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First published June 2011

ISBN 978 1 84099 468 1

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Litigants in person: a literature review

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This literature review considers the published research evidence on civil and family litigants in person (individuals without legal representation). The review was undertaken to inform an assessment of the potential impact of the proposed reforms under the Legal Aid Review on the number of litigants in person and their potential impact on court processes.

Key points

- While some good quality evidence existed, this was limited. Together the studies in this review provide useful indicators of the types of motivations, problems encountered and outcomes for litigants without legal representation (litigants in person). However, there are still a number of gaps in our understanding of this issue.
- The term litigant in person covers a range of scenarios. Individuals may have received varying degrees of legal advice; may have chosen to litigate or had claims brought against them; and may or may not have themselves participated in proceedings. One UK study suggested unrepresented litigants in family and civil cases were common. Most unrepresented litigants were inactive, particularly in civil cases.
- It appeared litigants in person tend to be younger, and have lower income and educational levels, than those who obtain representation. Suggested reasons for lack of representation included funding difficulties and the belief that cases were simple enough to be heard without a lawyer.
- Litigants in person could face problems in court, such as understanding evidential requirements, identifying legally relevant facts and dealing with forms. It was suggested that the oral and procedural demands of the courtroom could be overwhelming.
- Research with other court participants, such as court staff, the judiciary and other parties' representatives, suggested they felt compensating for these difficulties created extra work and possibly presented ethical challenges.
- The evidence on the impact of litigants in person on case duration was mixed. This appeared to be influenced by how active the litigant in person was and by case type. The evidence suggested cases took longer when the unrepresented litigant was active and could take less time when the litigant was inactive. Some studies found that family cases without representatives were less likely to settle, increasing case duration.
- The weight of the evidence indicated that lack of representation negatively affected case outcomes, although few of the studies reviewed controlled fully for case complexity. This was across a wide range of case types. There were indications that in some cases specialist lay representatives were as effective as legally qualified representatives.
- A number of studies investigated assistance for litigants in person, presenting positive findings on litigant and court staff satisfaction where such assistance was received. There was little research examining the impact of the various methods of assistance on case outcomes.

Research aims

The aim of this review was to examine, with a focus on family and civil courts in the UK, what evidence exists on:

- a) How many litigants in person are there and what type of cases do they bring?
- b) Who are litigants in person, and how do they compare to litigants with representation?
- c) What are the motivations of litigants in person?
- d) Are the outcomes of the cases of litigants in person different compared to litigants with representation?
- e) What action works in assisting litigants in person?

Approach

This review of the literature used two search methods:

Database search of published research

International electronic academic databases were searched using specified search terms (see Methodological note), covering the period 1990 to present. English language evidence only was included. The results were then screened to check:

- a) their relevance to the research questions (whether they were covered as a main or side focus of the publication); and
- b) whether they presented empirical research or reviews of empirical research (as opposed to theoretical, case law or opinion based articles).

Full text articles and reports were then obtained (including for results where it was not fully clear from the abstract whether it was relevant and based on empirical work). One study published prior to 1990 was included, as it formed the empirical basis for a number of articles published after this date.

Stakeholder input

Email and telephone contact were made with academics, stakeholders and research funders working in this area. This identified any further details of evidence relevant to the research questions. Further contacts were also identified, and provided additional sources of evidence. This included one unpublished study. A deadline was set for inclusion of new materials, and only sources found before this date were included in the review.

Following both approaches and screening of 110 full texts for relevance and empiricism, a total of 52 informed the results of this review. This included some studies found through tracking references within reports. Eight of the 52 studies were reviews themselves.

Methodological note: Search terms and databases

Search terms:

Search 1: any article/book etc with – “litigant in person” or “litigants in person” or “pro se”
Search 2: Any article/book with

One of these terms – research / study / investigation / evaluat* / impact / pilot / outcome / empirical /assessment / report / Statist* / Analys* /Systematic / Eviden*

AND one of these terms – litigant* / party / parties / claimant* / respondent* / defendant* / lawyer* / solicitor* / counsel / adult / individual / child* / applicant

AND one of these terms – unrepresent* / not represent* / no representation / self represent* / no solicitor / no lawyer / no counsel / no legal counsel / no barrister / not participating / without representation / without legal representation / without a lawyer / without legal advice / representing himself/herself/themselves

Databases:

