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Changing landscapes: The relationship between Student Law Clinics, Litigants in Person and family law dispute resolution in England and Wales

Hannah Camplin*

In November 2014 the Ministry of Justice published detailed research on the experiences of litigants in person (LIPs) in the family courts in England and Wales.¹ The study had been commissioned in anticipation of, and conducted prior to, the cuts to legal aid availability for most private family law cases brought about by the Legal Aid Sentencing and Punishment of Offenders Act (LASPO) 2012.² The research led to some key findings and recommendations for improving the experiences of LIPs in the family courts and, with the majority of private family law cases in England and Wales now involving one or both litigants self-representing³, and concerns that attendance at mediation is seemingly in decline⁴, it seems the findings from the report are more relevant than ever.

At the same time as the *Litigants in person in private family law cases*⁵ was published, the University of Westminster Student Law Clinic, aware like many other University law clinics that there was a growing need⁶, started to provide free family law legal advice and assistance services.⁷ Clinic staff and students have witnessed first hand the impact not being able to instruct a solicitor can have on those using our services, and it is in this context, and for this reason, a continued focus on LIPs and what is being done to try and assist them is necessary.

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¹ Trinder L, Hunter R, Hitchings E, Miles J, Moorhead R, Smith L, Sefton M, Hinchly V, Bader K and Pearce J, *Litigants in person in private family law cases* (2014) Ministry of Justice Analytical Series. Available at

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/380479/litigants-in-person-in-private-family-law-cases.pdf accessed on 26 June 2017.

² Legal aid is government (and therefore taxpayers') money paid to solicitors to represent those who could not otherwise afford legal advice and representation. Civil legal aid availability for private family law cases was removed by LASPO 2012, subject to exceptions for domestic violence and child abuse. For a good overview of the history of legal aid see Webley L 'When is a Family Lawyer a Lawyer?' in Maclean M, Eekelaar J and Bastard B (eds) 'Delivering Family Justice in the 21st Century' (Hart Publishing, 2015), at p 305.

³ *Family Court Statistics Quarterly, England and Wales, January to March 2017*, Ministry of Justice, 29 June 2017. Available at

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/622932/family-court-statistics-quarterly-jan-march-2017.pdf accessed on 10 July 2017.

⁴ Blacklaws C 'The Impact of the LASPO changes to Date in Private Family Law and Mediation' *Fam Law* (2014) 44(5) pp 626-628.

⁵ See note 1

⁶ See McKeown P and Morse S 'Litigants in person: is there a role for higher education?' *The Law Teacher* 49(1) pp 122-129.

⁷ For more information on the University of Westminster Student Law Clinic see <https://www.westminster.ac.uk/about-us/faculties/law/about-westminster-law-school/facilities/student-law-clinic>

This article seeks to provide an evaluation of the efforts in recent years to respond to growing numbers of LIPs in the English and Welsh family courts. Firstly the recommendations put forward by *Litigants in person in family law cases*⁸ and other key reports published in 2013-2015 will be considered. Secondly there will be a brief review of some of what has, and has not, been achieved since 2015 in response to the key recommendations. Thirdly the recommendations and subsequent policy developments will be considered in the light of the experiences of three LIPs who received family law advice and assistance from the University of Westminster Student Law Clinic since 2015. The experiences of three LIPs can provide no more than anecdotal evidence, but nevertheless this article concludes by making some observations about what more could be done to support LIPs in the family courts, especially those who are vulnerable, and where and how free family law advice and assistance fits in with this.

Definition of a litigant in person

This article uses the term ‘Litigant in Person’ (LIP) to reflect the terminology used by many of the reports in England and Wales when discussing ‘individuals without legal representation’.⁹ A more internationally recognised term for LIPs would be self-represented litigants.¹⁰ There is perhaps a debate to be had about the most appropriate terminology¹¹ particularly, as Trinder et al discuss, ‘LIP’ encompasses those who have received no legal advice and those who may have received some legal advice, assistance and even representation during the legal process but who appear as self-representing at a particular court hearing.¹² For now, though, ‘LIP’ appears to be the term widely in use in England and Wales.

