

## Remote hearings: LIPs and participation in court processes

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In the webinar run by LEF and Tortoise on 11/05/2020 there was a particular plea for evidence relating to how Litigants in Person (LIPs) were experiencing remote hearings. My research (pre-Covid-19) has been examining how LIPs participate in court processes, particularly in the court hearings, to help identify the points at which an LIP's right to effective participation under Article 6 ECHR could be at risk.

The project has not been able to observe remote hearings so I am unable to meet the plea for direct evidence that LEF issued. In place of this, I have reviewed the data and analysis of our findings to date, based on face to face hearings, to help determine what 'effective participation' should involve, whether via remote or face to face hearings. Where possible, comments are provided on the issues to be considered in evaluating how successful remote hearings might be in protecting the LIP's right to effective participation.

### The research

The Nuffield Foundation funded a 2+ year study on the experiences of LIPs in civil and family courts, focused on identifying the barriers to their participation in court hearings. The research publications on "Litigants in Person in Northern Ireland: Barriers to legal participation" are all available at [www.ulster.ac.uk/litigantsinperson](http://www.ulster.ac.uk/litigantsinperson). This research is built on two previous projects, the first reviewing the ability of tribunal users (represented and unrepresented) to participate in dispute resolution processes culminating in tribunal hearings,<sup>1</sup> and the second on research comparing the participative differences between courts and tribunals.<sup>2</sup>

The main findings of the LIP (2016-18) research were that self-representation posed risks to the article 6 ECHR right to effective participation. These risks were generated by different barriers to participation faced by LIPs. These barriers were defined as intellectual, practical, emotional and attitudinal:

- **Intellectual barriers** are those which prevent the individual from understanding how the legal process works. The main intellectual barriers were that LIPs did not understand the legal language used in court proceedings and documentation. This included many commonly-used legal phrases that were put to LIPs without any awareness by court actors that they might not be clear. Commonly, the LIPs did not understand how to apply legal rules to their case or the legal framework the court would use to make decisions. The consistent theme that emerged for LIPs was that of 'not knowing', in common with the finding from other LIP research of "substantive and procedural naivety of unrepresented litigants",<sup>3</sup> which raises a fundamental question over how can LIPs participate in a process they do not understand.

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<sup>1</sup> G McKeever, "A Ladder of Legal Participation for Tribunal Users" (2013) *Public Law* 573-598

<sup>2</sup> G McKeever "Comparing Courts and Tribunals through the lens of legal participation" (2020) *Civil Justice Quarterly* 217-236 (pre-published version attached)

<sup>3</sup> R Moorhead & M Sefton, *Unrepresented Litigants in First Instance Proceedings* (2005, Department for Constitutional Affairs: Research Series 2/05) p265

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- **Practical barriers** relate to not knowing how or where to get help to deal with the legal process and associated issues, ranging from the significant to mundane. The most obvious and common issue was that of cost – LIPs who felt unable to afford the cost of legal representation and did not appear to be eligible for legal aid. Practical issues beyond this arose from the lack of support for LIPs, including the absence of any central information point. This highlighted two major problems. First, that there was a lack of information and resources to assist either with the general legal issues or the task of self-representation. Second, the information sources that existed were disparate, unknown and LIPs were unclear the extent to which they could be trusted. Added to this was the lack of information about the reality of how cases progress, with court actors expecting multiple hearings (often to accommodate the additional time that LIPs needed) while LIPs saw a continual need to attend court as a practical difficulty. A final but important practical barrier for LIP participation was that the court service did not know if a litigant was going to be represented or not until the court hearing, making it more difficult to address some of the practical solutions that could be targeted at LIPs.
- **Emotional barriers** arise from the negative feelings associated with both the process and the issue being litigated, and can be exacerbated by being unable to overcome intellectual or practical barriers. The most obvious emotional barriers concerned LIPs struggling to be objective about their case, dealing with the anxiety about the facts of the case that they were living through beyond the court room. This could translate into a struggle to manage emotions to engage with the judge.
- **Attitudinal barriers** exist where the LIP is not seen as a legitimate court actor, but rather one who is disrupting the system. This arose from having to deal with court actors' stereotypically negative view of LIP behaviour, which resulted in the default assumption (and behavioural consequence) that LIPs would be difficult to deal with. This negativity was not without basis, with some LIPs equally strident in their negative views about court actors and equally unwilling to engage with court actors for this reason, but what it pointed to was a resentment by both LIPs and court actors that the system was not adapting to this breach of the legal 'norm'. Both cause and effect were evident, with court actors unhappy about adapting to accommodate LIPs' needs fed by an overall unwillingness to recognise LIPs as a legitimate part of the court system.

