Litigants in Person and the Family Court: The Accessibility of Private Family Justice After LASPO

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PRELIMINARY RESEARCH FINDINGS
PRE-PUBLICATION BRIEFING

Summary of Research
This ESRC-funded PhD research is currently being conducted by Jess Mant, a doctoral researcher at the University of Leeds and a Lecturer in Law at Cardiff University. The project aims to give an insight into some of the ways in which LIPs may now be experiencing the post-LASPO family court process without access to legal aid. These preliminary findings identify several barriers to the court process and family justice in a broader sense. These findings will be substantively published once the project and thesis are complete, and questions about any of the issues raised in this document can be directed to MantJ@Cardiff.ac.uk.

This pre-publication briefing has been compiled for the purpose of providing evidence to the LASPO Post-Implementation Review (PIR) Committee. If referred to, these findings should be cited as follows:


Research Methodology
These preliminary findings have been drawn from 23 semi-structured interviews with LIPs who were mid-way through or had recently completed private family proceedings regarding applications for Child Arrangements (s 8) Orders. These interviews focused on experiences of the post-LASPO court process, by exploring:
- The resources that LIPs made use of during their time in court, and the extent to which these resources were perceived as useful.
• Which aspects (if any) of the court process that LIPs found problematic without legal representation.
• Some of the ways in which ‘vulnerability’ is experienced within the court process and the extent to which this is effectively recognised within the family justice system.
• The extent to which LIPs view the family court process as accessible without legal representation.

The interviews conducted as part of this project therefore focused on the perceptions, experiences and interpretations that interviewees had relating to these issues. In doing so, they identified some commonly experienced practices and problems which require further investigation and research. However, now more than ever, LIPs who are no longer entitled to legal aid come with a diverse range of backgrounds and circumstances in which they engage with the family justice system. Given this diversity, the purpose of this project was not to give a comprehensive overview of the problems or experiences that LIPs now have of the family court. Rather, it aimed to provide an insight into some of the possible experiences that LIPs may now have of the family court process, including the ways in which particular circumstances and vulnerabilities may affect or compound these experiences. Additionally, by laying this foundation, the research was also able to explore the ways in which these experiences can impact perceptions and views about the family justice system as a whole.

Briefing of Main Findings

1. Difficulties Locating Support

1.1 Interviewees had difficulty locating legal advice without legal aid or access to funds that would enable them to instruct solicitors. Free advice was occasionally available through sporadic services such as drop-in clinics or ‘free advice evenings’ offered by local law firms, but the ability to access these services was dependent on geographic location as well as financial and social resources such as the time and money to travel to these services at the appropriate time. This was also often compounded by caring responsibilities and precarious working arrangements such as unpaid leave and variable shift work.

1.2 Interviewees made use of face-to-face non-legal support such as that provided by CABx or the PSU, but access to these services was again contingent on the amount of time and resources that interviewees were able to use in order to travel to these services. This was particularly so, because without the consistent support of a solicitor, interviewees often felt they had to ‘jump’ between each service in order to access more or different kinds of support, which created further barriers in terms of time and expense.

1.3 For those who could not access face-to-face support, the only support available was often online, and these resources are also characterised by compounding barriers experienced by those with mental health issues, learning difficulties and disabilities, who often struggle making use of written information, as well as the financial barriers involved with internet access.

1.4 Some interviewees sporadically instructed legal representatives in order to check the applications and documents they had prepared for court. For these interviewees, this was perceived as useful. However, there may be a concern that those who are able to partially
instruct solicitors may do so and therefore only access partial or sporadic forms of legal advice (i.e. only receiving responses to specific questions, rather than answers to questions they have not anticipated). Further, in order to access this form of support, several interviewees in this research took out high-interest ‘pay day’ loans or borrowed money from friends and family, thus exacerbating already precarious financial situations which are already compounded by issues such as domestic abuse.