Recommendations to improve LIPs access to the family justice system in England and Wales

Trinder et al¹³ considered areas of the family legal process where LIPs struggled without help from a solicitor or barrister. They concluded that, pre-hearing, LIPs tended not to be able to identify what the legal merits of their case might be,¹⁴ found it difficult to identify and complete the correct forms¹⁵ and misunderstood disclosure and other evidential requirements.¹⁶ Immediately prior to hearings, LIPs were likely not to know about the court emphasis on negotiation and agreement, and therefore

⁸ See note 1

⁹ Williams K, *Litigants in Person: a literature review* (2011) Ministry of Justice, p1. Available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/217374/litigants-in-person-literature-review.pdf accessed on 26 June 2017.

¹⁰ For example see, from the U.S., Shepard R ‘The Self-Represented Litigant: Implications for the Bench and Bar’, *Family Court Review* (2010) 48(4) pp 607-618.

¹¹ The distinguishing of ‘vexatious litigants’ for example, see Genn H ‘Do-it-yourself law: access to justice and the challenge of self-representation’ *Civil Justice Quarterly* (2013) 32(4) pp 411-444.

¹² See note 1, at p 12

¹³ See note 1

¹⁴ As above, p 36

¹⁵ As above, p 39

¹⁶ As above, p 42

were less likely to engage in settlement discussions.¹⁷ It was found that, during the hearing, ‘preparation of bundles and cross-examination were beyond the capacity of most LIPs without considerable help’.¹⁸ It was also concluded that hearings with LIPs worked better where the issues were relatively straightforward, the hearing was for directions rather than a substantive hearing, the LIP was ‘calm and competent’¹⁹ and there was a supportive professional present, either a helpful Cafcass Officer²⁰ or representative for the other party, or a judge taking a more interventionist role. These findings have been echoed by other reports both pre and post 2014.²¹

The experiences of LIPs going to family courts, and the associated experiences of courts in managing a process where one party has significant issues with court procedures, led to recommendations for change. Trinder et al, drawing on other reports such as that of the Judicial Working Group on Litigants in Person,²² organise their detailed recommendations under three key headings. ‘Information needs’ includes redesigning court forms and guidance to make them simpler to read and complete,²³ clear guidance in leaflets and letters provided to LIPs before and after key hearings,²⁴ online information²⁵ and face to face explanation and support, potentially provided by court staff.²⁶

Under ‘Emotional support’ Trinder et al suggest expansion of the Personal Support Unit (PSU) where volunteers provide emotional and practical support (but not legal advice) to LIPs.²⁷ The recommendations also include a presumption to admit McKenzie Friends²⁸ into the family courts if they are providing emotional and practical support to a LIP, and consideration of a regulatory framework for those who offer quasi-legal services.²⁹ Finally, in a detailed group of recommendations under the heading ‘Practical support and legal advice’ Trinder et al evaluate different options

¹⁷ As above, p 48

¹⁸ As above, p 52

¹⁹ As above, p 52

²⁰ Cafcass supports children law proceedings, providing risk assessments and reports for the courts.

²¹ For a more general civil, rather than family law, focus see *Access to justice for Litigants in Person report* Civil Justice Council (2011), available at <https://www.judiciary.gov.uk/wp-content/uploads/2014/05/report-on-access-to-justice-for-litigants-in-person-nov2011.pdf> accessed 28 June 2017. For a focus on welfare benefits see *Tackling the advice deficit: A strategy for access to advice and legal support on social welfare in England and Wales* The Low Commission (2014), available at <http://www.lowcommission.org.uk/dyn/1389221772932/Low-Commission-Report-FINAL-VERSION.pdf> accessed 28 June 2017.

²² *Judicial Working Group on Litigants in Person: Report* Judiciary of England and Wales (2013) p 12. Available at https://www.judiciary.gov.uk/wp-content/uploads/JCO/Documents/Reports/lip_2013.pdf accessed 26 June 2017.

²³ See note 1, p 106

²⁴ As above, p 106

²⁵ As above, p 107

²⁶ As above, p 109

²⁷ As above, p 112

²⁸ A term used for a lay person accompanying a LIP into court. The term originates from the case of *McKenzie v McKenzie* [1970] 3 WLR 472. McKenzie Friends usually provide emotional and practical support but the term also covers a lay person who offers legal or quasi-legal services for payment. McKenzie Friends may be permitted by the judge to address the court on behalf of the LIP.

