LORD CHIEF JUSTICE
OF ENGLAND AND WALES

Reforming the courts' approach to McKenzie Friends

A Consultation

February 2016

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Foreword

1.1 In July 2010 the Master of the Rolls and President of the Family Division issued joint Practice Guidance (the Guidance) concerning the proper approach courts should take to the provision of reasonable assistance by non-lawyers to litigants-in-person (LIPs) in respect of legal proceedings.[1] Such non-lawyer assistants are generally known as McKenzie Friends.[2] The Guidance also provided guidance as to the proper approach for courts to take in respect of applications from LIPs seeking a grant of a right to conduct litigation or a right of audience before the court to a McKenzie Friend.[3] The Guidance, which replaced previous Guidance issued in 2004 and then 2008,[4] was introduced as a response to an increase in the number of LIPs who were appearing before the court. It was, as were its predecessors, intended to provide a summary of the principles derived from the case law concerning exercise of the right to reasonable assistance and the courts' discretion to grant rights of audience and the right to conduct litigation.

1.2 Since the Guidance was introduced there has been a significant increase in the number of both LIPs and McKenzie Friends, especially those for whom a right of audience is sought. In addition to this there has been a noted increase in the number of McKenzie Friends, commonly known as 'Professional McKenzie Friends', who provide their services to LIPs on a fee-paid basis.[5]

1.3 In the light of these developments the Lord Chief Justice of England and Wales and the Judicial Executive Board asked Mrs Justice Asplin to convene a Working Group to examine the issue and suggest possible reform. The Working Group took initial soundings from a range of judicial office holders, who drew upon their experience with McKenzie Friends. The Working Group's conclusions provide the basis for this consultation on possible reform and replacement of the Practice Guidance.

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[1] *Practice Guidance (McKenzie Friends: Civil and Family Courts)* [2010] 1 W.L.R. 1881, [2010] 4 ALL E.R. 272, [2010] F.L.R. 962, [2010] 2 F.C.R 625, [2010] B.P.I.R 1204, and see <https://www.judiciary.gov.uk/wp-content/uploads/JCO/Documents/Guidance/mckenzie-friends-practice-guidance-july-2010.pdf>.

[2] After the decision in *McKenzie v McKenzie* [1970] 3 W.L.R. 472, see further para. 4.1, below.

[3] It should be noted however that the principles derived from the case law and summarised in the Practice Guidance concerning the grant of rights of audience and the right to conduct litigation apply to any non-lawyer and not simply McKenzie Friends.

[4] *Practice Note (Family Courts: McKenzie Friends) (No 2)* [2008] 1 W.L.R. 2757; *President's Guidance (McKenzie Friends)* [2005] Fam. Law 405.

[5] See, for instance, the Legal Services Consumer Panel Report, *Fee-charging McKenzie Friends*, (April 2014) <http://www.legalservicesconsumerpanel.org.uk/publications/research_and_reports/documents/2014%2004%2017%20MKF_Final.pdf>.

1.4 The consultation invites responses in relation to the courts in England and Wales. It does not relate to the United Kingdom Supreme Court or to the courts in Northern Ireland or Scotland. Nor does it relate to the Tribunal Justice system, for example the First-tier and Upper Tribunals, the Employment or Employment Appeals Tribunal.

1.5 Following the consultation, consideration will be given by the Lord Chief Justice and the Judicial Executive Board as to what, if any, steps need to be taken to reform or replace the Guidance and what the nature of any changes will be. For example, it may be necessary to invite the Lord Chancellor and the Civil and Family Procedure Rules Committees to make rules of court. Alternatively, it may only be necessary to update the present Practice Guidance on McKenzie Friends.

1.6 Consultation responses may be submitted by **email** to mckenzie.friends@judiciary.gsi.gov.uk or by **post** to: McKenzie Friends Consultation, Master of the Rolls' Private Office, Royal Courts of Justice, Strand, London WC2A 2LL.

1.7 The consultation opens on 25th February 2016 and closes on **19th May 2016**.
Please note this consultation now closes on **9 June 2016**

1.8 The contents of this paper should not be considered to reflect the final views of the Lord Chief Justice or the Judicial Executive Board.

Introduction

2.1 Litigants in England and Wales, unlike in some other countries[6], are not required to instruct lawyers to act for them. All litigants have the right to conduct litigation and address the court personally[7]. These rights are non-delegable. A litigant cannot, for instance, delegate them to a third party under a power of attorney.[8]

2.2 Historically, the majority of litigants have not however exercised their personal right to conduct litigation and address the court. They have instructed lawyers to act on their behalf. Over the last 15 years there has been a particular growth in the number of individuals who, for a variety of reasons, have either not or not been able to instruct lawyers to act on their behalf. They have acted as litigants in person (LIP). This growth was expected to increase further following the reduction in legal aid effected by the Legal Aid, Sentencing and Punishment of Offenders Act 2012.[9] Anecdotal evidence suggests that this has been borne out since the 2012 Act came into force in April 2013. More significantly however it is clearly borne out by the National Audit Office, which reported 30% increase post-April 2013 in family proceedings where one or both parties were LIPs.[10]

2.3 While LIPs conduct their own litigation individuals, known as McKenzie Friends, often help them. This may take a variety of forms from the provision of moral support, to – with the court's permission – carrying out the conduct of litigation or acting as an advocate on the LIP's behalf. Only at the courts' discretion, may a McKenzie Friend be granted a right to address the court in order to help the LIP present their case to the court. The grant of such a discretionary right has become increasingly common. In principle, a McKenzie Friend can also be granted a discretionary right to carry out the conduct of litigation for an LIP i.e., carry out certain tasks that would otherwise be carried out by a solicitor. The grant of such a right is, at best, rare.[11]

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[6] See A. Zuckerman, *No Justice Without Lawyers—The Myth of an Inquisitorial Solution*, CJQ 33 (2014) 355 at 360 – 361.
[7] *Gregory v Turner* [2003] 1 WLR 1149 (CA) at [75] and [78], and now Legal Services Act 2007, schedule 3, part 1, paragraph 6 and part 2, paragraph 4.
[8] *Gregory v Turner* [2003] 1 WLR 1149 (CA).
[9] See Judicial Working Group on Litigants in Person (July 2013) at [2.2], *'According to the Government's own figures, 623,000 of the one million people who benefit from Legal Aid every year will be denied access to this aid from 1 April 2013, when the relevant provisions of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 became effective*.' (The Hickinbottom Report) <https://www.judiciary.gov.uk/wp-content/uploads/JCO/Documents/Reports/lip_2013.pdf>
[10] National Audit Office, *Implementing Reform to Civil Legal Aid* (HC 784 Session 2014-15) (20 November 2014) at 4 <http://www.nao.org.uk/wp-content/uploads/2014/11/Implementing-reforms-to-civil-legal-aid1.pdf>.
[11] *Re H (Children)* [2012] EWCA Civ 1797

2.4 Before setting out the reform proposals it is helpful to set out the distinction between the three rights in greater detail.

