

McKenzie Friends Consultation
Master of the Rolls' Private Office
Royal Courts of Justice
Strand
London
WC2A 2LL

May 2016



Dear Lord Chief Justice

We welcome the opportunity to respond to the Judicial Executive Board's consultation on the courts' approach to McKenzie Friends.

The availability of assistance in court to litigants in person can be a valuable resource, and it meets a need which might otherwise remain unfulfilled in light of restrictions on the availability of legal aid. We appreciated the opportunity to be involved previously by providing input into Mrs Justice Asplin's Working Group. Several of the proposals made within this consultation align with our views on the subject. We are fully supportive of a white label Plain Language Guide, and a renaming of McKenzie Friends to a more understandable term.

We have responded to the full set of questions in the attachment. I would like to take this opportunity to identify and expand on key themes from a Panel perspective.

Prohibition on fees

The Panel wholeheartedly supports the broader aims of this consultation which seeks to improve the administration of justice for litigants in person. We recognise that there are risks attached to using McKenzie Friends, particularly for those litigants in person who are more vulnerable. We sought to highlight these risks in our report, as did Trinder and Hunter for the Ministry of Justice, although we would note that we found no evidence of them occurring on a widespread basis.

The Panel does not believe that these risks can be mitigated against by banning fees. In the reports produced so far, there is no evidence to suggest prohibiting fees will lead to an increase in quality of services, or have any impact on issues relating to confidentiality, insurance, or those McKenzie Friends which are agenda-driven. We are concerned that a prohibition on fee-recovery, either by way of disbursement or other form of remuneration, will reduce access to support at court for litigants who cannot get a free service or who prefer the fee-charging services on offer.

The consultation refers to the approach in Scotland where fees are banned, but lay assistance and lay representation is publicly funded through legal aid. A Citizens Advice Scotland (CAS) report found similar issues which underpin the risks listed above. In *Lay Representation in Scotland's Civil Courts*¹, CAS recommended defining the role of lay representatives, training on court conduct and specific issues, and improved options for accreditation. We are concerned about drawing parallels between two systems which

¹ http://www.cas.org.uk/system/files/publications/lay_representation_in_scotlands_civil_courts_0.pdf

have different funding mechanisms. We do not believe that it is how a service is funded that causes difficulties. It is rather to do with the levels of training and lack of oversight and it is these issues that we set out in our original report.

The consultation goes on to compare the offer of pro bono services in England and Wales with the support and assistance available in Scotland. Scotland's Law Society has recently brought attention to the difficulties facing the Scottish advice sector's sustainability, due to uncertainty of long term funding, along with increasing workloads². This situation is not too dissimilar from the experience in England and Wales, where the advice sector is shrinking and is facing further funding cuts³. The Low Commission recently published a report which highlighted the particular difficulties faced in Wales, where an ageing population of rural solicitors is not being replenished and the availability of free advice is limited⁴. We are therefore worried that advocating that these services should be offered on a pro bono basis may be misrepresenting their ability to meet the demand for assistance in court.

Choice is one of the core consumer principles, which the courts have maintained though allowing litigants to use the representation they choose. Prohibiting McKenzie Friends from charging fees removes a litigant's choice to pay for reasonable assistance. This may inadvertently impinge on access to justice as well as exacerbate existing vulnerabilities.

Proportionality

We recognise that this consultation will not be seen in isolation but as a part of the wider reform programme, for example the ongoing work of Lord Justice Briggs to review the Civil Courts Structure, as well as the work of the Litigants in Person Support Strategy (LiPSS). We therefore look forward to seeing the synergies and consistencies where procedural amendments are proposed, such as the introduction of a standard notice. In this respect it is important that there are no unintended consequences, such as precluding last minute help for the most vulnerable.

In the absence of consumer research or testing which identifies widespread or increasing levels of consumer detriment, we believe a proportionate approach must be adopted that balances the need for diverse services by multiple providers with consumer protection.

We would be very happy to discuss any aspect of this response in further detail and to address any questions you may have. Please do not hesitate to contact our Consumer Panel Associate Stephanie Chapman (stephanie.chapman@legalservicesconsumerpanel.org.uk).

Yours sincerely



Elisabeth Davies
Chair

² <http://www.lawscot.org.uk/media/505409/Legal-Aid-reform-document.pdf>

³ <http://www.lawgazette.co.uk/law/government-picture-of-advice-sector-not-up-to-date/5052813.fullarticle>

⁴ http://www.lowcommission.org.uk/dyn/1459955052268/WalesManifesto_English_web.pdf

Response to specific questions

Question 1: Do you agree that the term ‘McKenzie Friend’ should be replaced by a term that is more readily understandable and properly reflects the role in question?

The Panel is supportive of efforts to make the court and its processes easier to understand for litigants in person, and so we agree that the term ‘McKenzie Friend’ should be replaced.

Question 2: Do you agree that the term ‘court supporter’ should replace McKenzie Friend?

As in response to question one, the Panel is supportive of a change, however the term ‘court supporter’ could be misinterpreted as being a role within the courts, rather than being independent of the court. An alternative may be ‘supporter in court’.

Question 3: Do you agree that the present Practice Guidance should be replaced by rules of court? Please give any specific comments on the draft rules.

At present, the Practice Guidance is in need of updating to both simplify the language used and also to reflect recent case law. The position of McKenzie Friends as an alternative form of legal support is still an evolving one, and the Panel believes that to codify the Practice Guidance now may risk it becoming out of date sooner than anticipated.

Question 4: Should different approaches to the grant of a right of audience apply in family proceedings and civil proceedings?

Differential approaches in specific courts are theoretically an efficient way of setting guidance. However there needs to be consistent mindfulness of the impact this may have on vulnerable litigants in every court. There is a risk that a vulnerability is not discovered or does not develop until a case has been categorised and reasonable assistance or beyond disallowed. If this proposal is adopted, we would expect to see reasoning and evidence to inform the setting of the thresholds.

Question 5: Do you agree that a standard form of notice, signed and verified by both the LIP and McKenzie Friend, should be used to ensure that sufficient information is given to the court regarding a McKenzie Friend?

Question 6: Do you agree that such a notice should contain a Code of Conduct for McKenzie Friends, which the McKenzie Friend should verify that they understand and agree to abide by?

In our report we recommended consistent use of CVs, notices or other simple tools to help assess the credentials of McKenzie Friends when considering applications for a right of audience to be granted.

Question 7: Irrespective of whether the Practice Guidance (2010) is to be revised or replaced by rules of court, do you agree that a Plain Language Guide for LIPs and McKenzie Friends be produced?

Question 8: If a Plain Language Guide is produced, do you agree that a non-judicial body with expertise in drafting such guides produce it?

The Panel supports a white label Plain Language Guide for use by Litigants in Person and the advice sector. Law for Life have experience in this area and would be a good candidate to produce a version.

Question 9: Do you agree that codified rules should contain a prohibition on fee recovery, either by way of disbursement or other form of remuneration?

The Panel does not agree that the codified rules should prohibit fee recovery by way of disbursement or other form of remuneration. As set out in our covering letter, the Panel does not see that banning fees would tackle the core risks of using a McKenzie Friend. The proposals do not appear to be in the best interests of consumers, with potential impacts on choice and access to legal services.

Question 10: Are there any other points arising from this consultation that you would like to put forward for consideration?

As referenced in our covering letter, there are wider external considerations which may have an impact on this work, such as the Briggs Review of the civil courts structure. In addition to this, the Competition and Markets Authority is expected to publish its report in July. There may well be recommendations or at least commentary on the unregulated sector. We hope that any plans the judiciary makes are in line with these recommendations.