²⁹ See note 1, p 112

such as self-help schemes, taking inspiration from the Californian model of court help centres and extensive LIP support,³⁰ free advice services and unbundling practices.³¹ The recommendations also suggest that ‘the traditional arbiter role of the judge is not sustainable’ and that consequently the judiciary develop a more inquisitorial style.³² The recommendations end with a suggestion that vulnerable LIPs or those with very complex financial cases be extended legal aid through the exceptional funding provision under s.10 LASPO 2012.³³

Subsequent reports have refined these recommendations, but ultimately come to a similar set of conclusions. The Justice Select Committee considered the LIP experience when reporting on the impact of LASPO 2012.³⁴ Whilst the conclusions were more cautious regarding unbundling practices and the judiciary adopting an inquisitorial approach, the Committee recommended that additional funding be available for demands made on court staff, that information and free advice services be further developed, that McKenzie Friend regulation be addressed and remaining legal aid availability should be used flexibly where necessary. Additionally, the report highlighted that measures were needed to protect witnesses from cross-examination by their abusers, now more likely to be representing themselves.

Reports from free legal advice providers in 2015 suggest, in line with Trinder et al³⁵, that to increase LIPs’ access to justice there be easily accessible legal information, simplified paperwork and processes including evidence submission³⁶, and expansion of legal aid provision to the most vulnerable.³⁷

Academic and practitioner suggestions for LIPs accessing justice also support and refine the Trinder et al recommendations. Bevan suggests redesigned court forms and training for lawyers.³⁸ Genn, whose work significantly influenced the Judicial Working Group report on the subject, suggests very similar changes to Trinder et al

³⁰ See Zorza R ‘An Overview of Self-Represented Litigation Innovation, Its Impact and Approach for the Future: An Invitation to Dialogue’ *Fam.L.Q.* (2009) 43(3) pp 519-543.

³¹ A significant area of research and development in itself, see Maclean M ‘The Changing Professional Landscape’ *Fam. Law* (2014) 44(2) pp 177-182.

³² See note 1, p 119

³³ Limited in scope to exceptional cases, this provision allows legal aid for a solicitor to be granted even if the other requirements are not met.

³⁴ *Impact of changes to civil legal aid under Part 1 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012: Eighth Report of Session 2014-15* House of Commons (2015). Available at <https://www.publications.parliament.uk/pa/cm201415/cmselect/cmjust/311/311.pdf> accessed June 2016.

³⁵ See note 1

³⁶ *Standing Alone, Going to the family court without a lawyer*, Citizens Advice Bureau (2015). Available at <https://www.citizensadvice.org.uk/Global/CitizensAdvice/Crime%20and%20Justice%20Publications/Crime%20and%20Justice%20consultation%20responses/StandingAloneGoingtothefamilycourtwithoutalawyerfinalversion.pdf> accessed June 2016.

³⁷ Lin X, *Sleepless nights: accessing justice without legal aid*, Middlesex University and Toynbee Hall (2015). Available at http://www.toynbeehall.org.uk/data/files/Reports/Sleepless_Nights_digital_version.pdf accessed 26 June 2017.

³⁸ Bevan C ‘Self-represented litigants: the overlooked and unintended consequences of legal aid reform’ *Journal of Social Welfare and Family Law* (2013) 35(1) pp 43-54.

including access to early advice on the merits of the case, procedural modifications, access to information, courts admitting McKenzie Friends and an investigation into inquisitorial procedures. She also, crucially, recommends training for the judiciary on how to approach LIPs.³⁹

Due to the breadth and depth of the recommendations, many different potential areas of reform could be investigated and evaluated. However, for the purposes of the following section, the recommendations can be broadly summarised into five general areas:

- More information to be available
- Simplified court forms and court procedures
- Developments for the judiciary including specific judicial training and flexibility in adopting a more inquisitorial approach
- Greater availability of free/low cost legal advice and provision of emotional and practical support, including routine admission into court for volunteer McKenzie Friends
- Expand what legal aid and representation provision there is for the most vulnerable

The next section of this article aims to provide some evaluation of the steps taken to respond to these key recommendations.

Recent Developments for LIPs

Since 2012, when Trinder et al were conducting their research⁴⁰, the family justice system in England and Wales has undergone huge changes. The system of family courts, and the geographical location of many, has been changed following a modernisation process,⁴¹ which is still on-going.⁴² Changes to terminology and compulsory Mediation Information and Assessment Meetings have been introduced as a result of the Children and Families Act 2014.⁴³ There has been an increase in providers offering discrete, ‘unbundled’, low cost family law services, and these often make use of new technologies.⁴⁴ Although these changes may have been motivated by

³⁹ Genn H ‘Do-it-yourself law: access to justice and the challenge of self-representation’ *Civil Justice Quarterly* (2013) 32(4) pp 411-444. Genn’s suggestions cover a wider remit of civil law in general, but this includes family law.