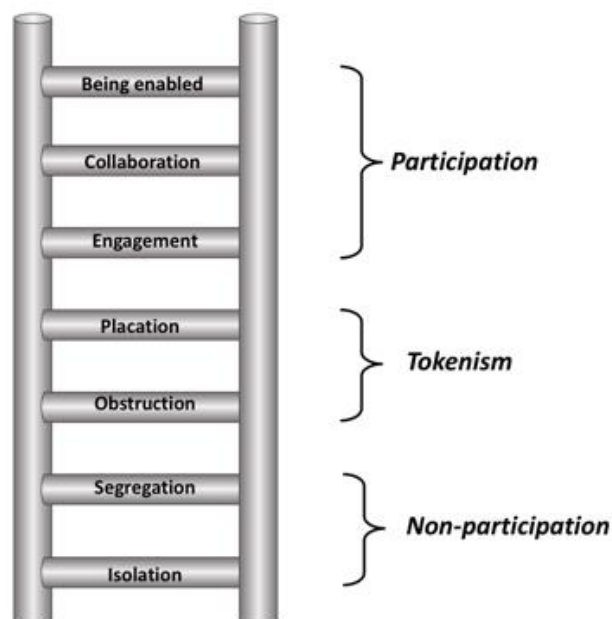
The Nuffield Foundation has now provided additional funding (2019-2022) to address the findings and recommendations of the original research, specifically on how to identify and manage the participative barriers to reduce the risk of a breach of article 6 ECHR. There are two elements to this current research project. First, the creation of support materials for LIPs, based on a human-centred design process that works with a large group of stakeholders, including LIPs. The materials proposed by the group are currently being prototyped by the research team, to be tested with LIPs in family courts in Northern Ireland. Second, using data from the first LIP project to develop a checklist of legal participation, to be tested and refined through court observations and interviews. The checklist has been developed but has not yet been tested due to the closure of courts necessitated by Covid-19. The Northern Ireland family courts have not responded at the same pace as courts in Britain to substitute face to face with remote family law hearings, in part due to Department of Justice in Northern Ireland not implementing a digital transformation programme as the Ministry of Justice has done. As a result, it has not been possible to 'observe' remote family law hearings and the project has been paused temporarily, pending the re-opening of the courts.

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Maximising the ability of LIPs to participate effectively in hearings

The ability of LIPs to participate in all hearings, whether face to face or remote, include power imbalances between the parties and between the LIP and the judge, the lack of legal capability including digital exclusion, the in/adequacy of access to support services, procedural demands that exacerbate litigant vulnerabilities and the failure to make reasonable adjustments for protected characteristics, as well as the non-practitioner status of LIPs.

Participation in legal hearings is not a binary process, whereby a litigant either participates or does not participate. Rather, there are different types of legal participation, defined by the extent to which the intellectual, practical, emotional and attitudinal barriers to participation can be managed or overcome. The different types of legal participation have been identified by the author, as set out below (Figure 1).



*Figure 1: McKeever's ladder of legal participation*

This model of legal participation groups the broad range of experiences as non-participatory, tokenistic or participatory, and identifies different types of participation within each of these categories.

Non-participatory experiences are defined as:

- **isolation**, which includes feeling excluded and unable or unwilling to engage with legal proceedings. In relation to our LIP findings, the ability to overcome practical barriers was limited by a lack of assistance by court actors to signpost or provide concrete forms of information or support that could address some of the legal and procedural deficits that LIPs suffer. As a result, LIP experiences evidenced a concern that their participation was unachievable, given how removed they felt from the court actors' understanding of law and process and the sense that they could never – or should never – be a part of the system, rendering any attempt to participate as futile.
- **segregation**, which includes feeling separate from the legal process, or secondary within it, without sufficient account being taken of the difficulties in participating.

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Segregation was evidenced by the powerlessness felt by LIPs compared to other court actors. The parallel track that LIPs were on, defined by a lack of knowledge or awareness of law or process, was contrasted sharply by the track that court actors were able to follow, informed by education, training, experience and familiarity that the LIP could not emulate. Here, the attitudinal barrier was less about whether the LIP had a right to be part of the system and more of a sink-or-swim attitude that had the same effect

Tokenistic experiences are defined as:

- **obstruction**, where the individual's journey through legal proceedings is obstructed by delays or inadequate information, or through fatigue at having to search for assistance. Our research evidenced that fatigue, delays and the provision of inaccurate information were elements which were clearly present in LIP experiences. Fatigue was a particular feature of having to personally attend each hearing (as opposed to having representative attend on their behalf), often for prolonged periods as they waited for their cases to be called, and to bear the emotional as well as practical and intellectual burden of arguing their case.
- **placation**, where support that is provided, or referred to, is ineffective in assisting the individual. Our research showed clearly that there were very few sources of information or advice in Northern Ireland that LIPs could rely on to break down intellectual, practical or emotional barriers, a fact that sits uneasily with the expectation of court actors that it was the LIPs' responsibility to inform themselves about relevant law and procedure.

