



LORD CHIEF JUSTICE
OF ENGLAND AND WALES

Reforming the courts' approach to McKenzie

Friends

Consultation Response

February 2019

Introduction

In February 2016 the Judicial Executive Board (JEB) issued a consultation concerning possible reforms to the courts' approach to lay individuals, commonly known as McKenzie Friends, who help individuals who litigate without the assistance of a lawyer (litigants-in-person or LiPs) (the Consultation Paper).¹ It also suggested possible reforms to the courts' approach to the exercise of its power to grant lay individuals the right to either conduct litigation or exercise a right of audience on behalf of the LiP.

Many consultation responses were received, for which the JEB is very grateful. A summary of those responses is published as an Annex to this Consultation Response. Following receipt of the responses, the, then, Lord Chief Justice, Lord Thomas, and the JEB considered the issues raised in the consultation and the responses. Consequently, Lord Thomas asked a Judicial Working Party to consider the matter further.²

¹ The consultation is at: <<https://www.judiciary.gov.uk/wp-content/uploads/2016/02/mf-consultation-paper-feb2016-1.pdf>>.

² The Working Party's membership was: Asplin LJ (Chair), Hallett LJ (VP), Singh LJ, Rose J, MacDonald J, HHJ Walden-Smith, DJ Letham, Judge Michael Michell (FtT Property Chamber), Regional Employment Judge Carol Taylor.

Recommendations

Having considered the Working Party's views, Lord Burnett of Maldon, Lord Chief Justice and the JEB have reached the following conclusions.

The question of the reform of the courts' approach to McKenzie Friends is one on which, as the consultation demonstrates, there are varying strongly held views. The growth in McKenzie Friends has coincided with the period following the enactment of the Legal Aid, Sentencing and Punishment of Offenders Act 2012. The government has been reviewing the impact of the changes to the availability of legal aid. JEB conclude that the growth in reliance on McKenzie Friends, and particularly fee-charging ones, should be considered in the context of the impact of those changes. It is for the government to consider appropriate steps to be taken to enable LiPs to secure effective access to legal assistance, legal advice and, where necessary, representation.

The role of the judiciary is to apply the law concerning the provision of legal assistance, the right to conduct litigation and rights of audience according to the law established by the Legal Services Act 2007, the common law and precedent.

The JEB remain deeply concerned about the proliferation of McKenzie Friends who in effect provide professional services for reward when they are unqualified, unregulated, uninsured and not subject to the same professional obligations and duties, both to their clients and the courts, as are professional lawyers. The statutory scheme was fashioned to protect the consumers of legal services and the integrity of the legal system. JEB's view is that all courts should apply the current law applicable to McKenzie Friends as established by Court of Appeal authority.

The Lord Chief Justice and JEB refer this consultation response and the annex summarising the views expressed in the consultation, to the Lord Chancellor.

Question 7 in the consultation paper concerns the provision of a Plain Language Guide for LiPs and McKenzie Friends. JEB support the view that a plain language guide could be produced by a non-judicial body for the assistance of LiPs. The judiciary continues to support the promotion of public legal education which would be aided by such a guide.

Finally, the Lord Chief Justice and JEB note that the current Practice Guidance on McKenzie Friends has not been revised or updated since it was issued in 2010.³ To ensure that it properly reflects the current case law, it should now be updated and re-issued.

³ Practice Guidance (McKenzie Friends: Civil and Family Courts) [2010] 1 W.L.R. 1881

Annex – Summary of Consultation Responses

The consultation received over 250 individual responses. Of those:

- 15 responses were from judges, magistrates, or judicial associations
- 15 responses were from solicitors or barristers, including solicitors' firms
- 20 responses were from legal, paralegal and McKenzie Friend representative and regulatory bodies
- 156 responses were from individuals,
- 28 responses were from organisations or committees
- 9 responses were from charities
- 30 responses were from individual McKenzie Friends
- 5 responses were from academics

Overall the responses were:

- narrowly in favour of replacing the term 'McKenzie Friend';
- broadly against replacing the term 'McKenzie Friend' with that of 'court supporter' Respondents suggested a large number of alternative names to replace 'McKenzie Friend';
- in favour of replacing the present Practice Guidance with rules of court;
- broadly balanced in respect of the question whether to introduce a standard form notice;
- broadly supportive of the introduction of a Code of Conduct;
- strongly supportive of the creation of a plain language guide;
- overwhelmingly supportive of the view that a non-judicial body should produce a plain language guide; and
- in terms of numbers, overwhelmingly opposed to a prohibition on fee-recovery.

PART ONE – SUMMARY OF CONSULTATION RESPONSES

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.

Respondents were fairly evenly divided on the question whether the term ‘McKenzie Friend’ should be replaced by one that is more readily understandable and properly reflects the role. A small number of respondents were neutral on the question, viewing names as unimportant. The justifications for change and for retention set out in the responses had, however, different focuses.