⁴⁰ See note 1

⁴¹ See, for example, *The Family Justice Modernisation Programme: Sixth update from Mr Justice Ryder* Judiciary of England and Wales (2012). Available at https://www.judiciary.gov.uk/wp-content/uploads/JCO/Documents/Reports/family_newsletter6.pdf accessed 9 July 2017.

⁴² See Sir Oliver Heald MP comments on digital court processes (though not specific to family law courts) at the Fifth National Forum on Access to Justice for those without means, from *Fifth National Forum on Access to Justice for those without means: A summary*, Civil Justice Council (2016). Available at <https://www.judiciary.gov.uk/wp-content/uploads/2011/03/cjc-fifth-national-forum-note.pdf> accessed on 5 July 2017.

⁴³ In response to the Family Justice Review recommendations, *Family Justice Review Final Report* Department of Education and Ministry of Justice (2011). Available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/217343/family-justice-review-final-report.pdf accessed 13 July 2017.

⁴⁴ Maclean M ‘The Changing Professional Landscape’ *Fam. Law* (2014) 44(2) pp 177-182.

LASPO 2012, they are also the result of a variety of factors, such as the Legal Services Act 2007, which changed the regulatory system for legal services.⁴⁵ Due to this and the rapidity of change, there is not scope to consider the types of discrete family law services offered or the developments in mediation. Therefore this section will focus on developments specifically implemented to support LIPs before and during the court process in the family courts.

Information for LIPs

Clear efforts have been made in the last two or three years to develop online information and resources for LIPs. The response to Trinder *et al.*'s recommendation for a 'single, authoritative, "official" website'⁴⁶ has arguably been met with 'Advicenow',⁴⁷ which provides advice guides and helpful videos on key topics and is funded, at least in part, by the Ministry of Justice. Although the website does not easily link to relevant court forms (with the exception of the court fee remission form), it does provide clear information and signposting to other legal advice provision. However, to read more detailed guides, the information must be purchased. The price is not extortionate,⁴⁸ but this potentially does limit the availability of some of the information. The government website also offers, fairly brief, information on family proceedings and does link to relevant forms, and a government supported legal information app has been developed.⁴⁹ Significant legal information is also provided by other charities, and this has been the case for some time.⁵⁰

Reliable and 'official' online information must be publicised as such. As Citizens Advice point out, there is a wealth of information on the internet but LIPs struggle to know what information is reliable and what is not.⁵¹ When using a search engine to find information on divorce, the Advicenow website does not appear on the first page of Google entries, though the government pages do. The entries appear to have changed little since a study of legal services in family justice was conducted in 2013-14, for example the website 'Quickie Divorce' offering 'a low cost document handling service for cases without issues to be resolved' still appears first on the list.⁵²

⁴⁵ See Webley L 'When is a Family Lawyer a Lawyer?' in Maclean M, Eekelaar J and Bastard B (eds) 'Delivering Family Justice in the 21st Century' (Hart Publishing, 2015), at p 305.

⁴⁶ See note 1, p 107

⁴⁷ See <http://www.advicenow.org.uk>, website developed by charity Law for Life with funding from the Ministry of Justice. 'Sorting out Separation' is also a useful 'official' website <https://www.sortingoutseparation.org.uk/legal-mediation/divorce-legal-separation/>.

⁴⁸ At last check, between £10-20.

⁴⁹ Called Sorting out Separation, although when searched for many other apps of a similar nature appear, making a confusing choice.

⁵⁰ For example, Citizens Advice, see <https://www.citizensadvice.org.uk> and Rights of Women, see <https://www.rightsofwomen.org.uk>.

⁵¹ *Standing Alone, Going to the family court without a lawyer*, Citizens Advice Bureau (2015). Available at

<https://www.citizensadvice.org.uk/Global/CitizensAdvice/Crime%20and%20Justice%20Publications/Crime%20and%20Justice%20consultation%20responses/StandingAloneGoingtothefamilycourtwithoutalawyerfinalversion.pdf> accessed June 2016.

⁵² Maclean M '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 M, Eekelaar J

It is suggested that more could therefore be done to support Advicenow as the 'official' and reliable website for LIPs, including better publicity and further direct links to court forms.

