *The civil justice system will be responsive to the needs of litigants* (c).

[69] ibid ch 7 [41].

4. The PSU

Continuing with the theme of face to face advice for LIPs, this section provides a detailed account of the services provided by the PSU to the interviewees and the degree to which this offers guidance and support to LIPs. The evidence outlined in this section provides a unique insight into the assistance offered by this service provider from the viewpoint of its customers. In this respect, it advances knowledge not only about the assistance being offered to LIPs, but also the extent to which it widens their access to justice capabilities.

The analysis begins by explaining the limited remit of the PSU before examining the extent of the assistance provided to LIPs. This consists of help outside the courtroom by completing forms and documentation and providing interviewees with realistic expectations about what will happen in court at different stages of the proceedings. When in court, the guidance involves the practical assistance of notetaking as well as ensuring that the emotionally charged atmosphere of the proceedings do not overwhelm the LIP. It is the highly valued support provided by the PSU that ensures not only that LIPs feel strong enough to continue with their litigation, but that they have a greater perception of fairness.

4.1. Limitations and biases

As the majority of interviewees were referred to the author through the PSU, they had received some form of assistance from this voluntary organisation, which supports LIPs with their family and civil matters. This charity does not, however, provide legal advice or representation.[70] Notwithstanding the narrow remit of the PSU, the evidence provided by this research highlights the wide array of assistance that LIPs can receive beyond the solicitor's office. It could be argued that any information supplied by the interviewees would be biased, as they were referred to the project by PSU volunteers. However, interviewees were not asked specifically about the support provided by the PSU, but their feelings about the help they received was a theme constructed during analysis of the data. In this respect, they relayed the feeling that they were keen to make sure that the work of the volunteers who had helped them was recognised. The author accepts, however, the real risk that only those interviewees who had had a good experience with the PSU may have been willing to participate in the study which may affect the reliability of the results. It is also acknowledged

[70] Personal Support Unit https://www.thepsu.org/about-us/what-we-do/ accessed on 11.07.16.

that the author is a core volunteer for this organisation and so bias is a real possibility when analysing the data. This is something that has been reflected upon throughout all of the stages of analysis and was discussed in chapter two.

Despite these limitations, the evidence offers a glimpse into the types of support presently available for LIPs and how they engage with the same. In fact, the availability of such support can be so important that it may determine whether a LIP continues with a child arrangements application to spend time with their child. As Interviewee 7 states, '*I might not have been here today if it wasn't for the PSU. As much as they were my kids, I might have just not followed through with it through being scared of facing the judge, barristers and what could have been going on in there'.*

Family court proceedings should never appear so onerous to a LIP that they would be willing to forego a relationship with their child because of the fear of attending court. Every child, who is separated from one or both parents, has the right 'to maintain personal relations and direct contact with both parents on a regular basis, except if it is contrary to the child's best interests.'[71] Those best interests should be determined by the court, if the parents are in disagreement, and not by the fact that one of them is so beleaguered by the court process that they do not have the strength to pursue parental responsibilities.

4.2. Completing forms and other documentation

As identified when discussing the court office above, one of the main difficulties faced by LIPs in family proceedings is the completion of the initial forms. A significant number of interviewees described how the PSU had helped them fill in the wide range of forms needed to initiate proceedings. As Interviewee 15 explains *'the court gave me the bundle. I had to do a C100 form and then to keep my address anonymous there were other forms, a C1, I think it was and a C10, so he didn't find out where I lived.'* This help was invaluable due to many interviewees struggling with the wording used, *'there were some big words in there that I hardly knew what they were and they explained them to me. I basically asked, "What does that mean? And they told me'.*[72] The testimony of interviewees describes how they relied on the PSU not only for form filing, but for all of the documentation required for their court

[71] Article 9(3) of the United Nations Convention on the Rights of the Child.
[72] Interviewee 32.

proceedings. This included preparation of Scott Schedules,[73] court bundles,[74] and any statements that the court had ordered to be filed.[75]

What is interesting about the assistance provided for the completion of statements was the contrast to how LIPs felt about receiving guidance on what to include. Whilst the findings in chapter three[76] indicated that interviewees preferred to retain control over what was included in their statement, and thus regarded this as a benefit to not having legal representation, they exhibited gratitude for the assistance PSU rendered. Interviewee 28's response was typical, '*Now if I was answering it back [respondent's statement] it would have been 50 pages long. She [PSU volunteer] managed to do it on one or two pages. I was like I'll put in that and she was no. I appreciated her help in just keeping it sweet and simple*.'[77] Whilst it might be questioned whether such help goes beyond the remit of legal information, it is assistance that is invaluable not only to the LIP, but also to the court. So far as the former are concerned, it ensures that only those details relevant to their claim are included. For the latter, it saves time in having to read through documents containing pages of irrelevant information. It is, therefore, crucial that LIPs receive this type of guidance to minimise delay, not only for them and their children, but also for the courts.

4.3. Allaying fears

Interviewees not only referred to the assistance they received in the preparation of their case, but also to the help they received once they were in court. A consistent theme was the trepidation felt by interviewees at the prospect of appearing in court alone, '*I was terrified going in there';*[78] *'I was frightened'*[79] and how having a PSU volunteer in court with them was enough to allay their fears. '*It gave me a bit more confidence to speak up than just being sat in the room completely alone. I found it ok to speak up in court as long as I had someone sat next to me'.*[80] '*I just felt a bit more at ease, because I was frightened, because you don't know what to expect do you*?[81]

[73] Interviewees 1, 13 and 3.
[74] Interviewee 1.
[75] Interviewees 15, 18, 22, 23, 25, 27, 28 and 32.
[76] See (n. 178).
[77] Interviewee 28.
[78] Interviewee 25.
[79] Interviewee 2.
[80] Interviewee 6.
[81] Interviewee 25.

Interviewee 32's testimony demonstrates just how important it is that LIPs are supported in court, so that they can confidently address the court. '*They* [mother's lawyer] *said I had like two offences against me, I have only had one, but that is what they had on their statement. I would have admitted to that if the PSU worker had not spoken to me'.*

A disconcerting feature of this evidence is that the fear of speaking in court can be so crippling that an LIP would accept a false allegation against them rather than speak out. Also the latent nature of the fear is such that it may not be visible to those in the courtroom who could otherwise check understanding and agreement with what is being discussed. The power imbalance between the represented and unrepresented litigant is such that assistance both inside and outside the courtroom is a necessary prerequisite to accessing justice. The ability of LIPs to achieve effective access to justice and the barriers that exist, from the viewpoint of the interviewees are further examined in the next chapter.

As well as giving LIPs the confidence to appear in court, interviewees described how a further positive aspect of being in court with a PSU volunteer, was the latter's ability to instruct them regarding the etiquette of the courtroom. This was true particularly when considering the issue of when and if they should speak. '*He only did a hand gesture, because he said, you know we can't speak, but it was enough to calm me and to say don't say anything else now, you've said enough.*[82] Again, this assistance is invaluable to the LIP in ensuring that they act appropriately in court and that the proceedings do not degenerate into a battle of words between opposing parties. As explained in chapter three,[83] the emotional involvement of LIPs means that they often cannot remain objective when presenting their case in court even though they may know exactly what behaviour is expected of them.

4.4. The importance of note taking

By far the most valuable assistance that LIPs referred to was the taking of notes by the PSU both before going into and whilst in court. This ensured that they addressed the important issues of their case to the judge and had an understanding of what had been decided. This then enabled them to comply with any order that had been made:

[82] Interviewee 21.
[83] See (n. 103).

When you go into court everything just seems to go to the back of your mind and you get out and you think, 'I wish, I wish, if only, if only'. So I am glad that the PSU were there to give me documentation of what the judge had said. I can look and say 'oh yes'.[84]

This indicates how the simple task of note taking on behalf of a LIP can make a real difference to their views on the fairness of the hearing. It also demonstrates how obvious matters, such as taking a pen and paper into the courtroom, which no lawyer would ever be without, are often overlooked by LIPs. Help with notetaking and understanding what was happening in the courtroom was particularly important for those interviewees who had learning difficulties that affected their reading and writing skills. For such LIPs the PSU was described as the only available free assistance they had the ability to access and involved explaining procedures to them throughout their application as well as reading documentation. In addition, help was provided with the production of statements along with attendance at court hearings.[85]

4.5. A constant source of support

The majority of interviewees described how assistance from the PSU was a constant aspect of their case. For most, this help began with the initial form filling and attendance at court, which then continued throughout the matter. '*I have had support from the PSU from the beginning and that has really helped in terms of knowing what to expect; where to go, things like that*'.[86] '*Every time I have had a hearing I have gone back into the PSU office and they have explained things to me.*'[87] In fact, those who initially represented themselves described how having assistance from the PSU had changed their outlook on the fairness of proceedings:

I went the first time and represented myself. I felt I never got a good hearing, because I never had the PSU and he [children's father] did have a solicitor. Then

[84] Interviewee 7.
[85] Having limited reading and writing skills meant that interviewees 24 and 32 were unable to use the internet for help and assistance.
[86] Interviewee 10.
[87] Interviewee 3.

I got the PSU and I felt more confident when I spoke to them about what you can and can't do and stuff. I wouldn't want to go on my own, but obviously with the PSU I can'.[88]

The testimony of these interviewees outlines how having legal information and guidance may not only allay fears, but also allows LIPs to have an understanding of the court process. This is particularly apposite in respect of the first hearing.

4.6. Ensuring realistic expectations

The notification received from the court about the initial hearing merely states that it is a 'FHDRA'.[89] LIPs, unsurprisingly, displayed no apparent understanding of what this acronym meant or what would happen at this hearing. This means that some LIPs attend court for the first time fearful of what will transpire.

The assistance received from the PSU in explaining what would happen at this first hearing was consistently referred to as being of importance to interviewees who often expected the matter to be completed that day. This outlines how LIPs can have scant understanding that the court process takes a number of months and requires a significant amount of evidence and a number of court hearings. Interviewee 21's understanding of events was typical:

When we went to court to see what we were doing, straight away she said [PSU Volunteer], 'it is not going to be finalised today, because it says it is a directions hearing'. I didn't know up until that point that we weren't probably coming to a decision that day.

Advising LIPs about the length of time that proceedings can take is very important as their expectations can sometimes be unrealistic. '*I just thought it would be one or two times, but I think this is the fifth or sixth time I have been. It has been 14 months.*[90] As Interviewee 3 explains, not knowing what happens at the initial hearing can be quite stressful for LIPs. '*I*

[88] Interviewee 23.
[89] First Hearing Dispute Resolution Appointment. See chapter three (n. 23).
[90] Interview 25.

didn't know whether they would just turn round to me then and say right he is going with his dad or something like that'.

These statements highlight the importance of procedural information for LIPs so that they have an appreciation of how their matter will proceed. This is an invaluable service that organisations, such as the PSU, can provide so that LIPs know what the family process involves and what is likely to happen at each stage of the proceedings. This can then dispel their fears that a parent will be granted a child arrangements order when there are safeguarding concerns or that a child will be removed from a parent without further investigation.

4.7. Increasing awareness and co-operation

In light of the reduction in legal aid and the consequential inability of some LIPs to afford legal advice, there needs to be an increased awareness of the services of organisations such as the PSU. Despite interviewees referring to the invaluable help they received, '*I think I looked at him as my little rock, he was brilliant';*[91] *'As I say my saviour is the PSU',*[92] many explained how before they attended court they had no awareness that this assistance existed.[93] As outlined, it is imperative that LIPs receive help from the outset of their matter so that they have accurate information about what can be achieved and how long this will take, as well as ultimately perceiving the process as fair. In this respect, the services of the PSU need to be more widely advertised and this should include a concerted effort by government departments such as the MOJ. This view is supported by the positive manner in which members of the judiciary have assessed the usefulness of the assistance provided by the PSU to LIPs.[94]

Whilst the courts appear to be referring LIPs to their services, those who do not attend the court office to commence proceedings are left unaware of the free help that is available. *'I didn't even know about the PSU until I come to court'*.[95] Having a voluntary organisation, such as the PSU, to provide legal information and guidance can also be part of a comprehensive approach to helping LIPs. In this respect the PSU can be used to provide

[91] Interviewee 25.
[92] Interviewee 2.
[93] Interviewees 2, 22, 23, 25, 26, 29, 30, 32 and 6.
[94] MOJ (n. 64) 33.
[95] Interviewee 29.

information from the very beginning of a case. For example, it can provide information about MIAMs and mediation in a positive manner so that they are not merely regarded as a 'hurdle' to overcome in order to institute proceedings. It can also guide those litigants who may still be entitled to legal aid to relevant legal practices. Hence, a more consolidated approach to assisting LIPs can be encouraged, which involves advice agencies, lawyers and the PSU working together to guide LIPs to sources of free advice.

The evidence provided by interviewees suggests that referrals are being made beyond the practice of the court office directing litigants to the PSU. Interviewees discussed how they had attended Citizen's Advice and had been directed to solicitors offering free advice.[96] Fathers' rights groups and domestic violence support groups had advised litigants about the requirement to attend mediation before proceedings could be instituted,[97] and solicitors had directed litigants to free assistance via the PSU when their fees were beyond the means of their client.[98] The services of the PSU were also explained to litigants when they attended meetings with Cafcass.[99] Making LIPs aware of the relevant support for their needs in this manner is crucial to promoting access to justice. It also ensures that litigants do not suffer from the 'phenomenon of referral fatigue, whereby the more times people are referred on to another advice service by an adviser, the less likely they become to act on a referral'.[100] The lack of 'referral fatigue' was a positive aspect of the interviewees' experiences when advice seeking.

4.8. The remaining gap in the legal services sector

Notwithstanding the glowing reports about PSU's services, interviewees highlighted an obvious flaw in the assistance received. They were not '*properly represented'*[101] in court, which for many was a drawback to lacking the funds needed to instruct a lawyer. '*[PSU Volunteer] is fantastic, but I am wondering if that suffices in the way that a solicitor has got a history and can speak up for me as the professional person*'.[102] These findings in respect of

[96] Interviewees 13 and 15.
[97] Interviewees 28, 5 and 7.
[98] Interviewee 31.
[99] Interviewees 26 and 6.
[100] Pascoe Pleasence, *Causes of Action: Civil Law and Social Justice, The Final Report of the First LSRC Survey of Justiciable Problems* (Legal Services Commission, 2004) 112.
[101] Interviewee 33.
[102] Interviewee 30.

the utility of the PSU, therefore, fail to fill the chasm in affordable legal services provision which LASPO created.

The limited remit of the PSU is strongly linked to that cited in the Practice Guidance 2010. This authorises McFs to provide moral support for litigants; take notes; help with case papers, and quietly give advice on any aspect of the conduct of the case.[103] In this sense the PSU conducts itself in accordance with the traditional role related to McFs, which is of support rather than representation.[104] For many LIPs even if they are fortunate enough to receive free legal information and support from a charity, such as the PSU, they will still be denied the legal advice and representation that they require. The problem is described powerfully by Interviewee 32:

> *I would have liked someone to talk for me. I speak to someone and they write it down and they would talk out for me what I have spoken to them. That would have been better, but I can't have nobody to do that for me. The only way I can get someone to do that is if I go and get a solicitor.*

This raises important questions about how LIPs can achieve access to justice in a court system that is underpinned by professional legal representation, which they are often unable to afford. After all, it is not only the fact that the PSU cannot represent the litigant in court that is a barrier to accessing justice, but they are also prohibited from conducting litigation. LIPs who attend the PSU do not have a volunteer that has been assigned to their case. The LIP merely attends the office on an ad hoc basis throughout their case and receives help from whichever volunteer is available. This is far from the model of assistance they would receive from a lawyer, who would generally deal with all aspects of their case and have a working knowledge of the specific issues involved. Nevertheless, contrary to Interviewee 32's analysis of the situation that only solicitors can provide legal representation, McFs have been allowed to advise and represent LIPs despite not being members of the legal profession. It is this phenomenon that the next section seeks to examine.

[103] Practice Guidance: *McKenzie Friends (Civil and Family Courts)* (12 July 2010) [3].
[104] Legal Services Consumer Panel (LSCP), *Fee-charging McKenzie Friends* (April 2014) [3.13].

5. The rise of McKenzie Friends

Having considered the role of the PSU in providing legal information and assistance, this section analyses the growth in the number of McFs, who are requesting and receiving permission to advocate on behalf of LIPs lacking the funds to instruct a legal professional. The appearance of McFs in the courtroom is hardly a new phenomenon. As early as 1831 Lord Tenterden CJ declared that, 'Any person, whether he be a professional man or not, may attend as a friend of either party, may take notes, may quietly make suggestions, and give advice'.[105] However, the rise in the number of LIPs has been correlated with a corresponding increase in the number of McFs who are being allowed to extend their remit beyond the conventional role of support in order to provide litigants with in court representation.[106] These so called 'Professional'[107] or 'Fee-Charging'[108] McFs have led to consternation amongst the judiciary and lawyers, culminating in a very recent Consultation[109] on their future. It is for this reason that the issues surrounding McFs have been given particular attention in this study.

The section begins by examining the legal status of McFs as well as the existing empirical and case law evidence concerning the numbers of McFs and their working practices. The statements provided by one of the interviewees for the study is woven into the analysis to provide an insight into how LIPs engage with these assistants and the impact this may have on them. Due to the shortage of qualitative data about McFs from the viewpoint of their clients, the fact that this project is able to provide a voice for those who have received their services is a unique aspect of the analysis which advances knowledge and understanding of McFs' conduct.

The section concludes by examining whether the fee prohibition recommended by the recent Consultation should be implemented or whether regulation alongside court supervision is an appropriate means of ensuring both access to justice and protection for LIPs.

[105] C*ollier v. Hicks* (1831) 2 B. & A. 663, 669.
[106] Consultation (n. 2) [3.5].
[107] This is the term used in the Practice Guidance (n. 103) [3.5].
[108] This is the term adopted by the LSCP (n. 104) [1.4].
[109] Consultation (n. 2).

5.1. McFs and the law

There is unequivocal legal authority for the proposition that a LIP can 'arm oneself' with 'such assistance as he thinks appropriate, subject to the right of the court to intervene'.[110] This reasonable assistance can take many forms,[111] which include the support of a friend or family member in court to provide reassurance and assistance, as long as such help does not hinder the 'proper and efficient administration of justice'.[112] Support can also extend to the provision of legal advice. Although this is classified as a legal activity under the Legal Services Act 2007,[113] it is not considered to be a reserved legal activity.[114] As a result, LIPs can receive legal advice from anyone holding themselves out as sufficiently qualified to provide this service. This leaves LIPs who cannot afford a lawyer in a precarious position, as they may receive well-meaning advice from an unreliable source. Worse still, they may receive advice from an unscrupulous adviser with ulterior reasons for providing the LIP with assistance.

The provision of legal support by a non-legally qualified friend does not extend to representation in court or conducting litigation, as both of these services are classified as reserved legal activities.[115] A McF would not be allowed to 'act as the litigants' agent in relation to the proceedings; manage litigants' cases outside court, for example, by signing court documents; or address the court, make oral submissions or examine witnesses'.[116] In fact, ignoring these prohibitions would amount to a criminal offence, unless the court is willing to grant these rights on the making of an appropriate application.[117]

There are clear reasons why the court should be 'slow'[118] to grant an application for rights of audience[119] or to conduct litigation[120] to a McF unless there is 'good reason.'[121] Unlike

[110] *R v Leicester City Justices, ex parte Barrow* [1991] 3 All ER 935 at 946 (Lord Donaldson MR).
[111] ibid 376.
[112] ibid 379.
[113] pt 3, s 12(3) (b).
[114] pt 3, s 12 (1).
[115] ibid.
[116] Practice Guidance (n. 103) [4].
[117] Legal Services Act 2007, s.14 (1).
[118] Practice Guidance (n. 103) [19].
[119] Legal Services Act 2007, s.12 (3) (1) sch 2 states that, 'A right of audience means the right to appear before and address a court, including the right to call and examine witnesses'.
[120] Legal Services Act 2007, s.12 (4) (1) sch 2 states that, the conduct of litigation includes, 'the issuing of proceedings before any court in England and Wales … the commencement, prosecution and defence of such proceedings and … the performance of any ancillary functions in relation to such proceedings'.

lawyers, they are not required to be legally trained, insured or regulated. So far as those who act as McFs on a regular basis and, therefore, consider themselves to be acting in a professional capacity are concerned, permission by the court to conduct litigation and/or represent LIPs should only be granted in 'exceptional circumstances'.[122]

Irrespective of this judicial guidance, the growth of LIPs has led to a willingness on the part of the judiciary to allow McFs a right of audience as a means of assisting not only the LIP, but also the court. Research conducted by the Legal Services Consumer Panel (LSCP) found that judges had a 'pragmatic attitude' towards granting McFs a right of audience, so that as long as they enhanced the progress of the LIP's case they would be allowed to represent their client.[123] Whilst this change in judicial attitude can be applauded for bestowing on LIPs greater access to justice through the provision of affordable legal assistance and representation, it is a service that is unregulated and offers LIPs few clear means of redress. Contrastingly, McFs allowed to represent the LIP in court, have legal protection in respect of their fees. They may recover their fees for support afforded to the LIP[124] including work in connection with the conduct of litigation[125] and representation,[126] although the opposing party's risk is limited to the cost of representation and not the conduct of the litigation itself.[127] Regardless of the quality of the service provided to the LIP, the McF, who works for remuneration, has the court's protection in respect of their fees. This raises concerns about whether McFs provide an effective means of widening access to justice for LIPs.

5.2. McKenzie Friends: The available evidence

One of the main problems in assessing the access to justice implications of recognising McFs is the lack of reliable data available in respect of both their prevalence and working practices. There have, however, been four recent reports that include evidence about the qualifications and behaviour of McFs. This section begins by examining these reports before comparing the findings to those which emerged from the interviews carried out for the present project.

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[121] Practice Guidance (n. 103) [20].
[122] ibid [23]. Legal Services Act 2007, sch 3 para 1(2) (b) states that a McKenzie Friend who wishes to address the court must receive prior permission.
[123] LSCP (n. 104) [4.12].
[124] Practice Guidance (n. 103) [27].
[125] Ibid [29].
[126] Ibid [30].
[127] ibid [29] and [30].

5.2.1. The Legal Services Board (LSB)

The LSB commissioned a report on the unregulated legal services sector in 2016.[128] Whilst this was not focused on McFs *per se*, it did investigate the services of those offering online divorces in uncontested cases. The LSB report found that such providers advised approximately 10 to 13 per cent of the individuals getting divorced each year.[129] Whilst this appears to be a modest figure, it represents some 23,000 to 30,000 clients per annum and somewhere in the region of £4m to £5m in revenue.[130]

For the most part, the evidence generated was favourable as the unregulated divorce providers were generally legally qualified, to some degree,[131] and offered more technologically advanced services at a lower and fixed rate than solicitors.[132] However, it should be highlighted that the value of the evidence is limited. The cases that the online providers were dealing with were always amicable divorces and not contested matters. If matters did become contested, the advisee was referred to the services of legally qualified professionals.[133] Accordingly, the risk of providing inferior advice on crucial matters between the parties was greatly reduced.

5.2.2. The LSCP

So far as McFs are concerned, the first investigation into their services was conducted by the LSCP in 2014.[134] The evidence base for this research consisted of a search of 34 websites offering McFs services for remuneration as well as interviews with 28 McFs.[135] The obvious omission from the LSCP project is the involvement of the LIPs who engaged the services of the McFs taking part in the study. This is a shortcoming recognised by the authors who refer to a lack of funding as a reason for the absence of the LIP's voice.[136] Despite this limitation, the report provides a valuable insight into the types of McFs as well as their behaviour and the professionalism with which they carry out their services.

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[128] Economic Insight Limited, *Unregulated legal service providers: Understanding supply-side characteristics, A report for the Legal Services Board* (April 2016) (LSB).
[129] ibid 5 Figure 2.
[130] ibid.
[131] ibid 55.
[132] ibid 5.
[133] ibid [4.3.1].
[134] LSCP (n. 104).
[135] ibid [2.9].
[136] ibid [2.10].

The LSCP found that that there were three main types of McFs. These consisted of, the family member or friend who helps on a one off basis; volunteer McFs attached to an institution, such as the PSU, and fee-charging McFs who either provide support or extend their remit to speaking on behalf of litigants in court.[137] This accords with the views espoused by The Judicial Working Group that the term McF may be 'technically apt' to describe only persons who provide support for a LIP, but 'in practice the term is used in different ways to describe one or more, or all, of these categories.'[138] It is the latter category of fee-charging McFs that has received recent judicial attention and with whom the following discussion is concerned.

The LSCP reported that, unlike those offering online divorce services, few McFs were legally qualified and most offered their services following their own negative experience in court during a divorce or child arrangements matter.[139] These negative experiences were such that they eradicated the advisers' ability to act in an objective manner and instead led to them pushing their 'personal viewpoint onto the client'.[140] As most McFs were male, and fathers themselves, they tended to be assisting other fathers, so that there was the resultant risk of them pursuing a personal agenda to the detriment of the client.[141] Being mainly interested in the plight of fathers, there was also anecdotal evidence of ex-wives and mothers being subjected to intimidating behaviour by the McF.[142] Although the authors of the report suggest that such behaviour may not be a large scale problem, due to the small numbers of litigants using McFs services and the lack of response to the call for case studies,[143] this may not accurately reflect the present situation.

5.2.3. Trinder et al

Trinder et al's report[144] included the observation of 24 cases involving McFs, of which three McFs were paid for their services.[145] Whilst one of these made a very positive contribution, the other two were motivated by their own personal history of pursuing litigation in the courts

[137] ibid [1.4].
[138] The Judicial Working Group on Litigants in Person: *Report* (July 2013) [6.13].
[139] LSCP (n. 104) [3.5].
[140] ibid [1.11].
[141] ibid [4.17].
[142] ibid.
[143] ibid [4.2].
[144] Trinder et al (n. 4).
[145] ibid 94.

and both made a 'negative contribution' to the proceedings.[146] This led to one case taking double the time it should have done. The other involved a mother who instructed a McF linked to a father's rights group, which led to her agreeing to a child arrangements order for the child to spend time with the father when she was reluctant to even allow him unsupervised time with the child.[147] The authors of the report voice the concern that such behaviour is unlikely to be rare due to the evidence supplied during the research from members of the judiciary, Cafcass and lawyers about the behaviour of McFs.[148] Recent case law and the evidence generated from the interviews for the present project on LIPs do not determine how widespread such behaviour is, but they do provide further evidence of its existence.

5.2.4. Smith et al

In an effort to fill the gap in the empirical research about the experiences of LIPs who have received assistance from McFs, the Bar Council commissioned a report, which was published in June 2017.[149] The study involved semi-structured interviews with 20 fee-charging McFs and telephone interviews with 20 of their clients. Additionally, seven cases involving McFs were observed.[150] Whilst the report does, for the first time, provide evidence from both McFs and their clients, the LIPs who were interviewed were informed about the study from McFs or organisations connected to McFs.[151] As the authors acknowledge, this has the potential to skew the results as McFs are likely to only bring the project to the attention of those LIPs who have had a positive experience.[152] In this respect, the research could not provide further insight into LIP's views about whether they were satisfied with the assistance they received.[153] Hence, the study is limited to determining why LIPs use McFs instead of lawyers and the work conducted by McFs. It is, however, this focus that provides an invaluable account of the types of McFs and the reasons why LIPs may instruct them to undertake work on their behalf. Smith et al found that there were four main types of McF. The 'business opportunists' become McFs because they realise there is a gap in the legal

[146] ibid 96 – 97.
[147] ibid 97.
[148] ibid 111.
[149] Smith et al (n. 3).
[150] ibid 10.
[151] ibid. The data consisted of interviews with 20 McFs, 20 telephone interviews with LIPs and observations of seven cases involving representation by a McF.
[152] ibid 11.
[153] ibid.

services market. They are attracted to the role either because they have been in a family matter themselves, see it as a first step to becoming a lawyer or, being already a lawyer, as a more flexible way to practice.[154] The 'redirected specialist' has years of experience as a family lawyer and makes the decision to instead practice as a McF because there is more work available.[155] The 'good Samaritan' McF is motivated by a desire to assist LIPs who are in dire need of help.[156] Contrastingly, the 'family justice crusader' is motivated by previous negative court experiences.[157] However, these McFs represented only a small number of the sample and not all of those with a negative experience became crusaders; some became 'good Samaritans' or 'business opportunists'.[158] The 'rogue' McF was the least common type of McF but their inappropriate conduct was at the 'extreme end of the spectrum' involving sexual offences and fraud convictions.[159] As there were only a small number of 'family justice crusaders' and 'rogue' McFs the study provides evidence that there are McFs who have a genuine desire to assist LIPs rather than being motivated solely by self-serving interests.[160]

Furthermore, the report reveals that there are a number of reasons why LIPs would favour the services of a McF over those of a lawyer beyond costs saving. The flexible manner in which McFs conducted their business was particularly favourable. Most worked from home and were willing to meet with LIPs outside normal office hours and respond to texts and emails late at night and at weekends. They were also willing to meet clients at mutually convenient locations and spoke to them in an informal friendly manner.[161] This meant they shared an 'identity or affinity' which was far more appealing than the formality adopted by lawyers.[162] Smith et al also provide evidence concerning the range of work undertaken by McFs, the bulk of which occurs outside the courtroom. They tend to conduct litigation on behalf of LIPs, despite this being a reserved legal activity,[163] engaging in an extensive range of tasks. This includes assistance with paperwork, giving legal advice and information, managing

[154] ibid 17.
[155] ibid 18.
[156] ibid 19.
[157] ibid 20.
[158] ibid.
[159] ibid 21.
[160] ibid 16.
[161] ibid 32
[162] ibid 39.
[163] Practice Guidance (n. 103) [18].

expectations and facilitating settlements.[164] Hence, representing LIPs in court is only the 'tip of the iceberg' when it comes to the activities of McFs.[165] In fact, Smith et al found that most McFs do not want to represent LIPs in court. They reported that McFs took three approaches to representing LIPs. The majority acted as a 'coach' and took on the traditional role of supporting the LIP rather than speaking in court.[166] Others would only participate in the court proceedings if the LIP was struggling and needed the McF to play a more active role. These 'understudy' McFs, therefore, did not actively seek rights of audience.[167] The only McFs who did want to represent LIPs and play a greater role in court were described as 'frustrated actors'. These McFs were more likely to be disruptive.[168] The value of Smith et al's report resides in the evidence that not all McFs are stereotypically driven by previous negative court experiences or act unscrupulously. Indeed, their analysis found that on the whole LIPs 'probably do better' when assisted by a McF than they would do if they had to proceed alone.[169] These findings have important access to justice implications in respect of the proposal to ban McFs from charging for their services and supports the contention, discussed further in this chapter, that regulation may be a more appropriate response.

5.2.5. The 'agenda driven' McKenzie Friend

One of the main concerns to arise is the extent of the LCSP's finding that McFs tend to be fathers who have had a previous unsuccessful court application and thus are agenda driven and hostile to mothers. Whilst Smith et al reported that such agenda driven McFs represented only a small proportion of their sample, their existence has reached the attention of the courts.[170] In *Re H (Children)* Sir Nicholas Wall (P) upheld the case management judge's decision to prevent the McF from representing his client in the proceedings. This was due to the fact that it was 'highly likely' that the McF had subjected the mother to intimidation.[171]

Whilst the behaviour of the McF in the case of *Re Baggaley*[172] may have been somewhat extreme, it provides further evidence that McFs can decide to offer their services following

[164] Smith et al (n. 3) 43.
[165] ibid 59.
[166] ibid 67.
[167] ibid 68.
[168] ibid 70.
[169] ibid 57.
[170] ibid 20.
[171] [2012] EWCA Civ 1797 [15].
[172] [2015] EWHC 1496 (Fam).

their own negative experiences. Thus, they approach proceedings in a manner inimical to the LIP's interests. Mr Baggaley offered his services as a McF having been both a persistent LIP and subject to a civil restraint order prohibiting him from issuing proceedings in that capacity. He had no legal qualifications, being previously employed as a 'bouncer' at a night club, as well as having a number of criminal convictions for dishonesty and public order offences. These led to spells in prison, the latest being two years before the instigation of the proceedings.

Sir James Munby (P) came to the conclusion that Mr Baggaley's behaviour was such that he should be the subject of an indefinite civil restraint order restricting him from acting as a McF in these and other proceedings. This behaviour included swearing and 'facing up to' the usher and solicitor for the other side in the court corridor. The latter was led to believe that he would be head butted by Mr Baggaley when he approached the mother in order to discuss the case with her. In addition, Mr Baggaley telephoned the father's legal representative in a threatening and abusive manner, as well as sending letters stating that any emails or letters to his client would be sent back unopened. This led to the mother being used by her McF as 'nothing more than a puppet in his hand'.[173] As Bellamy J remarked at first instance, 'Mr Baggaley is not an asset to a LIP. He is a serious hindrance'.[174] This case demonstrates how, despite the fact that the McF was actually representing the mother, his agenda driven focus led to her being treated in a detrimental manner that was far from conducive to her case.

5.2.6. Giving a voice to the LIP

The evidence that McFs can be agenda driven and hostile towards mothers is supported by one of the interviewees in the present study. This section, therefore, describes her experiences with the McF she instructed to assist her in opposing an application for a child arrangements order by the child's father. The importance of the statements made by the Interviewee are accentuated by the fact that, at present, there is a dearth of qualitative research on the views of LIPs who have instructed McFs. Given the problems encountered by Smith et al when trying to recruit LIPs who have engaged the services of McFs,[175] and the necessary refocus of their report, the following analysis advances knowledge and

[173] ibid [8]. The Practice Guidance (n. 103)[13] states that this is a reason for finding that the McKenzie Friend is or may undermine the efficient administration of justice and hence refusing his assistance in court.
[174] *Re Baggaley* (n. 172) [8].
[175] Smith et al (n. 3) 10. Only one interviewee was recruited independent of a McF referral to the study.

understanding of the experiences of LIPs. In this respect, it attempts to fill an important empirical research gap.

5.2.6.1 Reinforcing stereotypes

Interviewee 33 approached a McF on the recommendation of a friend, because she could not afford a solicitor. Although she engaged his services on a number of occasions she eventually decided to forego his assistance due to the detrimental impact his advice was having on her mental health and wellbeing. As with the evidence above, '*it was clear that he was a father that was denied access, going to the High Court with his own case*'. Although he described himself as a '*woman hater'* and appeared '*very bitter about the system'*, the Interviewee felt that she had no choice, but to accept his services. '*Anyway reluctantly he did seem to be very, very knowledgeable in the terms of the legal arena, so much so that he was very persuasive and I thought well I need him.*' The main reason for this belief was that she could afford to instruct the McF. '*He is a far, far more reasonable rate than any solicitor you can imagine'.* This rate was '*roughly around the £40 per hour mark, and I think he said £150 for a day'*. This evidence concurs with that provided by the LSCP who found that McFs charged an hourly rate of £15 to £89 or a daily rate of between £100 to £400, and typically £150 to £200.[176] It is also endorsed by Interviewee 5's evidence that his McF charged £140 per day.

When it is remembered that the main reason identified in chapter three for interviewees not instructing a solicitor, was the potential cost, it is hardly surprising that McFs are perceived as offering a service that is otherwise unavailable. As the LSCP observed, 'for many LIPs, the real choice is actually between using a McF or being entirely unsupported during proceedings.'[177]

The behaviour of this McF raises concern, as not only did he encourage the Interviewee to lie in court, but his demeanour made her feel '*very intimidated'*. In a case that involved a mother trying to protect her son from spending unsupervised time with a father she believed had sexually abused their child, the McF encouraged her to say that she had post-natal depression and mental health issues. She was also encouraged to say, '*he [child's father]*

[176] LSCP (n. 104) [3.18]. See also Smith et al (n. 3) 25, who refer to similar charges.
[177] ibid [4.5].

was mithering for sex and you weren't up for it'. These were points that were totally irrelevant to the issues in the case, but when the Interviewee indicated that she would not lie in court she was met with an aggressive response of, *'Do you want to win this case or not?'*

What is perhaps more perturbing is the fact that the McF ignored all of the relevant information and factual evidence that the litigant did possess. No reference was made to the issue of providing the court with supporting documentation in relation to the allegation of sexual assault. Additionally, despite the history of domestic violence and the allegations of sexual abuse, no reference was made to her eligibility for legal aid.

Further, when helping her prepare her statement she felt that it was '*very much kind of like, I don't want to create a slanging match, but I will get this dig in and that dig in'*. This is hardly appropriate in a family matter; a fact that the Interviewee recognised and led to her remarking that she '*wanted it to be factual and to be, look I have got this evidence here, I have got a lever arch full of stuff*'. In this manner it is obvious that, in the words of Bellamy J, this Interviewee was also being used as a 'puppet' by the McF to the obvious detriment of her case.[178] Despite these facts, as far as the Interviewee was concerned, he was '*a self-confessed legal whizz. He knows the procedures left, right and centre*'.

5.2.6.2. Assuming professionalism

Assuming that McFs are conversant with the law and procedure was also a feature of the testimony of Interviewee 5, who described his McF as '*very good*', but was nevertheless advised to obtain a whole host of unimportant material including '*witness statements from people that have seen you with your son or daughter, as many people as humanly possible'.* This particular aspect of advice has attracted the attention of the judiciary, as Sir Nicholas Wall (P) has remarked:

> People in the Appellant father's position frequently take the view that "character" witnesses are of particular importance in Children Act cases. In fact, often the reverse is the case. A witness who knows one of the parties, even if he or she has seen the party in question with the children, is rarely

[178] *Re Baggaley* (n. 172) [8]; Practice Guidance (n. 103) [13].

> any help to a judge deciding what is in the best interests of the child or children concerned in the particular facts of the case.[179]

This highlights the vulnerability of LIPs who assume that those who charge for their services are inevitably legally able. This corresponds with the findings of Trinder et al, who noted that, of the two McFs who were not particularly competent, their clients appeared satisfied with their assistance.[180] This is especially disturbing as, outlined above, the law at present means that anyone can call themselves a 'lawyer' and charge for the advice they provide. It is not a protected legal title.

There is evidence that McFs, who may describe themselves as lawyers, despite lacking legal qualifications, take a very active role when acting on behalf of LIPs. They have described their services as including, 'legal research; giving advice on points of law and the conduct of the case; case management; drafting documents; completing forms; and obtaining expert evidence'.[181] The extent of the assistance provided by McFs is confirmed by Smith et al's finding that the bulk of McFs' work takes place outside the courtroom.[182] Having such a varied role can leave unwitting and trusting LIPs in a precarious position.

This is demonstrated by the recent prosecution of McF, David Bright, who worked for a company called 'The Parents' Voice'. Bright submitted a report in family proceedings on behalf of his client, which he purported to be written by a psychologist. However, the report was subsequently found to be false and actually written by Claire Mann, the director of the company Bright worked for.[183] No doubt Mr Bright's services were also regarded as indispensable by his client when he instructed him, especially as he worked for an organisation providing McF services.