Those respondents **who support replacing** ‘McKenzie Friend’ with a new term made, for example, the following points:

- the term McKenzie Friend is an accident of history which is unclear as it provides no information concerning what they can and cannot do. A number of individual litigant responses exemplified this by variously noting their belief that McKenzie Friends have:
 - have rights of audience;
 - have rights of audience and a right to conduct litigation;
 - have a right to conduct litigation;
 - can give help and advice but do not have rights of audience or a right to conduct litigation;
 - can give help and advice and can have a right of audience if the court allows that;

A voluntary advice body made the point based on its broad experience that it was its belief that the term was *‘probably meaningless to most individuals without full explanation and few, including lawyers, will be familiar with the background to the term.’* Another voluntary advice body noted how its volunteers regularly experience misunderstandings around and expectations of what they can and cannot do; noting that the term McKenzie Friend has generally speaking lost any common meaning it may once have had.

The terms lack of clarity was particularly problematic where McKenzie Friends charged for their services, and charging is based on the impression (however it arises) that they can exercise rights of audience. It was also noted as being problematic and confusing when solicitors purport to act as McKenzie Friends despite being subject to professional regulation and being authorised to carry out reserved legal activities;

- the public generally, and litigants-in-person, in particular do not know what the term McKenzie Friend means. They find the term confusing. Familiarity with the term comes following familiarity with the, mainly, family courts and their processes;
- the term should be replaced in order to resolve any ambiguity or confusion over what can and cannot be done without specific authorisation by a legal services regulator or by the court. As one advisory body noted, the term can lead litigants-in-person to wrongly believe they are instructing a ‘fully-fledged and practising lawyer’. It is equally problematic as it conflates the help and moral support that can be given by a family member and a friend of the litigant with legal advice and assistance given by someone who acts as a McKenzie Friend on a regular basis either on a paid or unpaid basis;
- there is a need to replace the term with a plain language term that is neither an accident of history, arcane, nor mere jargon;
- the term, as one McKenzie Friend noted, ‘sounds amateurish’.

Those respondents **who support retaining** the term made, for example, the following points:

- the term is well-known and understood by McKenzie Friends, lawyers and court staff. It is also a familiar term to the public. It is synonymous with its role. It is in the dictionary. As one McKenzie Friend representative body put it, the name has been in use for 45 years and has wide recognition;
- the term is known to 1% of the population. The term is not obscure. It is more akin to commonly known terms such as *Mesher Order*;

- it is, as one representative body put it, ‘professionally neutral and non-judgemental’ a term;
- it is unclear in meaning, which is an advantage because it means the judge will have to explain its meaning to the litigant-in-person. Its lack of clarity is also a positive attribute because it forces litigants-in-person to search on the Internet to discover its meaning;
- it will not be possible to change the name because:
 - the Lord Chief Justice has no power to change the name. It is difficult to see how the name can be changed without negating the case law authority under which McKenzie Friends operate;
 - previous attempts to change the name have failed e.g., the perceived attempt to change the name to ‘unqualified legal adviser’ in *R v Leicester Justices, ex. Parte Barrow* [1991] 2 QB 260;
 - attempts to change other terms’ names, such as ‘ancillary relief’, ‘decree nisi’ or ‘litigant-in-person’ failed;
- changing the name will be confusing to litigants;
- the term indicates McKenzie Friends while they are obliged to conform to court protocols and procedures have an overriding duty to assist litigants-in-person

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.

A narrow majority of respondents did not agree that the term ‘court supporter’ should replace McKenzie Friend.

Those respondents **who support replacing** ‘McKenzie Friend’ with ‘court supporter’ in addition to agreeing with the points made in the Consultation Paper, made, for example, the following points:

- it was simple and clear. It made the point that support was being provided without creating any false impression as to the status of the person providing support i.e., it made clear that the individual was not a lawyer. As such it would be more easily understandable to the public;
- it avoided any suggestion that the individual had a right of audience or a right to conduct litigation. As such it made clear that the litigant-in-person remained in control of the litigation;
- it was capable of covering all the different roles that a McKenzie Friend could take and could apply to friends, family, pro bono and paid for assistance;
- it did not suggest the individual was a professional lawyer or had any legal skills or qualifications, which was not necessarily the case at the present time, as was suggested in an academic response, by individuals attached to one of the McKenzie Friend bodies

Those respondents **who did not support** replacement of ‘McKenzie Friend’ with ‘court supporter made, for example, the following points:

- the term suggests that the individual is attached to the court, approved by the court or regulated by the court;
- It wrongly gives the impression the individual is on a par with regulated legal professionals or are akin to an amicus curie (or Advocate to the Court), a Justice’s clerk, Magistrate’s legal adviser, court usher, court clerk or associate (or as they are sometimes known ‘In-court support’) or bailiff. By giving such an impression, it may put off litigants-in-person from using such assistance as they may be suspicious of the court and of individuals who appear to be part of the court infrastructure. It may also, give the impression that the individual has a right to address the court;
- the term is ambiguous and suggests that the individual is supporting or providing assistance to the court or the judge. This misrepresents the individual’s role which is to support or provide assistance to the litigant-in-person;

- use of the word ‘supporter’ suggests that the individual is a partisan pursuing the litigant’s cause rather than helping them to present their case. It also suggests they support the litigant-in-person in the same way a football supporter supports a football team;
- the term is already used in another context in criminal proceedings, and would thus cause confusion if introduced;
- the term fails to capture the fact that McKenzie Friends do more than assist with court work. As one trainee McKenzie Friend noted, they carry out a considerable amount of work outside court in terms of administrative help and advice.
- the term is both derogatory and vapid.