Simplified court forms and court procedures

Since recommendations were made for radical simplification of forms and procedures post LASPO 2012,⁵³ there has been relatively little change to the Family Procedure Rules 2010 and key family court forms for divorce, financial and private children matters. Family court forms were revised following the Children and Families Act 2014, and are regularly updated, but no significant simplification measures have been taken in terms of language or phrasing.

However, there has been noticeable change to one form. Tkacukova highlights a scheme by Birmingham Personal Support Unit that piloted a simplified version of the application for the exemption from fees (fee remission) form.⁵⁴ The form used bigger font, shorter sections and plain language. A version of this simplified form has now been adopted nationally.⁵⁵ Tkacukova concludes that 'Closer interdisciplinary cooperation with linguists and communication experts would bring more clarity to [court] forms and court procedures and processes'.⁵⁶ Although efforts have been made to revise forms, much further work could still be done, especially with divorce and financial application forms.⁵⁷

Developments for the judiciary

Whether or not, and when and how, family judges should adopt an inquisitorial approach to cases is much contested⁵⁸ and the discussion is largely beyond the scope of this article. However, what is clear from the findings detailed in the preceding section, is that LIPs have more successful hearings if a more interactive judicial approach is taken. Following a recommendation by the Judicial Working Group on Litigants in Person, new rule 3.1A was introduced into the Civil Procedure Rules 1998 in 2015. Whilst not implementing a new regime of inquisitorial approach, rule 3.1A 'emphasises the court's duty to adopt such procedure as it considers appropriate..when one or more LIPs is involved in a case'.⁵⁹ It also appears that there have been significant developments in judicial training on LIPs.⁶⁰ Two key issues however remain, the extent to which these developments allow the judiciary to

and Bastard B (eds) 'Delivering Family Justice in the 21st Century' (Hart Publishing, 2015), at p 323, p 328.

⁵³ For example, see Bevan C 'Self-represented litigants: the overlooked and unintended consequences of legal aid reform' *Journal of Social Welfare and Family Law* (2013) 35(1) pp 43-54.

⁵⁴ Tkacukova T 'Communication in family court: financial remedy proceedings from the perspective of litigants in person' *Journal of Social Welfare and Family Law* (2016) 38(4) pp 430-449.

⁵⁵ See 'Apply for help with fees' <https://formfinder.hmctsformfinder.justice.gov.uk/ex160-eng.pdf>

⁵⁶ Tkacukova T 'Communication in family court: financial remedy proceedings from the perspective of litigants in person' *Journal of Social Welfare and Family Law* (2016) 38(4) pp 430-449, p 442.

⁵⁷ For example, the divorce application form D8 still uses archaic wording such as 'Prayer'.

⁵⁸ See Zuckerman A 'No justice without lawyers – The myth of an inquisitorial solution' *Oxford Legal Studies Research Paper* (2014) 66 pp 355-374.

⁵⁹ Asplin S 'The need to coordinate LIP initiatives' *Tribunals* (2016, Autumn) pp 17-19, p 18.

⁶⁰ As above

intervene as necessary, and the issue of consistency of approach amongst judges (and magistrates and legal advisors). The significance of judicial approach is further discussed in relation to Student Law Clinic client experiences in the section below.

Expansion of current legal aid provision

Following the implementation of LASPO 2012 the Lord Chancellor emphasised that the exceptional funding provision at s.10 LASPO 2012 was to be interpreted strictly and only to be used in the ‘highest priority cases’.⁶¹ Legal Aid Agency decisions in relation to exceptionality were (and are) challenged by judicial review in respect to individual cases, though there are cases that have remained unfunded despite judicial and other concern.⁶²

There have, however, been two substantial developments in relation to vulnerable parties receiving representation in the family courts. The first was Rights of Women’s successful challenge to some of the evidential restrictions LASPO 2012 placed on victims of domestic violence trying to obtain legal aid in their family cases.⁶³ The second is the recent announcement that new legislation will prevent alleged perpetrators of abuse from cross-examining their victims personally in court and allow a publicly funded lawyer to cross-examine the witness for them (although other options must seemingly be explored before the court appoints a centrally funded solicitor).⁶⁴ This provision is to be welcomed, yet, from a cynical perspective, it is also a means by which the Ministry of Justice can react to judicial and other pressure to publicly fund vulnerable parties without relaxing the exceptional funding provisions.