ASSIA: Applied Social Sciences Index and Abstracts: 1987–Current
British Library Direct Plus (includes Google Scholar)
Criminal Justice Abstracts: 1968–Current
EconLit: 1969–Current
ERIC (Education Resources Information Center): 1966–Current
IBSS: International Bibliography of the Social Sciences: 1951–Current
National Criminal Justice Reference Service Abstracts: 1975–Current
PAIS (Public Affairs Information Service) Archive: 1915–1976
PAIS International: 1972–Current
PILOTS (Published International Literature On Traumatic Stress) Database: 1871–Current
PsycARTICLES: 1894–Current
PsycINFO: 1806–Current
Social Services Abstracts: 1979–Current
Sociological Abstracts: 1952–Current

A note on the evidence

This review aimed to answer a range of exploratory questions to help understand the extent and nature of, and outcomes for, litigants in person. An initial assessment of the literature suggested that there would not be extensive high quality evidence. Therefore, although it employed some features of systematic reviews/rapid evidence assessments, this was not a fully systematic review, as a more narrative approach was appropriate to the range of research questions. The review included stakeholder

input and did not exclude studies on the basis of quality criteria. The quality of the studies reviewed was assessed against a range of criteria, and this taken into account in presenting results. The criteria were: whether the study used defensible research methods; was transparent in reporting of design, implementation and analysis; and clear about the basis of conclusions and the study's limitations.

Where high quality studies are referenced this is noted. However while most sources were usually fit for their original purposes, this was not necessarily transferable for the purposes of this review. Only a minority provide robust evidence for our research questions. Few controlled for case complexity. As a result, this review should be treated as presenting evidence on the potential issues and impacts of litigants in person, rather than conclusive evidence of this.

Additionally, although the focus of this review was originally on family and civil cases in the United Kingdom, the searches revealed most of the evidence was American (where litigants in person are referred to as *pro se*) or Australian. This literature cannot answer questions specific to the UK. However, the problems faced by unrepresented litigants and impact they have when facing legal institutions and proceedings may be similar. This is also the rationale for including some evidence focusing on tribunals.

Definition

The phrases 'litigant in person' and 'unrepresented litigant' can cover a range of scenarios (Moorhead and Sefton, 2005). Usually, they indicate an absence of a legal representative, such as a solicitor or barrister, conducting litigation and providing representation. However, litigants in person range from those who have received some assistance or advice from a legal adviser, to those who have proceeded completely unaided. Additionally, unrepresented litigants may have chosen to become parties to litigation, or forced to litigate (where they defend claims). This may include a significant proportion of defendants who do not participate in proceedings (either by filing documents or attending hearings). While this review aimed to focus on litigants who are active participants in court proceedings, it is not always possible to differentiate

between these groups in the evidence. Therefore, in this report the term 'litigant in person' is used synonymously with 'unrepresented litigant' in the broader sense, unless otherwise stated.

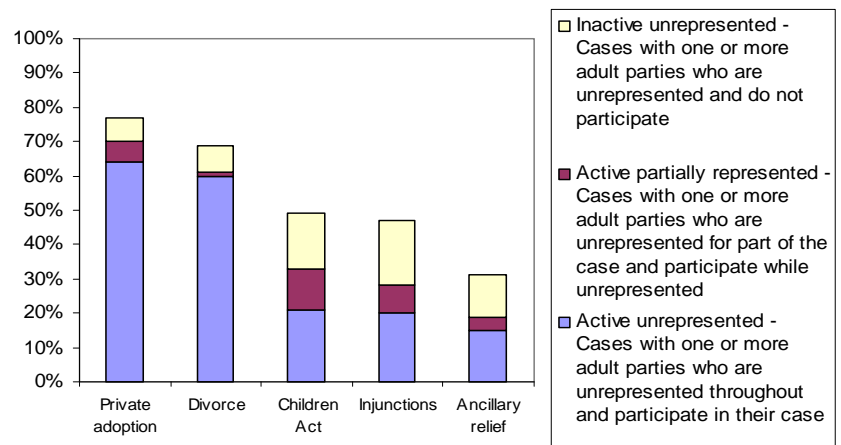
Results

How many litigants in person are there, and what types of cases do they bring?

Most of the published evidence on this issue provided numbers for other countries, particularly Australia and the US (including numbers for specific states). However different eligibility requirements for legal funding, cultural differences and legal context mean that relevance for the UK is problematic.

