

Litigants in person in Northern Ireland: barriers to legal participation

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Briefing Paper 3:
Can litigants in person participate in court proceedings?

LIPNI study overview

The Litigants in Person in Northern Ireland study looked at people who were involved in civil or family proceedings without representation by a lawyer. They are known as litigants in person (LIPs). The study was interested in people who had taken a legal route to solve an issue, and not those who were involved in mediation or other types of dispute resolution.

Civil and family law in Northern Ireland is similar to that of England and Wales; Scotland has a different legal system. Legal Aid is available in all parts of the United Kingdom, but is more limited in England and Wales than in Northern Ireland or Scotland. The similarities between the Northern Ireland legal system and other legal systems like England and Wales mean that this research will be relevant to all of these legal systems. The difficulty for LIPs in Northern Ireland is that there are still some differences in the law in Northern Ireland that LIPs may need to know about.

The study investigated the experiences of litigants in person (LIPs) to assess their access to justice rights. This examined the right of LIPs to a fair trial. It also tested a model of providing advice on legal procedures to LIPs to see whether it was effective. From September 2016 to August 2017, data from people who took part in the research study were collected in civil and family courts in Northern Ireland.

The participants included:

- 179 LIPs: 49 women, 126 men; 3 couples and 1 group counted as one LIP each.
- 13 members of the judiciary
- 7 legal representatives
- 11 members of Northern Ireland Courts and Tribunals Service
- 5 Court Children's Officers
- 3 people who act as McKenzie Friends

The data were interviews from all participants and court room observations. LIPs also completed a questionnaire about their experiences of self-representing and their demographic background. These qualitative and quantitative data were analysed and the results are presented in the main report and the summary report, available at:

www.ulster.ac.uk/litigantsinperson

There are five briefing papers which summarise the research study :



Can litigants in person participate in court proceedings?

Introduction

LIPNI Briefing Paper 3 discusses how the experiences of people who go to court in Northern Ireland without a lawyer are in danger of not meeting the standards for the right to a fair trial. The right to a fair trial is a human right, as Briefing Paper 1 on 'Litigants in person and access to justice' explains. The right to a fair trial is protected under Article 6 of the European Convention on Human Rights and other international treaties. The European Convention on Human Rights applies to the UK under the Human Rights Act 1998.

The right to a fair trial is threatened when litigants who go to court without a lawyer are not able to participate effectively in their proceedings. We have used the concept of 'legal participation' to understand how litigants in person (LIPs) participate effectively in their proceedings.¹ We use the LIP experiences that are described in Briefing Paper 2, 'What it's like to go to court without a lawyer,' to explain the barriers that LIPs face in participating in their cases.

Barriers to legal participation

Legal participation describes the different ways in which people participate in their legal proceedings. One of the authors of this report, Gráinne McKeever, has identified seven different types of legal participation, described in Briefing Paper 1 on 'Litigants in person and access to justice.' Not all of the types of participation will be enough to protect the right to a fair trial under Article 6 of the European Convention on Human Rights. The types that we think do meet the standard of participation required by Article 6 are those we describe as 'engagement', 'collaboration' and 'being enabled':

Engagement – this is where individuals are able to find their way through the legal process and communicate with the other participants to understand everyone's role in the process.

Collaboration – this is where individuals are supported in their journey through the process. Their understanding of the process is assessed by the court and is used as the starting point to take them through the process and deal with difficulties as they arise

Being enabled – this is where individuals are in the position where they are supported and equipped to engage in the process as equals and reach some degree of autonomy.

Our research shows that LIPs have to be able to overcome different barriers in order to meet the legal standard of participation required by Article 6 of the European Convention on Human Rights. We have grouped these barriers into categories that we call intellectual, practical and emotional barriers. We found that LIPs also have to overcome an attitudinal barrier to participation.

Intellectual barriers

Intellectual barriers are the difficulties litigants have in understanding legal terms and legal processes. This also includes difficulties in applying complex legal information to the facts of a case.

Briefing Paper 2 explains that LIPs in our study did not understand the legal language used in court proceedings and documentation and did not know what information to put on court forms. Many LIPs did not understand or know how to apply legal rules to their own case or understand the legal framework which the court would use to make a decision.

The theme of ‘not knowing’ was common among LIPs in the study. It raises concern about how LIPs can participate in a process that they do not understand.

There was strong evidence that LIPs reached the limits of their knowledge or understanding of the legal issues, sometimes regardless of how much preparation they had done.

It was common for LIPs to say that they thought that the court system should be more supportive of them, but their access to relevant legal information was lacking.



Practical barriers

Practical barriers arise when a litigant struggles to manage the practical demands of his or her legal proceedings. This would include, for example, not knowing where to get relevant information, who to direct queries to, what to expect, when to sit or speak or stand during the hearing.

The experiences described by LIPs, set out in Briefing Paper 2, reveal lots of practical barriers to being able to participate in court proceedings without a lawyer.