The right to reasonable assistance

2.5 Any individual who, for whatever reasons, litigates without legal representation has a common law right to receive reasonable assistance in proceedings that take place in open court from any third party. As Lord Donaldson MR put it in *R v Leicester City Justices, ex parte Barrow* (1991) every litigant has the right to '*arm himself with such assistance has he thinks appropriate, subject to the right of the court to intervene.*'[12] Assistance can thus be received from any third party whether or not they are described as a McKenzie Friend. Such third parties need have no legal training or experience, although some may do. They may be a friend of the LIP, a family member, doctor, charity worker, law student, or for example, a volunteer from the Personal Support Unit who supplies moral support only.[13] They may also be, and this has increasingly been the case, an individual who provides such assistance on a regular basis and who increasingly seeks to exercise rights of audience, whether on a fee-paid or pro bono basis. Such individuals are sometimes referred to as 'professional McKenzie Friends'.[14]

2.6 Where proceedings take place in closed court, the court has discretion to permit an LIP to receive reasonable assistance from a third party.[15] The assistance is given in order to enable the LIP to conduct the proceedings more effectively. As such the courts have acknowledged there is a strong presumption in favour of not curtailing a LIP's right to receive such assistance in open court and to permit its exercise in closed court,[16] although there are occasions on which that presumption may be set aside.[17]

[12] *R v Leicester City Justices, ex parte Barrow* [1991] 260 at 289.
[13] In respect of law students providing reasonable assistance see the work being developed at the County Court in Huddersfield <http://www.legalfutures.co.uk/latest-news/county-court-backs-law-student-mckenzie-friend-scheme>.
[14] A McKenzie Friend does not however have a concomitant right to provide such assistance.
[15] See, for instance, *Collier v Hicks* (1831) 2 B & Ad 669; *McKenzie v McKenzie* [1970] 3 WLR 472; *R v Leicester City Justices, ex parte Barrow* [1991] 3 ALL ER 935; *Re G (A Minor) (Chambers Hearing: Assistance)* (1991) Note [1999] 1 WLR 1828; *Re H (Minors) (Chambers Proceedings: McKenzie Friend)* [1997] 3 FCR 618; *ex parte Pelling* [1999] 4 ALL ER 751.
[16] See, for instance, *Re O (Children) (Hearing in Private: Assistance)* [2005] 3 WLR 1191.
[17] See, for instance, *Re F (Children)* [2013] EWCA Civ 726

2.7 The exact scope of the reasonable assistance has not been defined exhaustively. However, the case law as summarised in the Guidance does provide some clear guidance as to what it encompasses. The following, for instance, have been identified as falling within its ambit:

i) the provision of moral support for the LIP;
ii) note taking on behalf of the LIP;
iii) helping the LIP to prepare the case papers;
iv) sitting next to the LIP in court and quietly giving advice as to the conduct of the proceedings, what questions the LIP may want to put to witnesses or what submissions the LIP may wish to address to the court.[18]

2.8 Whether proceedings take place in either open or closed court, the court retains a discretion under its inherent jurisdiction to regulate proceedings, to circumscribe the provision of reasonable assistance.[19] This will generally be done where the assistance is being given for an improper purpose e.g., in order to promote the interests of the McKenzie Friend rather than the litigant; where it is being given in an unreasonable or disruptive manner; or where it is being given in such a way that the McKenzie Friend is effectively controlling the litigation.[20] The court may, where for instance a McKenzie Friend has acted in ways contrary to the effective administration of justice, bar them from acting as such in future proceedings.[21]

The right to exercise rights of audience

2.9 A right of audience is a 'right to appear before and address a court.' It includes the right to 'call and examine witnesses.'[22] It is a reserved legal activity strictly regulated by the Legal Services Act 2007.[23] As such it can only be exercised lawfully by: practising lawyers;[24] certain exempt individuals;[25] individuals who come within the ambit of the Lay Representatives (Rights of Audience) Order 1999 (the 1999 Order);[26] and those to whom the courts, on a

[18] Practice Guidance (2010) at [3].
[19] *R v Leicester City Justices, ex parte Barrow* [1991] 260 at 285; *Paragon Finance plc v Noueiri* [2001] 1 WLR 2357 at [56].
[20] Practice Guidance (2010) at [13].
[21] Through the imposition of a civil restraint order under its inherent jurisdiction: see *Re Purvis* [2001] EWHC 827 (Admin) at [18] – [19]; *Attorney-General v Purvis* [2003] EWHC 3190 (Admin) at [30] – [31]).
[22] Legal Services Act 2007, schedule 2, paragraphs 3(1) and (2).
[23] See Legal Services Act 2007, sections 12 – 19.
[24] That is those lawyers (barristers, solicitors etc.) who are authorised persons for the purposes of Legal Services Act 2007, sections 12 and 13(2)(a).
[25] Legal Services Act 2007, schedule 3, paragraph 1(3) – (9).
[26] SI 1225 of 1999 <http://www.legislation.gov.uk/uksi/1999/1225/pdfs/uksi_19991225_en.pdf>; and see Court and Legal Services Act 1990, section 11.

case-by-case basis, permit to do so.[27] It is a criminal offence for an individual to exercise a right of audience unless they are properly authorised to do so prior to carrying it out.[28]

2.10 Except in proceedings covered by the 1999 Order,[29] McKenzie Friends cannot lawfully exercise a right of audience unless granted such a right by the court. In this they do not differ from any individual who is neither a practising lawyer nor an exempt person under the Legal Services Act 2007. It is not uncommon however, and since at least 2010 has been increasingly common, for LIPs to seek the grant of a right of audience by the court to the McKenzie Friend who is providing them with reasonable assistance.

The right to conduct litigation

2.11 The right to carry out the conduct of litigation is also a reserved legal activity.[30] The Conduct of litigation, is defined by the Legal Services Act 2007, as the following:

a) the issuing of proceedings before any court in England and Wales,
b) the commencement, prosecution and defence of such proceedings, and
c) the performance of any ancillary functions in relation to such proceedings (such as entering appearances to actions).[31]

2.12 Broadly speaking, matters falling within the scope of the performance of ancillary functions include taking formal steps in the litigation, although this does not extend to signing statements of truth on behalf of the litigant or acknowledging service of process, as these activities may only be carried out by the LIP or an authorised legal representative i.e., a practising lawyer[32]. It does not include giving legal advice,[33] which is a separate and non-

[27] The inherent jurisdiction is preserved under Legal Services Act 2007, schedule 3, paragraph 1(2), and see *Paragon Finance plc v Noueiri* [2001] 1 WLR 2357 at 2368ff for a discussion in respect of the statutory predecessor to the provisions in the 2007 Act.
[28] Legal Services Act 2007, section 14.
[29] In general, this covers small claims proceedings in the County Court.
[30] Legal Services Act 2007, schedule 2, paragraph 4.
[31] Legal Services Act 2007, schedule 2, paragraph 4(1). Schedule 2, paragraph 4(2) however states that the definition does not include '*any activity within paragraphs (a) to (c) of sub-paragraph (1), in relation to any particular court or in relation to any particular proceedings, if immediately before the appointed day no restriction was placed on the persons entitled to carry on that activity.*'
[32] *Agassi v Robinson (Inspector of Taxes)* [2006] 1 W.L.R. 2126 at [29] – [52]. And see *Paragon Finance* at [60]. In so far as signing statements of truth and acknowledging service is concerned these acts do not fall within the scope of conduct of litigation: see *Agassi* at [52] and *O'Connor v The Bar Standards Board* (17 August 2012, The Visitors to the Inns of Court, unreported); [2012] ALL ER (D) 108 (Aug) and CPR r. 22.16 and r. 10.5. The CPR requires these acts to be carried out only by the party or their legal representative. The latter is defined by CPR r. 2.3(1) and only applies to, in this context, a 'legal representative', which is defined for the purposes of

reserved legal activity, nor does it include administrative assistance such as, '*photocopying documents, preparing bundles, delivering documents to opposing parties and the court*'.[34]

2.13 As a regulated legal activity, only the following can lawfully carry out the conduct of litigation: practising lawyers;[35] certain exempt individuals;[36] and those to whom the courts, on a case-by-case basis, permit to do so.[37] As with the exercise of rights of audience, it is a criminal offence to exercise this right unless properly authorised prior to carrying it out.[38] A McKenzie Friend who, for instance, issued proceedings without having been previously authorised to do so by the court (through, for instance a pre-action application by the LIP seeking the grant of such permission) would thus commit a criminal offence.[39]

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the CPR as an individual authorised to carry out the conduct of litigation under the 2007 Act. Only practising lawyers are 'authorised' under this Act.

[33] The position outlined in *Agassi* at [43] seems now to have been overtaken by Legal Services Act 2007, sections 12(3)(b) and 13.

[34] *Agassi* at [43].