Due to the unregulated nature of McFs, LIPs cannot assume that the advice and assistance they receive will be useful or even, it would seem, legitimate. In fact, Mr Bright had a

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[179] *Re H (Children)* (n. 171) [10].
[180] Trinder et al (n. 4) 112.
[181] LCSP (n. 104) [3.13].
[182] Smith et al (n. 3) 43.
[183] Max Walters, 'McKenzie Friend jailed for 'deceit in family court' *Law Society Gazette* (17 October 2016) http://www.lawgazette.co.uk/law/mckenzie-friend-jailed-for-deceit-in-family-court/5058352.fullarticle accessed on 18 October 2016.

previous conviction for money laundering and Ms Mann had orchestrated a harassment campaign against a mother at her daughter's school as well as being involved in a bomb hoax.[184] These are hardly the behaviours that the public would expect from those purporting to be legal professionals.

5.2.6.3. Intimidating behaviour

Interviewee 33 further describes how the McF's demeanour was '*very much testosterone*' driven and '*aggressive*'. This was so much so that he was talking incessantly about how he was better than the McF on the other side and how he had '*been up against him*' and had '*won that battle'*. Such behaviour led the Interviewee to feel as though the McF was treating the matter '*like theatre; it is like a drama qualification not the serious matter of my son being sexually assaulted*'.

When, after much soul searching the Interviewee finally decided to leave the McF, as she could not cope with his demeanour and his requests to lie, the Interviewee describes how his response was to state that, '*I know from your personality that you will lose it in court and that will just play into the opposition's hands. He is good, I know him and he will eat you alive'.* He then proceeded to warn the Interviewee that the *'judge wants it over with quickly and so the judge will automatically side with him, because his McF is so qualified. He was basically giving it the whole bravado of he is good, but not as good as me'.*

In this respect the Interviewee was left feeling that she was making a huge mistake in not maintaining a relationship with the McF, which she would probably live to regret. This led to undue pressure being exerted on the Interviewee as a means of forcing her to continue using the McF for her case. Following this exchange the Interviewee left the McF's home '*in tears, and I thought I can't cope with this man. I thought I have got to get it out of my head that he is my only choice out there'.*

To treat a LIP in such a manner is truly shocking and far from the behaviour that one would expect from someone holding themselves out as professional enough to be paid for their services. For this Interviewee it meant that she lost all confidence in the court system and

[184] ibid.

was faced with attending a fact finding hearing[185] with no legal assistance, feeling totally demoralised by the experience with her McF. *'He was saying, 'I'm telling you now he will get access. And I was so disheartened, I thought, what is the point of going through the whole process then? I might as well just set up 8 visits in a contact centre and do away with all of this stress that every single hearing creates.'*

Fortunately for Interviewee 33, she did receive free advice from a solicitor at a local Children's Centre who explained the appropriate action to be taken. '*She said you need to ask the judge for leave to file this addendum statement and put in all your evidence with it. She says, 'you also need to dispute the fact that Cafcass are saying indirect contact can start straight away''.* This was information that was crucial in a case that could have serious implications for a very young child. The Interviewee's experience with the solicitor could not have been more dissimilar to her encounter with the McF. This time she left the consultation feeling elated. '*She was so helpful, she was so on the ball; she gave me all the information that I needed'.* This evidence emphasises the very real danger that can exist when unqualified personnel are permitted to give legal advice for remuneration.

5.2.7. The valuable nature of empirical evidence

Whilst the testimony of this interviewee can be regarded as another anecdote, it is difficult to ignore when added to the growing case law concerning the behaviour of McFs and the evidence provided by both the LSCP report and Trinder et al's observations. Whilst Smith et al reported that in four of the seven cases they observed the McF had a positive influence on the hearing process and was neutral in another,[186] they also acknowledged that in two of the cases the involvement of the McF 'significantly impaired' the progression of the case.[187]

In any event, as Ritchie explains, 'A study which cannot support representational generalisation may still generate hypotheses which can inform and be tested in further research. It may yield material about a particular individual case which is of interest in its

[185] A hearing to determine the disputed facts between the parties. They usually involve allegations of domestic or sexual abuse and are discussed in the next chapter.
[186] Smith et al (n. 3) 67.
[187] ibid 82.

own right'.[188] There is a need for research to be carried out in order to ascertain whether the experience described by Interviewee 33 is unique or a more common unintended consequence of having unregulated legal advisers in the civil justice system. This is imperative, as the Interviewee remarked that the McF she instructed '*does have a lot of clients that are paying him to do this'*. It is, therefore, not only the number of McFs who are providing substandard assistance that should be considered, but also their potential client base. This is a concern also raised by Smith et al. They question the true number of McFs bearing in mind the fact that the sample of McFs selected for their report, and the LSCP's, only involved McFs advertising online. Smith et al caution that there may, therefore, be new service providers who do not at present use the internet to generate clientele.[189] Support for this hypothesis is provided by Interviewee 33 who explains the unsettling manner in which her McF operated. His name did not appear on any McFs' websites, so that he operated '*very much below the radar'*. In this respect she saw him at his house where he was very secretive and informed the Interviewee that '*you don't tell anybody that you have been here and stuff like that*.' Disconcertingly, this mode of operating does not appear to be unusual, as Smith et al report that the majority of the McFs they interviewed also worked from home.[190]

5.3. Protecting LIPs

Whilst it can be argued that it is difficult to prevent people from practising in this manner, it is possible to educate the public about the risks of using unregulated McFs, so that they can assess whether cheaper advice corresponds with their access to justice needs. This is particularly important as the LSB's report on unregulated online divorce providers found that 'in general, a significant proportion of clients are unaware of the regulatory status of their provider, even though it affects the level of consumer protection they receive'.[191] In addition, they found that clients were ignorant about what 'being regulated' meant in respect of the quality of the legal advice they should expect to receive. They also had no concept of the

[188]Jane Lewis and Jane Ritchie, 'Generalising from Qualitative Research' in Jane Ritchie and Jane Lewis (eds) *Qualitative Research Practice: A guide for social science students and researchers* (SAGE 2003) 266.
[189] Smith et al (n. 3) 82.
[190] ibid 32.
[191] LSB (n. 128) 6. Ipsos MORI's survey also found that only for 48% of issues did respondents check if their main advisor was regulated. Of those who did not make checks about regulation, some 52% reported that they assumed the adviser would be regulated. Ipsos MORI, *Online survey of individual's handling of legal issues in England and Wales 2015* (May 2016) 89.

extent of support or redress available should the advice be inapt.[192] There appears to be no reason why this would not apply to LIPs instructing McFs.

5.3.1. The financial and personal risks of instructing McFs

Educating LIPs about the benefits and risks of instructing McFs is imperative when it is considered that should a McF's assistance lead to unnecessary delay and thus wasted costs it will be the LIP who will be responsible and not the McF. In *Oyston and Another v Ragozzino* the defendant made defamatory comments of a sexual nature about the plaintiffs, a situation that had been facilitated by the McF, who had also sent similar correspondence on the LIP's behalf.[193] Despite the LIP not being 'at all well-served' by the assistance of his McF who was responsible for 'pouring yet more fuel on the flames rather than assisting Mr Ragozzino to present his defence with suitable moderation'.[194] The fact that he had allowed himself 'to be used as a mouthpiece' by the McF,[195] meant that he could not distance himself from responsibility for the defamatory statements made and thus the extent of the damages awarded.

Similarly in *R (on the application of Laird) v Secretary of State for The Home Department & (1) Belinda McKenzie (2) Sabine McNeil*[196] the two McFs were spared a wasted costs order of £2,000 when they brought an application for judicial review of a deportation order, but failed to attend with their client at the resultant hearing. By conducting litigation without the LIP's authority they had acted outside their remit as McFs[197] and were pursuing their own interests. Nevertheless, Simler J ruled that they should not be liable for the additional costs involved. This was due to the fact that they had been trying to help the litigant and had not been warned that a costs order might be made against them. The LIP was, therefore, liable for a wasted costs order in the sum of £4,421.

The cases of *Oyston* and *Laird* underline the precarious position of LIPs should they engage a McF who then uses their case as a means of pursuing their own personal interests. It also

[192] LSB (n. 128) [6.1].
[193] [2015] EWHC 3232 (QB).
[194] ibid [44].
[195] ibid.
[196] [2016] EWHC (QB) (unreported). See also Chloe Smith, 'Campaigning' McKenzie Friends avoid £2,000 cost order' *Law Society Gazette* (26 February 2016) http://www.lawgazette.co.uk/law/campaigning-mckenzie-friends-avoid-2000-cost-order/5053891.fullarticle accessed on 10 August 2016.
[197] Practice Guidance (n. 103) [18].

emphasises the fact that although McFs may state that they are conversant in law and procedure, this may not necessarily be the case. The McFs in *Laird* should have been aware of their limited remit, in accordance with the Practice Guidance 2010, and that their application was totally without merit. These are matters that should certainly have been relayed to their client, so that an informed choice about whether to proceed could be made.

Whilst incurring unnecessary legal costs is a matter of concern for LIPs in civil matters, in family matters there is more at stake than financial loss. If a McF antagonises an already fragile relationship between the parties or is incapable of providing objective advice to a LIP, due to their quest to serve their own agenda, then the LIP may be hindered in maintaining a relationship with their child or protecting them when there are safeguarding issues. This will no doubt have adverse consequences not only for the LIP, but the child who is the subject of the proceedings.

The quality of assistance provided by a McF is also of crucial importance in family proceedings, as the Practice Guidance states that where proceedings relate to a child 'the presumption in favour of permitting a McF to attend such hearings … is a strong one'.[198] As the evidence from interviewees set out above when discussing the PSU demonstrates, assistance in court is imperative for LIPs to be able to understand what is being discussed in court and to provide the encouragement to speak. In a situation where the LIP may be unable to maintain objectivity due to their emotional involvement, having an agenda driven McF, who also feels passionate about the issues, can be a toxic combination for court room harmony.[199] Whilst assistance in court is to be encouraged, as a means of facilitating access to justice for LIPs, this is subject to the vigilance of the judiciary in identifying behaviour that is inimical to the LIP's interests.

5.4. Access to justice v risk of abuse

Having regard to both existing research and the evidence that emerges from the present project, it is suggested that, despite the deficit in knowledge about the practices of McFs, there is sufficient evidence to raise concerns about the way that some assistants work and the granting of rights to represent cases in court. In this respect, contrary to the LSCP's

[198] ibid [9].
[199] cf Smith et al (n. 3) 74 who found evidence of McFs encouraging settlement and negotiation.

recommendation, it is too early to come to the conclusion that the services of McFs should be promoted in the Practice Guidance 2010 in a positive manner.[200] Similarly, it appears premature to conclude that fee-charging McFs should be regarded as 'a source of potentially valuable support that improves access to justice and contributes to more just outcomes'.[201] It cannot be denied, however, that LIPs require access to legal advice and assistance beyond the services provided by volunteers in organisations, such as the PSU, and family and friends. In the absence of public funding for all family matters, many LIPs are likely to be attracted to McFs as their only means of sourcing legal advice.

There are, of course, advantages to allowing McFs the opportunity to charge for their services and to allow those who are competent to have rights of audience. This undoubtedly enables LIPs to obtain greater access to justice and equality of arms at a price they can afford, but it also involves inherent risks for LIPs who are not conversant with the court process. McFs are unregulated; are not required to work in accordance with a code of practice or have insurance. As a result they do not offer LIPs any protection in respect of their competence to give legal advice and handle litigation. Also, in family cases especially, they do not provide any guarantee that the matter will be afforded the appropriate level of confidentiality.

Despite these risks there is evidence that the judiciary display a willingness to allow McFs into court as, on 'balance it [is] better to have a McF than not'.[202] This anecdotal evidence is supported by the LSCP which reported that eight out of ten of the McFs they interviewed revealed that they had been granted a right of audience to advocate on their client's behalf.[203] Such rights are, therefore, regarded by fee-charging McFs as the norm rather than being granted in 'exceptional circumstances' as required by the Practice Guidance.[204] The increased presence of fee-charging McFs in court and the obvious concerns surrounding protecting LIPs from unnecessary cost and unscrupulous practices has led to a Consultation being issued by the Lord Chief Justice of England and Wales and the Judicial Executive

[200] LSCP (n. 104) [5.15].
[201] ibid [6.16].
[202] CJC, *Access to Justice for Litigants in Person (or self-represented litigants): A Report and Series of Recommendations to the Lord Chancellor and to the Lord Chief Justice* (November 2011) [142].
[203] LSCP (n. 104) [3.14].
[204] ibid [5.36].

Board. The purpose of this is to consider the amendment or replacement of the Practice Guidance on McFs, as well as any other necessary reform measures.[205]

5.5. To regulate, or not to regulate? That is the question

One of the main debates to emerge is whether McFs should be permitted to charge for their services, subject to accompanying protection for LIPs in the form of regulation or whether seeking remuneration should be an unauthorised mode of practising. It is clear that McFs cannot continue to offer their services without regulation. Not only are there the possible problems of inappropriate behaviour and the lack of awareness by litigants of the unregulated nature of the services provided by McFs, as outlined above, but there is evidence that the unregulated legal services market engages in misleading advertising.[206] This includes omitting information about the LIP's possible costs exposure should the McF act in an unprofessional manner.[207] As highlighted in the case of *Laird*, [208] discussed above, this can involve a considerable amount of money for a litigant, who probably instructed the McF rather than a solicitor for financial reasons.

That some McFs would be less than honest about their services is perhaps to be expected, as parallels can be drawn with the problems that occurred when unregulated claims management companies (CMCs) began to offer legal services. The Access to Justice Act 1999[209] led to the withdrawal of legal aid from personal injury cases as well as a renewed emphasis on using conditional fee agreements (CFAs), otherwise known as 'no win no fee', as an alternative means of funding litigation. [210] A consequence of the growth of CFAs was the emergence of CMCs. CMCs developed the role of acting as intermediaries between litigants and solicitors by soliciting personal injury cases through advertising and direct marketing techniques. These were then passed on to solicitors for a referral fee.[211] The CMCs' main

[205] Consultation (n. 2).
[206] LSCP (n. 104) [1.11]; Smith et al (n. 3) 83 found evidence of 'inflammatory and potentially misleading' advertising by McFs.
[207] LSCP (n. 104) [4.36].
[208] *Laird* (n. 196).
[209] sch 2 para 1 (a).
[210] Between 2000 and 2004 there had been over one million claims brought using CFA. See Citizen's Advice Bureau, *No win, no fee, no chance* (December 2004) [2.12].
[211] Payment of a referral fee by CMCs and the legal profession is now prohibited by virtue of LASPO 2012, sch 3 para 1(2) (b).

activities now consist of handling compensation claims in respect of personal injuries and mis-sold financial products, particularly payment protection insurance.[212]

Despite the legal nature of the work conducted by CMCs, they were allowed to operate totally unhindered by regulation until the introduction of the Compensation Act in 2006.[213] During the six years in which they were unregulated their advertising and selling techniques were so pressurised and misleading that they were implicated in encouraging a compensation culture, through persuading litigants to 'have a go'[214] by bringing claims irrespective of their merits against insured defendants. This led to insurers often settling the claim rather than risking the excessive court fees that could ensue, which were often greater than the damages sought.[215] These practices were rebuked for introducing a climate of fear,[216] and bringing the legal profession into disrepute.[217] This provides a salutary warning for the legal services sector that has once again had public funding removed and is witnessing the consequential emergence of non-legally qualified, unregulated personnel.

What is also troubling is the negative manner in which the legal services market is adapting, as there is anecdotal evidence that solicitors are acting as McFs, as a means of offering their services at a more favourable rate by avoiding the expense of regulation.[218] An example of such behaviour is provided by the Solicitors Regulation Authority's (SRA) disciplinary proceedings against Abdul Barri. Mr Barri breached the SRA framework rules and code of conduct by acting for his clients outside the solicitors' practice for which he worked. Although this was done to provide cheaper legal assistance for his clients, who could not afford the firm's fees, he was not authorised to act as a sole practitioner. Protection for those clients in the form of indemnity insurance was, therefore, unavailable.[219] Whilst such behaviour may be a rare occurrence,[220] it highlights the urgency with which reform should be

[212] MOJ, *Claims Management Regulation*, *Annual Report 2014/15* 19.
[213] s. 4.
[214] Better Regulation Task Force, *Better Routes to Redress* (May 2004) 3.
[215] Lord Justice Jackson, *Review of civil litigation costs: Final Report* (December 2009) 111 [4.15].
[216] Lord Young, *Common Sense Common Safety* (Cabinet Office 2010) 7.
[217] House of Commons (HC) Constitutional Affair Committee, *Compensation Culture* (Third Report) (2005-06 HC) [81].
[218] Chloe Smith, 'Warning as lawyers offer McKenzie Friend 'unbundled' service' *Law Society Gazette* (2 May 2016) www.lawgazette.co.uk/news/warning-as-lawyers-offer-mckenzie-friend-unbundled-service/5055097.fullarticle accessed on 28th July 2016.
[219] https://www.sra.org.uk/consumers/solicitor-check/197000.article?Decision-1 accessed on 14.10.16.
[220] ibid. See also *Ballard v SRA* [2017] EWHC 164 (Admin) where the solicitor appellant's claim that he was acting in the capacity of McF was rejected by Beatson LJ.

introduced as a means of ensuring that the law keeps abreast of the changing nature of legal services provision post LASPO.

5.5.1. The judiciary's response

As a means of tackling the issue of 'Professional' McFs, the Consultation proposes that there should be a fee recovery prohibition. So far as the judiciary is concerned, the protection of litigants outweighs any access to justice benefits that could be derived from allowing unregulated and uninsured assistants to provide their services for a fee.[221] It is suggested that any extension of the rights of McFs to charge fees would be a matter for Parliament as it would implicitly 'acknowledge the creation of a new branch of the legal profession, albeit one that was not subject to effective regulation on a par with that provided by existing frontline regulators'.[222]

Whilst the protection of LIPs is no doubt important, the withdrawal of the right of McFs to charge fees may have a profound effect on LIPs. It is doubtful whether 'Professional' McFs would remain in the legal services market, as they are unlikely to be able to afford to provide their services on a pro bono basis. This will leave those LIPs who cannot afford to engage the services of the legal profession, without any other means of acquiring advice and representation beyond the pro bono services offered by some lawyers.

Unsurprisingly, the prohibition is supported by both branches of the legal profession.[223] However, the SRA takes a different approach to both the Law Society and the Bar Council by supporting the imposition of fees by McFs, subject to the court controlling their ability to represent clients in court and to conduct litigation.[224] Whilst retaining the right to charge fees is important in order to widen access to justice for LIPs, it is the courts' inability to consistently deal with requests for rights of audience that has led to problems.

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[221] Zuckerman's view is more cynical, arguing that rather than protection of LIPs, prohibition was more concerned with protecting the legal profession's monopoly. Adrian Zuckerman, 'The court's approach to McKenzie Friends - a consultation, February 2016 – no improvement in assistance to unrepresented litigants' (2016) 35(4) CJQ 268.

[222] Consultation (n. 2) [4.25].

[223] Bar Council, *Response to the Reforming the courts' approach to McKenzie Friends consultation* paper (June 2016); The Law Society, *Consultation on McKenzie Friends—Law Society response* (10 June 2016).

[224] SRA, *SRA Response: Consultation by Lord Chief Justice of England and Wales on reforming the courts' approach to McKenzie Friends* (20 May 2016) [14] - [18].

Despite the Practice Guidance requiring a short CV and a statement outlining the McF's experience; lack of interest in the case, and understanding of their role and the need for confidentiality,[225] there is evidence that the judiciary do not always request this vital information.[226] McFs are, therefore, gaining rights of audience in an unsolicited manner.[227] As current practice does not reflect the requirements of the Practice Guidance,[228] it is questionable whether, as the SRA asserts, the safeguards within the civil justice system[229] are sufficient to protect LIPs from the threat presented by unprincipled McFs.

As outlined in chapter three, when discussing vexatious litigants,[230] the court has power under CPR 3.11[231] to civilly restrain LIPs from bringing claims totally without merit to court.[232] However, this jurisdiction does not extend to McFs, as they are not "a party to proceedings" for the purposes of the litigation in which they are assisting.[233] In order to impose a civil restraint order on a McF, the High Court must use its inherent jurisdiction to restrain McFs who 'repeatedly act in ways that undermine the efficient administration of justice'.[234]

It is not only this jurisdiction that offers safeguards for LIPs, as the Consultation recommends that there should be a renewed focus on ensuring that courts request CVs and statements from McFs before allowing rights of audience.[235] Additionally, McFs should be required to adhere to a Code of Conduct[236] and the Practice Guidance should be replaced with rules of court.[237] Whilst this may be sufficient to safeguard LIPs who are instructing non-fee-charging McFs, it would not adequately safeguard in the event that McFs were allowed to charge for their services. When it is recalled that Smith et al found that the majority of McF's work occurred outside the courtroom and Interviewee 33 received assistance prior to her court appearance, judicial supervision is unlikely to provide adequate protection.

[225] Practice Guidance (n. 103) [6].
[226] LSCP (n.104) [5.39].
[227] ibid [5.36].
[228] ibid.
[229] SRA (n. 224) [14] – [16].
[230] See (n. 90).
[231] For family matters the corresponding provision is 4B PD 4.8 para 1.1.
[232] See also 3C PD 3.11.
[233] *Baggaley* (n. 172) [24] (Sir James Munby P).
[234] Practice Guidance (n. 103) [17]; ibid.
[235] Consultation (n. 2) Recommendation 12.
[236] ibid Recommendation 6.
[237] Ibid 16.

5.5.2. The LSCP's proposal

An alternative recommendation promoted by the LSCP provides that ''Fee-Charging' McFs should be 'recognised as a legitimate feature of the evolving legal services market.'[238] In order to achieve this, they suggest that external regulation should be rejected in favour of self-regulation through the formation of a trade association.[239] It has been argued that external regulation would, of necessity, drive up costs for McFs, thus causing their more affordable prices to rise in accordance with those charged by the legal profession or lead to them withdrawing from the market.[240]

Whilst there is no doubt that this is a legitimate concern, it does not warrant leaving LIPs susceptible to the unscrupulous practices of some McFs. As there is potential for such behaviour to be widespread, there is no empirical evidence to support the contention that McFs should be allowed to regulate their own practices in a manner rigorous enough to provide LIPs with ample protection. Nor is there any evidential basis for the contention that non-professionals offering legal services to LIPs should self-regulate in a manner that is not regarded as appropriate for members of the legal professions.[241] There is now a Society of Professional McFs which states on its website that its members have professional indemnity insurance and that they must adhere to a code of conduct.[242] This code appears to be merely a reference to the Practice Guidance and a reassurance that complaints will be investigated.[243] The level of protection that can be afforded to litigants by a limited company set up by two McFs, who became involved in the provision of legal advice following their own acrimonious family court proceedings, is clearly questionable.[244] Their objectivity may also be hindered by the fact that one of these founders has been politically active, which has involved

[238] LSCP (n. 104) [5.7].
[239] ibid [6.10] and [6.11].
[240] ibid [6.9]. Smith et al (n. 3) 27, refers to McFs omitting to have insurance due to the cost and likely impact on fees for LIPs.
[241] A parallel could be made with the work of paralegals. The Institute of Paralegals encourages those working in the paralegals sector to become members, but its remit is to 'set professional standards and provide recognition' for those working in the sector rather than regulate their activities. They do, however, have a code of practice which its members should conform to; http://www.theiop.org/regulation/the-paralegal-code-of-conduct-2.html accessed on 18.10.16. As most paralegals work in legal practices their work is overseen by regulated professionals and so the risk of abuse is reduced.
[242] http://www.mckenziefriends.directory/index.html accessed on 11 August 2016.
[243] ibid.
[244] http://courtwithoutalawyer.co.uk/ray-barry.html, http://courtwithoutalawyer.co.uk/john-ison.html accessed on 11 August 2016.

organising publicity stunts for Fathers 4 Justice.[245] That this may compromise a McF's neutrality is supported by Lord Woolf's reasoning in *R v Bow County Court Ex p Pelling (No.1)* where the McF was refused permission to assist a LIP due to his 'difficulty in divorcing his campaigning role as chairman of the pressure group to which he belongs from that as an assistant of LIPs'.[246]

Self-regulation by two directors of a limited company with such clear political interests, who favour the rights of one parent over the other, is hardly inimical to safeguarding LIPs. This is particularly apposite if the LIP is the mother of the child involved. In addition, the suitability of regulation by a body set up by McFs is questionable, bearing in mind that one of the directors of the Society of Professional McFs has stated that a criminal conviction would not automatically bar someone from membership of the Society.[247]

5.5.3. An alternative solution?

Despite the negative behaviour of some McFs, which has been outlined above, the author would argue that their services should not be curtailed by introducing a fee prohibition without further evidence. There will always be those that abuse their position when dealing with uninformed members of society, after all this is why both branches of the legal profession are subject to regulation. The fact that both solicitors and barristers find themselves subject to disciplinary proceedings, which can lead to expulsion from their respective profession does not lead to calls for them to be prohibited from charging for their services. In the same manner, what may turn out to be a few 'bad apples' amongst McFs should not prevent LIPs from having an alternative source for providing legal advice and assistance. Not only does Smith et al's report provide clear evidence of McFs offering valuable assistance to LIPs outside the courtroom, but members of the judiciary have also expressed the view that they play a positive role in court.[248]

[245] http://courtwithoutalawyer.co.uk/ray-barry.html accessed on 11 August 2016.
[246] [1999] 1 W.L.R. 1807, 1825.
[247] Walters (n. 183).
[248] MOJ (n. 64) 21.

In this respect, there is merit in the Competition and Markets Authority's belief that a blanket ban may be a disproportionate response to the rise of fee-charging McFs.[249] What seems important is that McFs are regulated and LIPs are educated about the regulatory requirements of all those who offer legal services. In this way LIPs can make an informed choice about where they seek legal advice and assistance.[250] Using the analogy of CMCs once again, it is argued that McFs should be allowed to charge fees, but that they are regulated externally. Following the problems encountered by the unregulated nature of CMCs, they are now regulated by the Claims Management Regulator. This is a unit of the MOJ, which is responsible for licensing firms that provide claims management services; carrying out investigations and taking action against both regulated and unregulated CMCs and providing guidance to consumers.[251] This provides an example of how new members to the legal services market can be introduced and regulated as a means of providing access to legal advice and assistance.[252]

An alternative means of regulating McFs could involve adopting the proposals made by the LSB, which promotes a new activity based approach to regulation. Rather than regulating specific professionals who offer legal services, it is proposed that the activities undertaken by such providers should be regulated according to the degree of risk the activity poses to consumers. A more targeted and proportionate approach is being advocated that is no longer based on the professional title of the service provider.[253] In addition, it is suggested that regulation should be through a single regulator covering the whole legal services sector.[254] By making these changes the LSB declares that:

> [They] would contribute to lower costs for providers and consumers, more freedom for providers to grow, innovate and deliver better services for

[249] Competition and Markets Authority (CMA), *Legal services market study: Final Report* (15 December 2016) 175.
[250] ibid 17. The CMA considers that the inclusion of 'unauthorised providers' of legal services within the regulatory framework may be a possible consumer protection solution.
[251] https://www.gov.uk/government/groups/claims-management-regulator accessed on 11 August 2016.
[252] See also Immigration and Asylum Act 1999, s.84, which requires any person who offers immigration and asylum advice to be registered with the Office for the Immigration Services Commissioner.
[253] LSB, *A vision for legislative reform of the regulatory framework for legal services in England and Wales* (September 2016) [6]. CMA (n. 234) 17.
[254] ibid [100].

> consumers, and greater confidence in regulation and legal services – and the important benefits they deliver for society – more broadly.[255]

If such an approach was adopted it could no doubt encompass the activities of McFs, irrespective of the fact that they are not members of the legal profession, and this could remove the need for separate regulation of their services. If the LSB is correct in its assertion that the cost of regulation would be cheaper it may be that the legal profession could pass on these savings by reducing its fees. This would no doubt widen access to justice for those LIPs who at present are unable to afford to engage the services of the legal profession.

Along with regulation, a further means of ensuring the quality of advice provided by McFs could be to require a minimum legal qualification. For family matters this could involve gaining units under the Institute of Legal Executive's Level 3 Certificate and Professional Diploma in Law. The relevant units would be Unit 7, 'Family Law' and Unit 12, 'The Practice of Family Law'.[256] Being set at A Level standard, such assessments would provide some assurance of the quality of advice being given to LIPs. Having a minimum qualification may also encourage some McFs to qualify in these units at level 6, which is degree standard.[257] Having entry requirements and regulation may also act as a deterrent to those who wish to become McFs for unscrupulous or self-serving reasons. Support for this contention is provided by the reduced number of CMCs that now operate. Since 2011, there has been a steady decline in the number of CMCs as a consequence of the introduction of regulation and the evolving nature of the CMC market. In 2011 there were 3,213 CMCs which had fallen to 1,610 CMCs by 2016.[258] Further, there appears to be an appetite for such qualification requirement amongst McFs. Smith et al found that the McFs they interviewed had a positive attitude towards training and often proactively sought training opportunities.[259]

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[255] ibid [7].

[256] http://www.cilex.org.uk/study/lawyer_qualifications/level_3_qualifications/level_3_units accessed on 17.10.16.

[257] http://www.cilex.org.uk/study/lawyer_qualifications/level_6_qualifications/level_6_units accessed on 17.10.16.

[258] MOJ, *Claims management regulation: Annual report 2015/16* 14.

[259] Smith et al (n. 3) 31.

5.5.4. Listening to the needs of LIPs

Any decision to remove the ability of McFs to charge for their services should not be made without the opinions of LIPs, who have sought their advice, being obtained. With this in mind, the testimony of the Interviewee who instructed a McF in the present study offers an insight into what LIPs believe should be the future for 'fee-charging' McFs. Whilst Interviewee 33 no doubt had an abysmal experience with the McF she instructed, this did not deter her from wanting to engage a McF in the future. From her point of view, they could offer a valuable service provided there were three main changes.

Firstly, there needs to be more choice, as '*there seems to be a big call for this, but yet there is only one real agency or a few of them that seems to be doing it. If you Google McFs it comes up that they are all in London and the Midlands; there is absolutely none at all for the North West'*. This view is supported by Smith et al who found that a substantial majority of McFs were based in London or the South East.[260]

Secondly, the Interviewee observed the need for regulation:

> *I think the McFs are a good idea if they could be regulated in a way where somebody doesn't ever speak to you in a way that that man spoke to me. No-one should ever say to me you don't stand a hope in hell's chance and he will win just because his McF is more qualified. That needs to be regulated, that shouldn't happen. But equally for me that can't afford a solicitor, then perhaps there should be more McFs.*

Lastly, Interviewee 33 pointed to the gender bias of McF as *'it seems to me that they are all guys and it has got that feel as though it is fathers only kind of feeling. What about mums that are struggling as well?*' This appears to be a more widespread problem as Smith et al reported that the majority of McFs they interviewed confirmed that they helped more men than women[261] and recruitment of clients was often through organisations such as Families Need Fathers.[262]

[260] ibid 15.
[261] ibid 34.
[262] ibid 30.

This emphasises the importance of the recommendation by the Consultation that a plain language guide should be prepared for LIPs.[263] Such guidance could explain the role of McFs as well as list individuals and companies offering this service. If there are more women or men, who are not involved with political groups, offering McFs services, then they need to advertise their services more widely so that they reach the attention of LIPs seeking their assistance.

Additionally, the plain language guide could explain all of the legal services available and, assuming that McFs were authorised to charge for their services, how they are regulated, their minimum qualification requirement and the possible means of redress. Making this available on websites provided by Advicenow and the MOJ as well as being available from the court office, voluntary organisations and McFs themselves would ensure that they reach the attention of LIPs.

The observations by Interviewee 33 signify the importance of listening to the views of LIPs before a decision is made to remove fee-charging McFs from the legal services market. The removal of this service, after receiving the views of the judiciary and lawyers, without giving those who are going to be most affected a voice, would not only be disingenuous, but would undoubtedly inhibit their ability to access justice. A regulated system of McFs who are able to charge fees, but are only allowed representational rights and the right to conduct litigation at the discretion of the court on the production of a CV and statement of experience and qualifications, could provide LIPs with an invaluable source of advice and support. The additional requirement of compliance with a code of practice and the judiciary's inherent jurisdiction to prevent disruptive McFs from appearing before the court would no doubt provide additional protection for LIPs.

5.5.5. A balance sheet approach to permitting McKenzie Friends rights of audience

So far as supervision of the behaviour of McFs by the court is concerned, there is now clear guidance provided in *Ravenscroft v Canal and River Trust*.[264] In this case Chief Master Marsh set out the balancing exercise to be undertaken when considering such requests.

[263] Consultation (n. 2) [4.15] – [4.19].
[264] [2016] EWHC 2282 (Ch).

The starting point was to consider whether the defendant 'reasonably needs' the McF's assistance and, if so, the scope of the assistance which the court should allow. Such factors required the court to consider not only the defendant's personal position, but also the context in which the application arises, the guidance in the Practice Note and the principles set out in the overriding objective.[265] Bearing these matters in mind, there were three crucial issues to consider. Firstly, the defendant was nearly illiterate and suffered from dyslexia which involved difficulty in understanding written material. Secondly, the claim involved quite technically complex areas of law, which would add to the difficulty in understanding the material. Thirdly, the fact that the outcome of the case was of public importance and, therefore, would be dealt with in the High Court against Queens Counsel meant that there was inequality of arms if the defendant had to represent himself.[266] Despite the McF adding to delay, due to the lengthy particulars of claim he prepared which had to be amended, the fact that he was 'highly intelligent and articulate' as well as being conversant with the legal issues[267] meant that the defendant should not be denied his assistance. However, this would be subject to the court's power to remove him should he prove to abuse the permission granted.[268]

It is submitted that the court's insistence on receipt of a statement and a CV as well as the detailed balancing exercise that *Ravenscroft* advocates when determining whether a McF should be allowed permission to advocate, is a welcome approach. This will ensure that courts rigorously apply the practice guidance when deciding if a McF should be allowed to represent a LIP. This approach, together with regulation, can ensure the protection of LIPs from those McFs who would seek to abuse the powers granted to them.

By allowing McFs to charge for their services LIPs will retain a valuable means of accessing justice and regulation will provide them with the accompanying protection needed. It is also a proposition that is advocated by some members of the judiciary.[269] The Consultation's proposal to remove the ability to charge fees is to be applauded for providing protection for

[265] ibid [22].
[266] ibid [22 (i – iii)].
[267] ibid [25].
[268] ibid [27].
[269] MOJ (n. 64) 23.

LIPs. However, this is to be achieved at the cost of potentially narrowing access to justice and without allowing those LIPs, who will be profoundly affected, an opportunity to have their voices heard.

6. The legal profession: transforming to increase access to justice

So far the discussion has considered how a new entrant to the legal services market can widen access to justice for LIPs. However, it is possible for the legal profession to adapt their practices in order to provide LIPs with affordable legal advice. This section, therefore, concentrates on how the legal profession has responded to the reduction in their client base due to the removal of legal aid and the threat created by new entrants to the market. It also examines how it can still adapt in order to provide a realistic source of advice for LIPs. The discussion begins with the Bar's decision to allow barristers to engage the services of litigants without the necessity of an instructing solicitor. There is then an examination of how solicitors can change their working practices by providing advice on a limited retainer basis.

6.1. An adapting Bar

Evidence that the Bar is adapting its practices in order to attract the shrinking number of litigants who can afford their services is provided by the introduction of 'Public Access'. This allows litigants to go direct to barristers rather than having to firstly engage the services of a solicitor.[270] Interviewee 26 explains how she instructed a barrister direct as it worked out cheaper than instructing a solicitor. *'Solicitors are dearer, because they charge by the hour, whereas we had a barrister and she charges by the day'.* This was not the only interviewee who was aware that barristers could be instructed directly. Interviewee 6 had already instructed a barrister without engaging a solicitor and Interviewees 10 and 9 talked about the possibility of instructing a barrister in the future. However, in accordance with Trinder et al's findings, few interviewees knew of the Bar Direct Scheme.[271] Interviewee 14 instructed a solicitor in order to be represented in court by a barrister. This was a process repeated by Interviewee 26, initially, until she realised that she did not have to use the solicitor as an intermediary.

[270] The Bar Council, http://www.barcouncil.org.uk/using-a-barrister/public-access/ accessed on 11 August 2016.
[271] Tinder et al (n. 4) 117.

Nevertheless, this Interviewee did refer to a possible limitation to the services that barristers can offer a LIP when being instructed on a hearing by hearing basis. As barristers are meeting their client shortly before attending court it means that they have a brief period of time in order to become conversant with the important aspects of the case. When a solicitor has been involved in the matter, the barrister will receive a brief of the necessary information from a legally qualified professional. However, when being instructed by a LIP direct, on a fixed charge basis, they will receive the paperwork and verbal instructions from the LIP. Thus, much will depend on the LIP's understanding of the important issues to be addressed to the court and the ability to convey these to the barrister. As Interviewee 26 describes:

> *It was me and my mum together that actually fed the bullets for the barrister to fire. We went through our own evidence to pass to her and it was her who then turned it round into the arguments. Knowing your own case, knowing what was in all those files, because she wasn't going to be looking through three years of things, was she*?

There may, therefore be limited usefulness in instructing a barrister directly if the LIP is struggling to understand the procedural requirements of their case and the relevant facts in support. This is apposite in respect of 'new uninformed' LIPs who are unlikely to understand their case sufficiently to guide a barrister through the salient issues. For more able litigants, such as the 'competent to instruct legal assistance' and 'self-reliant' LIP, it offers a more cost effective means of gaining representation.

LIPs need to be aware of the choices they have when instructing the legal profession, which may lead to them shopping around for legal services and thus widening routes to access justice. One way to encourage this behaviour is by making sure that litigants know how to instruct barristers directly. Since 2015 there has been a Direct Access Portal, which is the Bar Council's website listing all Direct Access Barristers together with their specialism.[272] It is imperative that this new service is advertised in a manner that reaches the attention of any potential litigants, so that they are aware of their legal service options.

[272] http://www.directaccessportal.co.uk/ accessed on 11 August 2016.

It may be that solicitors should also consider changing their charging methods to a fixed fee model for discrete court hearings. This would allow LIPs to access legal assistance which would otherwise be too expensive, because they do not have sufficient funds or knowledge of the court process to agree an inherently uncertain hourly rate.

6.2. Encouraging solicitors to unbundle

One further way that the legal profession can adapt to the changing family and civil litigation landscape, which now involves LIPs as the norm, is by offering their services in an 'unbundled' manner.[273] The scope of a solicitor's duty of care to clients is determined by reference to their retainer. As Oliver J explained in *Midland Bank Trust Co Ltd v Hett, Stubbs and Kemp (a firm)*, 'the extent of his duties depends upon the terms and limits of that retainer and any duty of care to be implied must be related to what he is instructed to do'.[274]

Traditionally this retainer would involve the solicitor dealing with all matters for the client from the initial instructions through to completion.[275] However, the withdrawal of legal aid has meant that a number of solicitors are now adapting their practices so that they offer litigants a limited retainer.[276] This involves litigants 'selecting from lawyers' services only a portion of the full package and contracting with the lawyer accordingly'.[277] This frees litigants from the burden of having to invest considerable financial resources in order to engage the services of a lawyer. Instead, LIPs can instruct a solicitor to deal with a discrete matter or provide advice on a particular issue without having the expense of retaining the lawyer for all other aspects of their case. In this manner, a LIP can retain control over their case, which is an essential element for them to regard the process as fair.[278] However, they also retain the possibility of seeking assistance when needed, depending on the seriousness of the issue and their financial position.

