

# Embracing the LIP

- [very very briefly] – how did this happen?
- LIPs and McKenzie friends
- Guidance and the Advocate's Toolkits
- Particular issues arising at fact-finding/ contested hearings

# LASPO

- Funding of litigants in private law cases now restricted to:
  - Domestic violence
  - ‘Exceptional funding’ scheme: LASPO s10 – 8 or 9 cases a year since 2013
- Applications to HMCTS for funding now ruled out: *Re K and H* [2015] EWFC 1
- JR attempt: *R (Rights of Women) v Lord Chancellor and another* [2015] EWHC 35 (Admin)
- Estimated £3.4m additional costs for MOJ in family courts following LASPO – see Justice Select Committee report <http://www.publications.parliament.uk/pa/cm201415/cmselect/cmjust/311/31109.htm>

# It's not all bad

- Small claims
- FDAC's lawyer-free hearings

DJ Nicholas Crichton:

*'initially problematic for the lawyers, who feared what their clients would say when they were not present'*

*'People who go through the court process feel the lawyers do all the talking and they never get to be heard...'*

# Research: LIPS in private law proceedings (Trinder et al, MOJ, November 2014)

- Vast majority not self-representing out of choice
- Requests for an adjournment to obtain representation ‘almost invariably refused’
- About 50% would be considerable ‘vulnerable’
- ‘no clear relationship between being highly educated, professional and articulate and being able to handle family law proceedings effectively’
- Courts swamped by correspondence – largely unanswered

# LIP as vulnerable witness

- More than half of LIPs would be classed as vulnerable witnesses
- YJCEA 1999, s 16 – criminal courts
- Indicators of vulnerability:
  - Being a victim of violence
  - Depression/ mental illness
  - Alcoholism/ drug use
  - Behavioural disorders
  - Learning disability
- Dyslexia
- Illiteracy
- Difficulty controlling emotions
- Nerves and anxiety
- Language difficulties
- Involvement with social services

# LIPs and the Court (1): Judge as Bad Cop

- *'Being a LIP with no previous experience of legal proceedings is not a good reason for failing to comply with the CPR or, I would add, court orders'*: Hysaj v SS Home Department [2014] EWCA Civ 1633
- Costs orders against LIP: H v Dent and others [2015] EWHC 2228
- Tinker v Elliott [2015] EWCA Civ 1289

# LIPs and the Court (2): Judge as Good Cop

- Trinder et al: *'tendency to assume that LIPs are being uncooperative when they may not understand what is required'*
- HMCTS guidance, 2014 – help with preparing bundles: 'LIP file'
- 2014: £2m package for LIP support:
  - PSUs
  - Community law centre clinics – initial legal advice
  - Online support for separating couples
  - Telephone helpline pilot for separating parents
- Re C (A Child) (Procedural Requirements of a Part 25 Application) [2015] EWCA Civ 539 – summary of judicial training on fair process

# McKenzie Friends

- McKenzie v McKenzie [1971] P 33
  - Right of litigant to ‘assistance, suggestions and advice’
- Re N (McKenzie Friends: Rights of Audience) [2008] EWHC 2042
  - Court’s discretion... ‘only for good reason’... court should be ‘very slow’ to grant, but no ‘exceptional circumstances’ test
  - May be circumstances in which granting of ROA is essential for fair hearing (equality of arms)
- Practice Guidance McKenzie Friends [2010] 2 FLR 962
  - Para 14: court should consider MF’s attendance at Advocates Meetings
- Graham v Eltham Conservative Club and Others [2013] EWHC 979

# Excluding a McKenzie Friend

- Paid McKenzie friend may be more easily excluded
  - No training or regulation
  - No insurance
  - Some with an axe to grind
  - Some fraudulent
  - Judicial Bench Book – caution with professional MFs
- Re H (Appeal Case Management Decisions) [2012] EWCA Civ 1797

# Guidance and Toolkits

- Litigants in person: guidelines for lawyers: Bar Council/ Law Society, 2015 (including 'Notes for LIPs: what to expect from the other side's lawyer')
- Handbook for Litigants in Person: Judicial College, [www.judiciary.gov.uk](http://www.judiciary.gov.uk)
- Equal Treatment Bench Book, 'Litigants in Person', November 2013
- Advocates' Toolkits 10, 13 and 17: [www.theadvocatesgateway.org](http://www.theadvocatesgateway.org)

# Fact-finding and Contested Hearings

- Re K and H [2015] EWFC 1
  - 17-year-old stepdaughter making allegations of sexual abuse against LIP stepfather
  - Stepfather financially ineligible for legal aid (just) – no means to pay privately
  - 2 younger half-siblings the subject of proceedings
  - Fact-finding hearing listed to test allegations

# The decision at first instance

- HHJ Bellamy:
  - 17 year old should give evidence
  - F should not cross-examine
  - Court should not put questions – incompatible with participants' Art 6 and 8 rights
  - HMCTS should provide legally qualified advocate to cross-examine on behalf of F – by analogy with power to fund interpreters
  - Power under MFPA s31G to order: 'cause' questions to be put
  - Relied on Q v Q [2014] EWFC 31 and other decisions of Munby P: power exists but 'an order of last resort'

# The Court of Appeal

- The Court of Appeal disagreed:
  - No power to order Lord Chancellor to provide funding (via HMCTS or otherwise)
  - No scope for funding representation outside LASPO scheme
  - MFPA 1984 s31G is there to enable court itself to put the questions and does not confer power to require HMCTS to fund
  - Nor does s1 of the Courts Act 2003
  - Judge was wrong to find in this case that without funding the parties' and child's Art 6 and 8 rights would be breached

# So when will there be a breach of Convention rights?

- *Steel and Morris v the UK* (2005) 41 EHRR 22: State does not have obligation to ensure 'total' equality of arms...
- *Gudanaviciene v Director of Legal Aid Casework and LC* [2014] EWCA Civ 1622: fairness and appearance of fairness
- Questioning of complainant may be 'inquisitorial': see PD12J, para 28
- But there still may be cases where lack of representation may lead to a breach.... In which case primary legislation should be enacted (para 62)

# Options for the court in the meantime

- Attach a condition to the direction for victim to give evidence that alleged perpetrator must instruct legal rep to do questioning (viable?)
- Judge asks the questions – unless this would lead to a breach of Art 6/ Art 8 rights. Difficult tightrope for Judge to walk – but ‘must do his best’!
- Ship in a justices’ clerk to ask the questions?? – see Re K and H, MR at para 44
- Appoint guardian to represent child (implication that G’s advocate then conducts the cross-examination)

# Top 5 Tips

- Consider vulnerability and draw it to the court's attention
- Draft orders clearly: what does LIP need to do and by when? – plain language (and see Lancashire CC v A and B [2016] EWFC9)
- Consider cross-examination – by whom? How?
- Should the LIP be asked to prepare written questions for the Judge (or justices' clerk, etc) to ask?
- Advance planning. Ground rules hearing? Intermediary? Special measures for witness, LIP or both?