[35] That is those lawyers (barristers, solicitors etc.) who are authorised persons for the purposes of Legal Services Act 2007, sections 12 and 13(2)(a).

[36] Legal Services Act 2007, schedule 3, paragraph 2.

[37] Legal Services Act 2007, schedule 3, paragraph 2(2).

[38] Legal Services Act 2007, section 14.

[39] See on this point, in respect to the statutory regime prior to the introduction of the 2007 Act, *Agassi* at [53] – [54].

The Background to Reform

3.1 Reform of the practice and procedure relating to McKenzie Friends has been considered and recommended by a number of bodies.

3.2 The Civil Justice Council initially considered reform in 2011.[40] Its recommendations focused on improving the quality of assistance McKenzie Friends give to LIPs and on encouraging LIPs to obtain their assistance.[41] It also suggested that, in appropriate circumstances, the courts could be more willing to grant McKenzie Friends rights of audience, albeit there should be resistant to permitting a McKenzie Friend to exercise such a right for payment.[42]

3.3 The Judicial Working Party on Litigants in Person then considered reform in its report in 2013. It recommended that consideration be given to:

(i) rationalising the approach taken to McKenzie Friends across the courts and tribunals;
(ii) codifying in the Civil and Family Procedure Rules the practice and procedure relating to McKenzie Friends;
(iii) issuing further guidance to maximise the positive benefits, and minimise the negative effects, McKenzie Friends bring to the administration of justice;
(iv) replacing the term 'McKenzie Friend'.[43]

3.4 This consultation paper considers the final three recommendations. It does not consider the first. A variety of Tribunals' procedural rules permit non-lawyers to represent litigants before them. The use of non-lawyer representation is thus the norm in Tribunals;[44] whereas in the courts it is primarily regulated and restricted by statute. Rationalisation would thus either take the form of rendering the approach to representation more restrictive in Tribunals to bring it into line with courts-based approach. There is no evidence to suggest that would be beneficial

[40] Civil Justice Council, *Access to Justice for Litigants in Person*, (November 2011) at [141] <https://www.judiciary.gov.uk/wp-content/uploads/2014/05/report-on-access-to-justice-for-litigants-in-person-nov2011.pdf>.
[41] Ibid at [140]ff.
[42] Ibid at [146].
[43] Hickinbottom Report at [6.22] – [6.28].
[44] See, for instance, The Tribunal Procedure (First Tier Tribunal) (General Regulatory Chamber) Rules 2009 r.11; The Tribunal Procedure (First-Tier Tribunal) (Health, Education and Social Care Chamber) Rules 2008 r. 11; The Tribunal Procedure (First Tier Tribunal) (Property Chamber) Rules 2008 r. 14; The Tribunal Procedure (First Tier Tribunal) (Social Entitlement Chamber) Rules 2008 r.11; The Tribunal Procedure (First Tier Tribunal) (Tax Chamber) Rules 2009 r.11; The Tribunal Procedure (First Tier Tribunal) (War Pensions and Armed Forces Compensation Chamber) Rules 2008 r.11; The Tribunal Procedure (Upper Tribunal) Rules 2008 r.11; The Tribunal Procedure (Upper Tribunal) (Lands Chamber) Rules 2010 r.11.

or otherwise desirable. Or it would take the form of liberalising the approach to representation in the courts to bring it in line with the tribunals-based approach. There is no evidence that, what would in effect be, a wholesale removal of restrictions on rights of audience in the courts is beneficial or desirable.

3.5 Most recently, the growth in the use of McKenzie Friends formed the basis of work carried out for the Ministry of Justice by Professors Trinder, Hunter et al (the MoJ study) and work carried out by the Legal Services Consumer Panel (the LSCP study).[45] The former study was based on a study of twenty four cases where a McKenzie Friend was present.[46] The latter study was based on interviews with twenty eight McKenzie Friends, a review of McKenzie Friends' websites, and roundtable discussions with a number of stakeholders.[47]

3.6 The MoJ study doubted whether an increased use of McKenzie Friends is beneficial and whether they provide sufficient value for money to justify an increased role for those who charge fees for their services.[48] The LSCP study took the view that the increased use of McKenzie Friends, and particularly fee-paid McKenzie Friends, should be '*recognised as a legitimate feature of the evolving legal services market*', subject to the implementation of measures intended to improve quality standards and training.[49]

3.7 The two studies highlight perceived advantages of any increased use of McKenzie Friends (fee-paid or otherwise) e.g., increased access to justice for LiPs, greater equality of arms, greater consumer choice. They also outline risks posed by any increase in use e.g., a lack of consumer protection by reason of a lack of effective regulation; agenda-driven McKenzie Friends; the provision of poor quality advice to litigants; a lack of insurance cover; the possibility of overcharging litigants of limited means; and lack of confidentiality.[50] In addition, concerns have been expressed that McKenzie Friends owe no duty to the court and as to the application of legal professional privilege when they are acting for a LiP.[51] Care needs,

[45] Legal Services Consumer Panel, *Fee-charging McKenzie Friends*, (April 2014) <http://www.legalservicesconsumerpanel.org.uk/publications/research_and_reports/documents/2014%2004%2017%20MKF_Final.pdf>
[46] L. Trinder, R. Hunter el al, *Litigants in Person in private family law cases*, (MoJ, November 2014) <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/380479/litigants-in-person-in-private-family-law-cases.pdf> at 94.
[47] LSCP Study at 19.
[48] MoJ Study at 111- 112.
[49] LSCP Study at 7.
[50] MoJ Study at 111 – 112; LSCP Study at 14-15.
[51] R. Assay ibid. at 136.

however, to be taken with both studies given the limited evidence on which they are based, their acknowledged lack of detailed consideration of benefits of McKenzie Friends from the LiPs' point of view.[52]

3.8 In the light of the reports, the JEB considers that reform of the courts' approach to McKenzie Friends is apposite.

Reform Proposals

(1) Replacement of the term 'McKenzie Friend'

4.1 The use of the term 'McKenzie Friend' to describe an individual who provides reasonable assistance to a LIP is an accident of history. It arose as a consequence of Mr Ian Hangar, an

[52] LSCP study at 9 – 11; R. Assay, *Injustice in Person*, (OUP) (2015) at 138.

Australian barrister, who was refused permission to provide such assistance to one of the parties in divorce proceedings. The refusal was appealed and the Court of Appeal held that the trial judge had been wrong in not allowing Mr McKenzie to have Mr Hanger's help.[53] The jurisdiction to permit a LIP to receive reasonable assistance however predated the decision.[54]

4.2 While 'McKenzie Friend' only properly applies to individuals providing LIPs with reasonable assistance, it has come to be used to describe individuals who are granted rights of audience on a case-by-case basis. As noted in the Hickinbottom Report,

'*Although the term 'McKenzie Friend' is technically apt to describe only persons who fall into the first category (provision of reasonable assistance), in practice the term is used in different ways to describe one or more, or all, of these categories (reasonable assistance, right of audience and right to conduct litigation).*'[55]

As the Civil Justice Council put it, '*In different minds there are different meanings of the term McKenzie Friends.*'[56]

4.3 The lack of clarity is both confusing for LIPs and can lead to the situation where they expect, or are led by McKenzie Friends to believe, that the latter are and will be able to address the court. It has led to situations where there is an expectation that by dint of the title 'McKenzie Friend' an individual has a right of audience.[57] The use of the term to encompass the ability to fulfil a right held by the LIP as well as discretionary rights that may be granted by the court can too easily lead to the improper conclusion that a McKenzie Friend may exercise each of the three rights on the same basis.

