



CIVIL JUSTICE COUNCIL (CJC) RESPONSE -

REFORMING THE COURTS' APPROACH TO MCKENZIE FRIENDS

Opening remarks

This is a timely and important consultation paper, and responds to the increasing activity and range of services offered by paid McKenzie Friends. These differ from the moral support offered by the traditional unpaid lay assistant in the daunting and unfamiliar environment of a court.

The judiciary has faced up to the issue of whether the present system requires reform in the absence of formal regulation, and with case law and practice guidance falling behind the needs and realities of the situation on the ground.

Some of the proposals are relatively uncontroversial, such as issuing a plain English guide or updating the terminology for McKenzie Friends. Other reforms would see formal rules of court adopted which would restrict the activities and (most controversially) prohibit the remuneration of the paid practitioners.

This consultation proposes that any costs incurred by litigants in the use of court supporters for reasonable assistance (and if the court expressly grants permission for the granting of rights of audience and the conduct of litigation) would not be recoverable.

This may seem a stark approach, particularly given the following factors:

- The high cost of conventional legal services;
- The far from universal availability of pro bono services; and
- The limited availability of legal aid for much of the population, and for many categories of civil and family proceedings.

However, against these factors must be set the risks which are inherent in the current system, which include:

- Lack of external regulation of these paid McKenzie Friends;
- Lack in many cases of professional indemnity insurance;
- The potential for poor quality advice from some non or only part qualified practitioners (and some members cited potential for abuse of the system in extreme cases)
- Variable fee rates;
- 'Agenda-driven' McKenzie Friends; and
- Question marks over the adequacy of safeguards for client privacy.

Given that at present there is no indication from Parliament or legal regulators (see Recommendation 13 of the Legal Consumers Panel report *Fee-Charging McKenzie Friends*) that the legal or regulatory framework will be reformed, the question the Judicial Executive Board (JEB) has faced is whether it should introduce reforms.

Having in mind the paramount consideration that the reforms are designed for, and motivated by the need to safeguard court users the CJC supports the judiciary's conclusion that action is required.

The judiciary's preliminary view is that the approach adopted in the Scottish courts should be followed, with rules introduced which prohibit the recovery of expenses and fees incurred by McKenzie Friends.

The CJC considers that codification would protect court users against the risks outlined above, and agrees that adopting the approach of the Scottish courts would provide an effective system of safeguards, without inhibiting the valuable role and work of unpaid McKenzie Friends.

Comments on 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? Please give your reasons for your answer.

Yes. In the report of the CJC's working party on Litigants in Person¹ it was noted that the term McKenzie Friend was being used to cover a wide range of roles of lay people assisting litigants in person in court, and in fact it now covers paid legal and paralegal practitioners.

Although the term has become a familiar one in legal circles, the CJC believes the proposals are right in looking beyond that to the users of the courts and tribunals. For them, it will just be another confusing, undefined and meaningless term of legal jargon, and the term's currency gives it a status that to the uninitiated may make it appear one of a fully fledged and practising lawyer.

Question 2: Do you agree that the term 'court supporter' should replace McKenzie Friend? If not, what other term would you suggest? Please give your reasons for your answer.

Yes, this is a much clearer term, unambiguous, and sufficiently broad. One member expressed a reservation that the term might suggest the person was not independent of the court.

Question 3: Do you agree that the present Practice Guidance should be replaced with rules of court? Please give your reasons for your answer. Please also give any specific comments on the draft rules in Annex A.

Yes, the CJC agrees that the time is ripe for codification – existing case law has grown up incrementally, and struggles to keep pace with developments in this field. The Practice Guidance captures existing case law, but it has little standing of its own.

¹ <https://www.judiciary.gov.uk/wp-content/uploads/2014/05/report-on-access-to-justice-for-litigants-in-person-nov2011.pdf>

Introducing rules would make amendments easier to make to reflect changes in practice and addressing any problems that arise. Rules can also offer judges authority to take action, but still allow flexibility for the exercise of judicial discretion. Slightly different forms of rules could apply between the civil and family courts.

Introducing rules would offer greater protection for litigants in person than exists at present, and that provides a clear justification for this proposal.

Question 4: Should different approaches to the grant of a right of audience apply in family proceedings and civil proceedings? Please give your reasons for your answer and outline the test that you believe should be applicable. Please also give any specific comments on the draft rules.

In principle, yes, and civil and family practitioners (and Rule Committees) are best placed to determine any differences in approach considered appropriate.

In terms of the draft rules, our only comment is:

- Rule 3.22(1) may wish to refer to court supporters assisting people whose first language is not English; and

Question 5: Do you agree that a standard form 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? Please give your reasons for your answer.

Yes. It provides a check and is both a useful safeguard and informative measure to make sure the Court Supporter understands what is expected. We understand that similar forms have proved effective when adopted as local practice by courts.

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? Please give your reasons for your answer.

Yes. The CJC's working party report from 2011 had a draft Code (at Appendix 5 to that report), and it is copied as an annex to this report. This Code has already been adopted by members of the Society of Professional McKenzie Friends², and it would be a very positive move for it to be adopted and adhered to more widely. As well as protecting the interests of litigants the Code also offers some useful guidance for Court Supporters, many of whom will be new to the role (which they may undertake on just the one occasion).

If this proposal is taken up it is suggested that the Rule Committees consult prior to adopting the code, as it has not been subject to public consultation.