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[273] Forrest S Mosten, 'Unbundling legal services and the family lawyer' (1995) 28 Fam LQ 421. It will be recalled that this term refers to the situation where lawyers provide their services on an issue by issue basis rather than dealing with a case from commencement to completion. See Chapter three (n. 97).
[274] [1979] 1 Ch 384 [402] – [403].
[275] The Law Society, 'Unbundling civil legal services' (4 April 2016) [2]. http://www.lawsociety.org.uk/support-services/advice/practice-notes/unbundling-civil-legal-services/ accessed on 11 August 2016.
[276] This has become a particular feature in matrimonial finance cases. See *Minkin v Landsberg* [2015] EWCA Civ 1152 [75].
[277] Mosten (n. 273) 423. Mosten explains that these services usually consist of '(1) gathering facts, (2) advising the client, (3) discovering facts of the opposing party, (4) researching the law, (5) drafting correspondence and documents, (6) negotiating, and (7) representing the client in court'.
[278] See chapter three (n. 178).

Such 'bespoke' or 'unpacked' services[279] have been met with consternation by solicitors, who express concern that they may become liable beyond the remit of their limited retainer.[280] This is due to their conventional model of operating involving liability for the full remit of issues that may arise from their contractual duty with their client. The fear is that providing unbundled services potentially leaves them exposed to claims of negligence if they fail to advise a LIP on an aspect of their case that the litigant has not expressly instructed them about or paid for. However, the CA has now given its seal of approval for solicitors to provide unbundled services in the wake of legal aid reforms:

> There would be very serious consequences for both the courts and LIPs generally, if solicitors were put in a position that they felt unable to accept instructions to act on a limited retainer basis for fear that what they anticipated to be a modest and relatively inexpensive drafting exercise of a document (albeit complex to a lay person) may lead to them having imposed upon them a far broader duty of care requiring them to consider, and take it upon themselves to advise on aspects of the case far beyond that to which they believe themselves to have been instructed.[281]

Whilst this judgment endorses limited retainers, solicitors must ensure that they carefully explain to LIPs the restricted nature of their assistance and where the boundaries lie in respect of their contracted services. In this respect, the Law Society has issued a Practice Note advising solicitors about the correct manner in which to provide unbundled services.[282] This is intended to ensure that litigants have a clear understanding of the extent of their contractual relationship with the solicitor to avoid any misunderstanding between the parties.

In order to avoid the risk of incurring liability beyond discrete task provision the terms of the retainer should be confirmed in writing and outline the limited nature of the contractual relationship.[283] This is particularly important, as the CA in *Minkin* explained that it is

[279] *Minkin* (n. 276) [75].
[280] Mosten (n. 273) 432.
[281] *Minkin* (n. 276) [76].
[282] The Law Society (n. 275).
[283] *Minkin* (n. 276) [38].

implicit in the solicitor's retainer that they will tender advice which is 'reasonably incidental' to the work they are carrying out.[284]

In *Minkin* the claimant, being a qualified chartered accountant, was 'an intelligent woman'[285] who had instructed solicitors on the matter before and had a competent understanding of the contents of her consent order. As such, the retainer to re-draft the consent order did not include advice with regard to its contents. The situation would no doubt have been different had the claimant had a limited understanding of the proceedings, which may be the position of many other LIPs.

The ambiguous nature of the duty owed by solicitors when they enter into a limited retainer with a LIP, who has insufficient understanding of the court process, may deter solicitors from offering unbundled services. However, the decision in *Minkin* provides reassurance on the condition that limited retainers are drawn up carefully and specifically address their scope. Jackson LJ envisioned that limited retainers would have a greater role in the future by suggesting that 'with the further passage of time, tried and tested formulas will be devised and used routinely by practitioners providing such a limited retainer service'.[286] In this respect, the Law Society has prepared a specimen client care letter to be used by solicitors when entering into unbundled services contracts.[287] If used carefully, this should reassure solicitors that they have restricted their exposure to claims of professional negligence by LIPs who dispute the extent of their legal responsibilities towards them.

6.2.1. A retrograde step?

Any advances towards encouraging solicitors to enter into unbundled packages by the decision in *Minkin* may, however, have been curtailed by the subsequent judgment in *Sequence Properties Limited v Patel.*[288] In this case the LIP had instructed his solicitors to assist with the preparation of his court bundle of documents. However, they did not ensure that the bundle was served on the court and other parties in time. On an application for relief from sanctions, which had been imposed for late submission, Asplin J remarked that the

[284] ibid.
[285] ibid [43].
[286] ibid [77].
[287] The Law Society (n. 275) Appendix D.
[288] [2016] EWHC 1434 (Ch).

'solicitors were involved in the whole process of producing the index to the bundle and, therefore the bundle, itself'.[289] Taking that into account, and disregarding the status of Mr Patel as a LIP, there was 'no good reason' why the bundle was not filed.[290]

This statement has been regarded by some members of the legal profession as 'killing' unbundling, as it contradicts the reassurance provided in *Minkin* that solicitors would not be liable beyond the remit of their retainer.[291] However, this may not necessarily be the outcome of *Sequence Properties Limited.* In accordance with Jackson LJ's interpretation of the scope of limited retainers in *Minkin*, ensuring that the LIP filed the bundle by a certain date would no doubt fall within the definition of tasks that are 'reasonably incidental' to the work for which the solicitor was instructed. In this respect, *Sequence Properties Limited* does not contradict *Minkin*, but rather endorses the viewpoint that solicitors who enter into unbundled services with LIPs must either make the remit of their services clear or otherwise ensure that their client is given sufficient assistance in respect of any incidental issues. As stated in *Minkin*, the extent of those incidental issues will depend on the knowledge and understanding of the individual LIP.[292] Solicitors will have to make a judgement about the ability of LIPs when providing unbundled services in order to assess the information to be relayed to their client. Subject to this requirement, it is hoped that solicitors will take a proactive approach to unbundling by not only providing this service, as a means of widening access to justice for LIPs, but also advertising its availability.

6.2.2. Evidence of unbundling

So far as the interviewees for this project are concerned, there was significant evidence that they were actively seeking out unbundled services as a means of gaining legal advice and assistance. The unbundled help received was mainly on a task by task basis, so that interviewees received help with a particular aspect of their case such as writing their personal statements;[293] drawing up a child agreements order and writing letters following failure to

[289] ibid [13].
[290] ibid.
[291] Gazette news desk, 'New judgment 'kills' unbundled legal services' *Law Society Gazette* (24 May 2016). http://www.lawgazette.co.uk/law/new-judgment-kills-unbundled-legal-services/5055453.fullarticle accessed on 11 August 2016.
[292] *Minkin* (n. 276) [38].
[293] Interviewee 10 and 17.

comply with such an arrangement;[294] assistance in preparing bundles of documents,[295] and advice on how to present oneself in a court hearing.[296] Others used a lawyer for an urgent hearing involving the refusal by one of the parties to allow any time with the child of the family or to return the child to their home, before dealing with other aspects of the case alone.[297]

In accordance with MacFarlane's findings,[298] a number of these interviewees approached solicitors who they had already had a relationship with, in respect of present or previous court proceedings, in order to carry out discrete tasks. Interviewee 17 returned to solicitors for the preparation of a personal statement at a cost of £170, whilst Interviewee 9 paid £120 for letters to be sent to the other party who was failing to comply with a child arrangements agreement. Whilst these interviewees paid for their unbundled service there was evidence of some interviewees behaving in a manner that Moorhead and Sefton described as, 'exploiting relationships to get limited assistance'.[299] These interviewees had instructed solicitors on a full retainer basis, but having run out of funds or once legal aid had been withdrawn, tried to remain in the relationship to gain free legal assistance.[300]

However, it was not only those who had a previous relationship with solicitors who tried to receive unbundled services on a complimentary basis. There was substantial evidence of litigants searching for and finding firms who would offer a free initial consultation. These interviewees went to solicitors' firms with the intention of receiving the free advice and then proceeding alone, as they knew they would not be able to afford the fees a solicitor would charge.[301] In fact, a few of these litigants shrewdly shopped around in order to receive a '*couple of free one hour advices*'[302] from different firms to provide assistance with specific aspects of their case.[303] Nevertheless, at a time when legal aid is scarce it may be that solicitors are withdrawing this service, as it is no longer likely to lead to publicly funded

[294] Interviewee 9.
[295] Interviewee 33
[296] Interviewee 12.
[297] Interviewee 14, 26.
[298] Macfarlane (n. 55) 13.
[299] Moorhead and Sefton (n. 50) 53.
[300] Interviewee 10 and 12.
[301] Interviewee 8, 19, 20, 33, 13, 34 and 36.
[302] Interviewee 34.
[303] Interviewee 33 and 34.

work. Interviewee 8 describes how he was '*ringing up different ones to see if I could just get a free interview or a free consultation and none of them do that anymore.'*

This is a worrying development, because if litigants cannot gain free advice from a solicitor face to face they will have to resort to unregulated McFs or online forums. As explained above when considering online advice and assistance, the quality and accuracy of the latter cannot always be guaranteed and may actually compound confusion. The impact will be even more profound for those LIPs who are not computer literate or do not have access to the resources to go online. For the purposes of this project, this was relevant to two interviewees,[304] but it has been suggested that those who are challenged by the use of computers are likely to be a 'significant class of civil court users'.[305] This view is supported by the figures available for 2016 which suggest that eleven per cent of households in Great Britain do not have internet access. Of these households, twenty per cent of respondents stated that this was due to a lack of skills, whilst nine per cent referred to the unaffordable cost of equipment or access costs.[306]

The evidence provided so far highlights how solicitors who offer their services on a full retainer basis are no longer meeting the requirements of LIPs who do not have the funds to instruct a lawyer for the lifetime of their claim. Despite this fact, only one interviewee was advised by a solicitor that they would be willing to deal with a particular aspect of their case for a one off fee. '*I think she was talking about £450 plus VAT to prepare all my finding of fact stuff*'[307] If LIPs are to gain wider access to justice, then solicitors must adapt their working practises to meet the needs of the modern family litigant. After all, barristers have adapted theirs. By introducing the possibility for LIPs to instruct them directly to represent them at a hearing on a one off basis, they are actually providing an unbundled service. If solicitors were prepared to offer LIPs a free half hour consultation, at which the prospect and price of unbundled services could be discussed, this would no doubt allow many LIPs to receive invaluable legal assistance. It is an approach supported by Lord Justice Briggs in his 2016 report on civil court structure. Briggs LJ recognises that LIPs should be able to receive

[304] Interviewees 24 and 32.
[305] Briggs (n. 5) 86.
[306] Office for National Statistics, *Internet access – households and individuals: 2016* (4 August 2016) 19. http://www.ons.gov.uk/peoplepopulationandcommunity/householdcharacteristics/homeinternetandsocialmediausage/bulletins/internetaccesshouseholdsandindividuals/2016#household-internet-access accessed on 02.11.16.
[307] Interviewee 33.

'affordable early advice on the merits of the case' without having to commit to the expense of a full retainer and that solicitors should adapt the provision they offer to respond to this requirement.[308]

The evidence generated for this project offers some insight into the issues for which LIPs require unbundled assistance. It will be recalled that in chapter three there was discussion regarding why litigants decide to proceed without legal representation. Two particular issues that arose were that the matter was not serious enough to warrant a legal advocate or that the litigant did not know the purpose of instructing a lawyer.[309] So far as the former is concerned, litigants highlighted that if the issue of dispute was concerning a divorce, financial issues or child arrangements order; especially if the latter involved with whom the child was to live then a solicitor would be instructed. Giving LIPs a free half hour consultation would be a means of detailing the specific skills that a lawyer could provide for the litigant that are imperative in family proceedings. In this way litigants would have a clear understanding of the services that a lawyer can offer. Additionally, emphasis could be placed on the willingness of the firm to allow the litigant to return for assistance should matters become more protracted, and the likely fee. In this manner, a plan could be drawn up regarding how the LIP would proceed and the stages at which they would return for assistance or representation. This is a much more appropriate model for advising litigants post LASPO. It is also a model that is more likely to attract the attention of LIPs classified as 'competent to instruct legal assistance'. These LIPs are more conversant with court procedure and so have the knowledge to determine when in the proceedings they require the assistance of lawyers.

7. Conclusion

This chapter has explored the main sources of advice for LIPs who struggle, for financial reasons, to engage the assistance of the legal profession. Such sources include online forums, the police station and the court office. However, particular attention has been focussed on McFs, who encompass voluntary organisations and fee-charging individuals. Whilst organisations, such as the PSU, can provide invaluable support and legal information their remit does not extend to legal advice or representation and they cannot conduct litigation.

[308] Briggs (n. 5) [6.38].
[309] See (n. 153).

This gap in the legal services market has led to the growth of fee-charging McFs. Despite the lack of evidence about the legal qualifications and working practices of such individuals the judiciary has been willing to grant them rights of audience as well as permission to conduct litigation as a means of facilitating assistance to the LIP in the courtroom. However, the lack of regulation and the unscrupulous behaviour of, what is as yet, an unknown proportion of McFs has led to the recommendation that charging for their services should be prohibited.

Contrastingly, this chapter has outlined alternative proposals to introducing this prohibition as a means of widening access to justice for impecunious LIPs. This has included the suggestion that regulation, a possible subject qualification and the court's vigilance when deciding whether to allow such individuals to appear in court, may provide adequate protection for LIPs instructing McFs for advice and assistance. Such proposal is advocated in part due to the interviewee in this project, who instructed a McF, articulating the view that they should be able to offer advice, but on a regulated basis. In this manner the voice of the LIP has been listened to, which is an element that has been afforded insufficient attention when making proposals for the future of McFs.

McFs are not the only means of widening access to justice. The legal profession can adapt to increase such access by promoting direct access to the Bar, offering free initial advice and unbundled services. By adopting all of these measures and providing education about the legal services available, LIPs will be presented with an informed choice about whether and where to obtain legal advice and assistance. This could ultimately lead to the services of McFs becoming superfluous, as LIPs would have a realistic prospect of engaging the services of the legal profession. Obviously, the author would prefer legal aid to be reinstated so that litigants can attain the services of the legal profession. However, in the absence of this now somewhat utopian ideal, the changing nature of the litigant in family and civil courts must be reflected in the nature of and manner in which legal advice and representation is offered. In this respect, an effort to lower fees by the legal profession may not be sufficient to satisfy the requirements of all LIPs. One of the benefits of instructing McFs highlighted by Smith et al was the flexible and informal manner in which they operate. In particular, their willingness to provide assistance outside the confines of the office environment or usual working day was

a favourable aspect of their provision.[310] If McFs are allowed to continue charging for their services, the legal profession will no doubt have to consider how they can respond so that they provide legal services in a manner that LIPs expect.

Throughout this chapter reference has been made to the question of how widening the opportunities for LIPs to gain legal advice and representation can promote access to justice. It is the purpose of the next chapter to continue with the theme of access to justice in order to examine how the characteristic aspects of the civil justice system can act as a barrier to gaining effective access.

[310] Smith et al (n. 3) 41.

Chapter five

The barriers to accessing justice inherent in the civil justice system

1. Introduction

In chapters three and four the emphasis has been on analysing the experiences of LIPs when initially deciding to commence proceedings and seeking advice and assistance. Taking a chronological approach, this chapter, and the one that follows, examines the problems encountered by LIPs once their matter is before the courts. Its purpose is to examine the barriers to effectively accessing justice that LIPs identify as existing due to the manner of proceedings in the family and civil courts. It is only through understanding the barriers to a fair process and just outcome, from the LIP's perspective, that the courts can be reformed in a manner that allows effective access to justice for all.

The exploration begins by discussing the initial problems LIPs encounter preparing for court hearings. A distinction is made between the three categories of LIP so that a contrast can be made between those who are new to the process ('new uninformed') and those who have been involved in litigation for a significant amount of time ('competent to instruct legal assistance') or have rejected legal representation ('self-reliant'). The chapter then examines the substantive reasons why LIPs encounter barriers to accessing justice. The inequality caused by the exclusionary nature of the language used in the courtroom and in documentation is discussed. This involves an examination of the vocabulary used by lawyers and judges as well as its impact on LIPs.

Due to the importance of the fact finding hearing, the next issue to be considered is how LIPs engage with the documentary evidence required for this stage in proceedings, together with the manner in which LIPs tackle the important issues of courtroom etiquette and cross-examination.

Continuing with the themes of inequality and the barriers to accessing justice, the final matter explored is the controversial rules that exist in order to qualify for legal aid when domestic

violence is alleged. It is these rules that have led to many victims of domestic violence being unable to secure public funding and, consequently, an invaluable source of legal advice and representation. Although the criteria for accessing legal aid in cases involving domestic violence has been the subject of recent revision, there will still be those who are unable to provide the relevant documentation to support their application. These LIPs will, therefore, have to appear in court in front of their abuser without legal advice or representation. It is the vulnerable[1] nature of these particular LIPs that compounds their unequal status in the courtroom and which justifies an in depth examination of their experiences when proceeding with family matters.

2. The initial barriers inherent in the court process

This section considers the initial obstacles to accessing the courts that exist when preparing for and attending hearings without representation or legal advice. The analysis focusses on the problems encountered by those LIPs categorised as 'new uninformed', who are new to the process compared to those who are 'competent to instruct legal assistance' or are 'self-reliant' because they have been in the system for some time or have had previous matters before the court. It is, therefore, imperative that the analysis begins by defining the different types of LIP.

2.1. New uninformed LIPs

These interviewees were scared by the process and appeared to be totally lost. This was apparent whether there was a lawyer on the other side or they were being opposed by another LIP. This meant that interviewees had no real understanding of the procedure or what was happening in court. It was only with the support of family or the PSU that such interviewees were able to understand how to proceed. These LIPs were unsure of where to gain advice and were more likely to have low levels of literacy, a previous history of drug or alcohol dependency or to have been the subject of domestic violence. One of the main problems encountered by these interviewees was the absence of control they possessed over

[1] The term 'vulnerable' in this study is used in a narrow context to describe an LIP who has been subjected to domestic violence. This, amongst others, was a vulnerability highlighted by both Moorhead and Sefton and Trinder et al in their studies. Richard Moorhead and Mark Sefton, *Litigants in person: Unrepresented litigants in first instance proceedings* (DCA Research Series 2/05, March 2005) 70; Liz Trinder et al, *Litigants in person in private family law cases* (Ministry of Justice Analytical Series 2014) 27. The latter found that this was the most single form of vulnerability displayed by participants. This is reinforced by the findings of the present study.

proceedings due to their lack of understanding about the rules of court. These LIPs required help with all stages of the matter.

2.2. LIPs competent to instruct legal assistance

All of these interviewees had been in court before with a solicitor either in the present proceedings or in the past. The amount of time they had spent in the family courts meant that they were able to understand more readily the procedural aspects of their case. These LIPs have often been represented before and so have documents they can copy which have been prepared by their previous solicitors or solicitors who appeared on behalf of their opponents. Their experience meant that they tended to need less assistance when speaking in court. However, their confidence in presenting evidence did not extend to the fact finding hearing discussed later in this chapter. Despite being more procedurally aware, these LIPs were still likely to find the process stressful. They also became confused by the mass of advice available that was at times conflicting. They did, however, appear more confident to seek out help from diverse sources.

2.3. Self-reliant LIPs

These LIPs had forgone the help of lawyers because they felt it was either unnecessary to engage their assistance or because they had little respect for lawyers due to previous negative experiences. In common with those defined as 'competent to instruct legal assistance', these LIPs had previous court experience and so were able to proceed more easily than those who were 'new uninformed'. However, this did not prevent them from finding documentation difficult to complete or from lacking knowledge about where to find relevant advice and information. All of these interviewees were eager to use online sources of information.

2.4. Being prepared

Trinder et al categorise the manner in which LIPs search for information as being proactive, reactive or passive. Those who are proactive carry out research without any prompting by the court whilst those who are reactive do so only after such inducement.[2] Contrastingly, passive LIPs merely relied on others for assistance without engaging in the court process.[3] There was evidence of all of these categories in the present study **irrespective of the type of LIP**.

[2] Trinder et al (n. 1) 86.
[3] ibid 88.

However, the majority of LIPs took a proactive stance and only a small minority of LIPs took a passive approach to preparation. This differs from Trinder et al's findings that a 'fairly sizeable' number were passive, but only a minority were proactive.[4] This may be explained by the fact that a significant number of interviewees (19) were either 'competent to instruct legal assistance' or were 'self reliant' and so had more understanding of what was required.

Those interviewees who were proactive referred to the substantial amounts of time they had spent researching and preparing documentation. They discussed how they devoted between 6 - 7 weeks[5] and 3 months[6] getting ready for hearings and invested hours online to search for relevant information.[7] '*We went through from March to September constantly researching things*'.[8] Whilst this highlights the willingness of LIPs to actively engage in the process, the fruitfulness of their efforts is doubtful.

A number of interviewees referred to preparing documents that were either not needed at present or were unnecessary. This mirrors the evidence of Moorhead and Sefton[9] and was usually due to a lack of understanding about what evidence the court would require and what would happen at the hearing. Interviewee 1 explains how she prepared far too much for the first hearing, as she thought it would be a full trial. '*I had to think, how am I going to present the evidence and I gave them far too much. Plus before the court hearing I thought it was going to be a full court hearing, so I was reading up on all of my stuff.*' Interviewee 17 assumed that the judge would want a statement although this had not been ordered. '*It is the only time I have ever done an opening statement for the judge today and he didn't even read it*'. Not knowing what documentation the court will require also leads to LIPs researching irrelevant information. For Interviewee 27 this involved spending considerable time trying to understand The United Nations Convention on the Rights of the Child (UNCRC) together with its four main principles. This was an issue that had no direct relevance to his application for child arrangements.

[4] ibid 86-88. Trinder et al reported that the majority of LIPs were passive and a minority were proactive.
[5] Interviewee 5.
[6] Interviewee 1.
[7] Interviewee 2.
[8] Interviewee 15.
[9] Moorhead and Sefton (n. 1) 155.

It is usually only once the LIP attends the hearing that they realise that the time spent, along with their efforts have been wasted, '*I had bundles of paperwork and she [solicitor] had a little diary and I was thinking, I think I have overdone it*'.[10] Interestingly, there was evidence that LIPs knew that they were doing more work than necessary, but did this because they believed it would impress the judge. Interviewee 34 refers to how he assisted the judge by his active engagement with the proceedings. '*Everything they asked me to do I had done plus more. I was recommended to go on a parenting course, and I never just went on one I went on many. I have got about twenty odd law books in mine'.* It is this eagerness to impress that can often lead to the preparation of unnecessary documentation[11] and is no doubt assisted by internet search engines, which have been attributed to enabling 'even the most unsophisticated litigant' to 'produce hundreds of papers of affidavits and (barely relevant) judgments to quote at a hearing'.[12] This supports the evidence outlined in chapter four concerning the problems LIPs encounter when attempting to access relevant internet resources.[13]

Despite the active engagement of some LIPs in preparing for their hearings, there was evidence of a number falling within Trinder et al's 'passive' category. These interviewees fell within the category of 'new uninformed' and failed to seek information due to their low levels of literacy such as dyslexia,[14] or an unspecified learning disability,[15] or appeared unaware that preparation was necessary. The latter type of LIPs were quite young, in their early twenties and their proceedings involved the complexity of allegations of violence or alcohol abuse.[16] This data affords further insight into why LIPs often fail to engage with the court process and provides evidence to support the need for the production of information with these specific requirements in mind.

A further reason identified for not preparing for court was a belief that matters could be resolved quickly, as the interviewee was willing to negotiate an agreement:

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[10] ibid.
[11] Interviewee 5.
[12] Lindsay Ellison SC, 'Litigants in Person - the Good, the Bad and the Ugly' (The New South Wales Bar Association May 2011).
[13] See (n. 23).
[14] Interviewee 32.
[15] Interviewee 24.
[16] Interviewee 13 and 31.

> *You have a solicitor for my ex on my case saying I was an amateur, I did not know what I was doing. I didn't know what I wanted … because I just want it to be alright for everybody. But no, it had to be done in a certain way.* [17]

This underlines a lack of understanding by LIPs of the adversarial nature of proceedings, as well as the requirement to present their legal position clearly to the court. The absence of preparation or too much preparation is caused by the LIP's unfamiliarity with the court process. It is this inexperience that leads to them struggling with what may seem, to the judge and lawyers, to be the mundane requirements of civil justice.

As mentioned when discussing the work of the PSU, interviewees had practically no understanding of what would happen at their first hearing.[18] Despite being an informal directions hearing, interviewees believed it would be '*quite formal*'[19] and expected to '*see all the people in their wigs and suits*'.[20] They were then relieved to discover that it would be '*very informal*'[21] and simply involved a meeting with Cafcass without the presence of a judge. This lack of knowledge about the informality of the first hearing caused interviewees unnecessary anxiety. For some LIPs their only knowledge of a courtroom was what they had seen depicted on television and in films, which usually involved criminal trials. '*I expected a judge and I stand on the left side and she stands on the right side and there is loads of people facing us*'.[22]

Information about what will happen at the initial stages of proceedings must be communicated to LIPs in a manner that they can understand, which will not only assist in allying fears, but will also help them to prepare appropriately for court hearings. Whilst the LIPs for the present project were given information in the court pack, they were handed when commencing proceedings, this was either not read, because of the sheer number of forms and guides contained therein, or not understood sufficiently to provide sufficient assistance.[23] Thus, as Trinder et al remark, some form of verbal communication is necessary or a more

[17] Interviewee 2.
[18] See chapter four (n. 89).
[19] Interviewee 24.
[20] Interviewee 15.
[21] Interviewee 30.
[22] Interviewee 24.
[23] The LIPs ability to understand the language used in proceedings is further discussed in chapter six.

reader friendly way of relaying information should be devised.[24] This is particularly important for those 'new uninformed LIPs' who passively engage in the court process due to vulnerabilities caused by low levels of literacy, or violence and drug dependency being a feature of the proceedings.[25]

2.5. Knowing the arbiter

Whilst it may seem an obvious thing to know, some interviewees also revealed that they did not know who was presiding over their hearing. Interviewees were unaware who the magistrates were, thus referring to the '*three people*'.[26] The Justice's Clerk was referred to as '*a guy who was writing everything up and doing most of the talking'*[27] or '*another woman, I don't know whether she was, a little typist or anything*'.[28] In fact, some interviewees had no idea that they were not in front of a judge, referring to the Cafass officer and legal adviser at the directions hearing as '*two judges'*.[29] As Interviewee 10 explains, '*There was a Cafcass woman there and there was this Mrs [Name] and I thought this person doesn't seem to be a judge, who are they?*' Interviewee 31 recognised that he was before a Cafcass officer, but had no idea who the legal advisor was, as he believed '*he was probably the director*'.

It is submitted that it is a basic tenet of access to justice that LIPs should know who the person deciding their case is and how they are qualified. Only in this manner can they have respect for the legitimacy of the outcome of their dispute. This is especially important when the confusion, caused by this lack of information, results in further anxiety for a LIP unfamiliar with the civil justice process. It would appear that although the Equal Treatment Bench Book requires members of the judiciary to state the judge's name and who the individuals present are,[30] this basic convention is not being adhered to.

2.6. Knowing when to speak

As well as being perplexed about the personnel in the courtroom, interviewees stated that one of the main problems they encountered in the hearing was not knowing when to speak. It is

[24] Trinder et al (n. 1) 106.
[25] ibid.
[26] Interviewee 2.
[27] Interviewee 10.
[28] Interviewee 18.
[29] Interviewee 24.
[30] Judicial College, *Equal Treatment Bench Book* (2013) 32 [45] (a) and (b).

this lack of insight about the requisite etiquette that caused interviewees to be uncertain about whether they would be allowed to portray their views on the salient issues. '*It is a bit unclear, sometimes I feel as though I am speaking when I am not being asked, but no-one directs you.*'[31] This led to interviewees being concerned about how to get the balance right between telling the judge the important issues, but not being regarded as speaking too much.[32] Crucially, for some interviewees this meant that they failed to raise important matters with the court or ask questions for clarification. '*I could have said things that I would have liked to have said, but I felt like I couldn't interrupt the judge. I would have liked to have asked a few more questions, which a barrister or a legal professional would have been able to ask at the right time*'.[33]

The problems encountered by interviewees in respect of the level of formality of hearings and the etiquette within the courtroom provide evidence that early advice is imperative if LIPs are to have an appropriate level of understanding of the civil court process. This will enable them to attend hearings with the requisite amount of evidence and realistic expectations of what is likely to occur at each hearing. Being advised about the basic requirements of the court process is a necessity for all LIPs irrespective of their educational attainment, as there was evidence that even those who had been educated to university level lacked knowledge about these issues. To this extent it made no difference that interviewees were former police officers,[34] social workers,[35] primary school teachers[36] or civil engineers.[37] This outcome is a replication of Trinder et al's finding that there appeared to be a lack of correlation between being highly educated, professional and articulate and the ability to handle family law proceedings effectively.[38]

2.7. Practice makes perfect

Whilst the majority of interviewees struggled to prepare for the first hearing or understand what would happen, there was evidence that many soon learned to adapt to the process.

[31] Interviewee 10.
[32] ibid Interviewee 5.
[33] Interviewee 7. Interviewee 1, '*I have come out now and I am thinking I didn't ask if I could have access to records, which is one of the things I wanted to ask*'.
[34] Interviewee 9.
[35] Interviewee 10.
[36] Interviewee 1.
[37] Interviewee 2.
[38] Trinder et al (n. 1) 24.

These interviewees mainly fell within the categories of LIPs who were 'competent to instruct legal assistance' or 'self-reliant'. Although interviewees described their first hearing in a negative manner, this often bore no resemblance to their more positive views of the hearings that followed. Interviewee 2 describes how the first hearing was '*awful*' and how the disastrous nature of his experience spurred him on to be more prepared for the next time he appeared before the court. '*On this occasion I had done a lot of homework. I knew exactly what I wanted, how to present it, how to present yourself and it was entirely different'.* This was mirrored by Interviewee 8 who, after attending the first hearing, '*knew what the process was*' and, therefore, '*did feel a lot better the second time'.* This supports the conclusion that LIPs grow in confidence with each hearing they attend. '*You gain more confidence in going in. Next time will be the third time and hopefully the last, so from the first one I was quiet and then the second one I have opened up. By the third one I will be like all done with it*'.

This confirms evidence from research conducted in New Zealand which found that a LIP's confidence increased over time, due to the knowledge and experience gained.[39] Conversely, MacFarlane's Canadian study reported that despite some LIPs beginning the process with a reasonable degree of confidence, 'within a short time almost all … became disillusioned, frustrated, and in some cases overwhelmed by the complexity of their case and the amount of time it was consuming'.[40] The evidence provided by the interviewees underlines further the importance of early advice so that access to justice is uninhibited by the failure of LIPs to bring to the court's attention all of the salient issues at the initial stage of proceedings.

LIPs not only learn to adapt by carrying out independent research, but many more able litigants follow the lead of the solicitor representing the other side. This results in them copying the way they behave in court, so that they know when and how to speak to the judge, as well as having a template for statements and the preparation of court bundles. '*Because we had the first statement and it was off a solicitor we kind of just tweaked it so we used that same format*'.[41] By far the main reason why LIPs grew in assertiveness was because they had been involved in court proceedings previously. '*Because I have been through the process for*

[39] Melissa Smith et al, *Self-Represented Litigants: An Exploratory Study of Litigants in Person in the New Zealand Criminal Summary and Family Jurisdictions* (July 2009) 69.
[40] Julie Macfarlane, *The National Self-Represented Litigants Project: Identifying and Meeting the Needs of Self-Represented Litigants* (Final Report, May 2013) 9.
[41] Interviewee 11.

three years I kind of know what to expect so it weren't as much of a daunting thing to experience. When I first come here I was an absolute nervous wreck, I didn't know what to expect'.[42] Similarly, confidence tends to grow because of the fact that the LIP has been involved in this particular family law matter for a considerable number of years. '*I am starting to understand the process after 3 ½ years of constant battle, how to put an application in and that sort of thing. So the first time I came 3 ½ years ago I needed help, but now I sort of understand the process*'.[43]

Those LIPs who had been in the court process for some time were able to cite the court forms they had filled in and the types of orders they had requested, such as prohibited steps orders or child arrangement orders, as well as relevant statutory provisions.[44] The ability of these 'competent to instruct legal assistance' LIPs meant that unlike 'new uninformed' LIPs they were more akin to Galanter's 'repeat players',[45] as they knew the rules of the court and how to conduct their case. This means that some of the disadvantages of being an inexperienced 'one shotter', who has scant knowledge of court procedure, no longer apply to them.[46] For this reason, they are more procedurally matched to the legal professional representing the other side than those who had never been to court before. '*I have studied it extensively for 4 years, special guardianship orders, contact arrangements orders and various other things. Parental responsibility, I've pretty much done my own research on it. So I am kind of like my own solicitor'.*[47] This evidence emphasises not only the need for early advice for LIPs who are bringing a family matter to court for the first time, but also the fact that help and assistance can be targeted towards these litigants rather than those who have been through the system a number of times previously. The needs of LIPs are not uniform, they depend on their previous family court experience, which is usually more relevant than their educational attainment or life experience, unless they have specific learning needs which require continual support.

[42] Interviewee 12. See also Trinder et al (n. 1) 83.
[43] Interviewee 6.
[44] Interviewee 1 referred to the Mental Capacity Act and Interviewee 16 stated relevant sections of the Children Act 1989.
[45] Marc Galanter, 'Why the "Haves" come out ahead: Speculations on the limits of Legal change' (1974) 9 Law and Society Review 631.
[46] ibid.
[47] Interviewee 5.

3. The exclusionary language of law and procedure

One of the main barriers identified by all categories of LIP, who were presenting their cases in front of a legally represented opponent, was an inability to understand the language used by the judge and lawyer(s) in court. This was highlighted as a problem which arose from the fact that LIPs '*don't speak the same language*'[48] as lawyers or the judiciary. The language used was referred to by the interviewees as '*jargon*',[49] 'go*bbildy gook*'[50] and '*mumbo jumbo*'.[51] They likened the inability to understand the words used by the legal professionals to the situation when '*people are speaking in a foreign language when they are in your company, someone starts to speak French when we are talking English*.[52] It's '*just like a Welsh man speaking in Welsh to me*';[53] it was '*like Chinese to me*'.[54]

Problems arose when lawyers and the judiciary were discussing law and procedure, which had the effect of not only excluding the LIP from the discussion but also increasing confusion. '*We didn't know what he was talking about. All these sections under the Mental Health Act, so it can be quite scary'*.[55] '*He spoke quite legally and I had to look at the judge quite confused, because he just said something along the lines of the finding of fact is purely in relation to section 8 of the Cafcass then? I was like hey kind of thing. Then she went yes, absolutely and clarified his question and sort of spoke just to him*'.[56]

Whilst referring to legislation and procedural aspects that LIPs do not understand can lead to feelings of isolation, the use of formal language can also result in a lack of clarity. An example of this is shown by Interviewee 17's experience in court:

Interviewee: *And the judge went well under the circumstances he is not staying overnight, there is too many, what do they call them chast … chastismints or something? They don't call it abuse.*

[48] Interviewee 1.
[49] Interviewees 11, 19, 20, 23 and 26.
[50] Interviewee 17.
[51] Interviewee 29.
[52] Interviewee 23.
[53] Interviewee 17.
[54] Interviewee 20.
[55] Interviewee 17.
[56] Interviewee 33.

Interviewer: Oh chastisement.

Interviewee: *Yes, yes. That's a new one to me.*

The difficulty, therefore, stems not just from the formality of the language used, but also the words chosen, which may be regarded by many as antiquated. Interviewee 20 described the language as '*almost old English'* and for Interviewee 31 the problem arose from '*the posh words that they say'*.

It is the inability to comprehend what is being said in court that led interviewees to believe that there was a particular level of educational ability expected of LIPs if they were to have any likelihood of successfully presenting their case in court. When you go to court '*the judge expects you to be intelligent, have an academic mind and to understand what the barristers are saying and to understand what is being said.*'[57] Being of '*average mind*',[58] therefore, places LIPs at a disadvantage so far as being able to grasp the salient matters being discussed in court is concerned. '*When you go to court you need to have a lot of knowledge of the lingo, how they talk; the laws*'.[59]

For many interviewees, therefore, the problem arose from their lack of knowledge and education rather than the system itself, although others did recognise that it was the lawyers themselves who had to change their approach. Rather than being '*blinded by jargon*',[60] Interviewee 23 suggested that '*there has to be less jargon and explain the points of law more. That is what I would say with these solicitors*.' It is, therefore, imperative that the judiciary and lawyers are conscious of the language they use in court and the likelihood that a LIP, who is not conversant with '*solicitor slang*',[61] will be unable to follow what is being discussed.

However, this is not always an easy task when members of the legal profession are immersed in the language and customs of legal procedure on a day to day basis. An example of the

[57] Interviewee 1.
[58] ibid.
[59] Interviewee 12.
[60] Interviewee 23.
[61] Interviewee 12.

difficulty in recognising legal language is highlighted by Interviewee 29's description of his first encounter with the court office staff. '*I went to the desk and they asked me if I have got a PSU and I asked them what a PSU was'.* The use of this familiar acronym by the member of staff indicates how technical words are absorbed into their everyday language and the ease with which those who work in the court system can forget that members of the public will be unaware of their meaning. In fact, even if one tries to avoid using technical language it is not always possible to recognise that such words are being used. The Interviewer's conversation with Interviewee 20 aptly demonstrates how difficult the task of using everyday language can be. When the researcher asked this Interviewee whether there had been any advantages to being a LIP, the response was, '*to being what*'?

What is interesting about this conversation is that the Interviewee has no knowledge of the term 'LIP' despite the fact that this is how the courts refer to those who are not represented. This is concerning, particularly as the handbooks and other guidance available for those who are representing themselves refer specifically to 'LIPs'. If LIPs do not recognise this label, they are unlikely to be able to find and engage with the assistance provided for them. Interviewee 20 was not the only person who had not heard of the term 'LIP', as Interviewee 24 was also unaware of his status in the proceedings and when the word was used, he responded that, '*I have never heard of that word in my life'.* This led to the Interviewer explaining the term by stating that 'somebody who goes to court is a litigant and because you have no solicitor you are in person, so you're a LIP.'

Having to explain this '*lawyer's phrase*'[62] to the Interviewee made the Interviewer realise the technical nature of this term and how a lay person would not understand why the term, which seems obviously appropriate to a lawyer, has been chosen to describe those who appear in court without representation. As Interviewee 33 remarked, '*she [solicitor] said something about LIP' and I went, 'does that mean representing myself?' I think legal people forget that we don't know the terminology*."[63] It is for this reason that there has been an attempt by the legal profession[64] and the judiciary[65] to prepare guidance and other forms of help for LIPs.