4.4 The justice system should, as far as possible, seek to use terms that are clear, simple and readily understandable by all court users. It should avoid terms that are vague or capable of multiple meanings. This is all the more important where, as now, there is a growth of LIPs who are unlikely to be familiar with legal terms of art. Accordingly, the term McKenzie Friend should, as has previously been done in respect of the terms Mareva injunction and

[53] *McKenzie v McKenzie* [1971] P. 33 at 37 '*Mr. Hanger was not there to take part in the proceedings in any sort of way. He was merely there to prompt and to make suggestions to the husband in the conduct of his case, the calling of his witnesses and, perhaps more importantly, on the very critical and difficult questions of fact in this case, to assist him by making suggestions as to the cross-examination of the wife and her witnesses.*'
[54] *Collier v Hicks* (1831) 2 B. & Ad. 663, 669
[55] Hickinbottom Report at [6.13].
[56] Civil Justice Council, *Access to Justice for Litigants in Person*, (November 2011) at [141].
[57] *R (Koli) v Maidstone Crown Court* (QBD, Admin) (10 May 2011, unreported).

Anton Pillar order,[58] be replaced by a term that is easily understandable and properly reflects the role in question.

4.5 McKenzie Friend could be replaced by a number of possible terms. One possibility is to replace the term with a number of different ones, each reflective of the role being carried out. Individuals providing reasonable assistance might, for instance, be known as lay supporters, as is the case in Scotland: see **Annex C**. Lay supporters who are granted rights of audience could be referred to as Lay representatives, again as is the case in Scotland, or lay litigators, if a grant of the right to conduct litigation is made.

4.6 While the use of such terms would have the virtue of drawing a clear distinction between the three distinct roles that McKenzie Friends can now carry out, this would be problematic for a number of reasons. First, the term lay representative is already used to describe an individual who comes within the ambit of the Lay Representatives (Rights of Audience) Order 1999. Its use here would thus create another basis for confusion. Secondly, each of the three terms uses the term 'lay'. While this term may be readily understood by the court and lawyers to refer to a non-lawyer, it may not be clear to all LIPs that this is the case. Thirdly, use of the term lay representative on a website or in advertising material may improperly lead to the perception that the individual in question has a right of audience.

4.7 A simpler approach may be to replace the term McKenzie Friend with that of 'court supporter'. The term is straightforward. It captures the nature of the role of giving reasonable assistance. It also avoids any connotation that the individual is eligible or likely to be granted a right of audience or a right to conduct litigation. Rather than create further titles, which might give rise to the problems identified above, it could be made clear that such further rights may only be granted on application to the court by the LIP. These further rights would be, as they are now, additional, and discretionary, forms of court support that are only granted by the court in limited circumstances.

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.

[58] Replaced respectively by the terms 'freezing injunction' and 'search order.'

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.

(2) Codification or Practice Guidance Revision

4.8 The courts' approach to McKenzie Friends has been the product of case law. A number of authorities have considered the manner in which both the right to reasonable assistance and the grant of rights of audience and the right to conduct litigation are to be dealt with in both the civil and family courts. The authorities are not always easy to follow.

4.9 In order to provide clarity in this area since 2005 the effect of the authorities has been summarised in Practice Guidance, which is primarily aimed at assisting lawyers and the courts. Such guidance, the 2010 Practice Guidance being the latest version, does not itself have the force of law. It is descriptive only. If there is to be a substantive reform in the approach to McKenzie Friends it cannot be effected by revising the present Guidance. While the Guidance could be updated to take account of developments in the case law that have occurred since it was issued, it could not be updated to deviate from the position set out in the authorities. It could, for instance, be updated to make clear that the approach set out within it applies to the Court of Protection,[59] or that companies can be represented by McKenzie Friends[60]. It could be updated to give further guidance in respect of the courts' approach to McKenzie Friends who seek rights of audience on a 'professional' or regular basis.[61] It could also be revised so that it was written in a more readily accessible style.

4.10 The JEB considers, however, that simply updating the Guidance is not sufficient and that codification of the courts' approach in rules of court should take place. Codification is advantageous as it would:

(i) enable the rule committees to clarify the law[62] and effect any necessary substantive changes to the law governing the courts' approach to the practice and procedure concerning McKenzie Friends. It would therefore enable the

[59] *LBX v TT* [2014] COPLR 561.
[60] *Bank St Petersburg PJSC & Anor v Arkhangelsky* [2015] EWHC 2997 (Ch)
[61] *R (Koli) v Maidstone Crown Court* (QBD, Admin) (10 May 2011, unreported).
[62] It could, for instance, clarify whether civil restraint orders can be issued against McKenzie Friends in courts other than the High Court, see for instance, *Nursing & Midwifery Council v Harrold* [2015] EWHC 2254 (QB), or update it to take account of the proposed guidance in *Graham v Eltham Conservative & Unionist Club* [2013] EWHC 979 (QB) at [26] – [38]

jurisdiction to be subject to considered, principled and practical reform and updating as and when necessary rather than having to wait for a suitable Court of Appeal or UK Supreme Court precedent;

(ii) enable differential approaches to practice and procedure to be adopted in different courts. It may, for instance, be appropriate for different threshold tests for the grant of a right to audience on a case-by-case basis to be set in family and civil proceedings. Codification could, within any statutory limitations, effect such a differential approach more readily than judicial decision-making;

(iii) provide greater clarity concerning the courts' powers to refuse to permit individuals to act as McKenzie Friends, to continue to act as such where they are providing poor quality assistance, or to bar them from acting as such in the future in order to provide better protection for LiPs and to better protect the due administration of justice. Such clarity would in turn enable necessary and greater consistency in the courts' approach to McKenzie Friends;

(iv) through the rule-making process, provide appropriate judicial, executive and Parliamentary scrutiny and approval of the approach taken; and

(v) allow by a clear, plain language guide to the law that sits outside the rules and which is specifically drafted to aid LIPs and McKenzie Friends (see below). It could provide a greater degree of clarity and place the proper extent of, and role played by, McKenzie Friends in a more positive light, as rightly suggested by the LSCP study.[63]

4.11 A draft set of codified rules is set out at **Annex A**. On its own however codification will not be sufficient. It will necessarily have to be complemented by a consistent approach to implementation of the newly codified rules by the courts.

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 set out at Annex A.

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

[63] LSCP Study at 17, 29 – 30.

and outline the test that you believe should be applicable. Please also give any specific comments on the draft rules.

(3) Standard Notice

4.12 The JEB considers that codified rules ought to require the provision of standard information by the LIP and McKenzie Friend to the court in order to ensure that it is able to properly manage the exercise of the right of reasonable assistance and the grant of any specific rights.[64] Such information would enable any LIP to understand the role a McKenzie Friend can properly play and any limitations on what they can do. To achieve this, LIPs should therefore be required to notify the court in advance of a hearing if they intend to exercise their right to reasonable assistance.

4.13 The provision of such information could be achieved through the use of a standard-form Notice, which should be specifically referred to within the codified rules. Such notice ought to make provision for the LIP to supply background information regarding the McKenzie Friend either in the form of a short curriculum vitae or note. It should also contain a standard code of conduct for McKenzie Friends outlining their role and how it should be carried out properly.

4.14 The standard form notice should also make provision for the LIP to put the court on notice that they intend to seek a right to conduct litigation or a right of audience for the McKenzie Friend. Where such rights are sought, the McKenzie Friend should be required to confirm that they have no interest in the litigation and understand that their role is limited to providing reasonable assistance unless specifically authorised by the court to exercise a right of audience or the right to conduct litigation. It should also require the McKenzie Friend to acknowledge that they owe both a duty to the court and a duty of confidentiality in respect of the litigation. A statement of truth signed by the McKenzie Friend should verify the information, the contents of the curriculum vitae and that they understand and agree to abide by the Code of Conduct.

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

[64] Such a form could build on the work done in this area by the Civil Justice Council, see Civil Justice Council, *Access to Justice for Litigants in Person*, (November 2011), Appendix 4, at 90.

given to the court regarding a McKenzie Friend? Please give your reasons for your answer.

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.