One of the practical barriers LIPs identified was the cost of getting legal representation. They reported that they were not eligible for Legal Aid and that the cost of legal representation was too high.

Many LIPs expected that there would be advice and support readily available to them. They were disappointed or frustrated with the lack of information and resources. Judges and legal representatives sometimes seemed unaware of the lack of advice and support for LIPs. They sometimes assumed that *pro bono* services and voluntary sector advice agencies were already offering this basic assistance. However, we found that available resources are woefully inadequate in meeting demand and advice agencies are not equipped to provide the level of legal or procedural advice required by LIPs. This lack of practical assistance blocked the ability of LIPs to participate.



LIPs did not know what advice sources could be trusted. There was no central information point that LIPs could access. Some of the existing information from sources such as the court service was not user-friendly, and the website was seen as difficult to navigate. LIPs were able to find lots of information online but not all of it was relevant or reliable, and LIPs may not have realised this.

LIPs were also frustrated with the length of time court proceedings took, often having little understanding that there were staged processes that meant cases progressed incrementally rather than at one sitting. LIPs got very little information about the length of time court proceedings took. They did not understand that court proceedings often take weeks or months rather than being resolved in a day. Not having any information about the reality of how cases progress meant LIPs found it difficult to manage the repeated visits to court.

LIPs also found it difficult to keep notes on what was said in court and there was no court record they could rely on to understand what was said or what they were expected to do next. This extended to LIPs not always keeping track of the court order or directions made by the judge.

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

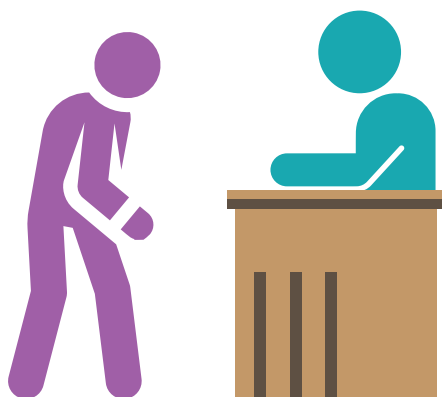
Emotional barriers

Emotional barriers arise from the anticipation or experience of the legal proceedings that can increase existing – usually negative – emotions.

LIPs experienced a range of emotions which acted as barriers to participation. These emotions, described in Briefing Paper 2, included frustration, anger, confusion, anxiety and fear. The fear and apprehension about the court process was largely based on LIPs not knowing what they should expect, not knowing how to behave, or how other court actors were supposed to behave. Waiting times could lead to anxiety and frustration among those unfamiliar or uncomfortable appearing in court, particularly when LIPs did not know how long the waiting period was likely to be.

Many LIPs described feeling supported by some court actors, but this was in contrast to the descriptions of a system that does not care and lacks sympathy for the difficulties they faced. These emotional barriers resulted in some LIPs becoming alienated or despairing of their situation. For others, it resulted in incredulity and the suspicion of unfairness, which could then develop into practical and intellectual barriers. LIPs could struggle to be objective about their cases and this made it difficult for them to present their cases effectively. This was an obstacle for both the LIP and for the court's ability to engage the LIP.

We measured the general mental health and well-being of the LIPs in our study using the General Health Questionnaire 12 (GHQ-12), which is a standardised measurement tool. We found 59% of the LIPs in this study had a high GHQ-12 score which told us that LIPs may be undergoing mental health difficulties. These can act as intellectual, practical and emotional barriers for LIPs to participate effectively in legal proceedings.



Attitudinal barriers

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

One of the obstacles that LIPs face is the stereotypically negative view of their behaviour, which may be related to the poor behaviour of another LIP rather than a reflection of their own. Equally, there were LIPs who had very forceful views about legal representatives based on negative experiences that they had had.

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



Conclusion

The study has drawn particular attention to the need to ensure effective participation and equality of arms for LIPs as a way to protect the right to a fair trial under Article 6 of the European Convention on Human Rights. We measured how well LIPs were able to participate by assessing their experience and identifying the intellectual, practical, emotional and attitudinal barriers to legal participation. The lack of access to information about relevant legal and procedural issues, the absence of accessible guidance on how to self-represent, and the failure to ensure LIPs understood what was involved in their legal proceedings could all threaten the right to a fair trial. It was difficult for LIPs to reach the emotional detachment they needed to participate effectively. Equality of arms too depends on being objective and able to understand the proceedings but was also threatened by the lack of judicial diligence in some cases to ensure equal opportunities for LIPs to present their cases.

The opportunity for litigants to represent themselves is not simply a matter of access to the court room if their right to a fair trial is to be fully enjoyed. It relies on the State obligation to ensure the LIP is supported to participate effectively and be able to influence the outcome of their case. Measures can be put in place to avoid threats to the right to a fair trial, to overcome the obstacles to participation and assist LIPs to participate in their court hearings. Our recommendations for these measures are summarised in Briefing Paper 5: Improving the experience of going to court without a lawyer.

Full report available at :

www.ulster.ac.uk/litigantsinperson

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



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