Participative experiences are defined as:

- **engagement**, where users can navigate the process and communicate with the actors to understand each other's role. There was an appreciation of the helpfulness of court staff who could help explain what the initial or subsequent stages required: the ability to ask questions of those with experience and knowledge was seen by LIPs as helping overcome or manage the intellectual, practical and emotional barriers. This applied across the board from judges and legal representatives on the other side, to more informal sources of help from friends, families or external organisations. An open line of communication evidencing engagement between LIPs and court actors could also reduce LIP feelings of alienation, reducing the impact of the attitudinal barrier.
- **collaboration**, where individuals are supported in their journey through the process, with their understanding of proceedings taken as the starting point, and difficulties dealt with as they arise. Attitudinal barriers could be dismantled, either with the LIP viewing the various court actors as honest brokers, or with the court actors appreciating the LIP's willingness to be a collaborative partner in supporting the requirements of the process. Where this element of trust could be built, even where it was fragile, there was progress to be made in managing all of the participative barriers.
- **being enabled**, where individuals are put in the position where they feel supported and equipped to engage in the process as equals, with an element of self-determination within recognised limits. This relates to the LIP being empowered to understand or to present their case in a meaningful way. While the role of the judge was often central to this – providing the LIP with clear explanations of what was being

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asked of parties and why – there were a number of ways in which LIPs could feel empowered, including simply by representing themselves in court. More substantively, the provision of support – whether through court actors, information or external organisations – gave LIP’s confidence to make some sense of what the legal process required and to understand where there were critical gaps in their legal and procedural knowledge. Trust in court actors was a key feature of LIPs being enabled, particularly trust in the judge.

Potential implications for remote hearings

The requirement for ‘effective participation’ has not been removed by the need to revert to remote hearings. The difficulty remains, however, in understanding what effective participation looks like. Our research show that the types of legal participation required for effective participation under article 6 ECHR are engagement, collaboration and being enabled. Remote hearings will need to be attentive to the intellectual, practical, emotional and attitudinal barriers that block these types of participation.

Some of the barriers will be managed through pre-hearing support and our research drives home the fact that effective participation is not limited merely to what happens in a court hearing. The current court system is poor at identifying, in advance of hearings, whether litigants will be self-representing and for that reason it can be difficult for court services to direct support to LIPs that would assist their preparation for and participation in their hearings. It may be that making the necessary arrangements for remote hearings can provide a mechanism for the court service to identify LIPs in time to direct them towards relevant resources, whether internal to the court system – for example, court clerks who can advise on some of the procedural issues including the nature of the hearing that has been listed and who will be attending – or to external support services, either through advice agencies where there is capacity and expertise, or online services that might exist. This could also present a good opportunity for the court service to improve its data collection and to look at ways in which LIPs might be identified within the system in advance of the hearing. Directing LIPs to support and providing them with trusted contacts within the court system could therefore help them to engage more fully in the hearing, addressing the participative barriers that exist. This comes with the caveat that judicial and court service staff should be realistic about what external support can provide. In our research, court actors often made generalised comments referring LIPs to advice, pro bono and other services that were not always consistent with what was available. Again, at a time when face to face advice and support is necessarily limited, expectations on how LIPs can be supported externally may need to be addressed.

The importance of trust was also critical to boosting the participative potential for LIPs. In face to face proceedings, this was often achieved though informal discussions with court actors outside of court and through the interactions between the LIPs and court actors. In our research, the judges spoke of being responsive to the LIP reactions, including physical cues that the LIP was becoming upset, agitated, angry or confused. Interventions by judges to enable breaks in proceedings or refocusing the hearing could be helpful, although researchers also observed instances where the physical cues from judges and legal representatives towards LIPs – indicating frustration, impatience, annoyance – were themselves the cause of LIPs feeling alienated or isolated. The relative difficulty in responding to, or misinterpreting,

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verbal cues in remote hearings (either by LIPs or judges) may be an increased risk factor for effective participation.

Ultimately the most significant contributor to effective participation was effective communication, that takes account of the LIP's non-practitioner status. In advance of hearings beginning this includes the practical aspects of case management and hearing procedures – for example, court timings, who will be present, how parties will be connected, who they can contact with queries, when to speak, when to remain quiet, whether the process will involve breaks in proceedings, or break-out rooms for litigants and representatives to have 'out of court' discussions – as well as the procedural preparation that allows the case to progress – for example that LIP has prepared (and been able to share where necessary) the paperwork and other submissions required for the hearings, as directed. The potential advantage to LIPs of remote hearings is that they would no longer be required to attend court for an undefined period of time, which presents difficulties for work and caring commitments, but other issues around connectivity, digital skills and having the space at home to focus on the hearing would need to be considered. Our research evidenced the hard work done outside of court to settle and agree issues, but that there was a need for expectations of out of court actions to be realistic. There may be greater difficulty in accommodating these more informal discussions via remote hearings and so judges may need to be prepared to either manage their usual expectations on what can be achieved or the court service will need to find ways to facilitate these discussions.