[62] Briggs LJ, *Civil Courts Structure Review: Interim Report* (Judiciary of England and Wales 2015) [5.30].
[63] Interviewee 33.
[64] See for example Simon Sugar et al, *DIY Divorce and Separation: The expert guide to representing yourself* (Jordan Publishing 2014) which is written exclusively by barristers from a London based Family Law Chambers.

Notwithstanding, as they tend to be prepared by lawyers, without the input of those who have been LIPs, the extent to which they are truly '*lay person friendly*'[66] may be debateable. Taking an example from the 'Handbook for LIPs', it is questionable whether the word 'accede'[67] is used by members of the public on a daily basis and would be readily understandable to many LIPs. This supports the contention made above that it is often difficult for the well-educated legally qualified professional to recognise words that are not commonly understood by ordinary members of society. What the evidence of the Interviewees suggests, therefore, is that guidance for LIPs written by members of the legal profession in collaboration with LIPs would have the advantage of ensuring that the language used is not too technical or formalistic in nature.

3.1. The importance of inclusionary language

With the increase in the number of LIPs appearing before the courts in family matters it is now more important than ever that the judiciary choose language that LIPs are familiar with when explaining law and procedure. This fact is now recognised by the Judicial College, which encourages the judiciary, when a LIP appears before them, to attempt to 'elicit the extent of the understanding of that party at the outset' and to give 'explanations in everyday language'.[68] On the evidence provided by the interviewees for this project it appears that the judiciary need to more readily engage with this guidance as a means of ensuring that LIPs understand what is being discussed in court and the next steps to be taken. The importance of this requirement was emphasised by Trinder et al, who reported that the capacity for LIPs to cope with procedure was linked to both previous court experience and the willingness of the judiciary to explain issues.[69] This is reinforced by the present study, which has found, as outlined above, that those who grew in confidence had previous litigation experience.

It is also clear that judges may need more training on how to relate complex legal issues to LIPs in a manner that they are likely to understand and, just as importantly, to recognise when they are failing to achieve this.[70] The necessity for training is supported by Interviewee

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[65] Edward Bailey J et al, *A Handbook for litigants in person* (December 2012).
[66] Interviewee 26.
[67] Bailey et al (n. 65) [16.44].
[68] Judicial College (n. 30) 31 [44(a)].
[69] Trinder et al (n. 1) 82-82.
[70] The Judicial Working Group on Litigants in Person: *Report* (July 2013) 20 [4.9], recommends that the judiciary have specific training in relation to litigants in person. This should form part of that training.

36's experience in court when '*they started off explaining in our terms, but half way through they got carried away with themselves and started their own wording and I come out and said to him [Husband], 'What was that all about*?

It would seem then that some judges are trying to accommodate the needs of LIPs by using appropriate non-technical language, but achieving this consistently throughout the hearing is a particularly challenging task for professionals who may no longer identify the words being spoken as legalistic in nature. This is no doubt also an issue of class and educational status. What is an everyday word to a middle or upper class member of the Judiciary or legal professions will not necessarily be the situation for other members of society. It will, therefore, be difficult for the Judiciary and legal professions to recognise that the language used is not part of the LIP's ordinary vocabulary. Support for this contention is provided by the finding that many interviewees struggled to understand the paperwork and letters sent to them by the other side's lawyer. '*Her solicitor has sent me letters about 20 flipping centimetres thick, and I haven't read it, because I don't know how to understand it'*.[71] As this statement identifies LIPs, faced with documents that they do not understand, may simply choose to ignore them in the absence of legal assistance to explain what they mean.

Without any communication with the lawyer representing their opponent, who may be willing to provide some guidance on the procedure involved, LIPs are likely to be unaware of the gravity of the situation they find themselves in. This is demonstrated by Interviewee 4 who received a statement from the barrister for the other side alleging that her application was an 'abuse of process.' She had no idea what this phrase meant, and so explained how she also had decided not to bother to read it. As a result, this Interviewee had no understanding of why she was in court that day or how long the hearing was scheduled for. This was despite the fact that it was her application. Not being aware of why the LIP was in court due to the technical nature of the language used in the court room was a recurring theme. '*I don't understand all of this you know. Every time I have been to court I just don't understand what is happening'. 'I just come and find out on the day'*.[72] Once again, this LIP is at a loss to understand the process when it is his application that is being heard.

[71] Interviewee 29.
[72] Interviewee 13.

LIPs displayed a lack of understanding not only in respect of why they were attending a hearing, but also about the outcome. '*The orders, I don't know what they mean and how I refrain from breaking them'.*[73] In cases involving domestic abuse allegations, the contents of orders made by the court must be followed carefully otherwise, as Interviewee 13 found out, the consequences can be dire. In his case the judge ordered that he was to send his statement to all of the parties. Although his ex-partner was represented, he did not understand, and it was not explained to him, that paperwork should be sent directly to the solicitor and not to his ex-partner. This was particularly important as the judge, in the same hearing, extended the non-molestation order protecting the child's mother. The Interviewee prepared his statement and sent it direct to his ex-partner and a few days later he was arrested for breaching the non-molestation order. Despite the fact that he had no inkling of his wrongdoing, he was found guilty of contempt of court and received a suspended prison sentence together with a fine of £280. This Interviewee's experience provides a striking example of the importance of explaining the contents of orders to LIPs in a manner that enables them to understand and, more importantly, comply with the directions of the court.

3.2. The complex nature of documentation

As well as the language used in court by the legal profession causing LIPs confusion, the wording of court forms also led to difficulties. This is hardly a surprising finding as MacFarlane's study found that even with legal training the forms could be confusing and contained terminology that could not be understood.[74] In fact, even some of the court guides, which are designed to assist LIPs, were shown to have a reading level as high as 13.5.[75] It appears that the forms in England and Wales are similarly legalistic and difficult for LIPs to understand. A survey undertaken by Advicenow, which assessed a sample of court forms and the accompanying guidance, reported that one information expert referred to them as 'the worst set of public documents I've ever seen'.[76] This critique is supported by the testimonies of a number of interviewees. Interviewee 26 describes how she had difficulty understanding what the wording on the notice of hearing received from the court, meant and

[73] ibid.
[74] Macfarlane (n. 40) 9.
[75] ibid 10. This research used Flesch-Kincaid Reading Grade Levels. A grade level (based on the USA education system) is equivalent to the number of years of education a person has had. As score of 13.5 would be equivalent to a final year sixth form student in this country. Further information is available at www.readability-score.com accessed on 16 May 2014.
[76] Law for Life, 'Better information needed at court' (12 November 2012) www.lawforlife.org.uk/blog/better-information-at-court accessed on 27 September 2015.

still appeared to be unsure. '*It said applicant's matter be re-listed. We didn't know what re-listed meant*'.

What is interesting is that one of the participants in Moorhead and Sefton's report also had similar problems with the word 'listing'. This highlights how, what many legal professionals would consider to be, a straightforward non-technical word causes problems of interpretation for LIPs. As this led to confusion for the participants in Moorhead and Sefton's report in 2005, and continued to do so in this study conducted in 2015, it is surely now time that this legalistic term is changed for something more simplistic. One suggestion may be to simply write that the matter is to be dealt with in court and the date and length of hearing, rather than state that it has been 'listed'.

It is argued that the wording used on court forms and orders needs to be completely overhauled so that the language used is plain language from a LIP's point of view rather than a lawyer's interpretation of 'everyday' language. This could prevent the confusion encountered by Interviewee 20. '*I didn't understand the letter. I thought I was in court in July, but when I went to sign in they said, oh no you are not in court it was just to serve papers on the other person'.*

Whilst turning up for a hearing that has not been scheduled is inconvenient, not understanding the language of the court can have a more serious impact if it leads to LIPs interpreting the words in a totally different manner to that intended. As Interviewee 29 explains: '*When I read the non-molestation order. I thought it meant molesting kids or something'.* It is inappropriate for a litigant to believe they are being accused of a serious offence simply because the language used is not plain enough for them to understand. The Interviewee's confusion was compounded by the fact that the application made by the child's mother included a 'prohibited steps order'. Coupled with the reference to a 'non-molestation order', the Interviewee interpreted this to mean that he '*couldn't step nowhere*' near his child. This caused the Interviewee understandable fear and a degree of anger.

At a time when LIPs in family proceedings are to become the norm, it is questionable whether the forms used in respect of the children of the family should still require LIPs to state whether they want a 'child arrangements order', 'prohibited steps order' and/or 'specific

issue order'. As Interviewee 29's testimony suggests, this is language that is not used in an everyday context and is thus unsuitable for inclusion in court documents which are to be filled in by non-legally qualified members of the public.

In light of the growth of LIPs, the wording of court forms and documents should be reviewed in a manner that involves input from both legally qualified and lay members of society. Only in this way can the court present LIPs with forms that are easy to understand and complete, rather than having to contend with documents that can be '*quite complicated*'.[77] In this respect, HMCTS has collaborated with the PSU in order to produce a more litigant friendly version of the fee remission form, which now has the more accessible title of 'Apply for Help with Fees' rather than being referred to as an 'Application for Fee Remission'. The form uses bigger font and language that is readily accessible, for example, there is no longer reference to 'remission of fees' or 'disposable capital'. Litigants are simply asked about their savings and income.

This progressive attitude towards the language used in forms is to be encouraged, as it 'stands as a shining example of a new approach to drafting procedural material in a language really (rather than theoretically) capable of being understood by court users without the assistance of lawyers'.[78] Nevertheless, the use of voluntary organisations that provide assistance to LIPs is only useful if the views of the latter are truly reflected in the reforms made. Every effort must be made to ensure that the amendments made to forms are done with the input of those who will ultimately have to fill them in, which may often be without the help of pro bono organisations. To this extent, it is argued that the task of reformulating the language and structure of court documents should involve a panel that consists of voluntary organisations, as well as those who have acted as LIPs in the family and civil courts. Making amendments to the forms, which will mostly be completed by LIPs, will make the experience of initiating proceedings less stressful. In addition, it will reduce the workload of court office staff, who often have to return forms that have been filled in incorrectly. This has been the reported experience of HMCTS following the amendment to the EX160A fee remission form,[79] and is a development that should be emulated.

[77] Interviewee 36.
[78] Briggs (n. 62) [3.18].
[79] Briggs LJ, *Civil Courts Structure Review: Final Report* (Judiciary of England and Wales 2016) [3.16].

4. The fact finding hearing

One of the most important hearings in any family matter is the fact finding hearing, as this often determines serious issues such as an allegation of physical or sexual abuse by one of the parties and ultimately whether there are safeguarding reasons for denying a relationship between that party and the child(ren) of the family. It is, therefore, imperative that a LIP realises that the judge has ordered a fact finding hearing to take place. This will then enable them to prepare for a hearing that may be listed for a number of hours, so that there can be verbal examination of the evidence before the court. Nevertheless, there was evidence that although some of the interviewees would be attending a fact finding hearing when they next attended court, they were unaware of this fact. This is supported by Interviewee 32's description of what was said to him after his last hearing. '*Her solicitor is saying that I should get a solicitor when I come back and I am thinking what is going to happen next? Is something bad going to happen?*'

This case involved serious allegations of domestic violence involving a weapon and the next hearing was obviously listed to determine whether or not there was sufficient evidence to conclude that the alleged incidents occurred. This hearing would, therefore, be crucial in deciding whether the interviewee would gain direct contact with his children. Nevertheless, the judge did not outline to the Interviewee the importance of this next stage in proceedings in a manner that he could understand.

Interviewee 29 was also ignorant about the next hearing being a fact finding hearing to determine the issue of domestic violence, as he explains that: '*all I know is that I am in on the 30th September at half past 10 for a three hour session'.* In accordance with the evidence highlighted above, an understanding of the requirements of a fact finding hearing was usually only present if there had been such a hearing in previous proceedings. Thus, Interviewee 3 knew what to expect, but '*only because it is another finding of fact hearing and I have already been in one so I have got an idea.*' It is obvious that if a LIP does not know that they will be attending a fact finding hearing then they will not have prepared.

However, even if a LIP has understood that the next hearing is for fact finding it does not mean that they will be aware of the important nature of this next stage in the proceedings. Interviewee 10 declares that, '*I am still a bit unclear in terms of the finding of fact that was mentioned by the Cafcass person. I feel like that wasn't addressed and I feel like I should have possibly said that today and I didn't'.* Interviewee 13 is able to cite that a fact finding hearing is taking place, but when asked whether he has prepared for that hearing he responds '*no*' and for Interviewee 10 her preparation would merely be to '*brace myself*' for the questions that would be asked.

Even those who have an inkling of what a fact finding hearing involves and want to prepare may not do so effectively, because they are unaware of the procedural requirements. A major prerequisite of a fact finding hearing is that both sides present their evidence to the court. In accordance with other reports,[80] it was this disclosure aspect of the procedure that caused those having to attend such a hearing considerable problems. Interviewee 33 explained how she had not submitted any of the important evidence in respect of the allegations of sexual abuse against her child's father until she fortunately attended an appointment with a solicitor as part of a free clinic advice scheme. However, for Interviewee 27 the realisation that evidence to be relied on had to be submitted to court came too late. '*[Mother] had evidence on her phone and texts and because I hadn't said to the judge that I was going to put it forward I couldn't use it. I weren't aware of that'.*

The evidence provided by these two interviewees supports the view espoused by Zuckerman that even if court assistance is provided during proceedings in the form of help with cross examination, it cannot adequately compensate LIPs for failing to prepare for the hearing because they lack the finances to consult a lawyer. Each party also requires 'their own champion unburdened by responsibility to the opponent beyond ethical obligations of propriety and fair play'.[81]

This is particularly true with regard to the preparation of the court bundle for this hearing and the Scott Schedule which has to comply with the specific requirements of the FPR[82].

[80] Moorhead and Sefton (n. 1) 158; Trinder et al (n. 1) 69.
[81] A Zuckerman, 'No Justice Without Lawyers—The Myth of an Inquisitorial Solution' (2014) 33 (4) CJQ 355.
[82] 12 J PD pt 12 para19 (c) requires the court to consider whether the key facts in dispute can be contained in a schedule or a table (known as a Scott Schedule) which sets out what the applicant complains of or alleges, what

Interviewee 5 explained how he, did not '*know whether the solicitor is allowed to show [Mother] the files that I have in relation to the diary'*, when disclosure is a crucial element of the preparation for a fact finding hearing. In addition, Interviewee 33 was '*struggling with the format of what I have got to do for the evidence for the finding of fact. Apparently, it has got to be in a table type format*.'

The preparation of a bundle of documents and the Scott Schedule that must accompany it are vital requirements for a fact finding hearing in order to provide the judge and the other parties with the salient issues to be addressed. Nevertheless, these Interviewees showed a lack of understanding as to why such documents had to be prepared or the format required. It is, therefore, imperative that judges explain to LIPs not only what a fact finding hearing is, but also the purpose and process for preparing and filing a bundle of documents and accompanying Scott Schedule. LIPs should never be in the situation where they are preparing documents for a hearing and attending the same without comprehending what will happen at the hearing or why documentation is needed.

4.1. The challenging nature of cross examination

It is not only the preparation involved for the fact finding hearing that causes problems for LIPs. They also have to deal with the issue of presenting their case to the court whether that be to another LIP or a lawyer. It is this issue that is now addressed along with the amount of assistance provided by the judiciary. The help they provide may be expected to increase, as there is now clear authority for the proposition that family proceedings are not adversarial in nature, but rather the 'judge always holds an inquisitorial responsibility'.[83]

4.1.1. An inquisitorial mode of enquiry?

So far as the fact finding hearing is concerned, the FPR reiterate that this can be an inquisitorial process in order to protect the interests of those involved.[84] However, there is no guidance about how this approach differs from the traditional adversarial hearing and the

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the respondent says in relation to each individual allegation or complaint; the allegations in the schedule should be focused on the factual issues to be tried; and if so, whether it is practicable for this schedule to be completed at the first hearing, with the assistance of the judge.

[83] *Re B and T (care proceedings: legal representation)* [2001] 1 FCR 512 [17].

[84] 12J PD pt 12 para 28.

judge's role. Some assistance is provided by Lord Thomas CJ who, commenting extra judicially about the approach to be taken in respect of LIPs, remarked that:

> It was really little more than the active interventionism characteristic of much pre-trial procedure, case and trial management. But I think it is right to refer to it as inquisitorial, because the essence of the change would be a much greater degree of inquiry by the judge into the evidence being brought forward.[85]

There appears to be no reason why the same definition would not apply to the conduct of family proceedings involving LIPs. However, not even the more inquisitorial nature of family proceedings can eliminate the major obstacles encountered by LIPs who have to engage in cross examination as part of the fact finding procedure. Interviewees described how they lacked the requisite skills to not only adequately question their ex-partner, but also to deal with the cross examination by that other party's solicitor. This is demonstrated by Interviewee 27's response when asked whether he thought about the questions he was going to ask his ex-partner: '*No, if I am honest I didn't really, I had an idea what I was going to ask, but with hindsight I should have really maybe written them down and then ticked them off as I asked them'.* The same Interviewee also struggled to understand the procedure when cross examining. '*He [the judge] just kept telling me, I can't ask that question, and that is when I realised. I think it was [PSU volunteer] who said you can only ask questions regarding what the solicitor has related to. So I felt almost restricted then I kind of got stuck*'.

Even those interviewees who considered the questions they wished to raise explained how putting these to the other side can be a major obstacle. As Interviewee 3 explains:

> *You do not know what is the right thing to say and, of course, I am cross examining the person who I am fighting against, so trying to speak to them and they just don't acknowledge you or won't speak to you and it is supposed to be me cross examining. So whereas they will answer a solicitor properly when it comes to answering you they are not, and it starts going into like an argument in the courtroom.*

[85] Lord Thomas LCJ, 'Reshaping Justice' (Lecture delivered to the organisation 'Justice', 3rd March 2014).

This testimony highlights how a LIP may know the essential elements of cross examination, but they lack the emotional objectivity to cope with the challenge of cross examining an opposing parent. Conversely, the same Interviewee explains how she also found it difficult to cope with the advocacy skills of the solicitor who cross examined her:

> *He is like sort of confusing me. A few times he was trying to make out that I was getting the statement wrong. It was all because basically he was trying to trick me into saying something, but that is what they do. They know how to do that, don't they?*'

attend a fact finding hearing when the other party has legal representation, as well as the adversarial skills that are needed to cope with being cross examined. It also highlights the importance of having an inquisitorial role for judges who need to assist LIPs when cross examination is taking place.

However, the negative experience of Interviewee 3 was not repeated by all interviewees, as some highlighted how judges assisted them with cross examination in order to make the hearing fairer. Interviewee 15 describes how the judge helped him answer questions being posed by his ex-partner's solicitor. *'The judge would say to me, now take your time it is not a rush, nothing is a wrong answer, and they would spend a lot more time with me than with them.*' This was also a feature identified by Interviewee 29 who explained that the judge, *'gave me more time, because I was on my own. She gave me a lot more time to speak and get my point across'.*

Such assistance from the judiciary when being cross examined by the other side was particularly important in cases that involved domestic violence, where the interviewee was ineligible for legal aid. Interviewee 16 explains how the judge provided her with protection from being questioned by her abusive ex-partner:

> *The judge allowed [Father] to address him rather than it being directly addressed towards me. I felt like I was given a certain element of protection as it wasn't directly aimed at me, it was aimed through the judge and then the judge would address me singularly.*

It was the judge's ability to recognise the intimidation that the LIP was being subjected to that allowed Interviewee 11 to be protected from her abusive ex-partner *'He [Father] had sat at the back of the screens and was looking through the window at me and when [Father] had gone out the judge said, 'If we had been carrying on with the proceedings today I would have asked him to move, because I could see him looking at you'.* The judge in this case did proceed with cross examination by the solicitor, but with her client out of the room. This allowed the Interviewee to be '*a bit calmer, and getting up in the stand and saying it, I was only saying it to her.'* Whilst excluding the father from the courtroom is an unusual means of protecting the mother, it was an approach adopted in *Re J (A Child).*[86] Here the local authority funded an advocate for the fact finding hearing, but the judge prevented the father from being in court when the mother was being cross examined. However, such a 'serious step' was later admonished because the father was later required to act as a LIP and thus did not have the benefit of hearing the mother's evidence when making his final submissions to the court.[87]

The more inquisitorial style adopted by the judges in the cases involving the above Interviewees have now been approved by the CA in *Re K and H (Children).*[88] In this case Lord Dyson MR rejected the notion that legal representation was the only way in which a LIP accused of sexual abuse can effectively cross examine the alleged victim. This was despite the fact that in criminal proceedings a legal representative must be appointed, as cross examination by the alleged perpetrator is prohibited.[89] It was also contrary to the solution employed by Sir James Munby P when awarding funding from HMCTS for fathers, otherwise ineligible for legal aid, to appoint an advocate to cross examine the mother/daughter alleging abuse.[90] Rather it was decided in *Re K and H* that the court had a number of other options at its disposal, amongst which were, the victim being questioned by the judge; the justices' clerk or an appointed guardian.[91] For Interviewees 16 and 11 the

[86] [2014] EWCA Civ 875.
[87] Ibid [108 (d)] (Gloster LJ).
[88] [2015] EWCA Civ 875.
[89] Youth Justice and Criminal Evidence Act 1999, s. 38(4).
[90] *Q v Q, Re B (A Child) and Re C (A Child)* [2014] EWFC 31; Applied in *Re K and H (Children: unrepresented father: cross examination of child)* [2015] EWFC 1 (Bellamy J).
[91] *Re K and H* (n. 88) [52]. See also 12J PD pt 12 para 28 which states that, 'Victims of violence are likely to find direct cross-examination by their alleged abuser frightening and intimidating, and thus it may be

option chosen was for the judge to provide assistance and although this falls short of legal representation and the benefits with regard to advocacy that brings, there is evidence that the Interviewees felt that they benefitted from this level of protection provided by the court.

Notwithstanding the view of interviewees, the approach taken by the judiciary is far from a fully inquisitorial approach and although LIPs were allowed to field their questions through the judge no assistance was given regarding the identification or relaying of salient issues. Using Trinder et al's categorisation of judicial assistance, LIPs were left to 'sink or swim', as no advice or assistance with formulating questions or to focus on relevant issues was provided.[92] Whilst being helpful, such minor assistance appears insufficient to redress the balance for those interviewees opposed by lawyers, nervously presenting their evidence in front of their abuser and/or being cross examined by the same.

Support for the contention that judicial assistance is insufficient to protect a vulnerable LIP from cross examination by their abuser is provided by the President of the Family Division and other members of the judiciary. A recent MOJ report, which involved interviews with family judges, has advocated the reintroduction of legal aid in order to provide legal representation for those accused of domestic violence.[93] This would enable the victim of domestic violence to be cross examined by a lawyer rather than their abuser. Whilst this would mirror the procedure in criminal cases, support for providing legal representation for all LIPs accused of abuse was not unanimous. Some judges recommended that public funding should be at their discretion depending on the seriousness of the case.[94] It is argued that taking such an approach should be treated with caution as it is questionable whether victims of domestic violence always reveal the full extent of their abuse either to themselves or others.[95] Public funding should be available without reference to judicial discretion to ensure adequate protection for all victims of domestic violence. Pressure for reform by the judiciary is mounting, as witnessed by the statement of Hayden J in *Re A (a minor) (fact*

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particularly appropriate for the judge or lay justices to conduct the questioning on behalf of the other party in these circumstances, in order to ensure both parties are able to give their best evidence'.

[92] Trinder et al (n. 1) 75.

[93] MOJ, *Alleged perpetrators of abuse as LIPs in private family law: The cross-examination of vulnerable and intimidated witnesses* (MOJ Analytical Series 2017) 3.

[94] ibid.

[95] Rights of Women (ROW), *Evidencing domestic violence nearly 3 years on* (December 2015) 6.

finding; unrepresented party.[96] Remarking that it was a 'stain on the reputation of our Family Justice system' that a judge cannot prevent a victim from being cross examined by their abuser, he declared that he was 'simply not prepared to hear a case in this way again'. It was both contrary to his judicial oath and his obligation to ensure fairness between the parties.[97]

The evidence outlined above demonstrates how the difficult nature of the fact finding hearing is such, that legal aid should be available for litigants to seek advice and assistance with the preparation of the necessary documentation. Further, the power imbalance when a LIP is being cross examined by a lawyer or their abuser is such that legal aid should be available for representation in court at this crucial hearing. The current requirement that appointment of an advocate is limited to matters involving 'grave and forensically challenging' issues[98] or 'complicated and complex' evidence[99] fails to acknowledge the inequality that occurs when LIPs are forced to attend this hearing without representation. Fact finding hearings often involve allegations of some form of criminal activity and so the outcome can have a profound effect on the future relationship between the parent and the child(ren) of the family. There can be fewer issues of greater importance than whether a child should be able to continue a relationship with one of its parents. As Sir James Munby has indicated, fairness to the child in the proceedings also requires fairness between those who are litigating.[100] Yet, the lack of legal aid for this hearing means that many LIPs struggle to adequately prepare and represent themselves. This has important implications not only for those wishing to defend the allegations made, but also for those wanting to protect their child by proving that safeguarding concerns exist. So far as the former are concerned, depriving a father accused of domestic violence access to legal advice poses a 'very real risk of the father's rights under Articles 6 and 8 being breached.[101] More perturbing, a lack of advice and representation for the fact finding hearing can result in a child having their relationship with a parent curtailed or, worse still, retaining a relationship with one that is physically, sexually or psychologically abusive.

[96] [2017] EWHC 1195 (Fam).
[97] ibid [60].
[98] *Q v Q* (n. 90) [76].
[99] *Re K and H* (n. 88) [62].
[100] *Q v Q* (n. 90) [22].
[101] ibid [85].

5. Domestic violence as a barrier to accessing justice

In the last section the inequality faced by vulnerable LIPs who have to appear before their abuser at a fact finding hearing without legal representation was discussed. In this section we consider this further by examining the reasons why victims of domestic violence fail to obtain public funding as legal aid is retained for these vulnerable LIPs.[102] Whilst it may have been expected that this exception to the withdrawal of public funding would provide protection for vulnerable LIPs, this has not been the reported consequence. Concerns have been raised that the eligibility criteria are too restrictive and thus lead to a denial of legal representation.[103] In particular, the requirement that the violence must have taken place within 24 months[104] and the limited nature of the evidence that can be submitted to support an application have been identified as reasons why LIPs are often refused public funding.[105]

As this is an issue that arises from the introduction of the LASPO reforms, previous reports on LIPs do not include qualitative data about this issue.[106] This section, therefore, seeks to contribute to the growing evidence regarding the difficulties encountered by LIPs when attempting to comply with the criteria for legal aid and the consequential impact of ineligibility. The examination of this issue is vital to any research underpinned by issues of effective access to justice and the barriers that may prevent this. LIPs who have been subjected to domestic violence have the additional inequality of having to represent themselves in front of their alleged abuser. The inability to attain public funding for legal representation, therefore, presents them with an additional obstacle to accessing justice.[107]

The discussion begins by examining why interviewees[108] subjected to domestic violence, failed to satisfy the eligibility criteria for legal aid and the impact this has on them when they

[102] LASPO 2012, sch 1 pt 1 para 12 states that civil legal aid is available where (a) there has been or is a risk of, domestic violence between the A and B and (b) A was, or is at risk of being, the victim of that domestic violence.
[103] Toynbee Hall, *Sleepless nights: Accessing justice without legal aid* (November 2015); Amnesty International, *Cuts that hurt: The impact of legal aid cuts in England on access to justice* (London 2016). ROW (n. 107).
[104] Civil Legal Aid (Procedure) Regulations 2012 (SI 2012/3098), Reg 33.
[105] Toynbee Hall (n. 103); Amnesty International (n. 103).
[106] Moorhead and Sefton (n. 1); Trinder et al (n. 1).
[107] Choudhury and Herring argue that the restrictions regarding eligibility for domestic violence cases are also a breach of Articles 3 and 6 of the ECHR. Shazia Choudhury and Jonathan Herring, 'A human right to legal aid? – The implications of changes to the legal aid scheme for victims of domestic abuse' (2017) 39 JSWFL 152.
[108] Although domestic violence is an issue that can affect both sexes, those interviewees that were subjected to abuse were all female.

appear in court with their abuser. The recent amendment to the rules governing legal aid entitlement, following a successful judicial review, are then discussed before highlighting the barriers that remain.

5.1. The 'timeliness' of abuse

One of the main reasons why interviewees, who identified domestic violence as a feature of their litigation, had been refused legal aid was the historic nature of the abuse, which had not taken place within the required 24 month period. Interviewee 11 explained that her ex-partner was a violent and intimidating man, but they had split up several years before the proceedings. However, his violent nature was still evident, due to the fact that he had recently beaten his own teenage son, from a previous relationship, and thrown him down a flight of stairs. The Interviewee would obviously not satisfy the criteria for civil legal aid as the violence towards her is not current, but her fear and distress at having to face her opponent in court was no less apparent. '*I was terrified. You would have thought that I had robbed a bank or something going in there and I had to have screens, because he just makes me feel horrible.'*

Interviewee 21 had a similar problem in respect of legal aid, as although the abuse towards her was historic, her ex-partner was obviously still a violent man due to the fact that he had beaten his current partner in front of one of the parties' daughters. Social services had informed the Interviewee that the violence had taken place and that they expected her to protect her daughter. However, such a telephone call would be insufficient to support an application for legal aid. The only relevant provision requires a letter from social services confirming that the applicant was assessed as being at risk of domestic violence.[109] Under the circumstances, the Interviewee was not entitled to legal aid, despite the fact that social services '*were concerned for when my middle daughter reaches teenage years that there may be a shift in the relationship, because there was with our eldest, she doesn't see him no more'.* This emphasises the shortcomings of having an arbitrary 24 month period in which the violence must have taken place. The respondent was still a violent man who the interviewee believed was a threat to both her and her daughter, but the recent violence had not been directed at them.

[109] ibid. See also *The Queen (On the application of ROW) v The Lord Chancellor and Secretary of State for Justice* [2015] EWHC 35 (Admin) [33] M. (h).

Even in situations where the violence had taken place against the victim within the last 24 months, interviewees were still left with the problem of evidencing this by producing the necessary supporting documentation. Interviewee 10 explained that there had been police call outs in respect of her ex-partner's behaviour when coming to collect the children. The last visit had led to '*another police call out, because he had come into the house and had robbed the key off the door'*. However, police call outs will not satisfy the requirements of Regulation 33.[110] For Interviewee 19 the psychological nature of the violence was such that she had no evidence whatsoever as she had never reported the abuse. Although emotional abuse is included in the definition of domestic violence in respect of the provision of civil legal aid,[111] the very nature of this type of abuse means that evidencing its incidence is likely to be a difficult requirement to satisfy.[112]

5.2. The consequences of being refused legal representation

For those LIPs who have been the subject of domestic violence the necessity to present their case in front of an abusive ex-partner can have a profound impact on their experience in court. Interviewee 16 explains how her ex-partner's shouting out in court resulted in the judge '*having to tell him to be quiet'* and how she thought:

> *He has asked for these contact dates, so easy life, agree to it, meet each other half way and hopefully we will be able to move on from it all and have a reasonable relationship. It was resolved, because I agreed to his terms and conditions.*

Although on the face of it the parties were in agreement, the Interviewee explains how those terms were far from equal:

> *I had agreed to too much contact. The children are entitled to time at home on holidays as well as time with dad. All these things were not made clear to me at that*

[110] *The Queen* (n. 109) M. (b).
[111] LASPO 2012, sch 1 pt 1 para 12(9) states that, "domestic violence" means any incident of threatening behaviour, violence or abuse (whether psychological, physical, sexual, financial or emotional) between individuals who are associated with each other.
[112] *The Queen* (n. 109) [43].

point. I just felt a bit intimidated to agree to the terms, because I didn't want to cause anyone else or myself and the kids any more distress.

This underpins the inequality that can arise, if one of the parties is abusive towards the other, even though on the face of it they appear equal because both are not entitled to legal aid for representation. The vulnerable position of the LIP, who has been subjected to domestic violence, necessitates the requirement of assistance in court.

For Interviewee 21 the prospect of having to attend a fact finding hearing and be cross examined by her ex-partner was too much to contemplate and led to her seeking to bring the proceedings to an end. This was despite the fact that social services had requested that she protect her daughter from the risk of domestic violence:

I am not even happy about the idea of going to trial, because again it is something that I haven't brought on. When he [judge] mentioned about a trial, getting cross examined made me wary. So I just thought I will look like I am being reasonable in applying for discontinuation.

Disconcertingly, this means that abused LIPs are expected to safeguard the children of the family without the assistance of legal representation against an abuser they are too scared to come face to face with in court. The removal of legal aid leaves not only the abused party unprotected, but also any children who are the subject of the proceedings. The anomaly is that should the fact finding hearing prove that there has been domestic violence that would lead to legal aid entitlement as the determination would be relevant documentary evidence.[113] The LIP would have legal representation from then on and for any other future proceedings, but when it is needed to help prove abuse it is unavailable.

It was not only in the courtroom that LIPs felt intimidated. Having no legal representation meant that they were often in a waiting room with their abuser sitting by them. Some interviewees asked for a separate room and were given it, but this took several attempts to organise and so was not available before all hearings. Interviewee 11's experience was typical:

[113] Civil Legal Aid (Procedure) Regulations 2012 (SI 2012/3098). Reg 33(2)(g).

I tried to ring Friday, I tried sending an email to try to get a witness room. I didn't get one, last time we didn't get one. That is a bit nerve wracking turning up and if he is there what am I meant to do if I have got to sit out there with him?

The inability to provide adequate witness protection rooms may be an indication of the sheer number of LIPs who have been subjected to abuse, but nonetheless are not entitled to legal aid. Having to sit in a waiting room opposite an abuser and then attend a court hearing without legal representation is a position that is untenable and contrary to the access to justice requirements of vulnerable LIPs. It is for this reason that some members of the judiciary have advocated for both separate waiting rooms and separate entrances for victims of domestic violence.[114]

5.3. Challenging the legal aid criteria

It is the experiences of domestically abused LIPs, such as the Interviewees discussed above, that led to the campaign group Rights of Women (ROW) mounting a legal challenge against the strict 24 month time limit within which violence must have occurred.[115] They argued that Regulation 33, which sets out the time limit for supporting documentation, frustrated one of the purposes of LASPO. Namely, that women who suffered from domestic violence should be eligible for legal aid provided they satisfied the relevant means and merits tests.[116]

Longmore LJ explained that 'drawing the threads together' the purpose of the statute was partly to save money by withdrawing legal aid from certain categories of case, but at the same time to make those services available to deserving categories, such as those subjected to domestic violence. Accordingly, the 24 month time frame did frustrate the purpose of LASPO,[117] rendering Regulation 33 invalid.[118] This is certainly a victory for the interests of LIPs who have been subjected to domestic violence. It has also led to the regulations governing the evidence requirements in support of an application for legal aid due to domestic violence to be reviewed.

[114] MOJ (n. 93) 25.
[115] *The Queen* (n. 109).
[116] ibid [30].
[117] ibid [47].
[118] ibid [51].

The evidence requirement is no longer restricted to violence within the last 24 months but has now been extended to a time frame of 60 months. However, this is still an arbitrary time limit, albeit a much longer one than before. Nevertheless, it is not difficult to envisage situations that would still fall outside the documentation requirements. One such example would be a LIP who had been subjected to serious violence six years ago, but is now faced with an application by her abuser for a child arrangements order. This would no doubt still be intimidating for the abused LIP, irrespective of the greater passage of time since the last violent episode. This is particularly true if the abuser had not been rehabilitated following any conviction.[119] A further problem is that the changes do not assist those who lack the verifying documentation required under Regulation 33, even though violence occurred within five years. In this respect the new evidence requirements would not alter the position of the interviewees in this study.

5.4. Adopting a more inclusive approach?

Following the decision in *The Queen (On the application of ROW) v The Lord Chancellor and Secretary of State for Justice* a further inequity has been corrected which provides additional protection for domestic violence victims. The definition of domestic violence for the purposes of qualifying for legal aid under Paragraph 12(9) of Part 1 of Schedule 1 of LASPO made no reference to the newly created offence of 'controlling or coercive behaviour in an intimate or family relationship'.[120] Although the definition for legal aid purposes included 'psychological abuse', coercive behaviour has a wider remit and includes 'humiliation and intimidation or other abuse that is used to harm, punish, or frighten their victim'.[121] This issue has now been clarified by the amendments to Practice Direction 12J which state that domestic violence 'includes any incident or pattern of incidents of controlling, coercive or threatening behaviour' and thus mirrors the definition introduced under the criminal offence. This is an important development, not only because it ensures consistency between criminal and civil law, but due to the lasting detrimental effect such

[119] Reg 33 of the Civil Legal Aid (Procedure) Regulations 2012 has been amended by the Civil Legal Aid (Procedure) (Amendment) Regulations 2016 (SI 2016/516) to include (ea) evidence that the abuser is on police bail and (eb) a relevant conviction for domestic violence in the sixty month period preceding the application for legal aid. Whilst this extends the relevant evidence that can be lodged in support beyond unspent convictions it would not include anyone who had a conviction beyond the sixty month period.
[120] Serious Crime Act 2015, s.76.
[121] ibid.

behaviour can have on the confidence of the abused party. This is highlighted by Interviewee 10's concerns when attending court for the first time: '*At the beginning I came in expecting to be told off, because he [Father] expects me to be told off and to say what a bad mother I am, but the court haven't done that'.*

Even though the definition of domestic violence now encompasses coercive or controlling behaviour there remains a further inconsistency between the evidence that is needed to support a criminal conviction and the necessary supporting documentation for legal aid applications. The former requires less stringent documentary evidence and yet it is being used to establish criminal liability, which can result in a maximum sentence of 12 months imprisonment on summary conviction or five years on indictment.[122] The statutory guidance produced in respect of this new offence lists a wide range of evidence that could be used to support a charge of domestic violence. Such documentation as copies of emails, phone records and text messages, as well as diary evidence collected by the victim and witness testimonies of family and friends are sufficient to aid a prosecution.[123]

There is no doubt that the inclusion of such a wide range of admissible evidence in support of a charge of controlling or coercive behaviour acknowledges the insidious nature of this type of abuse. However, this non-exhaustive list[124] is far wider than that permitted under Regulation 33. In the absence of police involvement or a protective injunction, the only evidence permitted is of referral to a domestic violence support organisation or medical records documenting the abuse.[125] It is argued that the evidence required for civil legal aid should mirror that required for criminal proceedings by allowing the same less formal requirements. This is a view that is, to some extent, supported by the Joint Committee on Human Rights, which has expressed concerns about the problems women may face in providing evidence for the purposes of civil legal aid when they have been subjected to coercive control.[126] The Committee, therefore, recommended that the Ministry of Justice review the domestic violence evidentiary requirements applied to determine legal aid

[122] Serious Crime Act 2015, s.76 (11).
[123] Home Office, *Controlling or Coercive Behaviour in an Intimate or Family Relationship: Statutory Guidance Framework* (December 2015) 12.
[124] ibid 13.
[125] Civil Legal Aid (Procedure) (Amendment) Regulations 2016 (SI 2016/516) Reg 33 (h), (j) and (k).
[126] House of Lords, House of Commons Joint Committee on Human Rights, *Violence against women and girls* (Sixth Report) (2014–15 HL Paper 106 HC 594).

eligibility.[127] However, as explained above, at present this has been limited to including those on police bail and those with unspent convictions within the 60 month time period. Those who have called out the police, even on several occasions (as was the situation with Interviewee 10) where no police caution has been given, will remain outside the eligibility criteria.