Only one item of UK evidence addressed this issue directly in relation to civil and family cases. This looked at a random sample of cases from four courts from around the country representing a range of court sizes. Based on analysis of 1,334 family and 1,098 civil cases, Moorhead and Sefton's (2005) study found that unrepresented litigants were common, although it was rare for both sides of a case to be unrepresented. Family cases in this study often involved one or more parties who were unrepresented at some stage in their case (see Figure 1).

Figure 1. Family cases involving unrepresented parties

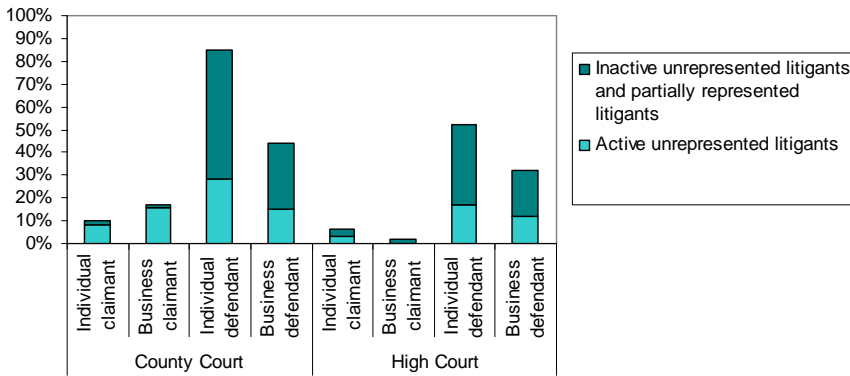


Source: Derived from figures in Moorhead and Sefton (2005), chapter 2

Civil cases had high levels of non-representation, particularly among defendants; 85% of individual defendants in County Court cases and 52% of High Court defendants were unrepresented at some stage during their case (see Figure 2).

Most unrepresented litigants, particularly in civil cases, were inactive and did not participate in their case. However, a small but significant proportion of

Figure 2: Unrepresented civil litigants



Source: Derived from figures in Moorhead and Sefton (2005), chapter 2

cases involved at least one active party who was unrepresented throughout the life of their case. Of family cases, adoption and divorce cases were most likely to contain active unrepresented litigants (64% and 60% respectively). Civil cases with individual defendants were more likely to involve an active litigant in person (28% in the County Court and 17% in the High Court), compared with business defendants, and business and individual claimants.

Who are litigants in person?

The research evidence on this issue suggested that litigants in person were more likely to have lower incomes and educational levels than those who receive representation, and were likely to be younger (Beck *et al.*, 2010; Sales *et al.*, 1993; Dewar *et al.*, 2000). Hunter *et al.*'s (2002) research on unrepresented litigants in Australia's family court found that they were more likely to have welfare payments as their main source of income, and to be male. The latter is consistent with UK evidence (Moorhead and Sefton, 2005) that men were more likely to be unrepresented than women, and were usually the respondents in proceedings.

These demographics seem to be reflected in case characteristics. For example, for divorce cases, some evidence exists that simpler cases, involving no property and no children, and newer marriages (in which there were less likely to be children and substantial financial assets) were more likely to have unrepresented parties (Sales *et al.* 1993; Yegge, 1994).

There was also evidence that litigants in person sometimes displayed indicators of vulnerability. Moorhead and Sefton (2005) found that a significant minority of unrepresented litigants in family cases (20 per cent of injunction cases and 15 per cent of Children Act cases) had a specific indication of

vulnerability (such as being victims of violence, having depression, a problem with alcohol/drug use, having a mental illness or being extremely young parents). This is the only study identified that directly examined this issue.

Why are people unrepresented? What are their motivations?

There were a number of reasons identified in the evidence as to why parties may be unrepresented. Some of these were financial, particularly inability to afford a lawyer, or unavailability or cessation of legal funding (Dewar *et al.* 2000; Hannaford-Agor and Mott, 2003; Sales *et al.*, 1993; Langan, 2005; Moorhead and Sefton, 2005; Law Council of Australia, 2004). Hunter *et al.*'s (2003) study on legal aid and self-representation in the Australian family courts indicated that there was a relationship between unavailability of legal aid and self-representation. It found that the Australian means test did not accurately reflect the level at which people can afford to pay for their own lawyer, but rather created a group of people ineligible for legal aid but unable to afford representation. Other research did not examine this relationship directly. Some presented changes in legal funding eligibility as a possible explanation for increases in numbers of self-represented litigants and for research participant views that lawyers were too expensive, or they could not afford a lawyer (Goldschmidt *et al.*, 1998; Moorhead and Sefton, 2005).