1.5 Some interviewees instructed professional McKenzie Friends who advertised themselves online or through social media support groups. Interviewees strongly felt that this support was beneficial in absence of legal representation, especially in terms of providing practical and emotional support. However, many charged significant amounts of money and did not have qualifications to support claimed legal expertise. The emerging market of professional legal support is a concerning challenge for the post-LASPO context, which requires further research in order to identify both the dangers and benefits of this adaptation of the McKenzie Friend figure.

2. Difficulties with Court Process

2.1 Interviewees struggled with oral advocacy due to the time-constrained and goal-oriented nature of this form of communication. Many explained that they were more able to express themselves on paper, as this allowed them time to collect their thoughts and convey them appropriately and felt that the requirement to advocate their position orally. This was particularly relevant for those with mental health and learning difficulties who often had problems processing and conveying information ‘on the spot’. This task also requires LIPs to extract ‘legally relevant’ information from often chaotic and sporadic experiences of family breakdown and intersecting problems. Both written and oral forms of communication used in the court process may need to be adapted to the intersecting and diverse needs of individual LIPs.

2.2 Victims of abuse in particular also struggled with oral advocacy as this is expected to be given in front of their perpetrator of domestic abuse – interviewees perceived this expectation to be a significant disadvantage for them within the court process.

2.3 Hearing locations and judges were experienced inconsistently among interviewees. Cases were often listed before several different judges for each hearing, and interviewees often perceived themselves as being passed between judges, who all had different approaches to LIPs and the various issues concerned. Due to availability of judges and courtrooms, interviewees were sometimes redirected to Crown courtrooms, which were inappropriately intimidating and formal. In contrast, other hearings were held in small spaces, such as judge’s chambers, which while less intimidating, were also inappropriate for those contending with domestic abuse, due to the proximity in which victims were expected to sit with perpetrators. The suitability of these formats therefore depends on the circumstances of the individual LIP, and the inconsistency of both judges and courtrooms caused LIPs significant anxiety between appearances in court, as it was difficult to pre-empt the content and format of each hearing without legal representation.
2.4 LIPs do not have legal training, and therefore struggled to understand aspects of the court process such as legal principles, conventions, vocabulary, and the purposes of different processes or different kinds of hearings. A consequence of this is that interviewees often experienced their time in the court process as sporadic experiences of individual hearings, with no clear trajectory towards an end point – this is essential if they are to be able to contribute to the decision-making process or be able to effectively raise safety concerns, for example, understanding the purpose of a fact-finding hearing. This inconsistency was often exacerbated by being listed in different hearing locations and before different judges at each hearing, which often gave interviewees the impression they were being ‘bounced around’ the court system.

2.5 Due to being unable to access legal advice or understand legal principles and conventions such as the settlement culture or the welfare principle, interviewees often experienced the court process as adversarial. A consequence of this is not simply a lack of willingness to settle, but an active disadvantage in terms of their ability to communicate with lawyers, who often did not appreciate or respond sensitively to this disadvantage in the waiting area. Rather, pre-hearing negotiations were often experienced as lawyers attempting to circumvent the court process and intimidate LIPs into signing arrangements, rather than initiate negotiations. LIPs may therefore be disadvantaged in terms of their ability to use these processes as well as the formal process within the courtroom.

2.6 When LIPs self-represented against lawyers during court hearings, they explained that judges would often manage this imbalance by speaking to the lawyer using ‘legal’ vocabulary or forms of knowledge (i.e. references to principles, case law, statute, internal acronyms), and then translating these conversations to LIPs. This is one method of attempting to include LIPs, but was often perceived by interviewees as exclusionary, as this prevented them from participating in conversations being held between judges and lawyers.

3. Specific Barriers: Domestic Abuse

3.1 Despite the progress that has been made in terms of expanding the restrictive eligibility requirements for legal aid, many victims of domestic abuse are still unable to provide forms of evidence which comply with the current criteria. The consequences of victims not being recognised as such for the purposes of legal aid have a stark impact on their subsequent experiences of the court process – particularly in terms of the requirement for victims to self-represent in close proximity to perpetrators and perform advocacy and even cross-examination against them.