The arbitrary nature of the 60 month time-limit, coupled with the evidence provided by interviewees of the impact of abuse, indicates that decisions regarding eligibility should be decided according to the severity of the issue and its impact on the victim rather than when the violence occurred. It is only by addressing the problems associated with the eligibility criteria that vulnerable LIPs will be able to overcome a major barrier to achieving effective access to justice. To this effect the statement contained in the Queen's Speech on 21st June 2017 that the Government is to introduce legislation to protect the victims of domestic violence is a long-awaited development.[128]

6. Conclusion

Using a definition of access to justice that incorporates effective access to the courts, this chapter has assessed the main barriers that LIPs encounter when proceeding with a matter in the family and civil courts. This analysis has outlined how 'new uninformed' LIPs struggle with the preparation and presentation of cases in court at the initial stage of proceedings. However, those who are 'competent to instruct legal assistance' and are 'self-reliant' learn to adapt once they have attended a number of hearings or have been involved in the court process for a significant period of time. Thus, early advice is imperative to ensure access to justice in the initial stage of proceedings, so that the court has a thorough understanding of the contested issues between the parties.

The language used in court and in documentation causes inequality and must be made 'LIP friendly', so that LIPs can understand what is happening in court and ultimately comply with orders. This requires an approach to reform that welcomes the input of LIPs so that the language adopted reflects the requirements of ordinary members of society and not the interpretation by lawyers of what LIPs understand.

[127] ibid [150]. See also ROW (n. 95) 9.
[128] The Queen's Speech 2017 www.gov.uk/government/speeches/queens-speech-2017 accessed on 25.06.17.

One of the greatest challenges for LIPs, irrespective of how they are categorised, is preparing the documentation for the fact finding hearing and engaging in the examination and cross examination of evidence. LIPs often do not have any inclination about what this hearing will involve or how to prepare for a hearing that will be crucial to the overall outcome of their dispute. Whilst those who have been domestically abused can receive legal aid in order to fund representation at this hearing many struggle to receive this assistance due to the stringent nature of the application process. Although the judiciary assist by asking questions on behalf of the abused LIP and ensuring that questions from the abuser are directed to the judge this is not sufficient to redress the power imbalance that exists. This finding is unsurprising when it is remembered that those interviewees subjected to domestic violence were more likely to be 'new uninformed' LIPs.

Whilst changes to the evidence requirements for legal aid when domestic violence is alleged are to be welcomed, greater flexibility is needed with regard to supporting documentation. As the effects of domestic violence can extend beyond arbitrary limitation periods, such time specific requirements should be abolished to allow applications to be determined on a factual basis. In this manner, effective access to justice can become an achievable objective for vulnerable LIPs.

The emphasis of this chapter has been on how court procedures can hinder access to justice. The next chapter continues with the theme of barriers to access to justice. However, the focus changes to investigating how legal actors such as lawyers, judges and magistrates can obstruct effective access. This includes an examination of the measures that can be taken to eliminate such obstacles as identified by the interviewees for this project.

Chapter six

Barriers to accessing justice: The role of lawyers, the judiciary, and magistrates

1. Introduction

Having considered the barriers to accessing justice that exist due to the nature of court proceedings, the focus now shifts to examine how legal actors can hinder a LIP's ability to achieve a fair process. The discussion focuses on the lawyers representing the other parties as well as the judiciary. Starting with lawyers, the rules on compliance are examined as there has been a renewed focus on issues of proportionality and delay within the court system. The manner in which lawyers and LIPs comply with orders and directions of the court are then discussed, as well as the nature of the relationship between lawyers and LIPs. In particular, the manner in which lawyers negotiate with LIPs and their professionalism when dealing with LIPs is explored. The responsibilities of the lawyer towards LIPs, as part of their duty to the court, are also examined in an attempt to assess how lawyers can assist LIPs to access justice.

Next, the role of the judiciary in facilitating justice for the LIP is investigated. This involves an examination of how the judiciary's role has changed from neutral arbiter to facilitator of justice and the changing nature of proceedings to a more inquisitorial process when LIPs are involved. Having regard to these issues, the manner in which the procedure within the courtroom can create barriers for LIPs is then discussed. Using the statements of interviewees a greater insight is provided into how the family and civil justice system can adapt to accommodate the needs of LIPs.

Finally, the obstacles that magistrates can create for LIPs are addressed. It is the 'lay dynamic' of both the adjudicator and the litigant that has the potential to create additional barriers for LIPs.

2. The role of the lawyer in ensuring that LIPs have access to justice

This section is concerned with the relationship between LIPs and the lawyer representing the other side and how this can affect the LIP's ability to access justice. It begins by outlining the changes to the CPR as a means of promoting proportionality and a culture of rule compliance. In particular, emphasis is placed on how these reforms affect LIPs who are not conversant with the rules of procedure and the courts' willingness to extend proportionality to family proceedings which will further impact on LIPs.

Having examined the legal basis for a stricter approach to rule compliance the focus turns towards the evidence supplied by the interviewees for this study. Particular emphasis is placed on investigating whether lawyers, as 'repeat players' comply with orders in a manner that is unattainable by the 'one shotter' LIPs and thereby gain a tactical advantage over the inexperienced opponent.[1] Lastly, the statements of interviewees are analysed to gain an insight into how lawyers and LIPs engage with each other both inside and outside the courtroom.

2.1. Proportionality and rule compliance

In 2009 Lord Justice Jackson published the final report of his *Review of Civil Litigation Costs* in which he admonished the legal profession for causing delay and excessive costs in the civil court system.[2] In response, a 'cost-benefit analysis' of litigation[3] was advocated which placed proportionality at the heart of the litigation reform agenda. To achieve this goal significant amendments were made to the 'overriding objective' contained in CPR 1.1 and to CPR 3.9, which deals with the rules on relief from sanctions. The overriding objective now makes specific reference to proportionality as well as justice, so that CPR 1.1(1) states that the court is to deal with cases 'justly and at proportionate cost'. The explicit requirement to consider proportionality is further emphasised by CPR 1.1 (2) which confirms that dealing with a case justly and at proportionate cost includes, so far as is practicable: (e) allotting to it an appropriate share of the court's resources, while taking into account the need to allot resources to other cases; and (f) enforcing compliance with rules, practice directions and orders. The amendment emphasises not only the importance of dealing with cases at

[1] Marc Galanter, 'Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change' (1974) 9 *Law and Society Review* 95.
[2] Lord Justice Jackson, *Review of Civil Litigation Costs: Final Report* (The Stationery Office 2009) 397.
[3] ibid 38 [5.17].

proportionate cost, but also places greater weight on proportionality considerations when enforcing orders. This is intended to counter the previous lax enforcement of breaches.[4]

By referring to the enforcement of compliance with rules, practice directions and orders, a clear link is being made between the overriding objective and CPR 3.9. This means that there is a possibility that justice on the merits of the case will no longer be the 'dominant factor' when deciding if relief from sanctions should be granted.[5] This is because the previous CPR 1.1 only referred to dealing with cases 'justly'. The requirement in *B v B*[6] that relief from sanctions requires reference to the overriding objective ensured that being able to decide the case on the merits would usually determine the matter. Now that the overriding objective refers to dealing with cases justly and proportionately, decisions about whether to grant relief from sanctions will require a greater emphasis on considerations beyond justice between the parties. Consequently, there is the real possibility that proportionality may become equally, or indeed, more important than providing justice in an individual case before the court. It is an argument that has been acknowledged by Lord Dyson who, when speaking extra-judicially, emphasised that the revisions to the overriding objective and CPR 3.9 meant that justice had changed:

> Because doing justice is not something distinct from, and superior to, the overriding objective. Doing justice in each set of proceedings is to ensure that proceedings are dealt with justly and at proportionate cost. Justice in the individual case is now only achievable through the proper application of the CPR consistently with the overriding objective.[7]

Further emphasis on proportionality is provided by the amendment to CPR 3.9. The list of nine factors for the judges to consider when granting relief, have been removed.[8] Instead, the

[4] Lord Dyson MR, 'The application of the amendments to the CPR' (18th Lecture in the implementation programme, 22 March 2013).
[5] *B v B* [2005] All ER (D) 189 [19].
[6] ibid.
[7] Lord Dyson (n. 4).
[8] CPR 3.9 (1) originally provided that: 'On an application for relief from any sanction imposed for failure to comply with any rule, practice direction or court order the court will consider all the circumstances including - (a) the interests of the administration of justice; (b) whether the application for relief has been made promptly; (c) whether the failure to comply was intentional; (d) whether there is a good explanation for the failure; (e) the extent to which the party in default has complied with other rules, practice directions, court orders and any relevant pre-action protocol; (f) whether the failure to comply was caused by the party or his legal

courts, when dealing with a case justly under CPR 3.9 (1) are to refer to the need (a) for litigation to be conducted efficiently and at proportionate cost; and (b) to enforce compliance with rules, practice directions and orders. The reiteration of the need to enforce compliance with rules, practice directions and orders means that there can now be no doubt that there is an express link between the overriding objective and the enforcement of sanctions.[9] This generated uncertainty as to whether courts would take a stricter approach to rule compliance now that proportionality and justice underpin rule compliance.[10]

2.2. Mitchell: A new robust approach to rule compliance

Any doubts about whether the amendments to the CPR would herald a new culture of compliance were dispelled in *Andrew Mitchell MP v News Group Newspapers Limited.*[11] The case involved defamation proceedings, during which the claimant's solicitors had failed to file their costs budget within the required seven days of the case management and costs budget hearing.[12] Accordingly, the Master, taking into account the new strict approach to rule compliance under CPR 3.9, imposed the mandatory sanction of limiting the claimant's costs budget to the court fees.[13] The question for the CA was whether the Master had responded proportionately, or whether the approach taken was too punitive even for the new regime, especially as the costs budget had been in the sum of £506,425.[14]

Mitchell provided the CA with the opportunity to not only clarify how robust the new regime was likely to be, but also to specify how the overriding objective and CPR 3.9 were to be interpreted. Only breaches that could be described as 'trivial'[15] would be entitled to relief. Otherwise it would be for the defaulting party to provide evidence that there was a 'good reason' for the non-compliance.[16] There is no doubt that only allowing trivial breaches was a robust interpretation, a point acknowledged by the CA.[17] However, it was an approach

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representatives; (g) whether the trial date or the likely trial date can still be met if relief is granted; (h) the effect which the failure to comply had on each party; and (i) the effect which the granting of relief would have on each party.'

[9] Lord Dyson (n. 4).

[10] For a comprehensive analysis of the courts approach to rule compliance see John Sorabji, *English Civil Justice after the Woolf and Jackson Reforms: A Critical analysis* (Cambridge University Press 2014).

[11] [2014] 2 All ER 430.

[12] Pursuant to CPR 51D PD.

[13] Pursuant to CPR 3.14.

[14] *Mitchell* (n. 11) [1].

[15] ibid [40].

[16] ibid [41].

[17] ibid [59].

predicted by Zuckerman. When commenting on the amendments to CPR 3.9 before the decision in *Mitchell*, he advocated a test that imposed sanctions on breaches that were 'more than negligible'.[18]

The stringency of this test is not only evident from the use of the word 'trivial' to describe breaches that will result in relief, but also the CA's explanation as to what would not be regarded as a good reason. Whilst narrowly missing a deadline imposed by an order, but otherwise complying with its terms would be regarded as trivial, the Court sent out a clear message to solicitors that overlooking a deadline would not be a good reason. Solicitors from now on would have to ensure that they either delegated work to others in their firm or refused to take the work at all if they were under pressure and likely to overlook deadlines.[19]

Any suggestion that the CA would allow a return of the pre-Jackson lax approach to relief was further laid to rest by the Court's interpretation of the new CPR 3.9 and its connection to the overriding objective. Whilst both the overriding objective and CPR 3.9 refer to dealing with cases justly, the fact that CPR 3.9 (1) now specifically referred to the need to (a) ensure litigation was conducted efficiently and at proportionate cost and to (b) enforce rules, practice directions and court orders, meant that these considerations should now be of 'paramount importance'.[20] Hence, the further reference in CPR 3.9 to consider 'all of the circumstances of the case' meant that, contrary to any suggestion that this may enable a broad approach to be taken, these other circumstances should be given 'less weight' than those specifically mentioned in CPR 3.9 (1) (a) and (b).[21]

The importance of *Mitchell* lies not only with its tough stance on compliance, but also in the assertion that justice, as Lord Dyson had warned, had entered a new phase underpinned by proportionality.[22] The prominence of proportionality is evidenced by the CA's endorsement of the Master's focus on the effect of the breach in *Mitchell* on other court users. In order to deal with the application for relief within a reasonable time frame the Master had been required to vacate a half day appointment which had been allocated to deal with an asbestos

[18] Adrian Zuckerman, 'The revised CPR 3.9: a coded message demanding articulation' (2013) 32 CJQ 123.
[19] *Mitchell* (n. 11) [41].
[20] ibid [36].
[21] ibid [37].
[22] ibid [38].

related disease claim.[23] Not only is collective proportionality,[24] which requires reference to other court users, a necessity of justice, but *Mitchell* highlights that justice in the individual case will no longer be the dominant factor. This point was acknowledged by the CA when stating that, 'although it seems harsh in the individual case of Mr Mitchell's claim, if we were to overturn the decision to refuse relief it is inevitable that the attempt to achieve a change in culture would receive a major setback'.[25] It is clear that the CA envisaged that *Mitchell* should mark the beginning of a new approach to achieving justice which, if necessary, would involve sacrificing individual justice for the collective good. As a result, it appears to be no exaggeration to define *Mitchell* as a watershed in civil justice[26] or a 'game changer'.[27]

2.3. Denton: Correcting 'misunderstandings and misapplications'

Despite the stringent approach to rule compliance in *Mitchell* and the renewed commitment to proportionality the judgment did not result in solicitors ensuring timetables were adhered to. Rather, it encouraged non-co-operation. If default by the other party could lead to sanctions then *Mitchell* gave lawyers an incentive to either refuse to agree such an extension or oppose relief from sanctions. There was a significant benefit to be gained by lawyers if they did obstruct requests for extensions, as in *Utilise*[28] a 45 minute delay in filing a costs budget led to costs being limited to court fees alone.

Denton[29], therefore, gave the CA an opportunity to reconsider the approach taken in *Mitchell*, which had led to the guidance contained therein being subsequently 'misunderstood and misapplied'[30] For Lord Dyson and Vos LJ the correct approach to relief from sanctions was to apply a three stage test.[31] Stage one involved determining not whether the breach was trivial, but rather whether it was 'serious or significant'.[32]

[23] ibid [39].
[24] Sorabji (n. 10) 167.
[25] *Mitchell* (n. 11) [59].
[26] Stuart Sime, 'Sanctions after *Mitchell*' (2004) 33 (2) CJQ 133.
[27] *Michael Wilson & Partners Ltd v Sinclair & Others* [2013] EWCA Civ 1732 [5] (Richards LJ).
[28] *Utilise Tds Ltd v Davies & Ors* [2014] EWHC 834 (Ch).
[29] *Denton and others v TH White Ltd and another; Decadent Vapours Ltd v Bevan and others; Utilise TDS Ltd v Davies and others* [2014] EWCA Civ 906.
[30] ibid [3].
[31] ibid [24].
[32] ibid [26].

Should the breach be 'serious or significant' then the second stage requires an investigation into why the default was made. However, the proposition that when a breach is 'serious or significant' and there is no good reason for it, then there must automatically be no relief from sanctions was dismissed by the Court.[33] When this occurs, stage three involves the court considering "all the circumstances of the case, so as to enable it to deal justly with the application", as stated in CPR 3.9 (1).[34]

It is at stage three that further ground towards a pre-Jackson approach was conceded. The factors referred to in CPR 3.9 (1) (a) and (b) where no longer to be of 'paramount importance'. Instead they were to be regarded as of 'particular importance' and to be given only this amount of significance when considering the circumstances of the case. Hence, although *Mitchell* had referred to the other circumstances being of 'less weight', they still had a role to play, so that when considering the circumstances at the third stage particular weight was to be given to (a) efficiency and proportionality and (b) the need for rule compliance, but other circumstances would also be relevant.

The effect of *Denton* appeared to be that the zero tolerance[35] approach, introduced following the *Mitchell* guidance was curtailed, however the strictness with which the court will deal with rule compliance remains uncertain. What is perhaps more certain is that the pre-Jackson lax approach was a phenomenon of the past. Jackson LJ reiterated that the mischief to be addressed was the way in which courts at all levels had become too tolerant of delays and non-compliance with orders.[36] Accordingly, the future involved a culture of compliance.[37]

2.4. The courts' approach to rule compliance and LIPs

Penalising lawyers who fail to comply with court orders and directions is justifiable as they are well versed in the procedural rules that underpin the family and civil courts. They should also be willing to co-operate with the other side in order to promote the efficient and proportionate running of the justice system. In this respect they have a duty under CPR 1.3 'to help the court to further the overriding objective'. However, the rulings in *Mitchell* and

[33] *Denton* (n. 29) [31].
[34] ibid [31].
[35] *Denton* (n. 29) [96] (Jackson LJ).
[36] ibid [88].
[37] ibid [96].

Denton have the ability to hold LIPs to the same stringent rule compliance requirements despite their lack of knowledge and skill. Yet when Lord Justice Jackson advocated a stricter approach to rule compliance LIPs were not included in the discussion. This was due to his final report recommending there be no change to the eligibility criteria for civil legal aid.[38] Thus a growth in LIPs was unpredicted at that time.

Further, the decisions in *Mitchell* and *Denton* do not address directly whether the same robust approach will be applied to LIPs. The only reference to LIPs and the criteria to be applied is the statement in *Denton* that:

> Litigation cannot be conducted efficiently and at proportionate cost without (a) fostering a culture of compliance with rules, practice directions and court orders, and (b) cooperation between the parties and their lawyers. This applies as much to litigation undertaken by LIPs as it does to others.[39]

This implies that the application of the *Denton* criteria will have serious implications for those bringing civil proceedings without representation. How much indulgence will judges allow LIPs, bearing in mind that their duty under the overriding objective is not only to ensure that litigants are on an equal footing,[40] but also to allot to it an appropriate share of the courts' resources?[41] This focus on proportionality will require judges to also have in mind the needs of other cases,[42] as well as enforcing compliance with rules, practice directions and orders.[43]

It would seem then, that the judiciary are faced with two competing duties when presiding over LIPs. They are required to deal with cases justly whilst also ensuring that efficiency and proportionality remain key concerns. Consequently, whether LIPs can truly achieve access to justice depends on the courts' approach to dealing with cases justly and proportionately according to the overriding objective and the stringency with which they interpret the *Denton* guidelines on rule compliance.

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[38] Lord Justice Jackson (n. 2) 68.
[39] *Denton* (n. 29) [40] (Lord Dyson MR and Vos LJ).
[40] CPR 1.1 (2) (a).
[41] CPR 1.1 (2) (e).
[42] ibid.
[43] CPR 1.1 (2) (f).

2.4.1. Proportionality and LIPs: Discretion at the margins

It may have been thought that the courts would be more flexible when dealing with LIPs, especially when deciding the issue of relief from sanctions for non-compliance, as the consequences of an unsuccessful application can be severely detrimental to their claim. This, however, has not been the approach taken by the courts. In *Mensah (t/a 37 Days 3 Hours 9 Minutes Creative) v Darroch & Ors*, Tugendhat J was clear that the CPR would also be applied robustly in respect of LIPs when stating that 'LIPs are at a great disadvantage, but the CPR must apply to them nevertheless'.[44]

Support for this approach can be found in the first instance decision in *Mitchell*. The District Judge acknowledged that a consequence of her ruling could be that Mr Mitchell would have to represent himself, depending on the financial implications of the decision in respect of the conditional fee agreement he had with his solicitors. Nonetheless, even if this was a consequence, it was indicated that he would have to manage like many other claimants who do not have lawyers. As a result, 'it could not be said that he would be denied access to a court any more than is the case for others if they had to represent themselves. Whilst Article 6 rights would be engaged, a proportionate sanction would be a legitimate interference with such rights as Mr Mitchell is not driven from the court'.[45]

There can be no denying that this is a harsh attitude towards the problems faced by LIPs, and fails to recognise the difficulties encountered by those who have to understand the complexities of the CPR. However, it is an approach underpinned by the decision in *Mitchell* as the claimant was only given four days (of which two were during the weekend) to prepare his cost budget. Despite this fact, it was decided by the Master that the time was not too short as the defendants had managed to comply within the allotted timeframe.[46] However, the defendants were the publishers of a national newspaper and so could afford to delegate the work to outside costs lawyers. This was not a luxury available to the claimant. The court appears to have assumed that the parties were on an equal footing rather than ensuring that they in fact were, as part of its overriding objective under CPR 1.1(2)(a).[47] This is a very important distinction, as although proportionality and rule compliance form part of the

[44] [2014] EWHC 692 (QB) [23].
[45] *Mitchell* (n. 11) [16].
[46] ibid [17].
[47] Sime (n. 26).

overriding objective and CPR 3.9, so does the requirement to ensure that parties are on an equal footing. In fact, proportionality also includes taking into account the financial position of each party.[48]

Despite the requirement to ensure that the parties are on an equal footing, there is a limit to the leniency that the courts are willing to afford to LIPs. In *Tinkler and Another v Elliot*, Sharp J set aside judgment against Mr Elliot due to his significant disadvantage. He not only had mental health issues, but his status as a LIP[49] meant that he was ignorant about his entitlement to make such an application. This had been made in his absence due to his inability to attend the hearing through ill health.

However, on appeal, Kay LJ was not prepared to grant Mr Elliot such tolerance. Although the facts and circumstances of being a LIP may be relevant they would only operate 'close to the margins'.[50] Being active in the litigation for some three months meant that the actuality that, if properly advised, he may have made a different application would be of no consequence now. 'The fact that a LIP "did not really understand" or "did not appreciate" the procedural courses open to him for months would not entitle him to extra indulgence'.[51] Sharp J was too lenient when considering the case as special on its facts, as 'that would be to take sensitivity to the difficulties faced by LIPs too far'.[52] This seems particularly unforgiving, as Mr Elliot had no idea that he could apply to set aside the judgment, as he had not received the judge's note of the hearing.[53] It was some 19 months after the judgment that he realised this entitlement.[54]

Any optimism that LIPs would be afforded special status was removed by the CA in the conjoined appeals of *Dinjan Hysaj v Secretary of State for the Home Department, Reza Fathollahipour v Bahram Aliabadibenisi and May v Robinson*.[55] Moore-Bick LJ came to the conclusion that being a LIP would be irrelevant to the first stage of deciding if a breach was 'serious and significant' as well as the second stage of considering whether there was a 'good

[48] CPR 1.1 (2) (C) (iv).
[49] [2012] EWHC 600 (QB) [107].
[50] [2012] EWCA Civ 1289 [32].
[51] ibid.
[52] ibid.
[53] ibid [47].
[54] ibid [108].
[55] [2014] EWCA Civ 1633.

reason' for the breach. This involved a strict interpretation of Lord Dyson and Vos LJ's statement in *Denton* that proportionality required compliance and co-operation by *all* litigants including those who appear in person.[56] Although the third stage of the *Denton* test was not addressed, any suggestion that 'all of the circumstances' may include the status of being a LIP appears to have been rejected by Moore-Bick LJ's statement that:

> The problems facing ordinary litigants are substantial and have been exacerbated by reductions in legal aid. Nonetheless, if proceedings are not to become a free-for-all, the court must insist on litigants of all kinds following the rules[57]

It is submitted that, following the decision in *Denton,* a LIP's inability to adequately understand the CPR should be taken into account at the third stage of the enquiry under CPR 3.9 when looking at 'all of the circumstances'. A failure to do this could lead to the situation whereby 'human error' results in a LIP being debarred from pursuing or defending their claim.[58] This would no doubt lead to what Walker J described as, a 'travesty of justice'[59] for those uneducated in the complexities of civil procedure.

2.4.2. The harsh effects of proportionality on LIPs

A disconcerting feature of the robust approach being taken by the courts is the link that is made between LIPs being able to take an active part in litigation with their ability to adequately respect the requirements of the CPR. Not only was this a feature in *Tinkler*,[60] but in *Hobson v West London Law Solicitors*, Collender J stated that in light of the LIP's history of involvement with the litigation he could not be described as 'litigation naïve'.[61] Having referred to the statements in *Fred Perry*[62] and Lord Dyson's Implementation Lecture, he then outlined the subsequent case law on the new approach to rule compliance. As a result, he concluded that Mr Hobson could not 'legitimately claim ignorance of the law's concern that

[56] ibid [44] (emphasis added).
[57] ibid.
[58] *Ian Wyche v Careforce Group plc* [2013] EWHC 3282 (Comm) [16].
[59] ibid [16].
[60] *Tinkler* (n. 50).
[61] [2013] EWHC 4425 (QB) [26].
[62] [2012] EWCA Civ 224 [41].

litigation be brought in time and prosecuted with due and proper diligence with proper observation of timetables set by rules and orders.'[63]

With the greatest respect, even if the LIP is aware of the new robust approach, which is itself doubtful bearing in mind that the statements were made in cases and publications aimed at legally qualified personnel, knowing of the robust approach is hardly the same as understanding what the CPR necessitate nor, indeed, how to go about fulfilling those requirements. Support for this argument is provided by the remarks made by Holman J in *Tufail v Riaz.*[64] This case involved divorce proceedings and, although the parties were now LIPs, they had received legal advice and assistance at earlier stages in the process. Nevertheless, Holman J expressed his dismay at the task that lay before him in reaching a decision in the case:

> I have no legal representation and no expert evidence of any kind. I do not even have such basic materials as an orderly bundle of the relevant documents; a chronology; case summaries, and still less, any kind of skeleton argument … I shall do my best to reach a fair and just outcome, but I am the first to acknowledge that I am doing little more than "rough justice".[65]

This outlines the difficulties that LIPs face when trying to comply with the CPR and the FPR in order to pursue a case through the courts, and the extent of the assistance that the unrepresented require. There may be a necessity to adopt a robust approach to rule compliance in the name of efficiency and economy. However, it should be remembered that Lord Dyson advocated this so that justice can be 'done in the majority of cases' under a system that 'must be managed for the needs of *all* litigants',[66] and not only for those who are conversant in the rules of the court. The dispensation of 'rough justice' is not, and never should be, the function of the civil courts.

[63] ibid.
[64] [2013] EWHC 1829 (Fam).
[65] ibid [8] and [9].
[66] Lord Dyson (n. 4) (emphasis added).

2.4.3. Extending proportionality and stringent rule compliance to family cases

The fact that LIPs are required to abide by the same strict approach to rule compliance as lawyers in civil cases is a worrying development. However, what is more perturbing is the willingness of the judiciary to advocate this approach in family matters.

Applications for relief from sanctions in family proceedings are dealt with under FPR 4.6. This mirrors the wording of the old CPR 3.9, before the Jackson Reforms, and thus retains the nine factors that courts are to take into account on an application for relief from sanctions. There is, however, an additional reference to the effect the granting of relief would have on the interests of any child affected by the proceedings.[67] The overriding objective is also unchanged, and so there is no specific reference to dealing with cases proportionally. Rather the overriding objective is to deal with cases justly and although this includes 'allotting to it an appropriate share of the court's resources, while taking into account the need to allot resources to other cases',[68] there is no reference to 'enforcing compliance with rules, practice directions and orders'.[69] The stringent approach in the civil courts to rule compliance appears to be inapplicable in family matters.

Notwithstanding this, McFarlane LJ's judgment in *Re H (children) (appeal out of time: merits of appeal)*[70] may undermine this assumption. The case involved an application to extend time to appeal against the decision to place the appellant's child for adoption. The notice to appeal had been filed eight months late and so was well outside the 21 day period allowed.[71] This was treated as an extension of time and thus the rules on relief from sanctions under FPR 4.6 were applicable.[72] For the first time since the civil procedure reforms, the CA had to determine what emphasis should be placed on the merits of a case when considering all of the nine factors to be taken into account on an application for relief from sanctions.[73]

[67] FPR 4.6 (1) (i).
[68] FPR 1.1 (e).
[69] CPR 1.1 (f).
[70] [2015] EWCA Civ 583.
[71] ibid [14]; FPR 30.4(2) (b).
[72] ibid [13].
[73] ibid [1].

McFarlane LJ endorsed the statement of Moore-Bick LJ in *Dinjan Hysaj* that when considering 'all the circumstances of the case' it should be remembered that:

> In most cases the court should decline to embark on an investigation of the merits and firmly discourage argument directed to them. Here too a robust exercise of the jurisdiction in relation to costs is appropriate in order to discourage those who would otherwise seek to impress the court with the strength of their cases.[74]

Thus on the facts of this case, where the father had a 'very strong' case, supported by the local authority, the merits had 'a significant part to play' when 'balancing the various factors that have to be considered'.[75] Whilst the appellant was successful in this case, endorsing the approach taken in *Dinjan Hysaj* to family proceedings is somewhat disconcerting. *Dinjan Hysaj* approves the stringent approach taken following *Mitchell and Denton* and its application in a family case suggests that future family cases involving relief from sanctions may be dealt with in a stricter fashion. McFarlane LJ made it clear that he was not suggesting that a different approach should be taken in family matters to those in the ordinary civil jurisdiction. Rather that was a question for another day when the merits in favour of the granting of relief were less clear.[76] However, he was prepared to state for the record that he was currently 'unpersuaded that there is any ground for distinguishing family law, in this respect, from the ordinary run of cases'.[77] Further the success of the appeal was due to the 'exceptional' nature of the facts of the case.[78] In future then, in line with *Dinjan Hysaj*, it is questionable whether the strength of the merits of the appellant's case is likely to be sufficient to tilt the balance in favour of an extension of time.

Worryingly, it may be that matters of proportionality, such as having regard to other court users may become more prominent in family matters, as they have done in civil cases, so that issues of justice between the parties no longer rule the day. This is highlighted by the fact that McFarlane LJ refers to the tendency for LIPs in public law family cases to appeal against

[74] *Dinjan* (n. 55) [46].
[75] *Re H* (n. 70).
[76] ibid [41].
[77] ibid [2].
[78] ibid [35].

adoption orders as a matter of course and often outside the time limit permitted, as they are likely to be unaware of the 21 day period allowed for the notice to appeal.[79]

Due to the likelihood that the increase in the number of LIPs will lead to more applications to appeal out of time, McFarlane LJ suggests that judges should, in every case, spell out to the LIP that they must appeal within 21 days and record the conveying of this information.[80] This is exactly the type of assistance that the judiciary should provide and, as will be outlined further in this chapter, that LIPs want. However, it is submitted that merely telling litigants that they can appeal is not sufficient information in order to justify taking a robust approach with those who fail to appeal in time. After all, this information alone fails to address questions as to how to actually appeal. If LIPs are armed with this information then there is no reason why they should not have to comply with rules and directions in the same manner as members of the legal profession. If they are not, then merely telling them that they can appeal within 21 days may not be sufficient to enable them to comply, which could result in them being unsuccessful in their application for an extension of time. They will need a 'very strong' case in support of dismissing the adoption order, as otherwise the merits of the case will be insufficient to outweigh the lateness of the application.

The concern that arises from this case is that it may signal a change in attitude in the family courts, so that the issue of proportionality may become more prominent in private family matters where the stakes are not as high as in adoption cases. In the more inquisitorial system of the family courts it may be thought that the judiciary will identify time limits and next steps in proceedings to LIPs. Yet, this may not necessarily be the approach adopted by all members of the judiciary, especially as McFarlane LJ felt the need to spell out the requirement to do this. In those circumstances, it is alarming that LIPs in family cases may be subject to the same strict approach to rule compliance as those who appear before the civil courts when the point at issue may not be financial, but the more significant issue of child arrangements.

Further evidence that the courts are now willing to take a more robust approach to rule compliance is provided by Sir James Munby P's comments in *Re W (a child) (adoption*

[79] ibid [31].
[80] ibid [34].

order: leave to oppose).[81] Referring to the local authority's failure to file a draft position statement he condemned the 'slapdash, lackadaisical and on occasions almost contumelious attitude which still far too frequently characterises the response to orders made by family courts'.[82] From now on family courts would no longer tolerate such behaviour[83] and would accordingly demand strict compliance with rules if consequences were to be avoided.[84] Echoing the sentiments stated in *Mitchell*,[85] Sir James Munby P declared that any application for an extension should be made before the time for compliance expired or the task should be delegated to someone else who is able to deal with it. Arguments that the burden of work prevented timely compliance would no longer be tolerated.[86] As the President states:

> Let me spell it out. An order that something is to be done by 4pm on Friday, is an order to do that thing by 4pm on Friday, not by 4.21pm on Friday let alone by 3.01pm the following Monday or sometime later the following week.[87]

This is an unequivocal endorsement of the approach adopted post Jackson and being espoused by the President of the Family Division is undoubtedly likely to have an impact on rule compliance in family matters.[88] In fact, implying that being a mere 21 minutes late would be a breach seems to misapply the 'trivial' test in *Mitchell* as it will be recalled that *Denton* requires infringements to be 'serious and significant'. Although *Re W* concerned the non-compliance by legal representatives on behalf of a local authority there is no indication that the same stringency will not be applied to LIPs. In fact, the affirmation of the *Mitchell/Denton* approach in respect of family cases makes this more than a likely eventuality.

[81] [2013] EWCA Civ 1177.
[82] ibid [51].
[83] ibid [50].
[84] ibid [52].
[85] *Mitchell* (n. 11) [41].
[86] *Re W* (n. 81) [53].
[87] ibid.
[88] See also *Re W (Children)* [2014] EWFC 22 [19] where Sir James Munby P reiterates his view in *Re W (a child)* (n.81).

2.5. Non-compliance as a barrier to LIPs accessing justice

Having analysed the law regarding proportionality and rule compliance, this section engages with the data generated from the interviewees for this study to consider the extent to which both the LIP and lawyers for the opposing party adhere to the directions of the court. As lawyers are aware of the strict approach taken in *Mitchell,* the reinforcement of proportionate justice in *Denton* and the requirements of the CPR and FPR, the expectation of the researcher was that they would readily comply with orders. Contrastingly, LIPs were expected to breach the rules due to their ignorance of the procedures involved. However, this is not reflected in the evidence provided by interviewees. Contrary to what was expected, it was often lawyers who failed to comply, rather than the LIP on the other side. This was evident when there was a time limit for statements or bundles of documents to be served. Several of the LIPs reported that the solicitors had only served them with statements on the day of the hearing or a short time before. Interviewees 4 and 6 received statements that should have been filed at least a week before the hearing on the day they were in court and Interviewee 3 received hers the night before a fact finding hearing.

Furthermore, Interviewee 27 received the court bundle from the other side on the actual day of the hearing. This placed these LIPs at a significant disadvantage, as it gave them a short amount of time to consider vital evidence before attending the hearing. Interviewee 27 remarked that, *I didn't have my bundles. There was paperwork missing. The judge only gave me 15 minutes or half an hour to go and look at them'.* Interviewee 8 also had to consider the evidence provided in a short time frame:

> *They [Magistrates] said to me you've got 10 minutes to read that statement and then come back into court. I only got half way through the statement and then they called me back in. I said, 'I am not even halfway through this', so they said you can have another quarter of an hour then.*

What is surprising about these testimonies is that both of these LIPs were given a mere 25 to 30 minutes to read the other side's evidence for what were the final hearings in their cases. In fact, Interviewee 27 was about to attend a three day hearing against an experienced advocate in order to determine whether or not his child would remain living at his home. Certainly, half an hour is an inappropriate amount of time to read through a previously

unseen bundle of documents and consider any relevant points that one wishes to raise when examining the evidence in court. Not only does this fail to accord with the culture of compliance that is being promoted by the judiciary, but it means that solicitors gain a further tactical advantage. LIPs often do not have the requisite skills to quickly read through a statement or bundle of documents in order to ascertain the salient issues and then consider how they are going to respond to the allegations made in an appropriate manner. It also removes any opportunity to seek advice or an explanation of the documents they have been served with before they attend the hearing. This was the situation in respect of these interviewees. Nevertheless, the non-compliance by solicitors in family matters does not appear to be 'an unusual occurrence',[89] as demonstrated by cases such as *Re B* where a non-English speaking LIP was given counsel's position statement of fourteen pages and four law reports of 100 pages at the door of the court.[90]

It is imperative that solicitors comply with orders in order to avoid placing LIPs at a severe disadvantage. One might question whether the lax attitude of some solicitors is a product of LIPs not questioning their lack of compliance in the court hearing and, so there is no threat of a sanction. None of the interviewees who had received late submission of documentation raised the issue of why the solicitor had not complied with the judge when they, as lay people, had been able to. This is a problem identified by Jackson J in *Re B* when he remarked that 'court hearings are already difficult for LIPs, but many, being inexperienced, are hesitant to complain about matters such as late service'.[91] In this respect, Interviewee 23 explains that she only received her ex-partner's statement from his solicitor two days before the court hearing. When this was brought to the court's attention the solicitor explained that this was because he had '*been on annual leave and stuff*'. This is testament to the lack of concern shown by some solicitors for the need to comply with court directions. Such an explanation is very unlikely to be put forward in any other civil case, as it was specifically stated in *Mitchell* that this would fail to be a 'good reason' for non-compliance[92] and would likely result in sanctions.[93]

[89] *Re B (Litigants in Person: Timely Service of Documents)* [2016] EWHC 2365 (Fam) [1].
[90] ibid.
[91] ibid [6].
[92] *Mitchell* (n. 11) [41] and *Re W (a child)* (n. 108) [53].
[93] *Eaglesham v MOD* [2016] EWHC 3011 (QB) [42].

Additionally, what is disconcerting is that there is evidence that some LIPs realised that the lax approach of solicitors to filing statements on time was perhaps a way of gaining a tactical advantage and so started to follow this example. Interview 15 explains how the solicitor for his ex-partner often filed statements late and so he decided to send the Facebook entries, he was submitting as part of his evidence, to the solicitor the night before a hearing. This ensured that the solicitor was unable to take instructions from his client until the morning of the hearing. Interviewee 6 explains how she pre-empted the fact that the solicitor for her children's father would present her with his client's statement just before the hearing by drawing up her own. '*He sort of said, smarmily, 'there is the statement, if you would like to read it' and I said, 'there is mine, if you would like to read it'.*

It is worrying that there is evidence that LIPs are interpreting the late submission of evidence as a means of solicitors trying to gain a tactical advantage and then following this example. This is hardly conducive to preventing delay in proceedings and ensuring that children are not denied time spent with either of their parents any longer than necessary. Nor does it foster the expected culture of compliance.