(4) Plain Language Guide

4.15 The original Practice Guidance issued in 2005 was intended to assist the courts and lawyers by providing them with a succinct guide to the case law applicable to the three rights. It was not, as noted in the Hickinbottom Report, intended to provide a guide for LIPs. A dedicated plain language guide produced by, what was then, Her Majesty's Courts Service was intended to complement the Guidance and provide specific guidance for LIPs.[65] This document was, for whatever reason, not produced.

4.16 There is, therefore, no plain language guide setting out what McKenzie Friends can and cannot do, the ambit of the right to receive reasonable assistance, and the courts' discretion to grant rights of audience and the right to conduct litigation.

4.17 The benefit of such a document for both LIPs and McKenzie Friends is obvious. Such a document would not be off-putting in the way the Guidance has been said to be, as it would not be written in formal, legal language. On the contrary, it should be readily accessible to non-lawyers. It would enable LIPs and McKenzie Friends to more readily understand the type of assistance the latter can provide, the courts' approach to the grant of rights of audience, and the manner in which the court will expect the McKenzie Friend to help the LIP.

4.18 Most importantly, a readily accessible guide should ensure that LIPs are properly informed about the type of help they can obtain. It may then increase the number of McKenzie Friends providing reasonable assistance, improve LIPs' experience of the undeniably stressful experience of going to court, and facilitate the proper administration of justice.

[65] Hickinbottom Report at [6.17].

4.19 In order to maximise the benefit of such a Guide, it ought to be widely available online, in advice centres and at court. It may be that a non-judicial body and one with particular expertise in preparing such documents should draft it.

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.

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.

(5) Prohibition on fee-recovery

4.20 The approach that the court should take to fee-charging or fee-paid McKenzie Friends is, as noted earlier, one that has been subject to recent and differing views. Positive views have been expressed by the LSCP. Less positive views by the MoJ Study. Fee-charging has, effectively, been prohibited in Scotland where the use of the equivalent of McKenzie Friends has recently been rendered permissible but only subject to court rules.[66] The present position in fee-charging in England and Wales is set out in: paragraphs 27 – 30 of the Guidance; CPR r. 46.5(2) and (3)(ii);[67] *Agassi v Robinson (Inspector of Taxes)* [2005] EWCA Civ 1507 at [69] – [73]; *Re N* [2009] EWHC 2096 (Fam) at [22].

4.21 The JEB's provisional view is that any reform of the courts' approach to McKenzie Friends should adopt the approach taken in Scotland upon the introduction of its rules concerning lay assistance and lay representation.[68] 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.

[66] See Report of the Scottish Civil Courts Review (2009) Vol. 2 at 19ff; Scottish Civil Justice Council, *Access to Justice Literature Review: Party Litigants, and the support available to them* (2014) at 40ff.
[67] The reference in paragraph 30 of the Guidance being an area that needs updating.
[68] See **Annex C**.

4.22 In reaching this provisional view the JEB notes that the recoverability prohibition in Scotland operates in a system where a variety of means of advice, assistance, and a limited amount of representation in certain types of proceedings (including lay representation) is provided through projects and project workers funded by the Scottish Legal Advice Board.[69]

4.23 It would seem that such assistance and support is akin to that provided in England and Wales given the availibility of pro bono advice and representation from, variously, the Citizens Advice Bureaux, the Personal Support Unit and similar bodies, the Bar Pro Bono Unit, the PILARS scheme in bankruptcy matters, the Companies Court Pro Bono Assistance Scheme, the Chancery Litigants-in-Person Support Scheme and the Queen's Bench Division Interim Applications Court Pro Bono Assistance Scheme.

4.24 The JEB's provisional view is that such an approach protects the public interest in facilitating the proper administration of justice, whilst providing effective protection to vulnerable litigants who would otherwise have little to no effective protection, or means of redress, from unregulated and uninsured individuals of varying and generally unverifiable competence carrying out otherwise reserved legal activities before the courts.

4.25 Such an approach also appears to be consistent with Parliament's intention that rights of audience and rights to conduct litigation are, as a general rule, to be subject to strict regulation.[70] The exclusion of financial incentives to seek and exercise such rights will arguably ensure that the courts' jurisdiction to grant such rights remains within its proper boundaries. The extension of rights of audience and the right to conduct litigation to fee-paid McKenzie Friends more generally, which any alternative approach to fee-recovery

[69] For a discussion see Scottish Civil Justice Council, ibid. (2014) at 31ff. Of the 264 advice and assistance projects only 13.3% provide representation and it is unclear whether this is by lay or qualified representation and whether the representation is before a court or tribunal, ibid. at 40. It is also unclear whether and to what extent such lay representation is provided within the scope of proceedings where there is a separate legislative basis for such representation to be provided outside the scope of the recently introduced provisions within the Rules of Court, see for instance: Sheriff Courts (Scotland) Act 1971, s36(1) and Home Owner and Debtor Protection (Scotland) Act 2010, s7, under which provision has been made to permit lay representation and authorised lay representation in summary cause and small claims and debt repossession cases respectively akin the provision in England and Wales that permits lay representation in the small claims track; and see Heritable Securities (Scotland) Act 1894, the Conveyancing and Feudal Reform (Scotland) Act 1970, the Consumer Credit Act 1974, the Bankruptcy (Scotland) Act 1985, the Debtors (Scotland) Act 1987, the Children (Scotland) Act 1995, the Debt Arrangement and Attachment (Scotland) Act 2002, the Bankruptcy and Diligence Etc (Scotland) Act 2007 for further provision to permit lay representation in Scotland: see A McIntosh, *Fifty Shades of Lay*, The Journal of the Law Society of Scotland (15 April 2013) <http://www.journalonline.co.uk/Magazine/58-4/1012423.aspx>.

[70] As set out in the Legal Services Act 2007.

would engender, is arguably a matter for Parliament and/or the Legal Services Board. That is because an extension would seem to implicitly acknowledge the creation of a new branch of the legal profession, albeit one that was not subject to effective regulation on a par with that provided by the existing frontline regulators. Such regulation is required to satisfy the public interest in the rule of law and the proper administration of justice.

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.

(6) General

4.26 This consultation has focused on the suggested revision of the courts' approach to McKenzie Friends. It has particularly considered the revision and possible replacement of the present Practice Guidance. The JEB welcomes any other points arising from this consultation not covered in the foregoing.

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.

Summary of Consultation 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.

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.

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.

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.

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.

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.

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.

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 you're your reasons for your answer.

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.

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.

Annex A – Proposed New Civil Procedure Rules[71]

Civil Procedure Rules Draft rules 3.22 – 3.24[72]

Section XXX Court Support

Court Support – Generally

3.22 (1) (1) Except where a rule or other enactment provides otherwise, where a hearing is in public a court supporter may assist a litigant. Assistance may, as the litigant requires, take the form of any of the following:

(a) providing moral support;
(b) helping to manage the court documents and other papers;
(c) taking notes of the proceedings;
(d) advising the litigant quietly on—
(i) points of law and procedure;
(ii) issues which the litigant might wish to raise with the court;
(iii) questions which the litigant might wish to ask a witness.

(2) For the purposes of this Section:

(a) litigant means an individual who is not represented by a legal representative;
(b) court supporter means an individual who is not a legal representative who is to provide such assistance as specified in rule 3.22(1)(1)(a)-(d) to the litigant.

(3) The provisions in this Section are only applicable during those periods, if any, where a litigant is not represented.

(Legal representative is defined in rule 2.3(1).)
(Rule 39.2(1) contains rules in respect of public hearings.)

(2) Where proceedings are in private a court supporter may only assist a litigant with the court's permission.

(Rule 39.2(3) contains rules in respect of private hearings.)

(3) An application for permission under rule 3.22(2) must be supported by evidence, unless the court orders otherwise. Such application is to be made by Application Notice, signed by both the litigant and the court supporter, in *Form NXXX (Court Support)*, unless the court orders otherwise.

(Part 23 sets out the procedure for making an application.)