A number of respondents expressed no definitive view. They stressed that any new term should reflect the variety of roles a McKenzie Friend can undertake. They also stressed that any new term should not introduce any ‘unwelcome apartheid’ into the justice system. Others suggested that any new title should not suggest court approval or bias in favour of the individual provided assistance.

Both those respondents who supported and those who did not support the term ‘court supporter’ suggested alternative replacement terms, such as:

- litigant or litigant’s helper, or case helper;
- litigant legal assistant;
- litigant friend
- litigant supporter, people’s supporter or people’s friend or court friend;
- case supporter;
- court user or lay supporter;
- support or supporter advocate and/or support representative;
- lay adviser, case adviser, court adviser;
- advocate for litigant in person;
- friend in court
- lay representative

- proceedings aider, proceedings friend, proceedings angel, proceedings assistant;
- voluntary case supporter and professional case supporter (to draw the distinction between unpaid and paid support)
- Family Law Supporter (Formerly McKenzie Friend), or Civil Law Supporter (formerly McKenzie Friend);
- Legal adviser;
- Litigant's officer to the court;
- LiP assistant LiP assister, LiP supporter;
- LiP Helper
- Non-Lawyer Assistant or Non-Lawyer Supporter;
- Court adviser or court assistant;
- Family paralegal;
- Paralegal;
- Community Legal Companion;
- McKenzie Assistant, McKenzie Representative, McKenzie Litigator;
- LiP Supporter, Support Provider, Court Liaison (to differentiate the different roles);
- Litigant assistant.

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.

A majority of respondents were in favour of replacing the Practice Guidance with codified rules of court. A number of respondents were in favour of using the indicative draft rules as they were viewed as providing clarity. Others found the draft rules complex and overly-formalistic.

Those respondents **who support replacing** the Practice Guidance with codified rules of court, in addition to agreeing with the points made in the Consultation Paper made, for example, the following points:

- the Practice Guidance does not apply to all courts, although it is a statement of principles established in the case law. Codified rules would ensure simplicity and clarity across all courts, including the criminal courts which were seeing an increase in McKenzie Friends, and the Court of Protection. Rules would also provide effective

guidance to the courts on the approach to take to Civil Restraint Orders for McKenzie Friends;

- The status of the Practice Guidance is unclear. The status of rules of court, which have the force of law, will be clear;
- Rules of court would produce greater certainty. They would also produce a stronger framework to clarify the role McKenzie Friends can take and to control 'rogue McKenzie Friends' and will provide better protection for litigants-in-person. Rules are also easier to amend when necessary than Practice Guidance, which can only be amended to take account of changes brought about by new case law;
- Rules of court would help promote McKenzie Friends as a legitimate feature of the legal services market;
- Rules of court are subject to scrutiny by Parliament. They can be subject to periodic review and reform;
- Rules will promote a more consistent approach across the courts to treatment of McKenzie Friends. They will therefore promote the better administration of justice;
- At the present time, the Guidance is routinely ignored by the courts where applications for grants of rights of audience are concerned. Rules of court will ensure that a more consistent approach and one in line with the rules is taken to such applications;

Those respondents **who did not support replacing** the Practice Guidance with codified rules of court made, for example, the following points:

- There should be a very limited number of rules of court;
- Rules of court are a form of legislation by the 'back door', which would effectively amend the Legal Services Act 2007;

- Rules of court would fetter the discretion provided by the Legal Services Act 2007. It is not the role of the courts to regulate McKenzie Friends. That is a matter for Parliament;
- Rules would place limits on McKenzie Friends and on what they can do. They would fetter the court's discretion;
- Introducing rules would formalise the role of McKenzie Friends and may raise expectations on the part of litigants-in-person concerning what McKenzie Friends can do. Formalising the role in rules may, on the other hand, reduce assistance to litigants-in-person by stifling use of the right to reasonable assistance. Rules would make access to justice more complex;
- Many litigants-in-person are unaware of court rules. Those who are aware of them do not think they apply to them. They do however understand the Practice Guidance when they are made aware of it;
- Rules will give the impression that McKenzie Friends are subject to regulation, and may encourage the growth of paid McKenzie Friends;
- There should be neither rules nor Practice Guidance as the court's discretion is and should be unfettered.

Other respondents saw no difference between rules of court and the Practice Guidance.

Respondents had mixed views on the indicative draft rules. Some thought they were a model of clarity. Other respondents thought they were complex and verbose. Significant numbers of comments on specific draft rules were submitted.

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.

A large majority of respondents opposed the suggestion that different approaches should be taken to granting rights of audience in family and civil proceedings.

Respondents **who supported** different approaches made the following points:

- A less strict approach to granting rights of audience should apply to family proceedings as:
 - litigants in family proceedings are more vulnerable and emotive than those in civil proceedings. There is less need for a McKenzie Friend to provide objective assistance in civil proceedings than in family proceedings. Either a lower threshold for the grant of a right of audience should therefore apply in family proceedings or there should be a presumption in favour of the grant of rights of audience in family proceedings;
 - alleged victims of abuse in family proceeding should not be cross-examined by the alleged perpetrator. In order to ensure this cannot happen there should be a presumption in favour of the grant of a right of audience to a McKenzie Friend. Equally, such alleged victims are in greater need of advice and support during hearings due the nature of the hearings and a lower threshold for allowing them to have the assistance of McKenzie Friends exercising a right of audience should be in place;
 - due to the different nature of civil and family proceedings, it is more important in family proceedings for an individual to have objective support from a McKenzie Friend than for them to have support from a family member or friend;
 - as it is easier to obtain litigation funding, via legal aid or conditional fee agreements, in civil proceedings it should be easier to obtain a grant of a right of audience in family proceedings’
 - because the consequences of a miscarriage of justice are more likely to be uncompensatable in family proceedings, there is a stronger case for access to a McKenzie Friend in such proceedings.