3.2 Many victims who self-represented against perpetrators explained that the ability to use screens and video links was limited both by judicial willingness to use these resources and the lack of funding available for these protections. Further, even though these adjustments (as well as the potential option of separate entrances) were offered on the C100 form, one interviewee explained that they did not request these adjustments for fear of giving the court the impression that they were ‘difficult’. Together, this indicates that more needs to be done in terms of actively offering these adjustments to individuals, as well as ensuring their availability.
3.3 Victims often felt that professionals such as lawyers and judges did not have sufficient information or ability to understand the implications of their abuse for their ability to self-represent, and this lack of training perpetuated an inability of professionals to accommodate victims, as well as particular myths and stereotypes about domestic abuse such as the prominence of false accusations. Feeling believed and recognised within the court process was of great importance to interviewees and was instrumental to their perceived ability to participate in hearings and contribute important information to judges, such as safety concerns about potential child arrangements.

3.4 Victims often felt unable to dispute points made by their perpetrators in court, and many left the court process without sufficient opportunity or ability to raise safety concerns or contribute to the decision-making process. Several were living with what they perceived to be unsafe or inappropriate child arrangements, and did not feel that returning to the court process to adjust these order was a realistic possibility, based on their previous experiences of the process.

3.5 Several interviewees explained that judges had allowed self-representing perpetrators to directly cross-examine them in the courtroom, and/or required victims to cross-examine perpetrators themselves. In this situation, interviewees felt unable to communicate effectively, let alone give appropriate evidence which would support their case. Rather, this was perceived as an opportunity for perpetrators to utilise existing strategies of intimidation and control in order to minimise their evidence and recognition within the process. The fact that the ‘right to cross-examine’ may be balanced equally by some judges against the need for protection, for interviewees, was an example of the limited understanding and training that they felt judges had with regard to the reality of domestic abuse. As a result, this process left many interviewees traumatised and contending with anxiety and PTSD which endured after their cases had concluded.

4. Broader Implications

4.1 The findings of this research suggested that interviewees largely felt excluded from participation in the process, and due to the nature of the issues concerned, a lack of meaningful participation in itself is indicative of the potential for the court process to fail to account for all relevant information or enable LIPs to volunteer this information, including safety concerns. As a result, it is very possible that LIPs may be at risk of receiving inappropriate and unsafe child arrangement orders as a result of a lack of access to free legal advice and representation.

4.2 A consequence of these perceptions about the legal system as a whole, for several interviewees, was a lack of trust in the system and in sources of institutional authority more generally. Many interviewees who received unsafe or inappropriate child arrangements as a result of their inability to participate in hearings, explained that they would not return to the family court as a means through which to improve their situations, as they felt that the system in fact often made their circumstances worse, and – in the situation of unrecognised domestic abuse – provided further opportunities for perpetrators to exercise control and intimidation against them.
4.3 Further training concerning the realities and implications of domestic abuse for those who work with LIPs, including judges and court staff, is essential. Input into this kind of training should be sought from the relevant charities and NFP organisations who already offer this sort of training, and can feed in first-hand experiences of these issues in order to raise awareness among court professionals as to the various needs and vulnerabilities that LIPs contend with.

4.4 The findings of this research suggest that it should not be presumed that attempts or approaches taken by court professionals to include or ensure participation of LIPs in hearings will have this desired effect. Rather, attention should be paid to the way in which these approaches are perceived by individual LIPs. Given the increasingly diverse needs and circumstances of LIPs now using the family justice system, all efforts should be made to enable them to contribute to the ways in which these processes are adapted for them. This will require an inevitably more inquisitorial approach from judges and court professionals, which in turn requires significant investment in training for those working with LIPs within the family justice system.