(4) Where a litigant intends to have the assistance of a court supporter under rule 3.22(1) or makes an application under rule 3.22(2), the litigant must supply the court with the following evidence verified by a statement of truth:

[71] Comparable rules could be drafted for family and other proceedings, with necessary adaptions.
[72] To be supplemented by a new Practice Direction 3G – Court Support.

(a) a short curriculum vitae or other statement setting out the court supporter's relevant experience;
(b) a statement confirming that the court supporter has no interest in the case and understands that
(i) their role is limited to providing support of the form set out in rule 3.22(1)(1)(a) – (d); and
(ii) that the duty of confidentiality.

(5) The court may on its own initiative or at the request of a party at any time:

(a) prohibit the court supporter from assisting the litigant under rule 3.22(1);
(b) refuse an application for permission under rule 3.22(2) and (3);
(c) withdraw a grant of permission made under rule 3.22(2) and (3);
(d) place such restrictions or limitations on the assistance necessary in the interests of justice.

(6) Assistance from a court supporter may be prohibited, refused, or withdrawn under rule 3.22(5) where:

(a) such assistance would be or is contrary to the efficient administration of justice; or
(b) the court supporter is an unsuitable person to act in that capacity (whether generally or in the proceedings concerned).

(7) Permission granted under rule 3.23(3) will be withdrawn by the court at any time where the court supporter is receiving, either directly or indirectly, remuneration from the litigant in respect of exercising the right of audience or carrying out the conduct of litigation

(8) Assistance from a court supporter, whether under rule 3.22 or rule 3.23, must not be permitted or allowed to continue in any circumstances where the individual is subject to, or made subject to, a Civil Restraint Order (whether generally or in the proceedings concerned).

(Rule 3.11 and Practice Direction 3C contain rules concerning the making of Civil Restraint Orders.)

(9) When the court is considering taking any of the steps referred to in rule 3.22(5) and (6), the court supporter, as a general rule, should be allowed to provide the litigant with assistance in court until a decision is taken under those rules.

(10) Unless permission is prohibited or withdrawn during the course of proceedings or withdrawn it endures until the proceedings, including any appeal, finish.

(11) Where a court supporter is providing assistance, the litigant may—

(a) show the court supporter any document (including a court document); or

(b) impart to the court supporter any information, which is in his or her possession in connection with the proceedings without being taken to contravene any prohibition or restriction on the disclosure of the document or the information; but the court supporter is then to be taken to be subject to any such prohibition or restriction as if he or she were the litigant.

(12) Any expenses incurred by the litigant as a result of the support of a court supporter under this Section are not recoverable disbursements in the proceedings.

(13) Where an individual is authorised to act as a court supporter, that individual in respect of those proceedings is deemed to be an officer of the court and thereby owes such duties to the court as if they were a solicitor.

Court Support – grant of right of audience or to carry out conduct of litigation

3.23 (1) This Part is without prejudice to any rule or enactment under which provision is or may be made for a party to be represented by an individual other than a legal representative.

(Practice Direction 27 and The Lay Representatives (Rights of Audience) Order 1999 make provision for lay representatives in specified hearings.)

(2) Rule 3.9 does not apply to this Part.

(3) A litigant may apply to the court for permission for a court supporter to:

(a) exercise a right of audience on behalf of the litigant at a specified hearing or in specified proceedings, including those to which rule 27 applies;
(b) carry out the conduct of litigation on behalf of the litigant in respect of specified proceedings.

(4) A court supporter must not exercise a right of audience or carry out the conduct of litigation at any time before the court has granted permission under this Part.

(5) An application for permission under rule 3.23(3) must be made by a litigant and such application must be

(a) in *Form NXXX (Court Support)* unless the court orders otherwise;[73] and in all cases
(b) must be supported by a curriculum vitae or other statement setting out the court supporter's relevant experience verified by a statement of truth.

(6) The court must not grant the application if the court supporter is receiving or is to receive, either directly or indirectly, remuneration from the litigant for exercising the right of audience or right to conduct litigation.

[73] This is to ensure that it applies to applications made under PD 27 3.2(3)

(7) Except where rule 3.23(8) applies, permission under rule 3.23(3) may only be granted where:

(a) there is good reason to do so taking account of all the circumstances of the case; and
(b) it is in the interests of proper administration of justice.

(8) Where a litigant seeks permission under rule 3.23(3) and the court supporter has sought or been granted rights of audience or a right to conduct litigation in other proceedings, permission may only be granted

(a) where it is in the interests of the proper administration of justice; and
(b) there are exceptional circumstances justifying the grant of such rights that are otherwise restricted to legal representatives or individuals within the terms of any relevant rule or enactment in more than one specified proceedings.

(9) The court may make the grant of permission under rule 3.23(3) subject to such conditions or limitations as it considers just.

(10) Permission granted under rule 3.23(3) may be withdrawn by the court at any time where:

(a) where the conditions set out in rule 3.23(7) or 3.23(8) no longer apply; or
(b) the court supporter is an unsuitable person to act in that capacity (whether generally or in the proceedings concerned).

(11) Permission granted under rule 3.23(3) must be withdrawn by the court at any time where the court supporter is receiving, either directly or indirectly, remuneration from the litigant in respect of exercising the right of audience or carrying out the conduct of litigation

(12) Permission under rule 3.23(3) cannot be granted retrospectively.

(13) Where a grant of a right to conduct litigation is granted, the Court Supporter may sign statements of truth and statements of case, including any Appellant's Notice. They may do so as if they were a legal representative (lawyer) acting on behalf of the litigant.

Amendment to Practice Direction 3C – Civil Restraint Orders

1. This Practice direction applies where the court is considering whether to make –

(a) a limited civil restraint order;
(b) an extended civil restraint order; or
(c) a general civil restraint order;

against:

(a) a party who has issued claims or made applications which are totally without merit; *or*
(b) against a court supporter who has acted in any proceeding or proceedings
(i) in a manner which is contrary to the proper administration of justice;
(ii) for remuneration contrary to any rule or order of the court; or
(iii) sought or exercised a right of audience or a right to conduct litigation on a regular basis.

Annex B – Practice Guidance: McKenzie Friends (Civil and Family Courts) 2010

1) This Guidance applies to civil and family proceedings in the Court of Appeal (Civil Division), the High Court of Justice, the County Courts and the Family Proceedings Court in the Magistrates' Courts.[74] It is issued as guidance (**not** as a Practice Direction) by the Master of the Rolls, as Head of Civil Justice, and the President of the Family Division, as Head of Family Justice. It is intended to remind courts and litigants of the principles set out in the authorities and supersedes the guidance contained in *Practice Note (Family Courts: McKenzie Friends) (No 2)* [2008] 1 WLR 2757, which is now withdrawn.[75] It is issued in light of the increase in litigants-in-person (litigants) in all levels of the civil and family courts.

The Right to Reasonable Assistance

2) Litigants have the right to have reasonable assistance from a layperson, sometimes called a McKenzie Friend (MF). Litigants assisted by MFs remain litigants-in-person. MFs have no independent right to provide assistance. They have no right to act as advocates or to carry out the conduct of litigation.

What McKenzie Friends may do

3) MFs may: i) provide moral support for litigants; ii) take notes; iii) help with case papers; iii) quietly give advice on any aspect of the conduct of the case.

What McKenzie Friends may not do

4) MFs may not: i) act as the litigants' agent in relation to the proceedings; ii) manage litigants' cases outside court, for example by signing court documents; or iii) address the court, make oral submissions or examine witnesses.

Exercising the Right to Reasonable Assistance

5) While litigants ordinarily have a right to receive reasonable assistance from MFs the court retains the power to refuse to permit such assistance. The court may do so where it is satisfied that, in that case, the interests of justice and fairness do not require the litigant to receive such assistance.

6) A litigant who wishes to exercise this right should inform the judge as soon as possible indicating who the MF will be. The proposed MF should produce a short curriculum vitae or other statement setting out relevant experience, confirming that he or she has no interest in the case and understands the MF's role and the duty of confidentiality.