- A stricter approach to the grant of rights of audience should apply to family proceedings due to the sensitive nature of the proceedings and because there is a higher risk in those circumstances that the McKenzie Friend may not be suitable to provide assistance or address the court. Furthermore, due to the nature of family proceedings and the greater need to secure confidentiality, a stricter test is necessary to minimise the risk that inappropriate individuals do not act as

McKenzie Friends or exercise rights of audience. This is less of an issue in civil proceedings;

- A stricter approach to the grant of rights of audience should apply where criminal proceedings are concerned. Such an approach should also apply where proceedings are more complex.

Respondents **who supported** a uniform approach made the following points:

- there is no evidence or other basis to show a need for a different approach;
- different approaches would be confusing and introduce unnecessary complexity. A simple, streamlined procedure uniformly applicable to all hearings was needed. If the aim of reform was to introduce greater clarity, different approaches and different criteria for the grant of such a right would undermine it and impose an additional and unnecessary burden on litigants-in-person. One set of rules applying the same test to all types of proceedings was the optimum approach and the easiest for litigants-in-person, McKenzie Friends and the courts to understand. Such an approach would introduce greater consistency of approach across all courts;
- litigants-in-persons' needs do not differ across different types of litigation. As such the test for rights of audience should not differ either. It was important to ensure that the approach taken in family proceedings was brought in line, in practice, with that adopted in civil proceedings. The approach in the former being one were a more lenient approach to the grant of such rights was adopted than in the latter;
- there is no reason to suppose that family and civil proceedings are fundamentally different or have different effects on litigants. Both types of proceedings can be emotive, and can have a serious impact on the parties;
- there was no justification for such an approach other than to 'cover-up criminal activities by secrecy' i.e., by making it harder for McKenzie Friends to be able take part in certain types of proceedings;

- a uniform approach would encourage greater availability of assistance to litigants-in-person;
- as the central issue was to balance the risk and benefit to the proper administration of justice, there should be a uniform approach across all jurisdictions.

A number of respondents supported a uniform approach, but noted that different factors would have different weights in specific instances i.e., in family proceedings where there was a history of domestic violence that would be a relevant factor that would not, necessarily, arise in civil proceedings. A uniform approach to criteria did not preclude a fact-sensitive application of such criteria. Where family proceedings were concerned, and particularly those held in private, it was noted that there was a specific need to make the strict rules concerning confidentiality clear to all participants.

A number of suggestions were made concerning the test to apply to granting a right of audience. A large number of respondents, including litigants-in-person, McKenzie Friends and voluntary groups expressed the view that the right to receive reasonable assistance, the grant of a right to conduct litigation and of a right to exercise a right of audience should be automatic. It was also suggested that such rights be granted if no serious objection was raised by the other party to litigation, and that a good reason for granting such rights should be that the proceedings are stressful. Other respondents emphasised that a more prescriptive approach to the grant of such rights should be taken in future, and specifically where family proceedings were concerned. Others suggested that as McKenzie Friends were not regulated professionals they should never be granted rights of audience. One voluntary body suggested that legal aid should be available for individuals who need legal representation.

A number of respondents stressed that whatever test was adopted it should be flexible enough to enable different circumstances in different cases to be taken account of in assessing whether to refuse the right to reasonable assistance or grant rights of audience. Others suggested that any such test should require the court to take account of the McKenzie Friend's experience, knowledge, and competence, as well as the nature, complexity, and sensitivity of the case. It was also suggested that where a litigant-in-person applied for a right of audience for a McKenzie Friend, details of any fee being paid to the McKenzie Friend and an explanation why such a fee could not be paid to a properly

regulated lawyer should be given to the court to help it assess whether to grant the application. Proposed tests for the grant of rights of audience included the following:

- A two-stage test:
 - is there a good reason to grant such a right; and
 - is it in the interests of the proper administration of justice to do so;

- A two-stage test:
 - would the grant of a right of audience assist the court, or would the refusal to grant such a right prejudice the litigant-in-person; and
 - both the litigant-in-person and McKenzie Friend have complied with any rules concerning service of any required information notice to the court (subject to a discretion to grant the right where notice was not given);

- A two-stage test:
 - would the grant of a right of audience enable the litigant-in-person's case to be more fairly and effectively presented; and
 - the proposed representative understands and will comply with the
 - duty to not knowingly mislead the court and will respect the court's process, while
 - acting in the interests of the litigant and not for some ulterior purpose of agenda.

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.

Responses to this question were broadly balanced, although a very large majority of responses from litigants-in-person objected to the introduction of a standard form notice.

Respondents **who supported** the use of a standard notice, in addition to the reasons set out in the Consultation Paper,⁴ made the following points:

⁴ See Consultation Paper, paras. 4.12-4.14.