As part of the court hearing, effective communication covered a range of issues, including that the LIP understands the relevance of points raised, is able to follow the proceedings, is able to make him- or herself understood, is able to introduce and respond to relevant issues, and understands the consequences of decisions or court directions. The role of the judge is clearly central to communication in the hearing, and this places a responsibility on judges to ensure their approach to the LIP is welcoming and inclusive to the proceedings. More specifically, the judge needs to ensure the LIP is aware of the hearing's purpose and the options open to them (for example, to settle out of court, to withdraw their application, etc); to ensure the LIP understands process, procedures, legal terms and not to replicate the familiarity that can be assumed with legal representatives (for example the judge may need to re-word, repeat, ask the LIP to explain back to show understanding, etc); that the judge ensures the use of clear, unambiguous, audible layperson's language by all parties; that the LIP is given space and time to consider his or her response. In LIP hearings that we observed, any explanations provided to LIPs were on the basis of what 'usually' happened in such hearings, with expectations premised on what the norm was in hearings where both parties were legally represented. Remote hearings provide an opportunity for judges to reflect on whether such comparisons are helpful or whether it would be possible to set out new ground rules (still rooted in existing evidential and procedural obligations) that assume an unfamiliarity by both parties with all aspects of how the hearing will be conducted. This may give greater potential for judges to ensure the LIP has opportunities to communicate his or her views and needs, and is supported to do so if s/he is unable to express him/herself; to allow the facts and information to be presented by both sides; and to adopt a more inquisitorial approach in order to obtain the facts and information required, if they have not already been presented. The flow of questioning and discussion in a face to face hearing that would potentially elicit the necessary information may be more stilted in remote hearings, and so being attentive to the need to explore points beyond the questions and answers

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should be considered. In all circumstances, the judge should be satisfied that the litigant has understood the proceedings and knows what is expected of him/her next – for example, asking, ‘Tell me what you have to do next?’.

## Conclusion

Our research does not provide any basis to assert that remote hearings are not compatible with effective participation. Indeed, our findings were that face to face hearings present risks to the LIP’s article 6 ECHR rights to effective participation and so should not necessarily be considered as the standard to be replicated in remote hearings. What we can say is that there are barriers to participation that will need to be overcome. This includes addressing the ability of the LIP to understand the legal issues and process – whether the process is an online version of a face to face hearing, or a new approach to ensuring that parties can engage and work collaboratively to progress the legal issues. There are additional practical barriers with remote hearings that may present insurmountable problems for participation, particularly where digital exclusions apply, but our research also recommended making hearings more compatible with LIP family and work obligations, which included the possible consideration of allocated time slots for different hearings. The pre-existing problems of access to advice and support services may take on a different significance if the current difficulties in enabling lawyers and their clients to consult during a hearing are not adequately rectified, with the potentially unintended consequence that the participation of represented litigants is compromised. The emotional toll of self-representation needs to be monitored. Our research suggests the potential for this barrier to both increase and decrease with remote hearings. For some LIPs the court building was an intimidating space in which their powerlessness was felt to increase and the waiting game necessitated by long court lists could increase their anxiety on the day. Remote hearings have the potential to remove these concerns, providing dedicated time slots for hearings, with the advantage that LIPs do not have to travel to unfamiliar surroundings. In the alternative, the emotional experience for LIPs could be improved significantly by the humanisation of the process, achieved through human contact with court clerks, ushers, representatives and judges, in a neutral environment that reflected the gravity of their dispute. LIPs were often upset at what they regarded as an over-familiarisation between representatives and judges that they witnessed at the hearings, and this has the potential to compound the relative lack of gravitas that online hearings might convey if this behaviour is also observed for online hearings. Perhaps the most significant barrier faced by LIPs is attitudinal and this is likely to be where the real test for participation in remote hearings is faced. If LIPs are automatically regarded as an aberration in a system designed to accommodate represented parties, then a new online system that regards their participation as less of a priority than enabling the participation of legal representatives or expert witnesses suggests that the prevailing alienation of LIPs will continue. If, however, the processes to accommodate remote hearings regard LIP participation as a priority, or at least as of equal value to the participation of other court actors, then that design feature will help to break down the view of LIPs as breaching the legal ‘norm’. This would represent a considerable advance in ensuring effective participation.