However, finances were not the only factor in explaining why people are unrepresented. Some people chose not to be represented, because they deemed the matter simple enough to handle on their own (whether this was the case or not). Others felt lawyers were not the best placed to advance their interests (Dewar, 2000; Greacen, 2003; Hannaford-Agor and Mott, 2003; Langan, 2005; Sales *et al.*, 1993; Moorhead and Sefton, 2005; Law Council of Australia, 2004). For example, a number of Moorhead and Sefton's court and judicial interviewees suggested that one reason for lack of representation was that it was unnecessary in certain types of proceedings, such as adoption and divorce cases, which were thought to be straightforward enough not to require representation. Sales *et al.* (1993), in their study of divorce cases,

found that 45% of unrepresented litigants said they were unrepresented because the case was simple.

Other reasons provided by research participants included disaffection or bad experiences with lawyers (Dewar *et al.*, 2000; Moorhead and Sefton, 2005). Also, some sources suggested that simplified procedures or openness of courts were factors in some litigants' decisions to represent themselves (Mather, 2003), although there is little empirical evidence for this.

What are the impacts on the court of unrepresented litigants?

A number of authors pointed out that litigants in person were not a homogenous group, and some were able to present their cases competently and understand the processes and requirements (Hunter *et al.*, 2002; Moorhead and Sefton, 2005; Lewis, 2007). However, most research suggested that litigants in person may experience a number of problems, which in turn impact on the court. For instance, the research pointed to problems with understanding evidential requirements, difficulties with forms, and identifying facts relevant to the case (Genn and Genn, 1989; Lewis, 2007; Langan, 2005; Sales *et al.*, 1993; Kelly and Cameron, 2003; Moorhead and Sefton, 2005; Law Council of Australia, 2004).

A number of sources also pointed out that litigants in person may have difficulty understanding the nature of proceedings, were often overwhelmed by the procedural and oral demands of the courtroom, and had difficulty explaining the details of their case (Lewis, 2007; Langan, 2005; Genn and Genn, 1989; Hunter, 1998; Hunter *et al.*, 2002; Baldwin, 1997). For instance, Genn and Genn found that many unrepresented tribunal appellants and applicants felt ill-equipped to present their case effectively at their hearing. They felt intimidated, confused at the language and often surprised by the formality of proceedings.

Such problems may also be relevant for those engaging in mediation without legal representation. One study (Petterson *et al.*, 2010) examined the effect of representation at mediation. This found that parties in mixed representation cases (where one party was represented and the other was not) were more likely, than cases where both or neither parties were represented, to report feeling unprepared to mediate, and concerns and fears about mediation.

Impact on other participants

A number of sources noted the extra burden that unrepresented litigants create for court staff and judges. Dewar *et al.* (2000) pointed to the stress and frustration that they experienced in dealing with unrepresented litigants. Other research noted the extra time that they needed to spend with litigants in person (Hannaford-Agor and Mott, 2003; Goldschmidt *et al.*, 1998; Family Law Council (Australia), 2000; Law Council of Australia, 2004; Kelly and Cameron, 2003). Moorhead and Sefton (2005) noted that while unrepresented litigants participated at a lower intensity (e.g. were less likely to defend cases, file documents or attend hearings) than represented parties, more mistakes were made. Elsewhere, tribunal judges highlighted the role of good representation in producing properly investigated cases, provision of the correct type of evidence and relevant facts, researching the law and presenting relevant cases. Without these, their job is made more difficult (Genn and Genn, 1989).

The ethical challenges litigants in person present for court staff and the judiciary were also noted in the research. Court staff felt they must tread a fine line between giving appropriate assistance and giving legal advice (Moorhead and Sefton, 2005; Dewar *et al.*, 2000). Some studies noted that litigants in person presented a challenge to the judiciary in maintaining impartiality, who were concerned about the perception of bias where one party was represented and the other was not (Goldschmidt *et al.*, 1998; Dewar *et al.*, 2000).

Some studies indicated that litigants in person also have an impact on other parties' representatives, with some representatives doing extra work to compensate for the lack of representation on the other side, such as preparing documents that would normally be prepared by the other party's representative (Kelly *et al.* 2006; Family Law Council (Australia), 2000; Law Council of Australia, 2004).