- a notice would increase transparency in the courts;
- a notice will help both the litigant-in-person and the court know who the McKenzie Friend is. It will also help the litigant understand what a McKenzie Friend can and cannot do. It will help the court take steps to take action if the McKenzie Friend breaches confidentiality or otherwise acts inappropriately.
- a notice would help reduce the potential for McKenzie Friends to act inappropriately or for the wrong reasons. It would help foster a more serious, professional attitude on their part. It would also help promote a more consistent approach by the courts to McKenzie Friends, and to the use of notices as some courts currently use them whereas others do not. In those courts which currently use notices, they were seen to work well;
- a notice should also be given in advance of any hearing to the opposing party so that it can be aware of the assistance and properly consider whether it wishes to make any submissions or observations to the court on the suitability of the McKenzie Friend or the type of assistance sought;
- a notice would serve as a proper basis for the court to consider whether to grant a right of audience to a fee-paid McKenzie Friend, would stop McKenzie Friends exaggerating their expertise and status, and would protect litigants-in-person by providing the court with material to help it determine if the McKenzie Friend was not a suitable person to provide assistance;
- McKenzie friends play a serious role in the courts and as such ought to be expected to provide the courts and parties with relevant information;
- as this is an area where there is no real regulation, and as there are a number of disreputable individuals acting as McKenzie Friends, a notice will enable the court to know who they are and what experience they have of litigation. It would also help the court check who they are through keeping records. Better control this way will help the court protect litigants-in-person, and particularly those who are vulnerable, from being exploited. Such records, as one respondent suggested, should be kept by Her Majesty's Courts and Tribunals Service (HMCTS) to facilitate a court's ability to

check whether a McKenzie Friend has, for instance, been barred from acting as such previously, is subject to a civil restraint order or a civil proceedings order. This would also assist with the collation of data concerning levels of McKenzie Friend misconduct. The proper use of civil restraint orders to control the activities of McKenzie Friends who act abusively was noted by some respondents as being of real importance as a means to protect by the interests of the litigant the McKenzie Friend was supposed to be assisting, but also the interests of the opposing party. Examples were given by some respondents of the serious and sustained abuse they had suffered at the hands of some McKenzie Friends who were helping the party opposed to them in litigation; abuse that was not as it might have been subject to court control via a civil restraint order;⁵

- if a notice had to be handed-in to a court before a hearing, and a litigant-in-person failed to do so, the court should retain a discretion to accept the notice at a hearing or to permit the litigant-in-person to provide details orally;

A number of respondents who supported the use of a standard notice stressed that care needed to be taken to ensure that it did not place an unnecessary burden on litigants-in-person. The notice should not, therefore, be too bureaucratic or complex. Nor should the notice put off family and friends from acting as McKenzie Friends. Some respondents suggested that if information concerning McKenzie Friends had to be provided to the court, then information concerning solicitors and barristers ought to be provided to the court as well.

Respondents **who opposed** the use of a standard notice made the following points:

- the introduction of a notice would lead to discrimination and McKenzie Friends by the courts. It would limit a litigant-in-person's freedom to choose who helps them;
- the use of a notice would simply lead to litigation over compliance with its requirements. It would lead to unnecessary delay in hearings as it would lead to arguments over matters such as what the McKenzie Friend can and cannot do;
- a notice requirement was unfair to those McKenzie Friends who only ever act as such once or twice. It would not be fair to require a family member or friend to

⁵ Under CPR r.3.11 or s.42, Senior Courts Act 1981.

obtain insurance. A notice would put some potential McKenzie Friends off from acting as such;

- it is none of the court's business who was helping a litigant-in-person;
- such a notice would be unnecessary if the court accepted that certain McKenzie Friends had met pre-established standards evidenced, for instance, through membership of a body such as the Society of Professional McKenzie Friends or the Institute of Paralegals;
- any form of notice would be too bureaucratic. Information should simply be given to the court clerk or usher before a hearing. If a right of audience is sought then relevant information will have to be given by the litigant-in-person and McKenzie Friend to the court anyway, so a general notice is unnecessary.

The following suggestions were made concerning the content of a Standard Notice:

- it should specify what the litigant-in-person wants the McKenzie Friend to do e.g., provide reasonable assistance, obtain a right of audience;
- it should clarify the nature of reasonable assistance and how that differs from carrying out the conduct of litigation and exercising a right of audience;
- a declaration that the McKenzie Friend has no financial or other interest in the proceedings;
- the basis on which the McKenzie Friend has been engaged to help e.g., a fee-paid or voluntary basis. The relationship between the litigant-in-person and the McKenzie Friend e.g., family, friend, voluntary organisation, fee-paid;
- what, if any, experience the McKenzie Friend has of litigation, including their involvement in other proceedings. This could be provided through the McKenzie Friend providing a full curriculum vitae. Alternatively, rather than a curriculum vitae (which some respondents viewed as unnecessarily complex), the McKenzie Friend could simply set out the relevant details and their name, address, and date of

birth to enable proper identification and the court to assess their ability to help the litigant-in-person. The provision of such information was perceived to be a good way to ensure that the activities of agenda-driven McKenzie Friends could be properly restricted;

- details of any insurance that the McKenzie Friend, including a copy of any insurance certificate;
- details of: any relevant qualifications or experience; membership or other connection of any relevant organisation; whether the McKenzie Friend was previously a solicitor, barrister, legal executive and, if applicable, whether they had been subject to removal from those professions for disciplinary reasons; whether they have been prohibited from acting as a McKenzie Friend in any previous proceedings; and, if they have any unspent convictions;
- a declaration and undertaking by the McKenzie Friend to act in the best interests of the person they are helping, to respect court procedures, and not knowingly mislead the court. It should make clear that breach of the undertaking is a contempt of court and may be punishable by, for instance, wasted costs orders against the McKenzie Friend personally;
- confirmation whether the McKenzie Friend is to be a witness in the case.