Provision of emotional and practical support

The government has clearly encouraged the provision of emotional support and free advice in relation to family law since LASPO 2012. In 2016 there were 20 Personal Support Units⁶⁵ in 16 cities across England and Wales and 14 more LawWorks⁶⁶ advice clinics set up, both organisations funded at least in part by the Ministry of Justice.⁶⁷

⁶¹ *Lord Chancellor’s Exceptional Funding Guidance (Non-Inquests)* Legal Aid Agency (2014), p 2. Available at

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/477317/legal-aid-chancellor-non-inquests.pdf accessed 9 July 2017.

⁶² For example, *Q v Q* [2014] EWFC 31

⁶³ *The Queen (On the Application of Rights of Women) v The Lord Chancellor and Secretary of State for Justice* [2016] EWCA Civ 91

⁶⁴ See Roscoe M ‘Reforms to cross-examination by alleged abusers in the Prison and Courts Bill’ *Family Law Week* (March 2017). Available at <http://www.familylawweek.co.uk/site.aspx?i=ed176325> accessed 10 July 2017.

⁶⁵ Provides volunteer emotional and practical (though not legal) support for those appearing in court unrepresented, see <https://www.thepsu.org>.

⁶⁶ An umbrella and signposting organisation for pro bono advice schemes, see <https://www.lawworks.org.uk>.

⁶⁷ See Sir Oliver Heald MP comments at the Fifth National Forum on Access to Justice for those without means, from *Fifth National Forum on Access to Justice for those without means: A summary*, Civil Justice Council (2016). Available at <https://www.judiciary.gov.uk/wp-content/uploads/2011/03/cjc-fifth-national-forum-note.pdf> accessed on 5 July 2017.

Free family law advice, of differing quality, tends to be provided by solicitors acting pro bono, Law Centres, charities and University law clinics. Whilst these services do undoubtedly provide tailored legal advice that would otherwise be unavailable, and reserve a valuable place within services for LIPs because of this, it is important to note that all free advice schemes have service limitations. Services may be only for those within a specific catchment area, offer limited one-off advice sessions or have services subject to time restrictions.⁶⁸ Usually free services are heavily oversubscribed. With the exception of solicitor-staffed Law Centres and some solicitor pro bono advice, many organisations offering free family law advice will not conduct litigation on behalf of clients or attend court,⁶⁹ though they may refer to limited organisations offering free representation, such as the heavily in demand Bar Pro Bono Unit.⁷⁰

There is also research from the U.S., both in relation to discrete advice schemes⁷¹ and advice provided by a University law clinic,⁷² which suggests that although clients leave advice sessions feeling satisfied with the service (and perhaps better informed), the advice alone has very little impact on the outcome of the case. This is contrasted with Sandefur's study revealing the very clear impact of the presence of a lawyer (or knowledgeable representative) on case outcomes, although it is the procedural rather than substantive knowledge that was interestingly found to affect the impact.⁷³

Though some experienced lay representatives, as well as lawyers, may meet the above requirement of extensive procedural knowledge, the presence of unregulated, unchecked McKenzie Friends has raised concerns and, in 2016, the judiciary launched a consultation on the regulation of lay representatives in court.⁷⁴ What has importantly not been explicitly considered, though may yet be, is a careful distinction between fee charging and voluntary McKenzie Friends and an official response to Trinder et al's⁷⁵ recommendation that there be a presumption of admitting voluntary McKenzie Friends into the family courts.

There have undoubtedly been many changes since 2014 in response to the rise of LIPs in the family courts. Some funding has been made available for the provision of legal information, free advice and emotional support in court. However, developments

⁶⁸ For example, many University law clinics will offer a reduced service outside of term time.

⁶⁹ Indeed there are potential regulatory issues with University law clinics conducting litigation, see Thomas L 'Law clinics in England and Wales: a regulatory black hole' *The Law Teacher* (2017) Latest Articles pp 1-17.

⁷⁰ An organisation that co-ordinates litigants in person with volunteer barristers, see <https://www.barprobono.org.uk>.

⁷¹ Steinberg J 'In Pursuit of Justice? Case Outcomes and the Delivery of Unbundled Legal Services' *Georgetown Journal on Poverty Law and Policy* (2011) 18(3) pp 453-506.

⁷² Smith L and Stratford B 'DIY in Family Law: A Case Study of a Brief Advice Clinic For Pro Se Litigants' *Journal of Law and Family Studies* (2012) 14(2) pp 167-221.