7) If the court considers that there might be grounds for circumscribing the right to receive such assistance, or a party objects to the presence of, or assistance given by a MF, it is not for the litigant to justify the exercise of the right. It is for the court or the objecting party to provide sufficient reasons why the litigant should not receive such assistance.

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[74] References to the judge or court should be read where proceedings are taking place under the Family Proceedings Courts (Matrimonial Proceedings etc) Rules 1991, as a reference to a justices' clerk or assistant justices' clerk who is specifically authorised by a justices' clerk to exercise the functions of the court at the relevant hearing. Where they are taking place under the Family Proceedings Courts (Childrens Act 1989) Rules 1991 they should be read consistently with the provisions of those Rules, specifically rule 16A(5A).

[75] *R v Leicester City Justices, ex parte Barrow* [1991] 260, *Chauhan v Chauhan* [1997] FCR 206, *R v Bow County Court, ex parte Pelling* [1999] 1 WLR 1807, *Attorney-General v Purvis* [2003] EWHC 3190 (Admin), *Clarkson v Gilbert* [2000] CP Rep 58, *United Building and Plumbing Contractors v Kajla* [2002] EWCA Civ 628, *Re O (Children) (Hearing in Private: Assistance*) [2005] 3 WLR 1191, *Westland Helicopters Ltd v Sheikh Salah Al-Hejailan (No 2)* [2004] 2 Lloyd's Rep 535. *Agassi v Robinson (Inspector of Taxes) (No 2)* [2006] 1 WLR 2126, *Re N (A Child) (McKenzie Friend: Rights of Audience) Practice Note* [2008] 1 WLR 2743.

8) When considering whether to circumscribe the right to assistance or refuse a MF permission to attend the right to a fair trial is engaged. The matter should be considered carefully. The litigant should be given a reasonable opportunity to argue the point. The proposed MF should not be excluded from that hearing and should normally be allowed to help the litigant.

9) Where proceedings are in *closed court*, i.e. the hearing is in chambers, is in private, or the proceedings relate to a child, the litigant is required to justify the MF's presence in court. The presumption in favour of permitting a MF to attend such hearings, and thereby enable litigants to exercise the right to assistance, is a strong one.

10) The court may refuse to allow a litigant to exercise the right to receive assistance at the start of a hearing. The court can also circumscribe the right during the course of a hearing. It may be refused at the start of a hearing or later circumscribed where the court forms the view that a MF may give, has given, or is giving, assistance which impedes the efficient administration of justice. However, the court should also consider whether a firm and unequivocal warning to the litigant and/or MF might suffice in the first instance.

11) A decision by the court not to curtail assistance from a MF should be regarded as final, save on the ground of subsequent misconduct by the MF or on the ground that the MF's continuing presence will impede the efficient administration of justice. In such event the court should give a short judgment setting out the reasons why it has curtailed the right to assistance. Litigants may appeal such decisions. MFs have no standing to do so.

12) The following factors should not be taken to justify the court refusing to permit a litigant receiving such assistance:

    (i) The case or application is simple or straightforward, or is, for instance, a directions or case management hearing;
    (ii) The litigant appears capable of conducting the case without assistance;
    (iii) The litigant is unrepresented through choice;
    (iv) The other party is not represented;
    (v) The proposed MF belongs to an organisation that promotes a particular cause;
    (vi) The proceedings are confidential and the court papers contain sensitive information relating to a family's affairs

13) A litigant may be denied the assistance of a MF because its provision might undermine or has undermined the efficient administration of justice. Examples of circumstances where this might arise are: i) the assistance is being provided for an improper purpose; ii) the assistance is unreasonable in nature or degree; iii) the MF is subject to a civil proceedings order or a civil restraint order; iv) the MF is using the litigant as a puppet; v) the MF is directly or indirectly conducting the litigation; vi) the court is not satisfied that the MF fully understands the duty of confidentiality.

14) Where a litigant is receiving assistance from a MF in care proceedings, the court should consider the MF's attendance at any advocates' meetings directed by the court, and, with regard to cases commenced after 1.4.08, consider directions in accordance with paragraph 13.2 of the Practice Direction Guide to Case Management in Public Law Proceedings.

15) Litigants are permitted to communicate any information, including filed evidence, relating to the proceedings to MFs for the purpose of obtaining advice or assistance in relation to the proceedings.

16) Legal representatives should ensure that documents are served on litigants in good time to enable them to seek assistance regarding their content from MFs in advance of any hearing or advocates' meeting.

17) The High Court can, under its inherent jurisdiction, impose a civil restraint order on MFs who repeatedly act in ways that undermine the efficient administration of justice.

Rights of audience and rights to conduct litigation

18) MFs do **not** have a right of audience or a right to conduct litigation. It is a criminal offence to exercise rights of audience or to conduct litigation unless properly qualified and authorised to do so by an appropriate regulatory body or, in the case of an otherwise unqualified or unauthorised individual (i.e., a lay individual including a MF), the court grants such rights on a case-by-case basis.[76]

19) Courts should be slow to grant any application from a litigant for a right of audience or a right to conduct litigation to any lay person, including a MF. This is because a person exercising such rights must ordinarily be properly trained, be under professional discipline (including an obligation to insure against liability for negligence) and be subject to an overriding duty to the court. These requirements are necessary for the protection of all parties to litigation and are essential to the proper administration of justice.

20) Any application for a right of audience or a right to conduct litigation to be granted to any lay person should therefore be considered very carefully. The court should only be prepared to grant such rights where there is good reason to do so taking into account all the circumstances of the case, which are likely to vary greatly. Such grants should not be extended to lay persons automatically or without due consideration. They should not be granted for mere convenience.

21) Examples of the type of special circumstances which have been held to justify the grant of a right of audience to a lay person, including a MF, are: i) that person is a close relative of the litigant; ii) health problems preclude the litigant from addressing the court, or conducting litigation, and the litigant cannot afford to pay for a qualified legal representative; iii) the litigant is relatively inarticulate and prompting by that person may unnecessarily prolong the proceedings.

22) It is for the litigant to persuade the court that the circumstances of the case are such that it is in the interests of justice for the court to grant a lay person a right of audience or a right to conduct litigation.

23) The grant of a right of audience or a right to conduct litigation to lay persons who hold themselves out as professional advocates or professional MFs or who seek to exercise such rights on a regular basis, whether for reward or not, will however **only** be granted in exceptional circumstances. To do otherwise would tend to subvert the will of Parliament.

[76] Legal Services Act 2007 s12 – 19 and Schedule 3.

24) If a litigant wants a lay person to be granted a right of audience, an application must be made at the start of the hearing. If a right to conduct litigation is sought such an application must be made at the earliest possible time and must be made, in any event, before the lay person does anything which amounts to the conduct of litigation. It is for litigants to persuade the court, on a case-by-case basis, that the grant of such rights is justified.

25) Rights of audience and the right to conduct litigation are separate rights. The grant of one right to a lay person does not mean that a grant of the other right has been made. If both rights are sought their grant must be applied for individually and justified separately.

26) Having granted either a right of audience or a right to conduct litigation, the court has the power to remove either right. The grant of such rights in one set of proceedings cannot be relied on as a precedent supporting their grant in future proceedings.

Remuneration

27) Litigants can enter into lawful agreements to pay fees to MFs for the provision of reasonable assistance in court or out of court by, for instance, carrying out clerical or mechanical activities, such as photocopying documents, preparing bundles, delivering documents to opposing parties or the court, or the provision of legal advice in connection with court proceedings. Such fees cannot be lawfully recovered from the opposing party.

28) Fees said to be incurred by MFs for carrying out the conduct of litigation, where the court has not granted such a right, cannot lawfully be recovered from either the litigant for whom they carry out such work or the opposing party.

29) Fees said to be incurred by MFs for carrying out the conduct of litigation after the court has granted such a right are in principle recoverable from the litigant for whom the work is carried out. Such fees cannot be lawfully recovered from the opposing party.