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.

Responses to this question were broadly supportive of the introduction of a Code of Conduct. A number of respondents emphasised the point that a Code should not be, or be seen to be, a form of regulation, and should be subject to consultation regarding its content. For others there was, however, a perceived risk that a Code would be taken to imply McKenzie Friends were regulated. Others queried whether it would be too weak a form of control; it would have no legal force and be of no real benefit. Concerns were also raised that a Code should not create unnecessary satellite litigation over issues of compliance or grants of rights of audience. Any Code should not impose too great a burden

on litigants-in-person, or reduce their access to justice. It was also suggested that if there were to be a Code there may need to be a basic version for family and friend McKenzie Friends and a more detailed one for fee-paid, recurrent McKenzie Friends. One respondent suggested such a Code should, in the interests of fairness, also apply to lawyers. Lawyers are however subject to detailed regulation and are required to comply with detailed regulatory and disciplinary codes.

Respondents **who supported** the incorporation of a Code of Conduct into standard form notice, in addition to the reasons set out in the Consultation Paper,⁶ the following points:

- a Code may act as a means of quality control by deterring McKenzie Friends who are unable to meet its requirements from acting as such. It would help protect litigants-in-person from unscrupulous McKenzie Friends;
- a Code would help guide McKenzie Friends, and particularly first-time McKenzie Friends, to act in both the litigant-in-person's interests and those of the proper administration of justice. It would do so by clarifying what they can and cannot do (specifically that a McKenzie Friend does not have a right of audience or a right to conduct litigation), and what are appropriate standards of behaviour including specifying that a McKenzie Friend owes a duty of confidentiality to the litigant-in-person who they help. It would, and should, detail appropriate conduct between McKenzie Friends and opposing parties. As such it would encourage good practice. It would also provide a clear basis for courts to decide whether to refuse or allow McKenzie Friends to provide assistance. It was stressed that clear guidance on appropriate behaviour and the sanctions for inappropriate behaviour was particularly important in an area where there was no responsible regulatory body which could act to protect vulnerable litigants-in-person from either potential or actual misconduct or poor practice;
- a Code should make specific provision to require any McKenzie Friend who wishes to help a litigant-in-person in family proceedings where there was a history of domestic violence to have completed specific training before they can provide such help;

⁶ See Consultation Paper, paras. 4.12-4.14.

- a Code would clarify McKenzie Friends status, thus making it clear to litigants-in-person that they were not lawyers. It would also emphasise the seriousness of acting as a McKenzie Friend;
- any Code should not be taken to imply that the court retains a discretion to modify its terms or disapply them in individual cases.

Respondents **who opposed** the incorporation of a Code of Conduct into standard form notice made the following points:

- there is no need for any Code. Judges already have the power to impose conditions on McKenzie Friends assisting in court or exercising rights of audience. The courts should secure compliance with existing court rules;
- the introduction of a Code is a matter for Parliament or a regulatory body and not the judiciary. The judiciary cannot regulate McKenzie Friends;
- McKenzie Friends should be regulated by a regulatory body and not a judicial Code. They should be required to pass an exam and be required to adhere to a regulatory code and to obtain insurance. Breach of regulatory requirements should result in a McKenzie Friend losing their position as such;
- a Code would create an unnecessary barrier to McKenzie Friends helping litigants-in-person. It would create unnecessary confusion for litigants-in-person;
- rather than a Code all McKenzie Friends should be required to act as officers of the court;
- a Code would not work in practice;
- a Code is unnecessary because all McKenzie Friends are paralegals and should be a member of a paralegal body and subject to its Code of Conduct;
- all that is needed is a summary of the McKenzie Friends' role which sets out what they can and cannot do. A code is unnecessary.

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.

A clear majority of respondents supported the creation of a plain language guide. Law and court processes were noted to be complex, when they should be easy to understand. A plain language guide would help make the court process more accessible. To aid accessibility the guide should be available via the Internet, in advice centres, and in courts. It should be available in a wide-range of formats, including Braille, and languages. There was concern, however, that such a guide might give the impression that McKenzie Friends were regulated.

Respondents **who supported** the creation of a plain language guide, in addition to the supporting the reasons set out in the Consultation Paper,⁷ made the following points:

- it would be of great help to both litigants-in-person in helping them understand their rights;
- it would help both litigants-in-person and McKenzie Friends, and particularly inexperienced ones, to understand what the latter can and cannot do;
- it would help open up the law and the court environment to non-lawyers, thereby playing a role in promoting public legal education.