The reason why solicitors may not be complying with orders in family matters in a manner that would have been expected, following cases such as *Re W*, is that LIPs are unlikely to know that the FPR enable them to request sanctions against the defaulting party or indeed that a LIP can claim for costs.[94] This means that they fail to bring the non-compliance to the attention of the court. The only evidence of the court showing its dismay at the lack of compliance by the represented party's lawyer was in the case involving Interviewee 8. The Magistrates offered to adjourn the matter, so that he would have time to read the mother's statement that he was handed on the day. However, as this LIP was the applicant parent who was making a child arrangements application, the offer of an adjournment would only postpone, even further, his wish to spend time with his son. This, ironically, would have benefitted the defaulting mother rather than sanctioning the failure to comply and would certainly not ensure that the solicitor complied in future. There is, therefore, a need for judges and magistrates to take a stricter approach to solicitors who fail to comply with the timescales outlined in court orders in order to avoid the lack of equality this causes. LIPs should have a sufficient amount of time to read evidence and prepare for trial, especially

[94] CPR 46.5 allows the court to award costs in favour of a LIP.

when they have ensured that their legally qualified counterpart has received their statement in plenty of time to afford them that courtesy. After all, as Interviewee 29 states succinctly, '*a solicitor should be following the judge's rules. I am!'*

2.5.1. The importance of support

That LIPs are complying with orders is due mainly to the fact that they have received help in court to understand the order made and, therefore, the timescale in which to file evidence. For Interviewee 11 it was her close friend who ensured that she not only understood what had happened in court, but also that she complied with the order made. '*[Friend] would be in there the whole time writing little bullet points down, because I would come out and say, 'what happened?'* It is the benefit of having someone in court to understand what is happening, and to write down the order that was highlighted by the interviewees as the reason why none of them had failed to comply with the orders made in their proceedings. Mostly this support was sought from the PSU who attended proceedings taking notes and then arranged to help interviewees with any documentary evidence they needed to submit. '*As for me getting the statements on time, yes. Obviously only with the help of the PSU otherwise no, I would never have'*.[95]

This statement highlights a weakness of the evidence generated for this project, as the interviewees received support in order to comply with timetables. There are, therefore, likely to be LIPs who are not fortunate enough to receive this type of assistance who, as this Interviewee acknowledges, will struggle to comply with orders.[96] There is, therefore, a need for further research into how LIPs who cannot receive support both inside and outside the courtroom cope with rule compliance and how judges deal with such breaches.

2.5.2. The finality of orders

Another disconcerting issue arising from the interviewees' determination to comply with directions made by the court, was the belief that once a final order was made it was unbreakable and must be followed. This was interpreted to be the situation even if this meant leaving the child of the family in a precarious position. The dilemma faced by LIPs is

[95] Interviewee 27.
[96] Trinder et al reported that LIPs often filed papers late. Liz Trinder et al, *Litigants in person in private family law cases* (Ministry of Justice Analytical Series 2014) 42.

explained by Interviewee 26: *You have got a court order in place that says don't break it, and you have got social services saying, "You have got a duty of care to safeguard your child". So you either safeguard the child or weigh up the risks of getting told off by breaking the court order.'* It is this question of whether the safeguarding matter is serious enough to break the order that seems to lead to a delay in LIPs acting to protect the best interests of the child. Interviewee 15 explains the judge's alarm that he took so long to remove his child from the mother's home:

> *One of his questions was why have you left this poor girl to go through this? I had social services involved, but do you remember the Baby P case where they had social workers for years, but until he died, and then that is when it got investigated? So you have got to wait for it to get so serious.*

This testimony highlights how important the availability of legal advice is to the parents of children who need to amend a court order in respect of child arrangements. It is a necessity expressed by Interviewee 26 when stating, '*You are stuck between a rock and a hard place. You have got nobody to advise, because the court, it is black and white, you have got an order there and you could get severely told off.* Receiving early legal advice when new situations arise would not only safeguard the child, but alleviate the fear and confusion felt by LIPs who are placed in a position whereby the order made no longer reflects the family dynamic.

2.6. The lawyer and LIP relationship: Negotiation and professionalism

Continuing with the theme of how lawyers can create barriers for LIPs, the next matter to be considered is the manner in which lawyers negotiate with the unrepresented party in proceedings. In particular, the tone that the lawyer adopts when negotiating as well as the professionalism of their behaviour is examined. Lastly, the effect that both of these issues can have on the LIP's willingness to participate in negotiations, as well as the impact on their perceptions of the justness of the court process, is discussed.

2.6.1. Adopting an appropriate tone

One of the main issues that arose in respect of the relationship between the lawyer for the other side and the LIP was the tone adopted by the lawyer, which did not correspond with the

expectations of the LIP. As Interviewee 29 explains, '*where a solicitor should negotiate, because the child is involved, it is more my client wants this and you have to agree otherwise you are not going to see him [child] kind of thing'*. It is this adversarial tone that interviewees found most disconcerting when speaking to the other side's solicitor. Interviewee 2 explains how his inability to adequately complete the initial paperwork was dealt with by the lawyer for his ex-partner.

> *She has got quite an aggressive way about her and she was just insulting and seemed anti-men; the kind of person who I would like to represent me really. She was trying to show you up because, you hadn't done the forms right. It was just really speaking to belittle you thinking that I would back away. She was like a bloody Rottweiler!*

Such an adversarial approach seems inappropriate in family proceedings, which are now supposed to be more inquisitorial in nature.[97] It is even more inappropriate when the LIP on the other side has been subjected to domestic abuse by their client. Interviewee 19 had brought a child arrangements application after her abusive husband had refused to allow her any time with them. She explains how her conversation with the solicitor transpired, before she attended court for her first hearing:

> *When she realised that I wasn't going to agree to what she was saying. Just her tone and the way she sort of then presented herself. She was sitting quite relaxed before and then she sort of sat up and was like, no this is my sort of case, so you'll do as I say.*

The impact of this hearing was such that, '*I honestly thought, after speaking to his solicitor, I am not even going to get anywhere here, what is the point? I even said to my mum outside, there is no point let's just go home I can't deal with this anymore.*

It is imperative that solicitors adopt an appropriate tone with LIPs who allege domestic violence, as they already have the inequality of having to represent themselves in front of their abuser. They should not have the additional anxiety of facing aggressive counsel.

[97] *Re B and T (care proceedings: legal representation)* [2001] 1 FCR 512.

2.6.2. Negotiating or bullying?

Not only can an adversarial approach lead to a vulnerable LIP questioning whether they can cope with the proceedings, but it may lead to allegations of bullying. This accusation also features in Lee and Tkacukova's study[98] as well as in studies in some commonwealth jurisdictions.[99] Interviewee 11 described her relationship with the solicitor for her abusive ex-partner. '*We had a witness protection room and we would be sat in there waiting and then she would come along and say right he wants this and he wants that. Like she was bullying me actually.'* It may be that solicitors are unaware of the impact that taking an adversarial approach can have on vulnerable LIPs, but it is something that they should bear in mind when negotiating with unrepresented parties. In fact, it is a requirement of the Law Society Guidelines for Lawyers on LIPs, which requests solicitors to 'adopt a professional, co-operative and courteous approach at all times'.[100]

There is evidence that it is not only vulnerable LIPs who interpreted the approach adopted by the solicitor for the other side as being of a 'bullying' or 'intimidating' nature. Interview 12's testimony is representative of many of the views divulged by the interviewees. '*I stood my ground. I said, very calmly, no that is not how I want it, so there is no agreement. She then said, 'if you don't agree all offers off the table, completely.' So that there is then trying to make me make a decision. She was abrupt and almost stormed out of the room.*

Not all LIPs who are alone in a room with a solicitor will have the confidence to 'stand their ground' when negotiations are taking place. Without legal representation the LIP has no-one to protect them from undue influence to enter into agreements that are contrary to their interests. Some of the interviewees in this study did have a PSU member or a friend in the room to offer them support; '*it is a good job my friend was with me, because she would go, no she is not doing that, because I would have just crumbled*'. However, not all LIPs can access this type of assistance and are left in the inequitable position of having to negotiate with someone professionally trained in the art. It can also mean that there is a biased nature

[98] Robert Lee and Tatiana Tkacukova, *A study of litigants in person in Birmingham Civil Justice Centre* (CEPLR Working Paper Series 02/2017) 12.
[99] Melissa Smith et al, *Self-Represented Litigants: An Exploratory Study of LIPs in the New Zealand Criminal Summary and Family Jurisdictions* (July 2009) 67; Julie Macfarlane, *The National Self-Represented Litigants Project: Identifying and Meeting the Needs of Self-Represented Litigants* (Final Report, May 2013) 91.
[100] The Law Society, *Litigants in person: guidelines for lawyers* (June 2015) [19].

to the negotiations, as only requests made by the represented party are discussed. None of the issues that the LIPs in this study felt were important were raised with the lawyer as points for agreement.

Although the attitude of the lawyers was construed by the LIPs as amounting to bullying, it may be that they were adopting an adversarial approach, which is alien to those who are new to the nature of court proceedings. It is, therefore, debateable whether this behaviour would fall under the definition of 'taking unfair advantage' through bullying under the Law Society's Guidelines.[101] Nevertheless, adopting an 'all or nothing' approach is inappropriate in family proceedings involving LIPs and is hardly conducive to negotiating an agreement in the best interests of the child.

Not only does the approach taken by lawyers when negotiating lead to allegations of bullying behaviour, but when those negotiations take place is important if they are not to be construed as exerting undue pressure to settle. Interviewee 3 was approached by her ex-partner's solicitor shortly before a fact finding hearing in order to negotiate child arrangements for his client. '*What his solicitor was trying to do was get me to agree it before I went into the courtroom. He does this by pressurising me, because, obviously, I am standing there on my own'.*

Whilst the parties are free to agree the terms of child arrangements before a fact finding hearing, there is inequality of power between the solicitor and a LIP who is about to enter quite a long and daunting hearing, which involves cross examination of witnesses and the scrutiny of documentary evidence without legal assistance. Solicitors need to adopt a manner that does not place the LIP under any pressure, so that agreement appears more appealing than attending a hearing that ultimately determines safeguarding issues. Otherwise LIPs will be left with the same impression as Interviewee 3, *'I feel like he is a bully, the solicitor',* which will have a negative impact on any opportunity in the future to reach an amicable resolution for the parties and their children.

[101] ibid [17].

2.6.3. Acting unprofessionally

A further issue raised by interviewees was the ability of the opposing lawyer to use their status to influence the order made by the court. When the proceedings involve a LIP being opposed by a legal representative it is now customary for the court to request the lawyer to draw up the order for the court, as they have the legal skill and vocabulary to reflect accurately what was determined.[102] However, Interviewee 10 explains how this may not necessarily be the outcome: '*His solicitor was directed at the first hearing to write up the interim order, which didn't reflect the hearing at all and so I complained to the court. He was told at the second hearing that whatever was written up he had to email it to me first'.* This was not the only reported incidence of a solicitor using their elevated position to determine the contents of an order. Interviewee 27 explains how he negotiated an agreement about spending time with his child. However, the contents of that agreement were not precisely relayed to the judge or reflected in the corresponding order. '*One solicitor who spoke to me before I went into court agreed on the days, Monday, Wednesday, Friday, but we didn't agree on the times. When we went into court the Solicitor came out with from 10 to 6. So I didn't question that. I feel the solicitor had used the meeting for her advantage'.*

Whilst the LIP could have questioned the accuracy of the solicitor's interpretation of the negotiated settlement, his inferior position in the courtroom meant that he did not raise the issue with the judge. In this manner the lawyer gained a tactical advantage for her client to the detriment of the LIP and possibly the child of the family.

2.6.4. Negotiating with McKenzie Friends

As explained in chapter four it is no longer accurate to attest that only lawyers appear in civil courts as advocates for litigants; there is an emerging market[103] of 'fee-charging'[104] or 'professional'[105] McFs. The behaviour of these McFs will also have an effect on negotiations and how the LIP perceives the fairness of the litigation process. However, as previously explained, whilst lawyers have a code of conduct[106] and guidelines to abide by, there is no

[102] The Law Society, *Litigants in person – guidelines for lawyers: Notes for litigants in person* (4 June 2015) 2.
[103] Legal Services Consumer Panel (LSCP), *Fee-charging McKenzie Friends* (April 2014) [2.8].
[104] ibid [2.4].
[105] Lord Chief Justice of England and Wales, *Reforming the courts' approach to McKenzie Friends: A Consultation* (February 2016) [1.2] (Consultation).
[106] Solicitors Regulation Authority (SRA), *Handbook* (Version 16, April 2016) SRA Code of Conduct 2011; The Bar Standards Board (BSB), *Handbook* (2nd edition, April 2015) Part 2 The Code of Conduct.

such code of conduct[107] for McFs. Consequently, there is a greater danger that they may use their position to exert pressure on the LIP. This may be more probable, as McFs do not have to undergo vocational training, which includes the principles of ethical conduct.[108]

Only one of the interviewees had a McF representing the other side and her experience suggests that the attitude he adopted was not conciliatory in nature. This was the same Interviewee discussed in chapter four who had been subjected to domestic violence and whose child had referred to an incident that suggested sexual abuse. Interviewee 33 not only consulted a McF to advocate on her behalf, but the applicant father also had a McF representative. This Interviewee explains how she was affronted by the attitude of her ex-partner's McF. '*He said "here is my CV. It is best if we can be amicable seeing as we have got the next 11 years of [Child]'s life to try to sort out". So this is me I am doing this and I have done this for the High Court and I am this'.* There appears to be no reason for handing a CV to the LIP on the other side and to refer to the proficiency of one's advocacy skills other than to intimidate the opponent. Intimating that they will be seeing each other for long periods of time also suggests to the LIP that she is unlikely to successfully prevent a child arrangements order. Such behaviour is highly inappropriate in any proceedings, but is especially problematic in a family matter where a domestically abused mother is representing herself to safeguard her child.

Whilst the testimony of one Interviewee cannot be said to represent the professionalism of all fee-charging McFs, it underlines the fact that they are not immune from behaving in an inappropriate manner. The Interviewee's experience provides further support for the need for the Consultation on the future of these advocates,[109] as well as qualitative research about the experiences of LIPs who have used the services of fee-charging McFs or have had to oppose this type of adviser.

2.6.5. The consequences of acting in an unprofessional manner

It is arguable that the evidence outlined above would breach the Law Society Guidelines with regard to the behaviour of solicitors when dealing with LIPs. The definition of 'unfair

[107] LSCP (n. 103) [6.10].
[108] ibid [5.32].
[109] Consultation (n. 105).

advantage' refers to behaviour 'any reasonable lawyer would regard as wrong and improper.[110] However, this definition necessarily raises the question of how high the standard of behaviour is set by the reasonable lawyer. It provides a wide discretion for solicitors when determining how to behave when complying with their duty to their client and the court; the latter involving responsibility towards the opposing LIP. Nevertheless, it appears likely that drawing up orders incorrectly, misleading the court as to the terms agreed between the parties, or using aggressive tactics to negotiate settlement, in order to benefit one's own client, would be regarded by a reasonable lawyer as 'unfair advantage'. In particular, it could be regarded as 'bullying' and/or 'misleading or deceitful behaviour'.[111]

2.6.6. Hostility and suspicious minds

Irrespective of whether this behaviour would be construed as 'taking unfair advantage', there is evidence that it affects the relationship between the parties and hinders negotiation. The Law Society Guidelines state that 'your first contact with a LIP might well set the tone for the way in which the case is dealt with from then on'[112] and this is supported by the evidence provided by the interviewees. Several LIPs became hostile towards the solicitor, as a result of their first encounter with them. Interviewee 27's response was typical of those interviewees who identified a feeling of being bullied by the solicitor for the other side. '*I didn't speak to her solicitor on the final hearing, because I felt like they were bullying me into making decisions. So I made it my point not to speak to anyone, just go straight into court'.* Interviewee 19 explains the practical reason for this hostility. '*I didn't want to speak to his solicitor because of the way I was made to feel before and I thought, no, I don't want anybody to sort of mix up what I have got going on in my head, because I am speaking for myself, I need to be clear on what I am doing. He did try to come and speak to me, but I refused'.*

This lack of interest in negotiating with solicitors for the other side is supported by the findings of Trinder et al, who reported that in cases involving only one represented party, what they term 'semi-represented' cases,[113] lawyers suggested that it was 'virtually

[110] The Law Society (n. 100) [17].
[111] ibid.
[112] ibid [19].
[113] Trinder et al (n. 96) 10.

impossible' to enter into pre-court negotiations with LIPs.[114] The evidence of the interviewees outlined above provides an insight into why lawyers may find negotiating with LIPs akin to 'communicating with a black hole'.[115] There is an unequivocal link between the tone adopted by the solicitor when they first meet the LIP and their willingness to negotiate thereafter.

Not only does the tone adopted by lawyers and their behaviour hinder negotiations, but there is evidence that it also causes LIPs to become suspicious of the lawyer's motives and ultimately their professionalism. Interviewee 27 refers to the fact that he was always '*bombarded with paperwork from her solicitors*' which he believed was their way of '*trying to just blow my mind a bit*'. He further suspects that *'her solicitors said to her, when I am in the court room, you look at papers and then whisper to me in my ear'* in order to gain a tactical advantage. Interviewee 6 was only told about a court appearance listed for the following Wednesday by email at 7 o'clock on a Friday evening. This meant that she was given insufficient time to instruct her usual barrister or gain any other representation. Interpreting this in a negative manner, she describes her feelings when attending court alone as making her:

> *Sick to be honest, because I just didn't know what I was going to be expecting. It made me feel even worse when I walked in and I saw him and his barrister looking at me and grinning and giggling, because clearly they thought 'I am going to walk all over this one, because she is completely on her own and doesn't know what she is doing.*

Being given insufficient notice of the hearing led to the LIP believing that the barrister was acting in an unprofessional manner which negated any opportunity for negotiation. This breakdown in the relationship between the lawyers and the LIP, therefore, impacts on the LIP's sense of justice. Interviewee 36 was encouraged to discontinue with her application for special guardianship by the lawyers for her daughter and grandchild, in the interests of her grandchild, however, she was left feeling negatively towards the lawyers and the court system itself:

[114] ibid 37.
[115] ibid.

> *We didn't have the support and they knew then that they could bully us into that submission. I feel like we have been cheated. I feel pushed into something that we couldn't fight. Because we were on our own, we didn't have no-one to back us up or anything.*

It is imperative that solicitors consider how their manner and tone may be interpreted by someone who is new to the civil justice process in order to effectively negotiate with the LIP. This will be a new skill for lawyers to acquire, as their training will have prepared them for adversarial negotiation against an equally skilled opponent, but it is crucial in order to ensure that LIPs have a sense of fairness in the civil justice system, even if the outcome is not what they envisaged.

2.6.7. Perceptions of unfairness

As explained in chapter 3,[116] it is generally argued in procedural justice theory that it is giving people an opportunity to participate in the decision making process that leads to a greater perception of fairness.[117] This ultimately has a favourable impact on how litigants react to the outcome.[118] It is this so called 'fair process effect', which, in a legal context, contributes to the 'legitimacy' and to the 'stability' of the court process over time.[119] The dominance of the fair process effect is highlighted by the fact that if participation is denied, a frustration effect will occur. This results in the litigant perceiving the outcome as unjust through being denied sufficient voice and control.[120] The importance of the fair process effect is further reinforced by Van den Bos et al's study. They found that whether a person knows the outcome of others is highly relevant in respect of the significance afforded to the fairness of the process when assessing their own outcome. Those who do not know the outcome of others may find it difficult to assess the justness of their own outcome and accordingly use the fairness of the process to assess their reaction to the decision. Hence, procedural fairness not only impacts on how litigants perceive the equality of the process itself, but also on the

[116] See (n. 196).
[117] Edgar Allen Lind, and Tom R Tyler, *The Social Psychology of Procedural Justice* (Plenum Press, New York 1988).
[118] Kees Van den Bos et al, 'How Do I Judge My Outcome When I Do Not Know the Outcome of Others? The Psychology of the Fair Process Effect' (1997) 72 Journal of Personality and Social Psychology 1034.
[119] Ronald L Cohen, 'Procedural Justice and Participation' (1985) 38 Human Relations 643.
[120] ibid.

ultimate outcome of proceedings.[121] The research by Van den Bos is highly relevant to LIPs as they are unlikely to know the outcomes of other litigants. This further reinforces the importance of fairness, which can be achieved through lawyers having a more co-operative approach when communicating with LIPs.

It is also vital that LIPs are aware of the duty advocates owe to the court and the guidelines issued by the Law Society in respect of solicitors' contact with LIPs during the court process. Although the Law Society has issued notes to guide LIPs[122] on how they should expect to be treated by the solicitor for the other side, it is questionable whether LIPs are aware of these. Only one of the interviewees referred to the fact that solicitors have to behave in a certain way towards the LIP on the other side. Interviewee 10 explains her experience with the solicitor for her ex-partner. '*I have only found out now that when you are getting represented yourself the opposite party's solicitor still has a duty, slightly to you, to show you where to go and stuff like that or to speak with you beforehand'.*

The guide is also published on the Law Society website, which was not a website that interviewees identified as a source for information. For LIPs to know that they should be treated by solicitors for the other side in a courteous and respectful manner the guidance should be more readily available. This will enable them to consult the guidance and know that they have a means of redress if they are not treated appropriately, which is crucial in a system where there appears to be such power imbalance. Solicitors are now placed in the novel position of having to strive to obtain the best outcome for their client without taking advantage of an opponent who has limited legal skills. Whilst it could be expected that the majority of solicitors would act in a professional manner at all times, such a situation does create the opportunity for LIPs to be exploited by reason of their lack of knowledge. Thus, there is an unequivocal need to provide LIPs with guidance and information about the reciprocal right to be treated in a courteous and professional manner.

2.6.8. Lawyers as a source of exclusion

The assistance expected from lawyers representing other parties may have been anticipated to extend beyond dealing with LIPs in a professional manner to include providing assistance. It

[121] Van den Bos (n. 118).
[122] The Law Society (n. 102).

is arguable that the duty to the court encompasses explaining to LIPs what is about to happen in court and the procedure to be followed.[123] Information about how the proceedings are progressing is particularly important if a LIP is required to present their case in a matter involving multiple parties, who are all represented. In this situation the LIP becomes the only person in court appearing without assistance and representation. Interviewee 1, who was making an application for deputyship in respect of her severely disabled son, explains the impact that being left out of conversations between the barristers for her son and the Clinical Commissioning Group (CCG) had on her:

> *The barrister would talk in adjournments to the CCG's barrister and they were agreeing things between themselves. Then [Son]'s barrister would put forward some things for a court order. It was very much to me like they were like within that same chamber. I felt isolated and vulnerable.*

Such was the lack of information supplied to Interviewee 36 that she was left with no insight into what was happening in proceedings which involved her application for special guardianship of her grandchild, '*I was frightened. It was awkward sitting there and listening to what was going on and not getting no feedback or anyone explaining to us what was happening. We were invisible we weren't there*'.

Despite the fact that there were three lawyers involved in this matter, who were representing the interests of the local authority, the mother and the child, none of them provided the Interviewee with any information or update as to what was happening and what the salient issues were between them. It is hardly surprising, in the circumstances, that the interviewee felt '*just totally lost*'[124] in the process.

In order for LIPs to understand the process and what is happening in their case it is imperative that the lawyers for the other parties as well as the judge involve the LIP. If this cannot extend to them being involved in negotiations, due to confidentiality issues, then this should be explained to them. Otherwise every effort should be made to include the LIP by

[123] ibid 1.
[124] Interviewee 36.

using language that they can readily understand.[125] As Lind and Tyler state when explaining their Group Value Model of Procedural Justice:

> Procedures that allow participation and affirm membership status might have two effects: they enhance perceived fairness by being in accord with basic values and they induce feelings of control because they encourage the inference that one is an active and full-fledged member of the group.[126]

It is only by ensuring that LIPs are actively involved in the proceedings that they can be equipped with a sense of control, which will ultimately lead to a sense of procedural fairness.

2.7. Examples of good practice

Not all of the interviewees referred to negative experiences with the solicitor for the other side and a few of the interviewees highlighted the positive relationship they had with the solicitor for their ex-partner. Interviewee 32, who has severe dyslexia, described how he '*told the solicitor that I don't understand, because they say big words and then she does break it down and does tell me to be honest'.* This positive experience was reiterated by Interviewee 23 who explains that the solicitor: '*came in with me and [PSU volunteer] and spoke to us and put his points forward. We all sat there and discussed it. Yes, she was ok to be fair. Obviously, still on his side, because she is his solicitor'.* Interestingly, in this case the parties were able to negotiate the child arrangements which were also facilitated by the Magistrates, who gave the parties time to negotiate between themselves rather than the court imposing an order. This highlights the fact that the tone adopted by the lawyer can have an influence on the willingness of the LIP to engage in negotiations and can ultimately lead to a positive outcome for both parties. It also reinforces the argument that having someone with the LIP when negotiations take place with the opposing lawyer affords the LIP a measure of protection.

3. The role of the judiciary in ensuring that LIPs have access to justice

Just as lawyers can behave in a manner that hinders a LIP's ability to access justice, so too can the procedure adopted by the judiciary. This section begins by outlining the role of

[125] The Law Society (n. 100) [21].
[126] Lind and Tyler (n. 117) 236.

judges in the modern family and civil justice system and how this has adapted in order to accommodate LIPs. Whilst judges can now take a more inquisitorial approach, there is little guidance on what this means in practice and the extent to which it actually assists LIPs. This section, therefore, examines the guidance provided in case law to enable judges to become more actively involved in proceedings when LIPs appear before them. It then considers what assistance was provided by the judiciary to the interviewees in this study and whether this aided their understanding. Finally, the section discusses what changes LIPs desire in order for the judiciary to improve their ability to achieve access to justice and reduce inequality. It is only by listening to the voice of the LIP that the court process can provide a just forum for the resolution of disputes.

3.1. Competing duties and the inquisitorial solution

For those who choose or are forced to litigate in person, the entitlement to do so[127] becomes somewhat futile if the litigant is unable to purposefully navigate through the adversarial process. As Fotherby notes:

> On one side, there is a substantive right afforded to all individuals to appear for themselves in court. On the other is the collection of procedural rules that dictate the way in which this part of the legal system works. The exercise of the former causes great difficulty for the functioning of the latter.[128]

This is particularly apt when one considers that under an adversarial system it is the responsibility of the parties to identify the relevant issues arising from the litigation. Thus, the function of the judge is merely to adjudicate on those issues alone, which means that a judge must reject a claim even if the unsuccessful litigant would have been successful had an alternative legal argument been relied upon.[129] It is not the judiciary's role to identify and advance legal points on behalf of the parties.

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[127] Such entitlement is unequivocally expressed by Lord Bingham of Cornhill CJ in *R v Brown (Milton)* [1998] 2 Cr App Rep 364, 369, where he stated that, 'In many legal systems parties are obliged to be represented by professional lawyers. That is not the British tradition, which has permitted individuals to represent themselves in both civil and criminal proceedings.

[128] William Fotherby, 'Law that is Pro Se (Not Poetry): Towards a System of Civil Justice that Works for Litigants Without Lawyers' (2010) Auckland University Law Review 54.

[129] *Al Medenni v Mars UK Ltd* [2005] EWCA Civ 1041 [21] (Lord Dyson).

Notwithstanding this, it can no longer be maintained that LIPs are left to steer through the judicial process totally unaided, so that Lord Denning's assertion that 'justice is best done by a judge who holds the balance between the contending parties without himself taking part in their disputations'[130] is now subject to important modifications. The introduction of active case management was an important objective of the Woolf reforms. The resultant CPR and FPR are meant to be capable of affording LIPs sufficient support in order for the successful progression of their cases. In this respect, judges are required to give directions to ensure that the trial of a case proceeds quickly and efficiently, fix timetables and help the parties to settle the whole or part of the case.[131]

In addition, the overriding objective of the CPR and the FPR require cases to be dealt with justly,[132] which includes the requirement that judges should ensure that the parties are on an equal footing.[133] However, it is irrefutable that judges should not 'descend into the arena'.[134] There exists an obvious tension between two of the judiciary's conflicting duties. Judges are expected to create a balance between ensuring that substantive justice is done, whilst at the same time safeguarding a system that is adversarial in nature and in which the judge is a neutral arbiter.[135] It is this requirement to adapt that has led to some members of the judiciary voicing their exasperation. As Ward LJ bemoaned:

> What I find so depressing is … the difficulties increasingly encountered by the judiciary at all levels when dealing with LIPs. Two problems in particular are revealed. The first is how to bring order to the chaos which LIPs invariably – and wholly understandably – manage to create in putting forward their claims and defences. Judges should not have to micro-manage cases, coaxing and cajoling the parties to focus on the issues that need to be resolved.[136]

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[130] *Jones v National Coal Board* [1957] 2 All ER 155,159.
[131] CPR 1.4 (2); FPR 1.4 (2).
[132] CPR 1.1 (2) subject to proportionality issues; FPR 1.1 (2) does not make reference to proportionality, but rather only requires reference to the justness of the case.
[133] CPR 1.1 (2) (a); FPR 1.1 (2) (c).
[134] *Yuill v Yuill* [1945] 1 All ER 183, 189 (Lord Greene MR).
[135] Richard Moorhead and Mark Sefton, *Litigants in person: Unrepresented litigants in first instance proceedings* (DCA Research Series 2/05, March 2005) 217.
[136] *Wright v Michael Wright Supplies Ltd and Another* [2013] EWCA Civ 234 [2].

The amount of 'coaxing and cajoling' that the judiciary engage in is a question for the individual judge, and will depend on the ability of the LIP, as well as whether one of the parties has legal representation.[137] As Cobb argues, whilst some LIPs will be intelligent enough to manage their cases with minimum assistance, others will be too emotional to do so. It is how the judge can guide these LIPs through the legal process that creates a real challenge for the judiciary.[138] It is the fact that the vast majority of LIPs are likely to require judicial assistance that led to the Judicial Working Group on LIPs recommending that a specific power be introduced into CPR Rule 3.1 allowing for a more inquisitorial style of proceedings when at least one party is a LIP.[139] However, Parliament's response so far has been to amend CPR 3.1, governing the judge's case management powers, so that judges may take into account a party's LIP status and adapt procedures accordingly. It does not specifically mandate an inquisitorial approach,[140] nor is it addressed to LIPs. Being part of the CPR it also raises the same issues of accessibility, as 'it is, like the whole of the rest of the CPR, drafted by lawyers for lawyers'.[141]

As family matters are now decided in a forum that is expected to be more inquisitorial in nature[142] the same issues arise as to the amount of indulgence a judge is expected to afford a LIP without entering the arena or appearing to favour the unrepresented at the expense of those who have representation. The task of advocating how this should be achieved has been undertaken by the Judicial College in the form of its Equal Treatment Bench Book (ETBB).[143] The guidance provided therein to the judiciary in respect of LIPs emphasises that the philosophy that underpins the assistance to be provided consists of ensuring that LIPs are not regarded as an 'unwelcome problem for the court'.[144] This involves:

> Maintaining a balance between assisting and understanding what the LIP requires, while protecting their represented opponent against the problems that can be caused by the LIP's lack of legal and procedural knowledge.[145]

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[137] Trinder et al (n. 96) 119 argue that a case involving litigants in person on both sides will require a fully inquisitorial approach, whereas if one of the parties is represented it is a question of the judge using strategies to 'level the playing field'.
[138] Stephen Cobb, 'Legal aid reform: Its impact on family law' 35 (2013) JSWFL 3.
[139] The Judicial Working Group on Litigants in Person: *Report* (July 2013) (JWG) 24.
[140] CPR 3.1A (1) and (4).
[141] Briggs LJ, *Civil Courts Structure Review: Interim Report* (Judiciary of England and Wales 2015) [5.34].
[142] 12J PD pt 12 para 28.
[143] Judicial College, *Equal Treatment Bench Book* (2013).
[144] ibid [24].
[145] ibid 25.

Notably, this is to be achieved by the judge no longer being a passive arbiter, but rather as a 'facilitator of justice'.[146] The guidance recognises the difficult balance to be struck when assisting a LIP in an adversarial system, but specifically provides that judges may 'adopt to the extent necessary an inquisitorial role to enable the LIP fully to present their case'.[147] Whilst this is a welcome development and has the potential to provide important assistance to LIPs, guidance regarding the requirements of an inquisitorial role is once again not provided within the ETBB. Neither is advice given about how a balance can be achieved which does not appear to disadvantage any represented party. That this is an important objective of the civil justice system is articulated by Mummery LJ in *AWG Group Ltd v Morrison* where he states that:

> The paramount concern of the legal system is to administer justice, which must be, and must be seen by the litigants and fair-minded members of the public to be, fair and impartial. Anything less is not worth having.[148]

Further assistance is required, as an inquisitorial role is not the same as having the inquisitorial system of civil jurisdictions, which involves the judiciary being more actively involved in the investigation of the salient issues. The judiciary will, therefore, need clarification as to what this hybrid approach requires and the full extent of support that can legitimately be offered by the judiciary, so that a consistent and fair approach can be adopted. Some guidance is, however, provided in *Mole v Hunter* where Tugendhat J describes the approach he took:

> I conducted the hearing by asking first Ms Hunter and then Ms Mole about each of the matters complained of in the counter claim. I then gave each of them an opportunity of asking questions of the other. Ms Mole chose to ask no questions. I then went through the chronology of events as I understood them to be, inviting each of them to correct or complement the understanding

[146] ibid [44].
[147] ibid [48].
[148] [2006] EWCA Civ 6 [29].

> I had formed on my own reading of the papers and to make their submissions.[149]

Whilst this 'hands on' approach is to be welcomed as a means of assisting LIPs, it is far removed from a fully inquisitorial approach whereby the judge would 'devise and deliver' the questions.[150] In this respect, Zuckerman argues that if the judge is merely acting as a case manager, as he contends Tugendhat J was in *Mole v Hunter*, by confirming the parties' positions and helping them present their evidence, this is an inappropriate alternative to legal representation.[151] As he explains, the LIP still has no-one to give private instructions to or assist with the preparation of the case for trial, which is vital in order to have real prospects of success. If on the other hand, judges do take on a responsibility of investigating the parties' respective positions then this may lead to bias on behalf of the judge. This is likely to occur if the judge forms a view of the merits of the case, which ultimately colours their investigation. This may lead to the judge advocating the case of only one of the parties much to the detriment of the other. As Bevan argues it would be inequitable if the party paying for representation was disadvantaged simply for seeking expert advice.[152] It is, therefore, questionable whether any proposals that advocate a more active role by members of the judiciary in the presentation of LIP's civil claims can ever lead to equality of arms in the absence of legal advice and representation.[153]

3.2. The judge as a facilitator of justice

Despite the concerns regarding the true nature of inquisitorial investigation there is evidence that a more flexible approach, when dealing with LIPs, is being encouraged in family proceedings. In *Re G-B (Children)* the decision by the trial judge to refuse to adjourn the matter because the mother had dismissed her legal team was upheld on appeal.[154] McFarlane LJ came to the conclusion that there had been no breach of Article 6, as the mother had had legal representation up until the date of the hearing. Consequently, many of the issues

[149] [2014] EWHC 658 (QB) [111].
[150] Trinder et al (n. 96) 76.
[151] Zuckerman A, 'No justice without lawyers—The myth of an inquisitorial solution' (2014) 33 (4) CJQ 355.
[152] Chris Bevan, 'Self-represented litigants: The overlooked and unintended consequence of legal aid reform' 35 (2013) JSWFL 43.
[153] ibid.
[154] [2013] EWCA Civ 164.

between the parties had been put in writing and were not in dispute, which meant that there was a very limited role for any advocate to play during the hearing.[155]

Notwithstanding the outcome of this case, the decision was underpinned by the extensive assistance that the judge had afforded the mother during the hearing when she was unrepresented. She 'went out of her way' to aid the mother to select which witnesses to call and assist her in how to question them by inviting her previous lawyers to stay in the courtroom during the first day of the hearing. This enabled the lawyers to help the mother select her witnesses and gave her time to consider whether she would like to reinstruct them.[156] Further assistance was given when the mother gave evidence. The judge 'allowed the mother full rein' without interrupting her, but ensuring that she remained on track by helping to focus witnesses onto questions based on what the mother had said.[157] The judge even questioned the ability of counsel to raise an issue with the mother that had not been filed in evidence.[158]

All of these features were praised by McFarlane LJ, who said of the interjection by the judge that it was, 'precisely the sort of technical intervention that a barrister would make on behalf of the mother' and was 'typical of the way that this judge approached the difficult judicial task of dealing with a self-representing litigant in sensitive proceedings'.[159]

This judgment provides unequivocal support for an extensive role to be played by judges, when assisting LIPs in the difficult hearing process. It clearly extends beyond the case management role[160] adopted by Tugendhat J in *Mole v Hunter*. It should, however, be noted that, as stated in *Re C (Children)*, in family proceedings 'it is fundamental that the judge has an essentially inquisitorial role'.[161] It remains to be seen, therefore, whether the endorsement of the approach taken by the judge in *Re G-B* by McFarlane LJ will extend to other civil proceedings which may now also take an inquisitorial approach under CPR 3.1A.

3.2.1. Officers of the court as facilitators of justice

[155] ibid [51].
[156] ibid [56].
[157] ibid [58].
[158] ibid [59].
[159] ibid [60].
[160] Zuckerman (n. 151).
[161] [2012] EWCA Civ 1489 [14] (Sir James Munby).

As well as the judiciary providing assistance to LIPs there is evidence that the court may expect other court personnel to play an important role in facilitating rule compliance. In *Re G (Children)*, Lloyd LJ considered the duty of a Guardian, appointed under Family Procedure Rule 16.4 to represent the interests of the children, who are made a party to the proceedings.[162] It was cited that this duty, at a minimum, involved being vigilant as to the avoidance of procedural or other unfairness to one or other of the unrepresented parties.[163] Thus, on the facts the Guardian, as the only party with the benefit of legal advice and representation, should have had in mind the appellant's need for advice and protection as a LIP. In the absence of legal representation for the appellant, he had a clear duty to take the initiative to progress the matter when the appellant mistakenly informed him of a breach of the child arrangements order rather than the court. It was a procedural mistake that would not have been made had she been represented and thus required the Guardian to act.[164]

There is no doubt that this places considerable pressure on a guardian appointed to represent the interests of children, especially as there has been such a huge increase in the number of litigants who represent themselves in family proceedings.[165] This would be particularly true if both the mother and father were unrepresented.[166] Hence, there may be a requirement to increase the number of Guardian appointments.[167] Depending on the amount of assistance required of the Guardian, appointed under Rule 16.4, it could also conflict with his duty, to represent the interests of the child and not those of the parents.