⁷³ Sandefur R 'Elements of Professional Expertise: Understanding Relational and Substantive Expertise through Lawyers' Impact' *American Sociological Review* (2015) 80(5) pp 909-933.

⁷⁴ *Reforming the courts' approach to McKenzie Friends: A consultation* Lord Chief Justice (2016). Available at <https://www.judiciary.gov.uk/wp-content/uploads/2016/02/mf-consultation-paper-feb2016-1.pdf> accessed 9 July 2017.

⁷⁵ See note 1

purporting to respond to LIPs' needs have seemingly not addressed crucial issues such as the radical simplification of all court forms and procedures, the adoption of the inquisitorial approach by the judiciary and the limitations of free family law advice. The Ministry of Justice appears to remain reluctant to permit provision of exceptional funding where cases involve the most vulnerable people. The question also remains as to whether LIPs feel the benefits of these developments. To consider these issues further, the final section of this article considers some experiences of LIPs recently involved in proceedings in the family court.

LIP experiences in a changing family justice system

This section will set out the experiences of three LIPs who were advised and assisted by the Student Law Clinic at University of Westminster in relation to their private children proceedings in the family court during 2015-17. It is not suggested that these experiences are anything more than anecdotal, and the experiences of three people in the London family courts involved in private children proceedings cannot be indicative of LIP experiences more widely. However, the experiences do provide a suggestion as to how changes are working and what more it is that could be done to assist LIPs in family proceedings.

Fred⁷⁶ is a man in his early 50s. He and his partner separated in December 2014 and their three children (10, 7 and 3 years old) remained living with their mother. Once separated from his partner, Fred had no contact with the children. After receiving some advice from the Student Law Clinic, Fred was able to contact a mediator and, when his ex-partner did not attend mediation, make an application to court. When the case progressed to court, however, things became much more difficult for Fred. The application took several months for the court to process and Fred needed detailed advice on what to do to contact the court and question the time taken. Throughout the lengthy proceedings (including a fact-finding and final hearing) Fred felt that he was at a disadvantage because his ex-partner was represented, but yet the court still refused the admission of a voluntary McKenzie Friend offering practical support to Fred. The proceedings were also beset with communication problems. Several court orders were sent to Fred containing directions different to what he thought had been agreed in court, and these needed time consuming clarification with the court. Court staff tended to correspond with his ex-partner's solicitor and only with Fred when prompted. Staff also appeared to be confused about the status of a direct access barrister⁷⁷ that Fred managed to pay to attend the fact-finding court hearing, sending correspondence to her as if she were his solicitor rather than direct to Fred. This lack of communication led to one occasion where Fred was not informed of a new court date. As a result of these issues, Fred found the court experience very frustrating.

Fatima is a woman in her late 20s from the Indian subcontinent. She has one daughter who, at the time of proceedings, was 5 years old. Fatima's ex-husband showed very little interest in his daughter and had not seen her for some time. When Fatima approached the Student Law Clinic she had very little financial means, low confidence and difficulties understanding formal English. It became clear that Fatima

⁷⁶ Names and some details have been changed to protect identity.

⁷⁷ A growing trend, barristers are providing services without being instructed by a solicitor. Usually they can be paid to attend a specific court hearing.

needed to apply for an order to resolve a specific issue about her daughter, but because of language difficulties and low confidence Fatima needed significant help with the application and preparation of evidence. In court a barrister was able to assist pro bono, but an interesting issue emerged in relation to the differing approach of the judges. At one hearing the judge asked for significant input from the barrister and ultimately adjourned the case. At the second hearing (without any change in evidence or situation) the judge took a more interventionist approach, identified the issues, questioned the parties and made a decision. Afterwards it was felt that Fatima probably could have represented herself before the second judge but, as she did not know which 'type of' judge she was going to get beforehand, she said she would always be worried in future about going to court without representation.

Grace is a woman in her 40s originally from Ghana. She has two teenage sons with her ex-husband. Unlike Fred and Fatima, Grace was the Respondent in proceedings and her ex-husband made several applications to see his sons. Grace was intimidated by her ex-husband and inclined to not attend court. The two boys live with their mother and were adamant about not seeing their father. Grace finds it very difficult to understand court processes and procedure, is not computer literate, is of limited means and struggles to understand formal English. She was desperate for assistance. In response, the Clinic provided her with advice and managed to arrange for a barrister to represent her pro bono at court, though it became obvious that the Clinic had both practical and emotional limitations for her.