Respondents **who opposed** the creation of a plain language guide made the following points:

- there should simply be one set of intelligible rules. The CPR should be replaced in its entirety by plain language rules, procedures, applications forms, and remedies;
- it was unnecessary because a competent McKenzie Friend would not only be able to read and understand rules of court, but would also be in a position to properly explain procedure to a litigant-in-person.

⁷ Consultation Paper paras. 4.15-4.19.

Those who supported a guide made numerous suggestions concerning its content. Suggestions included: guidance on public and private law; guidance on the pre-trial, evidence-gathering, and trial processes; advice on ADR; guidance on how to understand the CPR and its technical terminology; advice on the various advice and representation options available, and how to assess the different options. It was also suggested that any guide: should not be too complex or lengthy as that would undermine its utility, but equally it should not be imprecise; should be consistent with the rules and updated annually. Other suggestions were that it should apply to all types of proceedings (civil, family and criminal) and that there should be specific guides for specific proceedings.

Other respondents expressed concern that if rules and a guide were produced the present problem of complexity would simply be perpetuated: two documents dealing with the same thing being a recipe for confusion; any inconsistency between the two documents would be particularly problematic for litigants-in-person, McKenzie Friends and the courts. Others made the point that such a guide would only be necessary if the rules were not in plain language, and that if a plain language guide could be produced then plain language rules could 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 should produce it? Please give your reasons for your answer.

The overwhelming view of respondents was that any plain language guide should be produced by a non-judicial body such as: the Citizens Advice Bureaux; the Personal Support Unit; LawWorks; AdviceNow; the Ministry of Justice; the Law Society; Families Need Fathers; McKenzie Friends bodies.

The majority of respondents expressed the view that the judiciary were not best placed to draft such a guide given the perceived inaccessibility of the judicial Litigant-in-Person Handbook.⁸ Lawyers were also noted as not being capable of drafting documents in plain language. Other respondents took the view, however, that a guide could and should only be produced by the judiciary, as only they know the law and procedure.

⁸ A Handbook for Litigants-in-Person <<https://www.judiciary.gov.uk/publications/handbook-litigants-person-civil-221013/>>.

There was a significant view that any guide should benefit from a wide-range of input from legal bodies, support groups, litigants-in-person, McKenzie Friends, that it should be drafted by a body that was expert in plain language drafting; and it should be subject to judicial scrutiny to ensure that its content accurately reflected the law. A guide should thus be a collaborative effort; as should the drafting of rules and any guidance generally. It should also be comprehensive and balanced, so that it did not suggest any bias against McKenzie Friends or bias in favour of the use of lawyers to produce advice and support for litigants-in-person. Any guide should when drafted be tested on court users, whoever produced it, before it was finalised.

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.

Three central and consistent themes emerged from the responses to this question:

- first, that there was an absence of either qualitative or quantitative independent evidence concerning the benefits and problems which McKenzie Friends are believed to generate. This was a particularly acute problem in respect of family proceedings;
- secondly, that the court has sufficient power to control McKenzie Friends but there is a simple lack of consistency in use of those powers. In family proceedings, it was noted there was a lack of consistency in the application of the current test to grant rights of audience to fee-paid McKenzie Friends. The current test requires the court to only grant a right of audience to a McKenzie Friend who regularly seeks such a right in exceptional circumstances.⁹ It was noted that there is a tendency not to apply this test, which it was also noted was arbitrary, improper and a failure to follow or properly apply binding precedent. The courts should simply apply the present law properly;
- Particular concerns were highlighted by a range of respondents regarding the need for litigants-in-person to be provided with effective advice and representation in family proceedings. These concerns were acute where one of the parties was

⁹ *Clarkson v Gilbert* [2000] 2 F.L.R. 839.

engaged in litigation with an ex-partner and where there were allegations of abuse within the former relationship. Very many examples were given of McKenzie Friends providing helpful assistance in such cases through, for instance, properly advancing points of law which otherwise would not have been brought to the court's attention; addressing the court and questioning witnesses in situations where a vulnerable claimant would not have been able to do so; providing advice on procedure; and providing moral support. Other respondents however highlighted poor conduct on the part of McKenzie Friends. Examples of such conduct being: poorly prepared; causing hearings to be adjourned due to their behaviour in court; being aggressive and abusive to other parties both before and during proceedings as well as via social media; fostering a perception amongst litigants-in-person that the family justice system is secretive, corrupt or biased; and providing assistance that was agenda-driven rather than focused on the specific interests of the litigant.

The overwhelming, in numerical terms, view of respondents was that a prohibition on fee-recovery should not be introduced.