² <http://www.mckenziefriends.directory/code%20of%20conduct%20page%201.html>

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? Please give your reasons for your answer.

We agreed, anything that makes matters clearer and more readily understood for both litigants in person and court supporters would be a helpful development.

Question 8: If a Plain Language Guide is produced, do you agree that a non-judicial body with expertise in drafting such Guides should produce it? Please provide your reasons for your answer.

We would strongly support any such guide being prepared by or with the full assistance of the advice agencies with specialist expertise in this field. These bodies have particular expertise from dealing with people using the justice system and struggling with some of the current material. Guides produced by lawyers and court staff often slip into 'legalese' without realising it, and there is a real skill as well as knack into making such material clear and readily understood.

In principle, and subject to endorsement by full Council, the CJC would be willing to make a financial contribution to the costs of producing a guide.

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? Please give your reasons for your answer.

The first point to make here, given some of the responses which have been made to the consultation paper is to emphasise that these proposals do not affect those acting in a voluntary and unpaid basis to support someone going to court. Nothing here deters well-intentioned people from acting as court supporters.

The second point is that, as the consultation paper comments (paragraph 4.25) the statutory framework for conducting litigation and appearing as an advocate in court provides for strict regulation. This is to ensure the protection of individual litigants and the administration of justice, and at present paid McKenzie Friends circumvent this – indeed there are suggestions that practising solicitors are appearing as McKenzie Friends³ in cases to avoid the costs and confines of regulation.

The third factor to take into account is that – in the absence of any steps taken by Parliament or legal regulators – litigants and consumers are vulnerable to practitioners who are not subject to formal regulation and are not obliged to carry professional indemnity insurance. It is recognised that at one end of this developing profession there are experienced and fully or part qualified legal practitioners who are offering a service which is assisting people without access to legal aid and in great need of support. One member suggested judicial discretion should therefore be exercised, on a case-by-case basis, rather than having a rigid prohibition.

³ <http://www.lawgazette.co.uk/practice/solicitors-becoming-mckenzie-friends-to-avoid-regulatory-costs-cma-told/5054974.fullarticle>

However, there are fundamental concerns that the safeguards for consumers at present are inadequate, and in our view those concerns justify the approach suggested in the consultation paper, and which has already been adopted in Scotland.

As such, we support the JEB's provisional view that reform should prohibit recovery of expenses and fees incurred by McKenzie Friends. It should do so through providing that the provision of reasonable assistance in court, the exercise of a right of audience or of a right to conduct litigation should only be permitted where the McKenzie Friend is neither directly nor indirectly in receipt of remuneration.

Question 10: Are there any other points arising from this consultation on that you would like to put forward for consideration? Please give your reasons for your answer.

A point for further consideration might be what redress or remedy a litigant may have where a court supporter is given the right to carry out the conduct of litigation under the proposed new rule 3.2.3 and is negligent.

Suggested Draft Code of Conduct for McKenzie Friends

1. When someone involved in a court case asks another person to assist, not as a lawyer or a witness but as a friend, the person assisting is often called a “McKenzie Friend”.
2. This Code of Conduct summarises what is involved if you are asked to be a “McKenzie Friend”, and what the Court will expect of you.
3. Detailed guidance (the Guidance) was issued on 12 July 2010 by the Head of Civil Justice and the Head of Family Justice, and you should read that. It is available online at <http://www.judiciary.gov.uk/Resources/JCO/Documents/Guidance/mckenzie-friends-practice-guidance-july-2010.pdf> and a hard copy can be obtained from [].
4. If you follow the Guidance and this Code of Conduct then your involvement may be of material help to the person you are assisting and to the Court.
5. If you have a financial interest in the outcome of the case you should normally decline to assist.
6. If you have a personal interest in the outcome of the case then before agreeing to assist you should think about whether someone else who does not have a personal interest might be better placed to assist.
7. You may attend the hearing of the court case unless the Court says you cannot.
8. You may read the papers for the court case unless the Court says you cannot.
9. You should let the staff at the Court know as soon as you arrive that you have been asked to assist.
10. You should bring a short curriculum vitae (cv), and if you are asked by the Court staff to complete a short set of questions about yourself you should do so.
11. If you are being paid to assist or if you regularly assist a number of different people as a McKenzie Friend then you should make the Court aware of that.
12. The Guidance makes clear that you may provide moral support, take notes, help with case papers and give advice to the person you are assisting.
13. Normally the person you are assisting will be the one to speak to the Judge. But if that person cannot manage, the Judge may let you speak instead.

14. You must always follow any instructions given by the Judge.
15. If the Judge asks the person you are assisting to do something, please encourage them to do it, and remind them of any deadlines.
16. You should be courteous at all times to everyone else.
17. You should try to ensure that the way in which you assist does not cause any disruption or distract others. This is particularly important when someone else is speaking to the Judge or the Judge is speaking.
18. You must behave with honesty and not do anything that might mislead the Court or anyone else.
19. You should consider at regular points whether the person you are assisting might also be helped by attending a Citizens Advice Bureau, Law Centre or Personal Support Unit. If you conclude that they might, you should give genuine and conscientious consideration to encouraging the person you are assisting to seek that further help. It may be very helpful if you go with them.
20. Please remember at all times that you are there to assist someone else, and not on your own behalf.