Discussion

The experiences of the three LIPs supports the findings of Trinder et al⁷⁸ in relation to the need for court staff support and the benefits of judges taking a more inquisitorial approach. What is interesting from the perspective both of maximising the effectiveness of Clinic advice services and evaluating the changes set out in the preceding section, is to consider what factors would have allowed all three clients to successfully navigate the family courts as a LIP, with the assistance of one off (but recurring if necessary) free family law advice from the Student Law Clinic.

Fred had a significant advantage over Fatima and Grace because he could access a computer and was reasonably literate. With an initial free or low cost session of family law advice and an Advicenow guide he probably could have found the mediation procedure and then the necessary form to apply to court to see his children. If there had been some free or low cost online or face-to-face assistance to help him, or the form had been simplified in language and style, Fred could have completed his form and initiated proceedings himself. At court the greater assistance of court staff would have made a significant difference to Fred. If Fred had been handed a draft order immediately after the hearing, or information on what to do if he needed to clarify anything in the order, this would have assisted. If court staff had communicated with him as they did his ex-partner's solicitor and been clear about what information he could expect to receive from court staff, this would have greatly assisted him. This suggests the need for further thought as to how court processes and procedures can be adapted for LIPs, or simply better explained. Fred would also have

⁷⁸ See note 1

benefitted from the presumption of admission of a McKenzie Friend providing emotional and practical support.

At the time Fatima went to court⁷⁹ she would not have been able to access legal information or complete a form even if simplified, so she would have needed fairly detailed, free, family law advice and support to initiate proceedings. In court what made a real difference to Fatima was the approach of the judge. Therefore it is possible that, with the provision of fairly significant free family law advice, help with the form and writing a statement, and the promise of a consistent 'robust' approach from a judge, Fatima may have been able to feel that court proceedings were something she could manage herself. Fatima's case therefore suggests that a consistent, inquisitorial-type approach to LIPs by family court judges and magistrates would be of significant assistance.

Finally, even with the provision of free family law advice and information, Grace would not have been able to respond to her ex-husband's application herself. She cannot access information online and would have difficulties completing even simplified court forms. In terms of communication, she really only responds to text messages. She probably would avoid court if she had to attend on her own, even with an inquisitorial-style judge and supportive court staff. What Grace really needed was a solicitor.

These limited client experiences demonstrate that, with some significant discussions and changes, as well as the provision of free or low cost family advice at the beginning of proceedings, two of these LIPs might potentially have felt that their family court experience was a fair and accessible procedure.⁸⁰ However, one LIP needed substantial on-going advice and representation, irrespective of any changes made. It is therefore suggested that, as a priority, the basis of exceptional funding for legal aid is re-examined for those like Grace.

Conclusions

Litigants in person remain a significant consideration for the family courts in England and Wales. Several detailed reports made similar recommendations as to how family courts, judges, lawyers and the Ministry of Justice could respond to increased numbers of LIPs. Whilst important changes have been, and continue to be, made in response, it is argued that these are predominantly developments that can be implemented with relative ease and comparatively little expense, for example provision of judicial training, online information and free limited advice schemes. The more difficult issues raised by the recommendations, and echoed by the experiences of LIPs assisted by the Student Law Clinic, have, on the whole, not been considered in detail by the government. These include the drastic simplification of court forms and procedures, a consistent and inquisitorial approach by the judiciary, changes to the role of court staff and expansion of legal aid provision for the most vulnerable. Exceptions to this would be the recent introduction of expert cross-examination where there are issues of abuse and consideration of the regulation of McKenzie Friends,

⁷⁹ She has now greatly increased in confidence and her ability to understand English.

⁸⁰ I am not at any point suggesting that they would not prefer to instruct a solicitor.

though both of these developments are as a result of action from the judiciary and other interested groups.

The developments to the family justice system in England and Wales since LASPO 2012 have aptly been described as ‘a bagel with a hole in the middle’.⁸¹ The issue of LIP access to justice has not, and will not, go away with the provision of online information and free advice services, welcome as these may be. The evaluation of recent policy developments and experiences of LIPs set out in this article demonstrates that there is a greater need than ever for bold and difficult decision making in relation to the family justice system.

⁸¹ Maclean M ‘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 M, Eekelaar J and Bastard B (eds) ‘Delivering Family Justice in the 21st Century’ (Hart Publishing, 2015), at p 323, p 324.