Duration of cases

The evidence on the impact of litigants in person on case duration is mixed. Lederman and Hrungr's (2006) high quality analysis of the effect of lawyers on US tax court litigation outcomes found no statistically significant effect of representation on time taken to go to trial or to settle the case. Other evidence indicated that cases with unrepresented litigants were usually shorter, and finalised more

quickly than cases where both parties were represented (Rauma and Sutelan, 1996; Dewar *et al.*, 2000). Additionally, Hunter *et al.* (2002) found that cases in the Family Court of Australia involving fully unrepresented litigants were likely to be shorter than average and to finalise in the earlier stages of the case. Partially represented cases were however more likely to be of longer than average duration and correspondingly more likely to finalise at or close to final hearing or appeal judgment. Partially represented cases were more likely to involve particularly difficult children's matters.

The contrasting results suggest that there is a distinction between active unrepresented litigants, and those where the party is unrepresented and inactive (i.e. does not defend their case). Where active unrepresented litigants were considered separately, there was evidence that cases were seen to take longer. Most of this is from interviews with court staff, judiciary and representatives (Kelly *et al.* 2006; Kelly and Cameron, 2003; Greacon, 2003; Law Council of Australia, 2004; Moorhead and Sefton, 2005; Goldschmidt *et al.*, 1998).

In their case file analysis, Moorhead and Sefton (2005) found modest evidence that cases involving unrepresented litigants took longer. In civil cases, cases involving represented claimants against unrepresented defendants took *less* time than where both parties were represented. The exception was cases where there were *active* unrepresented defendants, which appeared to be *longer*. However, these cases were not much longer on average than cases where both parties were represented. In family cases, non-representation was generally associated with cases taking *longer*, particularly where the applicant or both parties were unrepresented. This varied by case type, with divorce cases with both parties unrepresented being *quicker* than where one or both parties were represented. Cases with a represented petitioner and unrepresented respondent were also quicker. The data suggested that non-representation was less common in more complex cases.

Some studies suggested that, particularly for family cases, the absence of a representative was linked to longer case duration as they were less likely to settle than cases involving a representative (Dewar *et al.*, 2000; Hunter, 2003; Moorhead and Sefton, 2005; Rosenbloom, 2003).

Additionally, there was high quality evidence (Seron *et al.*, 2001) that suggested that although cases involving representatives may have increased delay initially, this did not necessarily result in increased burden for the courts. Seron *et al.*'s study of housing cases in New York found that although the presence of a representative increased the number of days to judgment, it reduced the number of post-judgment motions filed. Therefore cases were concluded more efficiently overall.

Impact on case outcomes

Most evidence, generally from the medium quality literature, but also including some high quality studies, indicated that case outcomes were adversely affected by lack of representation (Engler, 2010; Lederman and Hrung, 2006; Genn and Gray, 2005; Sandefur, 2011; Law Council of Australia, 2004; Hannaford-Agor and Mott, 2003; Citizens Advice, 2009; Seron *et al.*, 2001; Moorhead and Sefton, 2005). This was across a wide range of case types. For instance, Lederman and Hrung (2006) found that attorneys obtain significantly better results in tried cases than unrepresented litigants, after controlling for the amount at stake, complexity and party characteristics. Seron *et al.*'s (2001) study found that provision of legal counsel produced large differences in outcomes for low-income tenants in the housing court, independent of the merits of case. Genn and Genn (1989) found that representation significantly and independently increased the probability that a case would succeed in tribunal cases. Sandefur's (2011) meta-analysis (a method in which the findings of comparable studies are combined) revealed a consensus in the studies included that lawyers had a positive effect on case outcomes.

Some of the literature explained this by looking at the benefits representatives bring – essentially, their skills and expertise compensate for the difficulties experienced by unrepresented litigants noted above.

An alternative explanation was given in Sandefur's (2011) high quality study, which found that representation had a powerful impact. However, lawyers affected case outcomes less through knowledge of substantive law than familiarity with procedures. This study found that lawyers' win rates were higher than those of expert non-lawyer advocates, however the differences were much smaller than when lawyers' win rates were compared with unrepresented litigants'.

Sandefur therefore suggested that, as procedural familiarity was key, representation did not need to be by qualified lawyers, and lay experts may be as effective at influencing the outcomes of trials and hearings. This suggestion was supported by other research that found that, in some types of cases, specialist lay representation is as effective as legal representation (Genn and Genn, 1989).