Respondents who were **opposed** to the introduction of an outright prohibition made the following points:

- there was no evidence to support the introduction of a ban. What evidence there was in the form of the two studies referred to in the Consultation paper was inadequate; one respondent referring to the evidence base in those studies as being no more robust than might be expected from an undergraduate thesis;
- there was no evidence why the current statutory arrangements and the court's existing powers could not manage the use of McKenzie Friends effectively. On the contrary, there was evidence from the effective way in which the Tribunals manage McKenzie Friends that the present control mechanisms can and do work if properly applied;
- a blanket prohibition on fee-paid McKenzie Friends was disproportionate. Where a fee-paid, or non-fee paid McKenzie Friend, was found to have acted inappropriately the court should use its powers to prohibit that individual from acting as a McKenzie Friend in future. A targeted approach would meet the harm, while

enabling those McKenzie Friends who provided a benefit to litigants-in-person and to the courts to offer proper and effective assistance;

- there was a risk that a blanket ban would adversely effect the ability of likelihood that family and friends or charities would help litigants-in-person. A reduction in skilled assistance would place litigants-in-person in a worse position, and would be contrary to the promotion of equality of arms and access to justice;
- such a ban would be unenforceable, not least because it could not apply to assistance given outside of court proceedings;
- the courts should have no role in managing the relationship between litigant-in-person and McKenzie Friend;
- it was wrong in principle to bar McKenzie Friends from charging for the provision of a valuable service;
- a ban would draw no distinction between recovery of necessary expenses, such as travel expenses, administrative expenses carried out on behalf of the litigant-in-person, and payment for services;
- a ban would not be capable of protecting vulnerable litigants-in-person, as it would act as a disincentive for those McKenzie Friends with the most experience to help them;
- a ban would breach article 6 of the European Convention on Human Rights;
- a ban would simply protect the legal profession.

Respondents who **supported** the introduction of an outright prohibition made the following points:

- Only qualified and regulated lawyers should be permitted to charge for acting as advocates. It is in the public interest, as provided by Parliament in the Legal Services Act 2007, for this position to be maintained;

- There is no system to properly evaluate the quality or reasonableness of assistance or work done by a McKenzie Friend;
- Permitting fee-charging by McKenzie Friends in essence is permitting the development of an unregulated and uninsured branch of the legal profession and one for which there is no basis to provide protection for litigants-in-person from poor service or over-charging. Such a development is contrary to the regulatory scheme set out in the Legal Services Act 2007;
- McKenzie Friends are supposed to be pro bono assistants drawn from family or friends of the litigant-in-person and not ‘solicitors-lite’;
- A prohibition is the most effective means to protect litigants-in-person from exploitation;
- the ability to charge for services is undermining the regulatory scheme as it is encouraging qualified lawyers to cease being regulated in order to act as McKenzie Friends;
- the ability to charge is a form of unfair competition between unregulated individuals and regulated professionals.

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

Respondents made a variety of points, many of which related to the earlier questions and were considered under them. Of other points raised, two significant issues were identified.

A number of respondents suggested that McKenzie Friends should be granted automatic rights of audience. A suggested model for this was the position in the Employment Tribunal. Linked to this it was suggested that the provision of legal services should not be regulated at all. The judiciary should, in respect of rights of audience and the right to conduct litigation, become a legal services regulator. Other respondents took the opposite view: legal services should only be capable of being exercised by regulated individuals.

There should therefore either be an outright prohibition on McKenzie Friends and other non-regulated individuals or organisations providing legal services. By way of analogy, one respondent pointed out that the non-qualified and unregulated individuals would not be permitted to carry out operations in NHS hospitals.

The alternative view was that McKenzie Friends should be regulated by one of the existing legal services regulators or by a body such as the Society of Professional McKenzie Friends or the Institute of Paralegals. One respondent raised the point that the Consultation Paper ought to have raised and considered the question whether there is a need for a new form of legal assistance for litigants and how it should be regulated. Another respondent suggested McKenzie Friends who wished to exercise rights of audience should be regulated by CILEX. Formal regulation by a body authorised under the Legal Services Act 2007, rather than self-regulation or regulation by way of a membership or representative body, was noted as being the proper means to regulate McKenzie Friends as it would ensure a common standard of training and expertise, mandatory insurance provision, and would provide independent oversight, effective discipline and effective sanction powers. Effective regulation was viewed by some respondents as the means to protect litigants-in-person, and especially vulnerable ones in family proceedings, from ineffective or agenda-driven McKenzie Friends. Without formal regulation there was no effective means to control McKenzie Friends who fell below any regulatory standards, as they could simply join another such body or carry on acting as a McKenzie Friend without being a member of any representative body.

Other respondents made the point that the present growth of McKenzie Friends is a consequence of recent reforms to legal aid. McKenzie Friends are providing a service to individuals who need effective access to justice, but due to the withdrawal of legal aid can no longer afford the services of qualified lawyers. It was suggested that steps should not be taken to make it more difficult for litigants-in-person to secure such assistance and the help it provided them in securing some degree of access to justice. It was also suggested that any proposal to restrict the ability of fee-paid McKenzie Friends by the JEB was simply being led by a desire to place pressure on the government to restore legal aid and thereby restore the fee-income of solicitors and barristers.

The point was also made that the Judiciary rather than focusing on McKenzie Friends ought to consider more constructive and practical ways to promote effective access to justice. It was suggested that, in the present environment where legal aid had been

withdrawn, the Judiciary should consider: the development of a duty lawyer scheme in the courts available to litigants-in-person, and particularly those involved in family proceedings; the development, with the Bar Council, of a modern version of the pre-Legal Aid and Assistance Act 1949 *in forma pauperis* procedure. The *in forma pauperis* procedure was one under which the impecunious could be provided with pro bono legal representation in proceedings in the High Court and Court of Appeal.¹⁰

¹⁰ Rules of the Supreme Court (Poor Persons) 1913, Rules of the Supreme Court (Poor Persons) 1914. See R. Egerton, *Legal Aid*, (Routledge, 1945).