Nevertheless, having a responsibility to liaise with a non-legally represented parent to inform them of what is happening in the case would at the very least enable them to understand what

[162] [2012] EWCA Civ 1434.
[163] ibid [32].
[164] ibid [41].
[165] According to the National Audit Office there was an increase of 18,519 family cases involving both sides being unrepresented in 2013-14. Also, eighty per cent of private family cases involved at least one side without representation. National Audit Office, *Implementing reforms to civil legal aid*, (2014-15 HC 784) 15. This is supported by figures from the *Court Statistics Quarterly* (January to March 2014) that the number of private law children cases involving representation for both parties had fallen from fifty per cent in 2011 to twenty six per cent in 2014. However, the National Audit Office have reported that the number of cases started in the areas of divorce and child arrangements in the April–June quarter of 2014 fell by 4,264 from the previous quarter, 20. Nevertheless, the Personal Support Unit provides additional evidence that the number of unrepresented people attending court in family proceedings is increasing. In 2013 they reported that there had been a 40% increase in the number of litigants seeking help for family matters compared to the previous twelve months: Personal Support Unit, Annual Report for the year ended 31 March 2013. https://thepsu.org/wp-content/uploads/2010/01/PSU-Annual-Report-2013-for-web2.pdf accessed on 24.04.15.
[166] Statistics state that in April to June 2016, neither the applicant nor respondent had legal representation in 34 per cent of private family law cases, representing an increase of 17 percentage point from April to June 2013. MOJ, *Family Court Statistics Quarterly, England and Wales* (April to June 2016) 14.
[167] Trinder et al (n. 96) 118.

is happening. This is especially important when the proceedings could result in the LIP losing their realtionship with the child of the family. For Interviewee 36, who was making a special guardianship order, and was the only party unrepresented, it would have given her some inclination of what was happening and a sense of inclusion rather than feeling '*totally lost'*.

It is not only Guardians who have been assigned duties in respect of LIPs. In *Re R (a child)* Black LJ stated that appeals in care proceedings, which involve an appellant litigating in person, should have a standard procedure under which the local authority is responsible for providing the appeal bundles. This would ensure that the bundles were of a sufficient quality and supplied with adequate copies for the court and the parties to the appeal.[168] The importance of the cases of *Re G* and *Re R* is not only that those who are legally funded should take on a responsibility towards LIPs within proceedings, but it is at least arguable that it may also imply that the courts will expect lawyers acting for the other side to take a more proactive approach to helping an opposing LIP.[169] However, taking a practitioner approach, Bevan questions why solicitors should be expected to 'counsel for all' when their clients expect them to act solely on their behalf. As he explains, their clients may already be financially worse off because of the increased fees incurred through the additional work their solicitors are expected to undertake. Notably, the preparation in creating bundles and the possible extra time needed in court when opposed by ill prepared LIPs.[170]

3.3. LIP's perceptions of judges as facilitators of justice

Now that the role of the judge has been outlined, this section considers how judges assist LIPs in practice. In particular, the extent to which the judiciary's attempts to facilitate justice accords with the subjective requirements of LIPs is examined. The analysis focuses on what LIPs believe is required for a fair procedure to exist and the manner in which the judiciary can ensure such requirements are satisfied. The discussion is underpinned by reference to existing theories on procedural justice and highlights how simple adjustments can provide LIPs with a process that is regarded as just.

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[168] [2014] EWCA Civ 597 [7].
[169] Thomas Crockett, 'Do it yourself: any further guidance since *Tinkler v Elliot*?' (2013) 9 The Commercial Litigation Journal 17.
[170] Bevan (n. 152).

3.3.1. The importance of good communication skills

Those interviewees who were involved in proceedings concerning LIPs on both sides, identified a number of techniques or, what may be described as, good practice utilised by judges which they felt aided their ability to present their case in court. Interviewee 16 describes how the judge she appeared before was '*just easier to speak to. She was just a lot warmer judge, better people skills. Her whole aura about her was just easier to deal with. Whereas the other judge was quite harsh and so you are a bit more defensive'.* These people skills are important in order for LIPs to feel that they can communicate with the court and involve simply explaining issues and keeping good eye contact. As Interviewee 17 explains: '*That last judge, he was absolutely superb. He explained things a lot easier, he looked right at you when you were speaking to him. He was very clear and he was the same with my ex-partner as well.'*

It is the feeling of being listened to and having the same opportunity to speak as their opponent, that many interviewees identified as being important when appearing in court unrepresented. Interviewee 20 confirms the view of Interviewee 17 that this can make a difference irrespective of the outcome. '*He gave us both time to speak, he listened to both sides. He was very fair. Obviously, I would have preferred for him to favour my side, but deep down I do know that he listened to my side as well.* This evidence correlates with the procedural justice definitions discussed in chapter three which suggest that a fair process can provide litigants with a sense of justice irrespective of the outcome.[171] Interviewees identified the most significant criteria to assess the fairness of the process as being those least linked to outcomes. Thus issues such as ethicality, defined as politeness and concern for one's rights, honesty and the effort to be fair are regarded as more important than actual outcomes.[172]

3.3.1.1. Having your say

So far as a fair process is concerned, as with solicitors, the tone adopted by the judiciary can have a great impact on a LIP's notion of justice and the ability to present their case in court.

[171] Lind, and Tyler (n. 117).
[172] Tom R Tyler, 'What is Procedural Justice? Criteria Used by Citizens to Assess the Fairness of Legal Procedures' (1988) 22 Law & Society Review 103.

In fact, those interviewees who expressed disillusionment with the court proceedings had the opposite experience to those outlined above. For these interviewees it was a lack of opportunity to relay their side of events that was identified as a reason for feeling disgruntled. Interviewee 21 explained how she felt as though the judge was cutting her short when she tried to explain the reasons for her views: '*I felt like you don't get the chance to fully explain your side. They [judges] will ask a question and it is almost like they want a yes or no answer rather than being able to explain. Once he had had enough of you he stopped you talking. So I never felt that I could get out my side'.* This was also a feature of the proceedings identified by Interviewee 7 who explained that '*He [judge] sort of just talked over us when we were speaking. Where it wouldn't happen in a court where a legal representative would have had his say until he had finished. The judge didn't seem to want to let me get a word in'.*

For Interviewee 34 it was the judge's refusal to acknowledge that he wanted to speak that led to him not feeling able to relay his point of view to the court. '*I did think at certain times it was hard to talk. I was putting my hand up and the judge might just leave me for 5 minutes when it was like an important comment or question'.* All of these interviewees were in proceedings that involved LIPs on both sides and a further issue identified by such interviewees was a feeling that the judge was biased towards the other LIP by allowing them more opportunity to speak. Interviewee 9's experience is typical of those who identified bias as a barrier:

> *It just really felt like I wasn't part of the conversation and sort of half way through [Mother] could just jump in and say what she wanted and I just couldn't say nothing. Even when I was putting my hand up and expecting her to say, sorry what did you want to say? So it really felt like one sided.*

If there is no-one in the court room explaining to the LIP why the judge does not need to hear what they are saying, be that because what they are saying is irrelevant, that they have said sufficient for the court to gain an impression of the facts, or they will have an opportunity to speak later, then feeling discontented is hardly surprising. In the absence of lawyers in the court room to guide litigants, open communication between the judge and the LIP is vital in order for them to assess the hearing as fair.

3.3.1.2. Letting the lawyer speak first

A further reason for LIPs feeling excluded from the process was the fact that most judges allowed the lawyer to speak first, which intensified their feelings of isolation and disempowerment. This in turn led to the impression that they were '*not respected as a person*'[173] during the hearing. Although it is the usual rule that the applicant presents their case to the judge before the respondent, it has now become common for the lawyer to speak first. This is so that they can explain the law and procedure to the judge in a manner that, perhaps, a LIP would not be able to.[174] This was certainly the experience of the interviewees in this study and replicates the procedure approved by Brooke LJ in *Small v Cadogan Estate; Same v Laurence Murphy (a firm); Earl Cadogan v Small*. In this case the approach taken by Watts J was endorsed when deciding to hear counsel for the defendant before the unrepresented plaintiff. Whilst it was 'certainly correct that in the ordinary way the appellant would have the first say', he remarked that 'some judges prefer to hear a legal representative setting out the facts of a dispute clearly before calling on a LIP. Such an approach in his judgment 'could not possibly give rise to a complaint fit for argument in this court'.[175]

As there is a legitimate reason for allowing counsel for the respondent to speak first, it is imperative that steps are taken to allow the LIP to feel included in the process. One simple way to achieve this is by explaining to the unrepresented party why the lawyer is speaking first and informing the LIP that an explanation will then be given to them about what has been discussed. This can be achieved by using straightforward language that is understandable to the LIP.[176]

3.3.1.3. The importance of oral evidence

Being listened to by the judge was a strong theme that emerged in respect of the fairness of the process, as many interviewees did not understand why the judge did not want to hear oral evidence from them even though they had filed written evidence before the court. Interviewee 19 explains the difference having the opportunity to present her evidence made.

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[173] Interviewee 12.
[174] Evan Bell, 'Judges, fairness and litigants in person' (2010) 1 Judicial Studies Institute Journal 1.
[175] [1999] Lexis Citation 2474.
[176] JWG (n. 143) 50 [2.5], recommends that when litigants in person are appearing before the court the judge should 'start by setting out what is going to happen and how the case will be conducted'.

'*The first judge, she didn't take what was on paper and make an instant decision about me as a person. She had time to listen to what I had to say. The second time round that didn't happen, because I just kept getting talked over, so I kind of shut off a little bit then and was kind of like, I am not getting anywhere'.* It would seem then that LIPs have an expectation that they will be allowed to speak in court and not just rely on statements they have filed. The views of Interviewee 4 were typical, '*I didn't understand why I couldn't put my side of the story. I know she keeps saying 'you have already gone over this', but I have not actually said it. It has been in witness statements I have handed in. Nobody has questioned me about it. I expected to be able to put my side'.*

This highlights a lack of understanding as to the relevance of documentary evidence and how the court treats such documentation, as although Interviewee 21 states that she felt that the judge did not allow her to talk, she then refers to the fact that the judge did this '*Even though it was in black and white, because obviously there was a police report'.* She did not accept that because the judge already had this evidence he did not need to take up court time in discussing it further. This again is something that must be explained to the LIP by the judiciary due to the absence of legal representation. It is this need to explain issues that is important if LIPs are to regard the process as just, as it ensures that procedures accord with their own sense of fairness. This is regarded by Lane as one of the procedural goods required in order to achieve procedural justice.[177] It also supports Lind et al's research, which suggests that having a voice, irrespective of whether it influences the ultimate decision is of paramount importance if the procedure is to be considered just.[178]

3.3.2. Suspicious minds

One of the consequences of LIPs identifying communication problems with the judge was that they became suspicious of the process. As Interviewee 27 explains, '*I thought he was very biased. It was always her solicitor spoke first. It was only at the end of the trial, where we had to speak to do our summing up that he wanted me to speak first, which I thought was a bit strange'.* Although the usual procedure is for the respondent to present their final

[177] Robert E Lane, 'Procedural Goods in a Democracy: How one is treated versus what one gets' (1988) 2 (3) Social Justice Research 177.
[178] See chapter three (n. 163); E Allen Lind et al, 'Voice, Control, and Procedural Justice: Instrumental and Non-instrumental Concerns in Fairness Judgments' (1990) 59 (5) Journal of Personality and Social Psychology 952.

submissions to court first, when LIPs are involved the order is often reversed.[179] However, a failure to advise the Interviewee of the reason why the judge has decided to change the order in which the parties speak, coupled with his experience of not being able to speak for as long as his ex-partner, led to him becoming suspicious of the process. The fact that the Interviewee did not know the reason why the procedure had changed is also support for the contention that LIPs are unaware of the guidance available to them. The Handbook for LIPs, which only one of the Interviewees was aware of, does explain the process in the family and civil courts and the fact that judges can change the procedures. They are further advised 'not to be concerned about the order of speeches.'[180]

Suspicion about the judiciary's motives also arose in respect of Interviewee 4 who had not had an opportunity to present her evidence orally in court. For this Interviewee the hearing was not fair due to *'the fact that he [lawyer] and the judge seemed to know each other quite well. I mean why again did it happen to be her [judge]? I don't understand that and she seemed to always talk to him rather than me'.* The implication is that judicial consistency had occurred in order to benefit the lawyers involved in the case at her expense. This accords with Galanter's argument that lawyers, as repeat players, not only have the tactical advantage of knowing the law and rules of the game, but they also have the opportunity to develop facilitative informal relationships with officers of the court. Given the fact that the lawyer and judge will know each other and share a legal vocabulary, it is quite easy to appreciate how a LIP, who is daunted by the prospect of being in the unfamiliar surroundings of the courtroom, may perceive that the lawyer, who is a familiar face to the district judge, is treated more favourably and thus has a tactical advantage. Interviewee 27 summed up these feelings stating that, '*the judge was looking at me and looking at her solicitor, and thinking there is no way that I am going to let you win, because he has been to law school'.*

The fact that a 'clubby'[181] atmosphere can exist between lawyers and the judiciary has been acknowledged by the judiciary in other jurisdictions. In *Wilson v Department of Human Services - Re Anna*, Justice Palmer remarked that:

[179] Edward Bailey J et al, *A Handbook for litigants in person* (December 2012) [16.31].
[180] ibid.
[181] Lindsay Ellison SC, 'Litigants in Person - the Good, the Bad and the Ugly' (May 2014) [27].

> No one explained to Ms Wilson what was going on in Court or asked her if she had anything to say. As a result of what appeared to be a rather quick and "in club" discussion between the Bench and Bar Table, an interim care order was made. The most important person in the courtroom at that time -- the mother whose child had been taken from her at birth two days ago -- was ignored.[182]

This mirrors the experience of Interviewee 36 when bringing her application for special guardianship against a legally represented local authority and highlights the importance of ensuring that a club mentality does not exist between the lawyers and judiciary involved in the matter.

Interestingly, the belief that judges would always decide matters in favour of the solicitor rather than the LIP was evidenced even when LIPs had not highlighted any problems with communication in court. Interviewee 3 explains that '*the judges do try their best to help you and everything, but you are never going to win and you are never going to get anywhere, because the opposite party has got the solicitor and you don't know how to put things across the way they do. So you are just constantly fighting a losing battle'.* This supports the view of Briggs LJ that those who decide to proceed as LIPs 'suffer crippling disadvantages by comparison with represented opponents which none of the present efforts to alleviate do more in reality than palliate'.[183] Nonetheless, the Interviewees in this study highlighted how judges can make small adjustments to their practice which enables LIPs to feel respected and have a procedure that they consider to be fairer, albeit not one that eliminates inequality.

3.3.3. Promoting inclusion

Despite the negative experiences of interviewees, outlined above, there was some evidence of members of the judiciary attempting to ensure that LIPs comprehended what had been discussed in court. Replicating the findings of Lee and Tkacukova's study, the judiciary's efforts to promote procedural fairness meant that interviewees were positive about the process even when outcomes were not as anticipated.[184]

[182] [2010] NSWSC 1489 [104].
[183] Briggs (n. 141) 51.
[184] Lee and Tkacukova (n. 98) 14.

3.3.3.1. Checking understanding

The main strategy used was for the judge to enquire about how the LIP felt about the matter once the judge had finished speaking to the lawyer(s). However, despite the fact that many of the LIPs expressed to the judge that they were in agreement with the lawyer for the other side, this does not appear to reflect their true feelings. This can be because the LIP is fearful and overawed by the experience. Interviewee 20 describes how she informed the judge that she was happy with the contents of her consent order despite the fact that she had concerns:

> *There were concerns that I had, but I was that nervous and that scared, I didn't speak and I just said yes. I agreed to whatever, because I just didn't want to voice my concerns and I didn't understand the consequences if I agreed to that.*

It is feelings of fear that can often paralyse a LIP from admitting that they do not agree. Interviewee 29 expresses this when he states that, '*they would always ask me, "How do you feel about that"? I would go huh. Sometimes I just can't get the words past my lips. It just doesn't come out and I am just a wreck*'. There is also evidence that LIPs do not want to admit to the judge and lawyers that they do not understand as they want to appear intelligent. This then leads to them agreeing with the view espoused by the lawyer for the other side. Interviewee 1 sums up how the judge would try to include her in the proceedings:

> *The judge would say how do you feel about that? So I feel that he was making sure that I was included in the decision, but it all became quite complex and at the end I wasn't really sure, I just wanted to get out of there, because I had had enough.*

It is clear that the judiciary often enquire about the LIP's understanding and agreement about what has been discussed. However, their unwillingness to admit to the professionals in the courtroom that they do not understand what is being deliberated, thereby further advantaging the opposing lawyer, can act as an invisible barrier to accessing justice. It is, therefore, imperative that the judiciary make concerted efforts to explain to LIPs what has been discussed and its importance. Only by doing this can they be treated in a manner which

assures them that they have a value equal to that of members of the legal profession and are not outsiders in a legal clique or the 'unwanted prodigal children of the court system'.[185]

3.3.3.2. Non-complex language

Chapter five examined how the use of legal language by the judiciary can lead to feelings of isolation and vulnerability for the LIP due to a lack of understanding.[186] Contrastingly, the absence of such complex language was regarded by interviewees as an indicator of fairness: '*Whereas the other ones were more there is sections this that the other. He actually spoke to you and listened to you. That did make a difference today*'.[187] Not only did a lack of complex language spoken by the judge indicate a just hearing, but a willingness to admonish lawyers for using technical language to the disadvantage of LIPs was regarded as good practice. Interviewee 4 explains how the barrister for the other side started to refer to regulations, but was met with disapproval by the judge:

> *He kept saying to the barrister, "[Interviewee] doesn't understand what you are talking about; just explain what you mean". Because he was just going to go over my head and saying that it is regulation this and that and the judge was saying no you can't say that you have got to explain exactly what you mean here. So that is a fair hearing.*

It is the judge's acknowledgment that the language in the court room must be accessible to the unrepresented party that ensures that the LIP is validated as a respected party to the proceedings. Listening to the LIP and allowing them an opportunity to be involved in the process through having an adequate voice and understanding ensures that they consider the procedure as fair. In this regard the judge ensured that the club mentality could not develop, thus making the LIP feel a valued part of the proceedings.[188]

3.3.3.3. Continuity

A further procedural matter that was raised in respect of accessing justice was the issue of continuity. Many interviewees indicated that there had been a number of different judges

[185] Forrest S Mosten, 'Unbundling legal services and the family lawyer' (1995) 28 Fam LQ 421.
[186] See (n. 48).
[187] Interviewee 17.
[188] Lind and Tyler (n. 117).

who had dealt with their application.[189] This was particularly true if the matter had been repeatedly brought back to court by the parties over a number of years.[190] Whilst this was not identified as a barrier to accessing justice,[191] those who had had the same judge throughout their case commented that this was a favourable aspect of the procedure. The benefits of continuity are articulated by Interviewee 29, '*She [the judge] knew the history from the start to the finish. She had all the reports. If we had a different judge it would be like the other judges have got to learn from the previous one and then say another judge at the final hearing would have had to have learned from the two previous. It just made more sense to have one judge'.*

This raises an important concern for LIPs. Whilst the issue of judicial continuity may not be determinative for those with the legal skill to explain to the judge what has happened previously in the case and to identify the salient issues, for a LIP without these skills continuity is imperative. There are two reasons for this. Firstly, if a LIP is opposed by legal representation then it gives that other party an unfair advantage, as the evidence above highlights how judges are likely to refer to the lawyer to outline the relevant matters. This is a particular issue if the judge has had insufficient time to read all of the papers, which is probable if the matter has been contested over several years.

Secondly, if both sides are LIPs the judge may be minded to form an opinion based purely on the documentation rather than hearing from both sides. As has been outlined above, fairness for LIPs is linked to an ability to present their arguments to the court and the documentation alone may not provide the judge with an indication of the more nuanced issues between the parties that a previous judge may have observed. In domestic violence cases this may not be words spoken in the courtroom, but simply the way the accused abuser looks at the LIP.[192] It is for these reasons that every effort should be made to achieve the objective of ensuring continuity of judicial involvement in the conduct of proceedings from the FHDRA hearing to

[189] Nine interviewees had had 2 or more judges dealing with the matter.
[190] Interviewee 35 - 3 judges over a 4 year period; Interviewee 17 – 5 judges over an 8 year period, and Interviewee 12 – 25 separate court appearances involving several judges.
[191] This was an issue identified by MacFarlane (n. 99) 99.
[192] It will be recalled from chapter five (n. 86) that the judge presiding over Interviewee 11's case realised that her abuser was staring at her in an intimidating manner by using the windows to see past the screen. See also MOJ, *Alleged perpetrators of abuse as litigants in person in private family law: The cross-examination of vulnerable and intimidated witnesses* (MOJ Analytical Series 2017) 34.

the final order.[193]

3.3.4. Adjusting expectations

Whilst a belief that the procedure had been fair led to a positive response to the proceedings, there was evidence that even if interviewees felt that they had been treated unequally during the process they took comfort in the fact that they had been competent enough to actually commence proceedings. Interviewee 1 was a LIP who had felt isolated and vulnerable as a result of the hearings she attended, but nevertheless felt vindicated by her ability to bring her case to court. '*If you look on the positive side, I was enabled to come to court. I have got the ability to put together a really good court bundle that they considered that this should come to court and I think that is a tremendous achievement'.* This emphasises how for some LIPs access to justice can simply be about accessing the court building, although objectively one could hardly argue that this equates to justice. Nevertheless, it provides support for Amartya Sen's argument that those who are in a deprived position 'tend to adjust their desires and expectations to what little they see as feasible'.[194] In this way LIPs are adapting their expectations and perceptions of the court system in accordance with what they regard as achievable. To this extent the inequality between the represented and unrepresented is perpetuated by the LIP's acceptance of their inability to achieve the same results as those who are represented.[195]

If LIPs are to continue to regard the courts as a legitimate system for resolving family disputes it is important that they not only accomplish an outcome, but that there is also a legitimate system or process for achieving it.[196] As Hensler states, 'the legitimacy that people accord the courts - which is essential to a rule of law - is dependent on the courts offering the opportunity to resolve disputes on the basis of facts and law, using fair, thorough, and dignified procedures, to all who seek it'.[197] The evidence above provides an insight into how LIPs require the family and civil process to adapt in order to provide them with a system that they regard as legitimate and fair. Whilst giving LIPs more opportunity to address the court

[193] 12B PD 12.1 para 10.2.
[194] Amartya Sen, *The idea of justice* (Penguin Books 2010) 283.
[195] ibid.
[196] Legal Services Institute, *Improving Access to Justice: Scope of the Regulatory Objective: Interim Strategic Discussion Paper* (December 2012) 17.
[197] Deborah R Hensler, 'Suppose it's not true: Challenging mediation ideology' (2002) 1 J Disp Resol 81.

may have resource implications at a time when proportionality is at the heart of the court system,[198] ignoring the views of LIPs will further entrench their feelings of disillusionment.

4. The role of Magistrates in ensuring that LIPs have access to justice

This section considers the barriers to accessing justice that LIPs identify when they appear before a panel of magistrates rather than a legally qualified judge. These obstacles are discussed separately as the adjudicators as well as the LIP is not legally qualified, which is a characteristic that can impact on procedural fairness.

4.1. The need for control

A number of the interviewees appeared before a panel of three magistrates rather than a judge. This highlights quite a novel situation that can occur in the family courts as lay people appear before members of the judiciary who are also not legally qualified. Although magistrates are used in the criminal court system, the continuing availability of legal aid means that legal representation is the norm. This means that solicitors are still available to the magistrates in criminal cases in order to outline the relevant law and procedure pertaining to the case. The lack of legal representation in family and civil matters means that this may no longer be a feature in such cases.

It will be recalled from chapter three that perceptions of procedural fairness are strongly linked to the amount of control litigants' exercise over the process.[199] However, one of the main issues that emerged from interviewees who had appeared before magistrates against another LIP was the lack of control that they appeared to have over the proceedings. A number of interviewees identified how proceedings had been adjourned on several occasions, because the other party had not appeared before the court. Interviewee 30 explains that, '*The clerk said it is not worth getting the Magistrates here, because my ex-partner has not turned up again for the fifth time in a row'.* This was also the experience of Interviewee 35 when her matter was before the Magistrates: '*So today he has phoned in and said can it be*

[198] MOJ, *Transforming our justice system* (September 2016) 5.
[199] See (n. 171) discussing John Thibaut and Laurens Walker, 'A Theory of Procedure' (1978) 66 California Law Review 541.

adjourned. Now there should be a quicker process, because we have come every time. I have had enough of it'.

The comments of Interviewee 35 highlight the fact that often matters are being adjourned continuously, but no-one appears to be taking control of proceedings, as the LIPs do not address the issue in court. If the litigants were represented then their lawyers would raise the unacceptable nature of this behaviour and could request that the matter be dealt with in the absence of the other party.[200] To an extent this is acknowledged by Interviewee 30 when questioning, '*Next time I come here, shall I bring my solicitor with me? I don't want to pay for my solicitor to be there and they are going to adjourn to next time.* The experiences of these interviewees replicates the findings of Maclean and Eekelaar in their observational study of family judges in the lower courts. They reported that a lack of legal representation led to 'a more frequent need to adjourn and relist when an unrepresented party fails to appear and no-one present has instructions which would enable the case to be heard'.[201]

What is undeniable is the acceptance by both Interviewees of the situation they find themselves in and their sense of a lack of ability to change matters. '*I am back up on the 11th of next month in front of the Magistrates, and I will just take it from there'.*[202] In the absence of lawyers in the courtroom to request that matters be progressed it is the responsibility of the Magistrates and the legal clerk to ensure that the case is appropriately managed by steps being taken to ensure that the absent parent attends court.[203] The delay that occurs, because LIPs do not request an appropriate order to be made, is unacceptable both for that party and the child(ren) who are the subject of the proceedings.

There is evidence that, unlike magistrates, judges take a more rigorous approach to adjournments, as evidenced by Interviewee 28's statement. '*[Mother]'s solicitor had phoned up, may be less than an hour before the court case, and said we want to cancel. The judge said, no it goes ahead'.* This was also the attitude of the judge when Interviewee 6 requested an adjournment, as she had only received three days' notice of the hearing and was unable to

[200] FPR 12.14(6) allows the court to hear an application in the absence of a respondent if the same has 'reasonable notice of the date of the hearing'.
[201] Mavis Maclean and John Eekelaar, '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.
[202] Interviewee 30.
[203] FPR, pt 4.

instruct either her usual counsel or a replacement. The strict approach to adjournments by district judges is highlighted by Interviewee 4's experience: '*I underwent major surgery for breast cancer in the end of September. The consultant who did the operation and the radiotherapy consultant and my local doctor all sent letters to the court saying that I was not fit enough to attend. The court rejected these on the grounds that if I was fit enough to write letters, I was fit enough to organise representation'.*

Although this appears to be a very robust attitude to adopt, it is in accordance with the current case law on this issue. In *Levy v Ellis-Carr & Others*,[204] Norris J stated that even if medical evidence is provided that outlines the features of the litigant's condition and why participation in the trial process is prevented the court can still:

> Consider what weight to attach to that opinion, and what arrangements might be made (short of an adjournment) to accommodate a party's difficulties. No judge is bound to accept expert evidence: even a proper medical report falls to be considered simply as part of the material as a whole (including the previous conduct of the case).[205]

This strict approach was further confirmed in *Hobson* where a letter from the LIP's doctor that he was 'unable to face the stress and anxiety relating to attending a court case at present' was insufficient to warrant an adjournment. This was because it did not give any hint as to the likelihood of change for the better or worse in the future'.[206] This was despite the fact that the claimant's ill health materialised as a consequence of a previous stroke.[207]

Whilst these cases and Interviewee 4 were involved in civil proceedings and so a strict approach is unsurprising, the statement of Norris J has been endorsed in the family matter of *Veluppillai v Veluppillai and others* by Mostyn J.[208] Hence, a similar attitude is likely to exist in family proceedings. Magistrates, with the assistance of their legal clerk, must ensure that matters are not continuously adjourned due to the LIP being unaware of their ability to

[204] [2012] EWHC 63 (Ch).
[205] ibid [36].
[206] *Hobson* (n. 61) [36].
[207] ibid Appendix, 12.
[208] [2015] EWHC 3095 (Fam) [5].

request that the matter be dealt with in the other party's absence or for action to be taken to ensure the other party attends the next hearing. This is imperative if LIPs are to regard the process as fair. The legitimacy of the adversarial system is contingent upon LIPs not only having process control, but also the decisional control is held by an impartial judge who hears and weighs up the evidence and makes the ultimate decision.[209]

4.2. The importance of communicating with the LIP

A further feature that arose from the interviews with LIPs who appeared before a panel of Magistrates was the belief that Magistrates wanted the matter dealt with as quickly as possible, irrespective of the LIP's safeguarding concerns. Interviewee 12 was typical of those interviewees who raised this issue. '*I feel that because the magistrates have been given a lot more work, they just want to get rid of the case as soon as possible. So they are not doing a fair procedure at all'.*

The need for effective communication is also vital when matters appear before Magistrates, as Interviewee 31's experience demonstrates. Her application for special guardianship arose out of her mother's alcoholism and although Cafcass had not produced their report, the Magistrates were mindful to dismiss the application until the Interviewee spoke up in court. '*The Magistrates just wanted to throw the case out. Instead of reading through a report, they have just gone, no until I opened up and said they never had a report from Cafcass or other agencies. I felt as though they had already made a decision'.*

This case demonstrates the need for a clear protocol when both sides are LIPs appearing before lay magistrates. In the absence of legal representation, the legal clerk's role in explaining the law and procedure to the Magistrates becomes of paramount importance and one would argue that it must also include some engagement with the LIPs. Just as Guardians are expected to provide assistance to LIPs in appropriate cases,[210] it is submitted that the legal clerk should be expected to speak to the LIPs to explain the procedure and ascertain any salient issues from them. This will ensure that the magistrates are adequately informed of the issues between the parties, who may feel too intimidated to address the bench.

[209] Thibaut and Laurens Walker (n. 199).
[210] *Re G (Children)* (n. 162).

In respect of Interviewee 31 the court would have at least been told that there were safeguarding issues and that the Cafcass report was, therefore, a fundamental requirement before a decision was reached. In fact, the solution of requiring the Justice's clerk to assist the parties in relaying the important information about the case to the court was a suggested remedy by the Interviewee: '*It might have been a bit more easier and uncomplicated if that person [clerk] was speaking to us both separately and got an idea of it then that would be easier for them [Magistrates] to make a decision'*. This emphasises once again how simple procedural changes can be made which will allow LIPs to perceive the process as fair and how it is important to include LIPs in any decisions that are made about reforms to family and civil procedure.

For those LIPs who were appearing opposite a lawyer in the Magistrates' court, the issue of magistrates wanting to deal with the matter quickly was also linked with the view that the magistrates had been unwilling to listen to their version of events. Interviewee 12 explains how the '*magistrate would speak to her solicitor and the local authority and leave me out. I didn't feel that they gave me enough opportunities to talk, because if you are a quiet person and you are just sitting there then you are not going to have the right amount of time to speak as everybody else'.* As explained when discussing the judiciary and LIPs, this perception led to her becoming suspicious of the relationship between the lawyer and the magistrates and to allegations of favouritism. '*They do see them on a daily basis, you could tell that they have got the banter and the good relationship. They don't see you in the same light as anybody and they just want to get it over and done with as quickly as possible'.* Once, again the LIP is left to feel outside the club to which the lawyer and magistrates are exclusive members. It also supports Galanter's argument that the repeat player lawyer gains the tactical advantage of knowing the law.[211] In fact, appearing before lay magistrates this is intensified as the lawyer is addressing unqualified adjudicators.

As with the evidence regarding hearings before judges, this highlights how important it is for LIPs to be able to communicate with the court and believe that their voice has been heard if they are not to become suspicious of the process or believe that the judges are prejudiced. In the absence of good communication between the LIP and the court, important issues may not be addressed. Interviewee 6 describes her experience and the importance of voicing her

[211] Galanter (n. 1).

concerns. '*They addressed the barrister like I wasn't even there and asked him to state everything he had on his statement and didn't even so much as look at mine. And I had to sit there and say, excuse me, but I have something to say and these are the points. I think that if I had walked in with no preparation and no paperwork. I think they would have gone yes you can have the details of the nursery'*. The importance of allowing the interviewee to speak is underlined by the fact that she describes her ex-partner and his new partner as having '*a history of drugs and alcohol and criminal convictions,'* but were, nevertheless, applying for a child arrangements order for the very young child to live with them.

It would seem that Magistrates follow the practice of judges in allowing the lawyer to speak first irrespective of whether or not it is their application. As stated earlier,[212] there are sound procedural reasons for doing this, as the lawyer is able to outline the relevant law and procedure to the judge. However, when the person addressing the court is legally qualified unlike the adjudicators, the issue of power imbalance arises. Measures must be taken to ensure that it is not only the legally qualified advocate who is able to address the court, but also the LIP's right to a fair hearing must be safeguarded by ensuring they also have a voice. Interviewee 21 explains how not having the opportunity to speak in court, because '*the judges and his solicitor were doing all of the talking'* felt '*like watching a tennis match'.*

Contrastingly, it would seem that the good communication skills of the LIP makes a difference to the experience before the Magistrates, as Interviewee 2 describes how different his second hearing was before the Magistrates compared with his first. '*They [the magistrates] were helpful and fair. They wasn't on my side, but they certainly wasn't on her side either really and they actually asked her solicitor to shut up, if you like, on a few occasions'.* By ensuring that both parties could adequately present their case the LIP was left with a sense of fairness and respect for the court system. Yet, many LIPs, do not have the skills to adequately prepare for a hearing and then address the court in an eloquent manner as this Interviewee did. In such circumstances, it is essential, for LIPs to judge the process as fair, that the courts ensure that they exercise sufficient control, are treated in a dignified manner and feel comfortable with the procedural requirements.[213]

[212] Bell (n. 174).
[213] Judith Resnik et al, 'In the Eye of the Beholder: Tort Litigants Evaluations of their Experiences in the Civil Justice System' (1990) 24 Law & Society Review 955.

As the above evidence outlines this can, to a large extent, be achieved without great expense and merely requires strategies to ensure that LIPs feel confident enough to communicate with the court in a manner that raises salient issues, so that they exercise control over the proceedings. In this respect, proceedings will not be allowed to stall for months on end to the detriment of the LIP and the children of the family. Strategies to improve the family and civil courts, so that they do not create barriers to justice for LIPs must involve liaison with LIPs so that changes truly reflect their needs and not what lawyers interpret these requirements to be.

5. Conclusion

The barriers to accessing justice do not exist solely within the procedural requirements of the family and civil justice system. Those who litigate on behalf of the represented party along with the judiciary and magistrates can create obstacles which restrict a LIP's access to due process. Only by taking account of these barriers can the family and civil courts truly reflect the requirements of LIPs and provide them with a procedure that is regarded as just.

The judiciary must take a stricter approach to rule compliance by lawyers. The delay through failing to file documentation or preparing reports is unacceptable by professionals especially when LIPs are trying their utmost to comply with the rules of court. Training is required for lawyers, the judiciary and magistrates. This will enable lawyers to negotiate with LIPs in a language and tone that is not interpreted as hostile, as well as ensure that the judiciary, including magistrates, speak to LIPs in a manner which gives them the confidence to address the court. This will then foster their involvement in the proceedings rather than believing that the court system is a club to which they do not belong. At a time when proportionality in addition to justice between the parties lies at the heart of the family and civil court system, the judiciary must ensure that they, as well as lawyers, do not exacerbate LIP's difficulties in navigating through the court process.

Now more than ever it is time to accept that it is the court system itself that is the problem, due to its inaccessible and incomprehensible procedures, rather than the LIPs for whom the

system exists.[214] It is only by listening and taking heed of the barriers that LIPs encounter that we can have a court system that operates for the ordinary person and not the legal elite.

[214] Lord Woolf, *Access to Justice: Interim Report to the Lord Chancellor on the Civil Justice System in England & Wales* (1995) Ch. 17 [2].

Chapter seven

Conclusion

The objective of this research has been to investigate the experiences of LIPs in the family and civil courts following the removal of legal aid from the majority of civil areas of law. Whilst there have been reports providing invaluable insights into how LIPs prepare for and engage in the court process, these have been undertaken prior to the changes introduced by LASPO and as part of the Government's commitment to providing public funding in a more cost effective manner. As such, it is arguable that the motivation for commissioning these reports is underpinned by a desire to explore the extent to which legal aid provision can be removed, or remain limited whilst maintaining a commitment to access to justice for LIPs.[1] Additionally, more recent qualitative studies have narrowed the focus to human rights issues,[2] or the physical and emotional impact of proceeding with litigation without representation.[3] Contrastingly, a more holistic approach underpins this research, which is intended to provide a voice for LIPs as a means of examining the extent to which the modern court system can enable them to access justice through the provision of procedures that they regard as fair and just. As such the research seeks to fill a real gap[4] in empirical research about LIP's experiences by affording an independent and contemporary analysis of how the modern court system accommodates litigants who appear without representation.

The methodology employed in order to undertake this task has been both qualitative and socio-legal in character. The use of interviews enabled an in depth analysis to take place of

[1] Richard Moorhead and Mark Sefton, *Litigants in person Unrepresented litigants in first instance proceedings* (DCA Research Series 2/05, March 2005); Liz Trinder et al, *Litigants in person in private family law cases* (Ministry of Justice Analytical Series 2014) and Kim Williams, *Litigants in person: A literature review* (MOJ, 2011).
[2] Amnesty International, *Cuts that hurt: The impact of legal aid cuts in England on access to justice* (London 2016).
[3] Toynbee Hall, *Sleepless nights: Accessing justice without legal aid* (November 2015).
[4] The only other LIP focused research conducted post LASPO investigates how LIPs' access legal and procedural information. This involved questionnaires and telephone interviews unlike the present study which used face interviews as the chosen method. Robert Lee and Tatiana Tkacukova, *A study of litigants in person in Birmingham Civil Justice Centre* (CEPLR Working Paper Series 02/2017).

the views of LIPs as a means of gleaning a 'world view' of the challenges they face when navigating through the civil court system.[5]

The social aspects of the research have been underpinned by legal analysis not only by laying the foundational background for discussion, but also through the application of theories of procedural justice, access to justice and proportionate justice to the themes emerging from the data. In particular, the analysis is premised on a definition of access to justice which is limited to effective access to the courts and the barriers that restrict such access. In this respect the research has sought to analyse the views of LIPs alongside pre-existing theories espousing what litigants need and expect from the civil justice system, as a means of confirming and confronting procedural norms.

The substantive chapters of this thesis have taken a chronological approach to analysing the experiences of LIPs. This began (chapter three) with an analysis of the legal requirement to attend a MIAM and the reasons why, according to interviewees, these often do not result in mediation. This necessarily involved an examination of whether LIPs engage in vexatious litigation before moving on to consider the reasons why LIPs litigate without representation. The next issue to be addressed (chapter four) was the changing nature of advice seeking post LASPO. This focussed on the manner in which new entrants have penetrated the market and how the legal profession can adapt to meet the changing access to justice needs of LIPs. Having considered the pertinent issues when commencing litigation, the analysis moved to investigate the barriers to access to justice which are inherent in the court process (chapter five). Finally, the changing nature of the family and civil justice system, which now emphasises the importance of proportionate justice and an inquisitorial role for the judiciary when LIPs feature in the courtroom was explored (chapter six). This involved a discussion surrounding the role of professionals in facilitating justice for LIPs and the extent to which they do, or may in the future, be able to fulfil this function.