Type of outcome (as opposed to likelihood of 'winning') can also be affected by representation. As noted above, Hunter *et al.* (2002) found that cases involving fully unrepresented litigants were likely to be resolved by withdrawal, abandonment, default judgment or dismissal, rather than agreement between the parties or by judgment following a trial or appeal hearing. Engler's (2010) research review identified evidence that representation alters custody outcomes, for example shared decision-making and visitation arrangements were more likely to be made when both parties were represented. There was no evidence identified that directly dealt with the quality of outcomes for litigants in person, or longevity of outcomes.

What action works in assisting litigants in person?

There were a number of examples in the literature of ways in which litigants in person were assisted. These ranged from studies on court-based advice services, self-help and hotlines (Morris *et al.*, 2006; Plotnikoff and Woolfson, 1998; Henschen, 2002; Goldschmidt *et al.*, 1998; Philliber Research Associates, 2009; Judicial Council of California, 2003 and 2005; Pearson and Davis, 2002; Greacen Associates, 2008). Most of this is evidence from the US.

As both Engler (2010) and Greacen (2003) noted in their reviews, although the evidence on the whole indicated high levels of user satisfaction with services and that court staff appreciate them, there was little evidence of the impact of these efforts on court outcomes. Adler (2008a and b) examined the effectiveness of pre-hearing advice for tribunal cases. He found that, for some types of cases, people who received pre-hearing advice but represented themselves did almost as well as those who were represented. However this was the only study identified that examined this issue.

Additionally, some studies identified ways in which judges assisted litigants in person, and adapted their

style to help them through the court process (Goldschmidt *et al.*, 1998; Greacen Associates, 2008; Genn and Genn, 1989; Moorhead and Sefton, 2005; Kelly and Cameron, 2003; Hunter, 1998; Lewis, 2007). Judges sometimes adopted a more interventionist role to compensate for the difficulties of litigants in person, questioning them to elicit evidence. They also sometimes altered the order of proceedings to help those without representation, and provided explanations to litigants. There was, however, little evidence of the effectiveness of these efforts. Some studies indicated that there was some worry among judges about the propriety of adopting a more interventionist style and that they might appear to be unfair (Genn and Genn, 1989; Goldschmidt *et al.*, 1998).

Implications

The weight of the evidence indicated that lack of representation generally had a negative effect on case outcomes. One explanation given was that this may be a result of the procedural familiarity legal representatives have with the courts. Evidence on the effectiveness of specialist lay representation supports this.

While there was some evidence that cases involving litigants in person concluded quicker than those involving representatives, it was unclear whether these were cases where the unrepresented litigant was an active participant in proceedings, or whether they involved inactive parties. Where studies looked at active litigants in person, the evidence suggested that cases may take longer. There was also evidence that representatives in some situations speed up proceedings.

Evidence on the problems experienced by unrepresented litigants suggested that there is a need for further clarity for litigants on the processes and requirements involved in going to court. However, while this may be sufficient for some litigants, some could still be overwhelmed by the experience, or simply not have the capacity to represent themselves. There is therefore a need to establish what types of assistance would achieve acceptable results for litigants, as well as for court staff and the court system. Issues such as litigant capacity, case type/complexity and forum (type of court or tribunal) should be considered.

As noted above, this literature review drew on a range of evidence of variable quality. While together

they provide useful indicators of the types of motivations, problems encountered and outcomes of litigants in person, the review did not provide conclusive evidence on:

- the numbers of litigants in person in the UK by case type, as there is only a limited understanding of the scale of the issue. This needs to distinguish between active or inactive unrepresented litigants, as these different groups will have differing needs and differing impacts on the courts. An understanding of reasons for inactivity is also required (for example, are people inactive out of genuine choice, or because they are daunted by the prospect of court proceedings), as well as what impact this inactivity has on 'fairness' of outcomes;
- the impact of methods of assistance, beyond user satisfaction, looking at their impact on the

courts and on litigant outcomes. This may be particularly relevant given the notion that procedural familiarity is a key feature of legal representatives' contribution to case outcomes;

- how the quality and longevity of outcomes compare for litigants in person to those who are represented.

Additionally, broadly the aim of this literature review was to examine the evidence on litigants in person and their impacts on the courts. A further gap exists in that it did not examine the potential impact of changes to access to legal funding on:

- whether people with problems amenable to resolution in the justice system would be reluctant or unwilling to participate in the justice system if they did not have legal advice;
- what they do instead, and the effectiveness of the alternatives they may turn to.

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