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LiPs: a radical solution

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An inquisitorial approach could be adopted in small claims, improving the speed and efficiency of these cases, as more litigants in person come to court.

When Simon Hughes (pictured), the justice minister, unveiled details of the Ministry of Justice's extra help and support for those representing themselves in court, many thought 'is that it?'. No extra funds for legal aid. Instead there would be better support for litigants in person (LiPs) without giving them lawyers.

This initiative amounts to £1.4m a year in additional funding to provide support for LiPs, primarily in family and children cases, in selected court centres via charitable and pro bono schemes such as the Personal Support Unit with the provision of more online and telephone information for separating couples.

It is wrong that so many litigants cannot access legal help and assistance. Public funding will continue to diminish. It is unlikely that anything other than the most extreme cases will qualify for any type of assistance.

And for most LiPs the internet is their first port of call for direction. In a few clicks they can find detailed guidance on procedure and the law. There are forums, blogs, claims management services and advice sites. More of this type of guidance is not needed.

Further staff cuts and court closures are still to come - we've yet to reach rock bottom - with the knock-on effect of reducing access to justice for LiPs who face having fewer courts, further apart and little chance of finding someone to ask about their claim/defence.

The rise in LIPs is widely acknowledged as causing difficulties in the effective and efficient running of our courts. The problem has been acute in the county court for some time where judges may not see a single legal representative for days. But the rise of LiPs in family courts and the High Court has made this a political issue.

LIPs are rarely vexatious (though often angry) but sometimes their lack of understanding and/or intermittent engagement in the process creates more work for them, their opponents and the court. We cannot remove all LiPs from the court system. Mediation schemes and alternative dispute resolution processes may help but ultimately some claims rightly require some form of court process.

Is it time to be radical?

Ours is an adversarial justice system where the process and final hearing are essentially a contest between parties. The judicial role, though increasingly less passive as the Jackson reforms take root, remains non-inquisitorial.

This is difficult for LIPs. US and UK crime dramas are not the best training for skilled cross-examination. Direct adversarial questioning is hard for LiPs generally and, in emotionally charged disputes, can be unacceptable. Judges face delicate situations trying to balance the needs of the parties.

In many small claims hearings, where procedure is less formal, the process already segues into a quasi-inquisitorial approach, where judges often give more detailed directions indicating specific documents to be produced by each party in the run-up to the final hearing.

At the hearing the judge might focus on particular questions litigants should address. This minimises the amount of direct questioning between litigants – particularly in cases where emotions run high. Why not formalise this approach? Have an inquisitorial system as the default position for small claims where both parties are unrepresented; I'm not suggesting we move to the French system or that the entire process becomes inquisitorial.

The actual change would be one of emphasis. Many judges dealing with such claims day-to-day are close to using an inquisitorial approach with LiPs but are held back by adversarial tradition.

With limited additional training for the judiciary, and limited rule changes, an inquisitorial approach could be adopted in small claims improving the speed and efficiency with which such cases were disposed. This could be a judicial option (rather than a default) where both parties are unrepresented for fast-track and multi-track cases. It may be possible to adopt a similar approach in some family and children cases.

And is this so radical after all? The idea has been gaining traction and was reinvigorated by the current lord chief justice who said in March 2014: 'To some a change to a more inquisitorial procedure seems like the obvious or the only solution to the present situation we find ourselves in with the increase in LiPs and the need to both secure a fair trial for all whilst doing so within limited and reducing resources that have to be distributed equitably amongst all those who need to resort to the courts.

'It might be said by them that to attach to it the label of "inquisitorial" was doing it a disservice, as it was really little more than the active interventionism characteristic of much pre-trial procedure, case and trial management.

'But I think it is right to refer to it as inquisitorial, because the essence of the change would be a much greater degree of inquiry by the judge into the evidence being brought forward.'

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