1. Reflecting on the experiences of LIPs

Previous contributors to the qualitative study of LIPs in the family and civil courts have highlighted the procedural and legal problems encountered when legal representation is

[5] Robert Walker, *Applied Qualitative Research* (Gower 1985).

unobtainable and assistance outside the court room is either limited or non-existent. It was, therefore, unsurprising to find that LIPs struggle to obtain advice from both online and face to face providers. Further, it was an expected finding that they would also experience problems with the language used in court by the judiciary and members of the legal profession as well as within legal documentation.[6] Confirming the results in previous studies, LIPs also began to gain confidence in their ability to prepare for and attend hearings and understand the procedural and documentary requirements once they had been in the court process on a number of occasions.[7] In this respect, the ability of LIPs to engage with the court process and to seek legal advice and assistance depends on whether they are 'new uninformed', 'competent to instruct legal assistance' or 'self-reliant' LIPs. Hence, LIPs' access to justice needs are not uniform. This must be taken into account when deciding the appropriate manner in which to support LIPs through the civil and family courts. Those who are 'new uninformed' are more likely to benefit from face to face assistance due to the frequency of domestic violence, lower levels of literacy and alcohol or drug dependency. However, the needs of those who are 'competent to instruct legal assistance' or are 'self-reliant', who more readily engage with web based information, could be met by a more structured and coherent system of online support.

The value of this project lies not only in confirming previous studies but in its advancement of knowledge with regard to issues that arise exclusively from the withdrawal of legal aid and the amendments to family and civil procedure. In this regard, the three main issues that have emerged from this study, providing fresh insight, are the observations around the compulsory requirement to attend MIAMs, the emergence of McFs and the eligibility criteria for legal aid when domestic violence is alleged. The compulsory requirement for applicants in the family courts to attend a MIAM post-dates qualitative studies examining attendance by litigants at MIAMs and mediation.[8] With this in mind the project sought to determine why MIAMs do not lead to attempts to mediate a settlement as well as the effect that compelling one side to attend has on the parties to the litigation.

[6] Moorhead and Sefton (n. 1); Trinder et al (n.1).
[7] Trinder et al (n. 1).
[8] Anna Bloch et al, *Mediation Information and Assessment Meetings (MIAMs) and mediation in private family law disputes: Qualitative research findings* (Ministry of Justice Analytical Series 2014); Anne Barlow et al, *Mapping paths to family justice, Briefing paper and report on key findings* (University of Exeter June 2014).

Applicant LIPs fail to understand the legitimacy of being forced to attend a MIAM before being allowed to commence proceedings. This is often due to the fact that the respondent is unwilling to attend or negotiate because of the animosity felt between the parties. This results in the exercise of having to attend a MIAM being considered as an unnecessary hurdle to overcome as well as adding to the delay and cost of litigation. The policy decision to force applicants to attend a MIAM before litigating, therefore, does not appear to have achieved its aim of promoting mediation due to the lack of awareness amongst LIPs of the benefits to be gained from this form of dispute resolution. This supports the view that MIAMs should be free for both parties in an attempt to facilitate a change in culture.[9] Whilst some allegations that MIAMs fail due to the vexatious nature of the proceedings were unfounded there was evidence of LIPs being brought back to court continuously, especially when child arrangements were disputed. This causes untold misery for both the respondent LIP and the children who are the subject of the proceedings, the latter being unable to settle in accordance with the order made. This highlights the need for judges to be willing to use the court's inherent jurisdiction to curb such applications as well as the requirement for judicial continuity, so that all attempts to engage in this type of litigation are recorded on file.

There remains a lack of co-ordinated online resources for LIPs which leads to confusing and inaccessible advice being consulted from a myriad of forums. This is a situation that continues despite various reports espousing a more joined up approach.[10] The MOJ's website fails to reach the attention of LIPs, partly because they are unaware of its existence. Even when accessed, the language is targeted at legal professionals rather than members of the public. Some work has commenced to tackle the language used on forms in order to make it more accessible for LIPs.[11] There is a real need for this initiative to continue so that it also encompasses the language used in the CPR and FPR and in online resources. One effective means of doing this would be to include those who have previously acted as LIPs so that the language truly reflects the needs of ordinary members of society. Despite these efforts there will always be those 'new uninformed' LIPs who are unable to access internet resources for

[9] House of Commons Justice Committee (HCJC), *Impact of changes to civil legal aid under Part 1 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012* (Eighth Report) (2014–15, HC 311) [124] – [143]; Barlow et al (n. 7).
[10] Trinder et al (n. 1); The Low Commission, *Tackling the advice deficit: A strategy for access to advice and legal support on social welfare law in England and Wales* (January 2014).
[11] For example see form EX 160; Briggs LJ, *Civil Courts Structure Review: Interim Report* (Judiciary of England and Wales 2015) [38].

financial or educational reasons and efforts must be made to ensure that these LIPs can also receive understandable and affordable advice.

Beyond online support, the manner in which LIPs seek face to face advice has necessarily changed following the removal of legal aid. In accordance with previous studies, in the absence of financial resources to instruct lawyers, interviewees sought assistance from court office staff. However, they were met with the same barrier that most assistance is regarded as legal 'advice' rather than legal 'information'.[12] In this respect, assistance with identifying and completing relevant forms was unavailable. Now that LIPs feature more prominently in the civil and family courts it is imperative that the existing gap between the provision of advice and information is addressed. A distinction should be made between procedural and legal advice. In this respect, court staff should be allowed to help LIPs identify forms and, if necessary, assist in their completion. It is imperative that the financial investment required to train and recruit staff is provided. LIPs are unlikely to perceive the procedure in the civil and family courts as fair and legitimate if their first contact with the court is the hostile refusal by its staff to provide any assistance with the procedural aspects of their case. Allowing staff to provide procedural advice can enable LIPs to regard the court process as fair from the outset. In the absence of assistance from court staff, LIPs have begun to seek assistance from unconventional sources. Rather than attending solicitors' offices, it is the police station that many interviewees attended to gain advice concerning child arrangements and enforcement of such orders. This no doubt has resource implications for the police and impacts on the budgetary savings expected from the withdrawal of legal aid.

The growth of LIPs has led to a corresponding increase in the number of McFs offering unregulated advice and 'in court' representation. Whilst the Consultation's[13] recommendation to remove the ability of McFs to charge for their advisory and representational services is intended to protect LIPs, it also has the effect of removing a means of widening access to justice. It is submitted that such an important decision should not be made without further qualitative research to gain the views and experiences of LIPs who have consulted and appeared against McFs. With this in mind this project has

[12] Moorhead and Sefton (n.1); Trinder et al (n.1).
[13] Lord Chief Justice of England and Wales, *Reforming the courts' approach to McKenzie Friends: A Consultation* (February 2016).

highlighted the views of one such client who advocates the regulation rather than removal of professional McFs. LIPs can obtain legal information from sources such as the PSU but there is a gap in the availability of legal advice due to their inability to afford the services of a lawyer. McFs who are regulated, have minimum qualifications, follow a code of practice and are supervised by the courts could help fill this void. In this manner, LIP's access to justice is widened and they are afforded protection from exploitation. However, further research is needed to discover the prominence of the views expressed by the interviewee in this study and provide a risk benefit analysis of allowing a new regulated provider into the legal services sector.

As a supplementary or alternative measure to McFs, unbundled services can be promoted so that the legal services offered to LIPs meet their need to retain procedural control, whilst also having the services of a solicitor or barrister for discrete matters. Unbundled services must be targeted towards the needs of LIPs. This project has highlighted that assistance is needed when child arrangements concerning where the child is to live are contested and when preparing Scott Schedules and bundles of documents for fact finding hearings. In this respect, there is evidence of interviewees engaging in unbundled services with solicitors and of engaging barristers directly to avoid the intermediary services and hourly fees charged by the former. It is these changing methods of practising that could ultimately lead to greater access to legal advice for LIPs and a consequential reduction in the need for McFs' services. To further assist LIPs, solicitors should also consider how they charge for their services as a means of eliminating the uncertainty caused by hourly fees.

The policy decision to retain legal aid for those subjected to domestic violence does not appear to be meeting its aim of protecting vulnerable litigants. The statements of interviewees provide further understanding of the reasons why LIPs fail to receive public funding and resultant legal representation. The main barriers to qualifying for legal aid were the 24 month limitation within which the violence must have occurred and the restrictive nature of the evidence permitted to support applications. Whilst the success of ROW in having the time limitation declared *ultra vires*[14] has led to a relaxation of the time period to a

[14] *The Queen (On the application of Rights of Women) v The Lord Chancellor and Secretary of State for Justice* [2015] EWHC 35 (Admin).

more favourable 60 months, the evidence requirements remain a significant hindrance. This is supported by the fact that, despite these changes, several of the interviewees would still not be entitled to public funding. This calls into question why the same flexible approach to evidence allowed for a conviction for the new offence of coercive and controlling behaviour, which is now incorporated into the definition of domestic violence for legal aid purposes, should not be adopted when assessing eligibility to civil legal aid. If the arbitrary time limit within which domestic violence must occur and the inflexibility of the evidence requirements remain, vulnerable LIPs will be left to present their evidence in front of their assailant. Worse still, if the latter are also unrepresented, the abused LIP will have to endure their cross examination.

The evidence generated for this project highlights the limited nature of judicial assistance provided to LIPs when presenting their evidence. In accordance with *Re K and H*[15] this was restricted to fielding the questions through the judge rather than any specific help with which questions or salient issues should be addressed. It is hoped that the announcement in the Queen's speech[16] that legislation is to be introduced to protect victims of domestic violence will address the problematic eligibility criteria. The evidence contained within this study indicates that the wholesale removal of legal aid from family matters requires reassessment, so that the inequality encountered by both vulnerable LIPs and their LIP accused in having to prepare for and represent themselves in fact finding hearings can be redressed.

Underpinned by the theme of access to justice, the project sought to discover whether LIPs regard the family and civil justice system as procedurally fair. This was achieved by using the statements of interviewees and comparing and contrasting these to existing procedural justice theories. This resulted in two main findings. Firstly, that despite the challenging nature of appearing in court without legal representation, LIPs, in accordance with procedural justice theory, can perceive the process as fair. This is a result of being given, to a certain extent, a voice in order to communicate their side of the story in their own words and the ability to exercise a level of control over the proceedings.

[15] *Re K and H (Children)* [2015] EWCA Civ 543.
[16] The Queen's Speech 2017 www.gov.uk/government/speeches/queens-speech-2017 accessed on 25.06.17.

Secondly, the actions of the legal profession and the adjudicators, be they judges or magistrates, can have a profound effect on how LIPs perceive the justice process. More specifically, the tone adopted by lawyers when negotiating with LIPs can lead to allegations of bullying and ultimately impacts negatively on their willingness to engage in discussions aimed at settlement. It also results in LIPs regarding the lawyers in a hostile and suspicious manner, calling into question their professionalism. A lack of respect for solicitors also results from their lax attitude to rule compliance. Whilst *Mitchell*[17] and *Denton,*[18] and subsequent cases in the family courts[19] endorsing their stringent approach to rule compliance, may have led to an expectation that solicitors would readily respect timetables, this was not a finding of this study. Contrastingly, it was interviewees who showed a greater respect for compliance and who regarded the unwillingness of the legal profession to comply as a means of gaining tactical advantage.

The role of the modern family and civil judge as a facilitator of justice in proceedings that are inquisitorial in nature when LIPs are involved, places the judiciary in a position whereby they have to assist the LIP without leaving the other party feeling disadvantaged by legal representation. This has to be done in a manner that takes a proportionate approach to the resources expended in respect of the matter before the court as well as bearing in mind the needs of future court users. Having regard to this new role, the project has sought to examine the extent to which the judiciary and magistrates enable LIPs to achieve procedural justice. The evidence of interviewees highlights a number of important adjustments that can be made in order to ensure that they feel included in proceedings in a manner that affords them self-worth and dignity. These consist of ensuring good communication between the LIP and the judiciary through giving explanations using non-complex language and allowing LIPs an equal opportunity to speak. LIPs need to know who is presiding over the matter and what the next stage in proceedings will be. This is especially important if a fact finding hearing is being arranged, as many interviewees lacked not only the knowledge that such a hearing had been ordered, but also what it entailed. This curtailed their ability to prepare and represent themselves at a hearing that would determine their future relationship with their child. It is

[17] *Andrew Mitchell MP v News Group Newspapers Limited* [2014] 2 All ER 430.
[18] *Denton and others v TH White Ltd and another; Decadent Vapours Ltd v Bevan and others; Utilise TDS Ltd v Davies and others* [2014] EWCA Civ 906.
[19] *Re W (a child) (adoption order: leave to oppose)* [2013] EWCA Civ 1177.

the lack of explanation as to why lawyers are allowed to speak first, or why oral evidence is not being allowed, that leads to LIPs regarding the actions of the judiciary and magistrates as suspicious. Further, despondency arises from the lack of control LIPs maintain when appearing before magistrates. The constant adjournment of proceedings because respondent LIPs fail to attend leaves them with no-one to take decisional control. This ultimately leads to unnecessary delay in gaining a child arrangements order.

The hostility and suspicion that a significant number of interviewees held towards members of the legal profession, judiciary and magistrates is a disconcerting finding of this study. It indicates that further vocational training is needed to educate lawyers and the judiciary about the four procedural justice criteria of voice, neutrality, respect and trust[20] in order to include LIPs in the process and acknowledge them as a legitimate and normal feature of the family and civil courts. This can ensure that LIPs are treated in a respectful manner that accords with their access to justice needs and affords them active engagement with the legal process. They are, therefore, more likely to regard the process as fair, accept the legitimacy of the proceedings and more readily comply with orders.[21]

2. Limitations of the research

As with any qualitative study there are inherent limitations to the research contained within this project. Firstly, the fact that it is part of a PhD thesis means that there were not only time constraints, but also it was limited to one researcher. This necessarily means that there is a restriction on the number of participants that can be interviewed or the geographical areas covered. This is one of the reasons why the project only involved interviews with 36 LIPs in one North West City in England. This, therefore, impacts on the nature of the evidence generated and prohibits the making of generalisations in respect of all LIPs. It is for this reason that the analysis contained herein relates to these interviewees and not the wider population of LIPs. The purpose of the study is not to make sweeping generalisations, but to have the narrow remit of gaining a unique and contemporary insight into the experiences of LIPs.

[20] Tom R Tyler, 'Procedural Justice and the Courts' (2007) 44 Court Review: The Journal of the American Judges Association 217.
[21] Tom R Tyler, *Why people obey the law* (Yale University Press 1990) 107.

Secondly, the design of the project also has potential limitations. Many interviewees had received support from the PSU and so their experiences may be more favourable than the many LIPs who are not fortunate enough to gain assistance before commencing litigation or attending hearings. The use of the PSU to source participants may potentially have led to selection bias. This was something the researcher made the volunteers of the organisation aware of by requesting that all customers be given a leaflet outlining the details of the study rather than making subjective judgements about appropriateness. However, this does mean that those who were interviewed had received some form of assistance and so the study does not address the needs of LIPs who have not received any form of face to face and/or online assistance. This is a limitation also recognised by other studies including those that have collaborated with the PSU as a means of gaining access to participants.[22] The inability to recruit interviewees in a manner that was conducive to forming focus groups means that triangulation was not an integral part of the research process. This can call into question the trustworthiness of the data generated and so when coding and categorising data the researcher constantly reflected on her own personal features and beliefs to eliminate, as far as possible, stereotypes or bias. One of the main issues to be taken into consideration by the researcher was the reliability of the data in respect of the capability of LIPs to give an objective portrayal of their experiences or opinions about the court system. This is particularly important when it is remembered that LIPs were interviewed shortly after appearing in court. It may be questioned whether this allowed for a sufficient period of reflection as responses may have revealed initial thoughts but not long term perspectives. Hence, LIPs' sentiments about the civil and family court process may have changed once they were no longer emotionally involved in the process.[23] This is an inherent feature of qualitative research that can no doubt affect the validity of the data to the extent that it must accurately reflect the phenomena under study as perceived by that study population.[24] A further limitation of the research was the author's membership of the PSU as a core volunteer. Although the interviewees had not received help from the researcher prior to being asked by the PSU to participate, the fact that they were being directed to the researcher by the PSU may have

[22] Amnesty International, *Cuts that hurt: The impact of legal aid cuts in England on access to justice* (London 2016). Robert Lee and Tatiana Tkacukova, *A study of litigants in person in Birmingham Civil Justice Centre* (CEPLR Working Paper Series 02/2017).
[23] Trinder et al (n. 1); Lee and Tkacukova (n. 22) 5.
[24] Lewis Jane and Ritchie Jane, 'Generalising from Qualitative Research' in Jane Ritchie and Jane Lewis (eds) *Qualitative Research Practice: A guide for social science students and researchers* (SAGE 2003).

coloured their views of the assistance received by the PSU. It may also have made them less likely to criticise the help received from the volunteers at PSU. Nevertheless, the support of the PSU was crucial in gaining access to interviewees and being a core volunteer benefitted the author because it meant that she had a pre-existing relationship with the organisation. This no doubt influenced its willingness to entrust the researcher with access to its customers which may have been more difficult to achieve had she written to them for assistance as an unknown PhD student.

However, one of the drawbacks of using the PSU to gain access to LIPs was the lack of interviewees who were involved in civil matters. This was because the PSU office which the author collaborated with dealt mainly with family matters. Only two of the interviewees were not involved in family issues and so there remains an identifiable gap in the qualitative research about the experiences of LIPs in civil courts post LASPO or since Moorhead and Sefton's 2005 report.

3. Looking to the future

The recent announcement that a timetable has been set to review the LASPO reforms is a much anticipated development.[25] Whilst the author would advocate the reintroduction of legal aid to the pre-LASPO scope, the financial implications of such a proposal make this an unlikely outcome. Nevertheless, during the period of this study there have been a number of initiatives introduced to provide a more coordinated response to support the legal needs of LIPs. The LIP Support Strategy is a project of collaboration between a number of advice agencies including Law for Life, LawWorks, the PSU, RCJ Advice, Bar Pro Bono Unit and the Access to Justice Foundation. Its aim, through the LIP Network, is to create a community of interested parties to share knowledge and ideas as a means of more effectively meeting the access to justice needs of LIPs.[26] One of its achievements so far has been the introduction of AdviceNow's website as the 'central digital portal' for LIPs to obtain online help.[27] However, the extent of LIP awareness regarding this development is questionable given the lack of knowledge of the website's existence by LIPs in the present study. A coordinated

[25] Joint meeting – All Party Parliamentary Groups on Legal Aid, Pro Bono, Public Legal Education (17 January 2017) www.apg-legalaid.org/sites/default/files/APPG%20Legal%20Aid%20-%2017.01.17%20-%20Minutes.pdf accessed on 04.07.17.
[26] www.lipsupportstrategy.org.uk/current-work.html accessed on 15.01.18.
[27] ibid.

response has been facilitated by the creation of the LIP Judicial Engagement Group as it communicates with the LIP Support Strategy in order to ensure that reforms within HMCTS are informed by the views of advice agencies and pro bono providers.[28] So far as HMCTS reforms are concerned, an important development has been the introduction of LIP liaison judges in a significant number of family courts.[29] This ensures that the needs of LIPs remain at the forefront of court business especially when new measures are contemplated and implemented.

Whilst this collaborative approach is encouraging, this study highlights that the present strategy in order to address the access to justice needs of LIPs is not fit for purpose. Having PSUs in courts, to provide legal information, together with some organisations and lawyers offering pro bono advice and representation is failing to adequately support those LIPs who cannot afford legal advice and representation. The present research has identified three reasons for this. Firstly, there is the information and advice divide caused by the reluctance of the PSU and the inability of court staff to provide advice. Secondly, the sheer volume of LIPs seeking support means that advice given on a pro bono 'one to one' basis cannot sufficiently meet demand. Reported figures for private family law state that there were 'almost 43,000 children cases and 38,000 finance cases started in 2015'.[30] Thirdly, though PSUs are regarded by interviewees as offering a valuable service they are not available in all courts, operating at present in a mere 17 cities.

Many of these shortcomings could be addressed by taking inspiration from the response by other common law jurisdictions, such as the United States of America (USA) and Canada, to the increasing numbers of LIPs. In California self-help centres have been created to 'facilitate the timely and cost-effective processing of cases involving self-represented litigants and improve the delivery of justice to the public'.[31] Described as 'the optimum way' for courts to perform this function,[32] they now exist in 500 centres across the USA.[33] The centres are located in or near court buildings and although they may appear to be similar to

[28] www.lipnetwork.org.uk/topics/lip-engagement-group-lipeg/all accessed on 15.01.18.
[29] Briggs (n. 11) [3.43].
[30] MOJ, *Transforming our justice system* (September 2016) 13.
[31] 2018 California Rules of Court 10.960 (b).
[32] Task Force on Self-Represented Litigants (TFSRL), *Statewide Action Plan for Serving Self-Represented Litigants* (Judicial Council of California 2004) 4.
[33] Commission on the Future of Legal Services, *Report on the future of Legal Services in the United States* (American Bar Association 2016) 19.

PSUs there are a number of important differences and major improvements. The centres 'must include an attorney and other qualified staff who provide information and education to self-represented litigants about the justice process, and who work within the court to provide for the effective management of cases involving self-represented litigants'.[34] Information and support is, therefore, mandatorily supervised by lawyers who, along with other staff, provide procedural and general legal advice[35] as well as educational workshops and courses.[36] Taking a collective approach rather than merely providing 'one to one' support means that more members of the public can be assisted in order to widen the reach of access to justice provision. An innovative means of reaching LIPs is the New York Justice Bus which is a project designed to transport lawyers and students to LIPs in rural parts of California who would otherwise not be able to receive assistance.[37] This novel idea could be used at home as a means of reaching LIPs who are located in more isolated parts of the country where 'advice deserts' have been experienced.

Self-help centres also have a clearer link with the courts. It is the responsibility of the Administrative Office of the Courts to establish guidelines and procedures governing the operation of self-help centres which include ethics, qualifications of staff and the scope of their services.[38] In addition, the policies and procedures that are designed by self-help centres to assist LIPs to effectively access justice are to be regarded as a 'core function of the courts'[39] for which funding must be made in annual budgets.[40] In contrast, PSUs may be based in court buildings but they are not financed by HMCTS and the courts have no responsibility to provide LIPs with the services of a PSU.

There are also stronger connections between self-help centres and university students as Justice Corps programmes recruit and train university students in California under the guidance of lawyers to provide assistance to LIPs in self-help centres.[41] Contrastingly, in England and Wales, university law clinics operate independent of the courts which prevents

[34] 2018 California Rules of Court 10.960 (c).
[35] www.courts.ca.gov/selfhelp.htm accessed on 15.01.18.
[36] Bonnie Hough, 'Self-Represented Litigants in Family Law: the Response of California's Courts' (2010) California Law Review 15.
[37] TFSRL (n. 27) 54.
[38] 2018 California Rules of Court 10.960 (e).
[39] 2018 California Rules of Court 10.960 (b).
[40] 2018 California Rules of Court 10.960 (f).
[41] Douglas Denton, 'Procedural Fairness in the California Courts 44 (2007/2008) Court Rev 44.

this more co-ordinated response. This is a benefit acknowledged by Briggs LJ when commenting on the Justice Access Centre in the British Columbian city of Victoria. Here the university law clinic operates in conjunction with the local court in order to maximise their provision.[42] One of the most important features of self-help centres is their LIP focussed websites which explain procedures and provide a host of materials to assist those unable to afford legal advice. These include handbooks, information sheets on family matters and extensive resources on domestic violence which include videos and audio recordings. They also have links to other agencies and programmes available to assist LIPs.[43] For those LIPs who do not have access to computers, there are computer booths at self-help centres which they can use whilst getting assistance from volunteers.[44] A distinct feature of self-help centres in family matters are Family Law Facilitators. These are lawyers funded by the state to provide LIPs in Californian superior courts with educational materials, court forms and provide explanations of the law and procedure. They can also assist both parties as they do not act as either party's personal lawyer.[45]

Further initiatives in California include Legal Document Assistants (LDAs) who can charge for their services but whose remit is restricted to the preparation of documents for LIPs. These are usually experienced professionals required to have minimum qualifications. This is a unique answer to providing assistance which affords LIPs a further means of accessing an unbundled legal service from a trusted source. For the purposes of this study it would be beneficial to 'new uninformed' LIPs when they commence child arrangement proceedings and have to fill in a Form C100 and accompanying forms. For 'self-reliant' LIPs, who usually understand the forms sufficiently to complete them unaided or with the help of family and friends, LDAs could be used for the completion of Scott Schedules and bundles of documents.

If the problems encountered by LIPs are to be addressed then the creation of self-help centres at courts throughout England and Wales would be an important step in widening access to justice. Following the Californian model, they could be staffed by lawyer facilitators, law

[42] Briggs LJ, *Civil Courts Structure Review: Final Report* (Judiciary of England and Wales 2016) [6.118].
[43] www.courts.ca.gov/selfhelp.htm accessed on 16.01.18.
[44] Public Agenda and Doble Research, *Trust and confidence in the California courts: Public court users and judicial branch members talk about the California Courts* (2006) 45.
[45] http://www.courts.ca.gov/documents/ENFLFQuickRefGuide.pdf accessed on 16.01.18.

students and those members of the public having related experience (including previous LIPs). Most importantly the conflict between advice and information which exists at present due to court staff being unable, and PSUs being unwilling, to provide advice could be addressed in the same manner. Centre staff would be allowed to explain procedural issues and family law facilitators would be qualified to provide legal assistance and education. This could include computer booths for those that are not computer literate or do not have access to the internet. Each court could have a website dedicated to providing online support and information relevant to that court and its geographical area. Again, as with Californian court websites, this would include procedural explanations and could include computer software to assist LIPs to produce legal documents. In addition, courses and workshops could be provided as a means of educating LIPs about the court process and providing valuable information about other support available. In fact, such courses could take place in the community in libraries and schools as the American Bar Association recommended in its 2016 report on the *Future of Legal Service in the United States*.[46]

Taking this approach would address the needs of the different categories of LIP. 'New uniformed' LIPs could receive early legal advice about the stages of their case and assistance with paperwork and in court support. Those who have experience of the court, ('competent to instruct legal assistance' and 'self-reliant') who engage more easily with online resources, would have a reliable website which they could easily access in order to gain support. In turn, these LIPs may not require the same levels of face to face assistance required at present. Self-help centres would, therefore, address the three reasons why LIPs struggle to seek out legal assistance identified in this study. The tension between advice and assistance would be addressed, supply would more readily meet demand and LIPs throughout the country would have access to face to face or online support. Having a centre in every court providing both 'one to one' assistance and procedural advice as well as collective assistance in the form workshops and courses, would ensure that LIP support in England and Wales no longer lags behind other common law jurisdictions.

Rather than merely following the initiatives of other jurisdictions, Lord Justice Briggs's vision of an online court offers an opportunity for England and Wales to lead the way in innovatively widening access to justice for LIPs. It is a scheme backed by the MOJ who has

[46] TFSRL (n. 26) 45.

provided a budget of £700 million to modernise courts and tribunals.[47] Although a proposal that is restricted, at present, to small claims' procedures under £25,000,[48] the court is to be the first designed 'for use by litigants without lawyers.'[49] Having its own newly drafted rules[50] it will break away from the 'lawyerish culture'[51] and language of the existing civil courts and the CPR. The concept is of a totally online court which will consist of three stages. At stage one 'triage software' will be used to guide LIPs to produce documentation with the help of generic legal advice. The focus at this stage is on providing the parties with initial advice and to mediate a settlement. Mediation is to be facilitated by each party being aware, at an early stage in the proceedings, of the contentious issues between them.[52] Stage two would involve attempts by 'case lawyers' to assist the parties to reach a conciliated agreement.[53] Finally, stage three would be the determination. This would usually be done on a document only basis or through telephone or video conferencing. Only as a last resort would there be a traditional face to face decision by a judge. This would also occur if the matter was particularly difficult or required cross examination. [54] In accordance with the culture of a court designed for LIPs, judges will be expected to take a more inquisitorial approach. However, this role will go beyond the 'sink or swim'[55] approach adopted by judges in this study, who helped LIPs to put forward their questions or to remain focused. The court is to 'mark a radical departure from the traditional courts … by making the judge his or her own lawyer'.[56]

This unique approach to providing a court for LIPs, designed for their needs rather than the interests of lawyers, could have many advantages if adopted in a family law context. The focus on mediation at the outset, and as part of the court process, eliminates the requirement for MIAMs and would make mediation a legitimate part of the family court process rather than an adjunct or tick box exercise that has to be attended to before being allowed to issue proceedings. This would have the advantage of saving costs and delay as well as possibly leading to more mediated settlements, as the parties would be assisted early on in the process

[47] MOJ (n. 30) 3.
[48] Briggs (n. 42) [12.6].
[49] Briggs (n. 11) [6.5].
[50] ibid [6.21].
[51] ibid [6.29].
[52] ibid [6.8] – [6.12].
[53] ibid [6.13].
[54] ibid [6.14].
[55] Trinder et al (n. 1) 75.
[56] Briggs (n. 11) [6.15].

to reveal the issues between them. An online family court would no doubt benefit 'competent to instruct legal assistance' or 'self-reliant' LIPs who more readily engaged with online advice. These LIPs would have access to an online court which through 'Assisted Digital'[57] would guide them through the completion of documentation and the family procedure. This would even be available as a 'smart phone app' which research shows is often the way that LIPs access the internet.[58]

The main drawback to an online court is that there are likely to be many LIPs who are not computer literate or do not have access to the internet.[59] It has been estimated that this could represent as many as '50% of the population formerly entitled to legal aid'.[60] Hence, for these LIPs (in this study 'new uninformed' LIPs) face to face assistance and free telephone advice would be imperative. Sufficient funding would have to be made available and maintained for this assistance. Additionally, not all cases would be appropriate for online dispute resolution (ODR). Cases involving domestic violence or child abuse, which require fact finding hearings and accompanying cross examination, are more suited to the traditional court setting. These would need to remain in the court setting with accompanying legal aid for representation. However, by dealing with the more straightforward family cases online, resources could be freed for those with more challenging legal issues. Hence, a more resource targeted approach could be taken when addressing the access to justice needs of LIPs. This also acknowledges LIPs' procedural justice expectations as Lee and Tkacukova explain that their LIP participants' most favoured form of future advice was face to face followed by online.[61]

Some support for the argument that an online family court could provide an effective means of facilitating access to justice for LIPs is provided by the Netherlands' *Rechtwijzer 2.0.* Designed to provide 'people centred justice',[62] it is an 'online-based dispute resolution platform'[63] that allows people to manage their case 'in their own home, using their own

[57] Briggs (n. 42) [6].
[58] ibid [6.18] Lee and Tkacukova (n. 4) 9.
[59] Briggs (n. 11) [6.57].
[60] Roger Smith, *Digital delivery of legal services to people on low incomes: Annual update May 2016* (The legal education foundation) 6.
[61] Lee and Tkacukova (n. 4) 9.
[62] http://www.hiil.org/project/rechtwijzer accessed on 16.01.18.
[63] ibid.

words and at their own pace.'[64] The platform allows LIPs to learn about their legal options at the same time as trying to mediate with the other party. If this culminates in an agreement then the final document is read by a neutral lawyer.[65] The system has been proven to have procedural justice benefits. Seventy per cent of participants have reported that they found the process fair to a great or very great extent, 84 per cent of participants stated that they have more control over the separation process and 82 per cent feel respected by the lawyers or mediators on the platform.[66] As this study has discussed, having control and being treated with dignity and respect were two of the important procedural justice criterion identified by interviewees. The success of the Dutch ODR system has led to British Columbia adopting the model to create MyLawBC which has guided pathways dealing with debt, wills and family matters. The latter includes guidance and sources of support for victims of domestic violence[67] and no doubt this could be a valuable means of advice giving that a family online court could incorporate to guide victims of abuse to available assistance at an early stage.

Going forward the government and HMCTS must be more innovative when addressing the access to justice needs of all LIPs. It is no longer acceptable to continue to tweak the existing lawyer led civil and family court systems. The introduction of an online court for civil matters focused on LIPs and using plain language rules is an impressive development but the resources must be made available to ensure that all LIPs, including those with low literacy and computer skills, can receive appropriate support. Additionally, the momentum must be maintained so that the online court does not remain a court purely for lower value financial matters. Starting with claims under £25,000 prevents too much resistance from lawyers, as this does not affect their 'core business'.[68] It also tackles the disproportionate costs issue often encountered by parties in civil cases.[69] If the main impetus for Briggs LJ's reform is the access to justice needs of LIPs rather than costs saving, then reform in the family courts where children's futures are decided is imperative. After all it was the removal of legal aid in family matters that impacted on the volume of LIPs, an issue irrelevant in small claims where

[64] ibid.
[65] ibid.
[66] Maurits Barendrecht, 'Rechtwijzer: Why online supported dispute resolution is hard to implement' *HiiL User Friendly Justice* (21 June 2017) www.hiil.org/insight/rechtwijzer-why-online-supporte-dispute-resolution-is-hard-to-implement accessed on 16.01.18.
[67] www.mylawbc.com/ accessed on 16.01.18.
[68] Hiil Innovating Justice, *ODR and the Courts: The promise of 100% access to justice? Online Dispute Resolution 2016* (Hill Trend Report IV) 74.
[69] Briggs (n. 11) [6.48].

the costs rules discourage the use of lawyers. Indeed, one could argue that taking a true LIP perspective would have necessitated a family law focus from the outset.

Taking inspiration from other jurisdictions it may now be possible, some 18 years after Lord Woolf advocated a pro-active approach to assisting LIPs,[70] that the doors of justice can be opened for litigants irrespective of their representational status. Introducing a system of self-help centres with accompanying websites and educational workshops; ODR systems using pathways to guide LIPs through the civil and family court system and lawyers providing unbundled services can go some way to achieve this. However, LIPs must also have a voice and an input into how the civil and family system should adapt to meet their procedural justice needs. Only in this way can the courts provide a process that is understandable, accessible and unbiased, so that there truly is effective access to justice for all.

[70] Lord Woolf, *Access to Justice: Interim Report* (June 1995) ch 17.

Appendix

Characteristics of interviewees

Interviewee	Age Range	Employment	Matter	Role	Status/ Gender	Reason LIP	Parties
One	61 - 70	Retired Teacher	Deputyship - Mental Capacity Act	Applicant	Mother	Cost: Inability to pay for lawyer	LIP v Lawyer
Two	51- 60	Civil Engineer	Children	Applicant	Father	Disillusionment with lawyers	LIP v Lawyer
Three	18 - 30	Office worker	Children	Respondent	Mother	Cost: Over legal aid threshold	LIP v Lawyer
Four	61 - 70	Retired Manager	Bankruptcy	Defendant	Female	Cost: Inability to pay for lawyer	LIP v Lawyer
Five	18 - 30	Office worker	Children	Applicant	Father	Cost: Inability to pay for lawyer	Ex-Parte
Six	31 - 40	Civil Servant	Children	Respondent	Mother	Insufficient notice of hearing to instruct barrister	LIP v Lawyer
Seven	51 - 60	Unemployed	Children	Applicant	Father	Cost: Inability to pay lawyer	LIP v LIP
Eight	18 – 30	Unemployed	Children	Applicant	Father	Felt lawyers unnecessary/self-serving	LIP v Lawyer
Nine	31 - 40	Law Student	Children	Applicant	Father	Cost: Inability to pay for lawyer	LIP v LIP
Ten	41 - 50	Social Worker	Children	Respondent	Mother	Cost: Legal aid withdrawn	LIP v Lawyer
Eleven	18 – 30	Retail worker	Children	Applicant	Mother	Cost: Inability to pay for lawyer	LIP v Lawyer
Twelve	18 – 30	Unemployed	Children	Respondent	Father	Cost: Legal aid withdrawn	LIP v Lawyer
Thirteen	18 – 30	Unemployed	Children	Applicant	Father	Cost: Inability to pay for a lawyer	LIP v Lawyer
Fourteen	31 – 40	Para-legal	Children	Applicant	Father	Cost: Ran out of funds to pay lawyer	LIP v Lawyer
Fifteen	31 – 40	Manual	Children	Respondent	Father	Cost: Inability to pay for a lawyer	LIP v Lawyer
Sixteen	18 – 30	Unemployed	Children	Respondent	Mother	Cost: Inability to pay for a lawyer	LIP v LIP
Seventeen	41 - 50	Bus Driver	Children	Applicant	Father	Cost/Disillusion-	LIP v LIP

						ment with lawyers	
Eighteen	18 – 30	Unemployed	Children	Applicant	Mother	Cost: Inability to pay for a lawyer	LIP v LIP
Nineteen	18 – 30	Secretary	Children	Applicant	Mother	Cost: Inability to pay for a lawyer	LIP v Lawyer
Twenty	51 – 60	Salesperson	Finance	Applicant	Wife	Cost: Inability to pay for a lawyer	LIP v LIP
Twenty One	31 – 40	Classroom Assistant	Children	Respondent	Mother	Cost/Disillusion-ment with lawyers	LIP v LIP
Twenty Two -	41 – 50	General Practitioner	Financial	Respondent	Mother	Cost/Disillusion-ment with lawyers	LIP v LIP
Twenty Three	31 – 40	Air Cabin Crew	Children	Respondent	Mother	Disillusionment with lawyers	LIP v Lawyer
Twenty Four	18 – 30	Unemployed	Children	Applicant	Father	Cost: Inability to pay for a lawyer	LIP v LIP
Twenty Five	51 – 60	Cleaner	Children	Applicant	Grand-mother	Cost: Inability to pay for a lawyer	LIP v LIP
Twenty Six	31 – 40	Nurse	Children	Respondent	Mother	Cost: Inability to pay for a lawyer	LIP v LIP
Twenty Seven	41 - 50	Painter and decorator	Children	Respondent	Father	Cost: Inability to pay for a lawyer	LIP v Lawyer
Twenty Eight	41 - 50	Fairground Worker	Children	Applicant	Father	Cost: Inability to pay for a lawyer	LIP v Lawyer
Twenty Nine	18 – 30	Factory Worker	Children	Respondent	Father	Cost: Inability to pay for a lawyer	LIP v Lawyer
Thirty	51 – 60	Plasterer	Children	Applicant	Father	Cost: Inability to pay for a lawyer	LIP v LIP
Thirty One	18 - 30	Student	Children – Special Guardianship	Applicant	Sister	Cost: Inability to pay for a lawyer	LIP v LIP
Thirty Two	18 – 30	Unemployed	Children	Applicant	Father	Cost: Inability to pay for a lawyer	LIP v LIP
Thirty Three	31 – 40	Civil Servant	Children	Respondent	Mother	Cost: Inability to pay for a lawyer	LIP v McKenzie Friend
Thirty Four	31 – 40	Car Salesperson	Children	Applicant	Father	Cost: Inability to pay for a lawyer/lawyers unnecessary	LIP v LIP
Thirty Five	31 – 40	Unemployed	Children	Applicant	Mother	Cost: Inability to pay for a lawyer/ran out of funds	LIP v LIP
Thirty Six	51 – 60	Civil Servant	Children – Special Guardianship	Applicant	Grand-mother	Cost: Inability to pay for a lawyer	LIP v Lawyer

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