30) Fees said to be incurred by MFs for exercising a right of audience following the grant of such a right by the court are in principle recoverable from the litigant on whose behalf the right is exercised. Such fees are also recoverable, in principle, from the opposing party as a recoverable disbursement: CPR 48.6(2) and 48(6)(3)(ii).

Personal Support Unit & Citizen's Advice Bureau

31) Litigants should also be aware of the services provided by local Personal Support Units and Citizens' Advice Bureaux. The PSU at the Royal Courts of Justice in London can be contacted on 020 7947 7701, by email at cbps@bello.co.uk or at the enquiry desk. The CAB at the Royal Courts of Justice in London can be contacted on 020 7947 6564 or at the enquiry desk.

Lord Neuberger of Abbotsbury, Master of the Rolls

Sir Nicholas Wall, President of the Family Division

12 July 2010

Annex C – Rules of Court – Scotland

1) Sheriff Court Ordinary Cause Rules

Rule 1.3A – Lay Support[77]

(1) At any time during proceedings the sheriff may, on the request of a party litigant, permit a named individual to assist the litigant in the conduct of the proceedings by sitting beside or behind (as the litigant chooses) the litigant at hearings in court or in chambers and doing such of the following for the litigant as he or she requires—

(a) providing moral support;
(b) helping to manage the court documents and other papers;
(c) taking notes of the proceedings;
(d) quietly advising on—

(i) points of law and procedure;
(ii) issues which the litigant might wish to raise with the sheriff;
(iii) questions which the litigant might wish to ask witnesses.

(2) It is a condition of such permission that the named individual does not receive from the litigant, whether directly or indirectly, any remuneration for his or her assistance.

(3) The sheriff may refuse a request under paragraph (1) only if—

(a) the sheriff is of the opinion that the named individual is an unsuitable person to act in that capacity (whether generally or in the proceedings concerned); or
(b) the sheriff is of the opinion that it would be contrary to the efficient administration of justice to grant it.

(4) Permission granted under paragraph (1) endures until the proceedings finish or it is withdrawn under paragraph (5); but it is not effective during any period when the litigant is represented.

(5) The sheriff may, of his or her own accord or on the motion of a party to the proceedings, withdraw permission granted under paragraph (1); but the sheriff must first be of the opinion that it would be contrary to the efficient administration of justice for the permission to continue.

(6) Where permission has been granted under paragraph (1), the litigant may—

(a) show the named individual any document (including a court document); or
(b) impart to the named individual any information,

[77] Act of Sederunt (Sheriff Court Ordinary Cause Rules) 1993 (SI 1993/1956) (as amended) <https://www.scotcourts.gov.uk/docs/default-source/rules-and-practice/rules-of-court/sheriff-court/ordinary-cause-rules/chapter-01BC08A562544E1C7244A0398D716EFA9F2DAB854A5F49E4AB39A76BA46646EE959E0A21B8B222C4B3BF81F5877E48DA10A6CAD9B5B17E95D8B4A5B885.doc?sfvrsn=14>

which is in his or her possession in connection with the proceedings without being taken to contravene any prohibition or restriction on the disclosure of the document or the information; but the named individual is then to be taken to be subject to any such prohibition or restriction as if he or she were the litigant.

(7) Any expenses incurred by the litigant as a result of the support of an individual under paragraph (1) are not recoverable expenses in the proceedings.

Rule 1A.2 – Lay representation for party litigants[78]

(1) In any proceedings in respect of which no provision as mentioned in rule 1A.1(1) is in force, the sheriff may, on the request of a party litigant, permit a named individual (a "lay representative") to appear, along with the litigant, at a specified hearing for the purpose of making oral submissions on behalf of the litigant at that hearing.

(2) An application under paragraph (1)—
(a) is to be made orally on the date of the first hearing at which the litigant wishes a named individual to make oral submissions; and
(b) is to be accompanied by a document, signed by the named individual, in Form 1A.2.

(3) The sheriff may grant an application under paragraph (1) only if the sheriff is of the opinion that it would assist his or her consideration of the case to grant it.

(4) It is a condition of permission granted by the sheriff that the lay representative does not receive directly or indirectly from the litigant any remuneration or other reward for his or her assistance.

(5) The sheriff may grant permission under paragraph (1) in respect of one or more specified hearings in the case; but such permission is not effective during any period when the litigant is legally represented.

(6) The sheriff may, of his or her own accord or on the motion of a party to the proceedings, withdraw permission granted under paragraph (1).

(7) Where permission has been granted under paragraph (1), the litigant may—
(a) show the lay representative any document (including a court document); or
(b) impart to the lay representative any information,

which is in his or her possession in connection with the proceedings without being taken to contravene any prohibition or restriction on the disclosure of the document or the information; but the lay representative is then to be taken to be subject to any such prohibition or restriction as if he or she were the litigant.

(8) Any expenses incurred by the litigant in connection with lay representation under this rule are not recoverable expenses in the proceedings.

[78] Legal Services (Scotland) Act 2010, section 127; Sheriff Courts (Scotland) Act 1971 (as amended), sections 32(n) and 32A; Act of Sederunt (Sheriff Court Ordinary Cause Rules) 1993 (SI 1993/1956) (as amended) <https://www.scotcourts.gov.uk/docs/default-source/rules-and-practice/rules-of-court/sheriff-court/ordinary-cause-rules/chapter-1a---lay-representation.doc?sfvrsn=16>.

2) Court of Session Rules

CHAPTER 12A[79]

LAY SUPPORT FOR PARTY LITIGANTS

Rule 12.A.1 – Lay Support

(1) At any time during proceedings a party litigant may apply to the court for permission to have a named individual assist the litigant in the conduct of the proceedings by sitting beside or behind (as the litigant chooses) the litigant at hearings in court or in chambers and doing such of the following for the litigant as he or she requires—

(a) providing moral support;
(b) helping to manage the court documents and other papers;
(c) taking notes of the proceedings;
(d) quietly advising on—
(i) points of law and procedure;
(ii) issues which the litigant might wish to raise with the court;
(iii) questions which the litigant might wish to ask the witness.

(2) It is a condition of such permission that the named individual does not receive from the litigant, whether directly or indirectly, any remuneration for his or her assistance.

(3) The court may refuse an application under paragraph (1) only if—
(a) it is of the opinion that the named individual is an unsuitable person to act in that capacity (whether generally or in the proceedings concerned); or
(b) it is of the opinion that it would be contrary to the efficient administration of justice to grant it.

(4) An application under paragraph (1) is to be made by motion and accompanied by a document, signed by the litigant and the named individual, in Form 12.A-A.

(5) Permission granted under paragraph (1) endures until the proceedings finish or it is withdrawn under paragraph (6); but it is not effective during any period when the litigant is represented.

(6) The court may, of its own accord or on the motion of a party to the proceedings, withdraw permission granted under paragraph (1); but it must first be of the opinion that it would be contrary to the efficient administration of justice for the permission to continue.

(7) Where permission has been granted under paragraph (1), the litigant may—

(a) show the named individual any document (including a court document); or
(b) impart to the named individual any information, which is in his or her possession in connection with the proceedings without being taken to contravene any prohibition or restriction on the disclosure of the document or the information; but the named

[79] Act of Sederunt (Rules of the Court of Session 1994) 1994 (SI 1994/1443), <https://www.scotcourts.gov.uk/docs/default-source/rules-and-practice/rules-of-court/court-of-session/chap12a.pdf?sfvrsn=8>.

individual is then to be taken to be subject to any such prohibition or restriction as if he or she were the litigant.

(8) Any expenses incurred by the litigant as a result of the support of an individual under paragraph (1) are not recoverable expenses in the proceedings.

CHAPTER 12B

LAY REPRESENTATION[80]

Rule 12B.1 – Application and interpretation

1) This Chapter is without prejudice to any enactment (including any other provision in these Rules) under which provision is, or may be, made for a party to a particular type of case before the court to be represented by a lay representative.

(2) In this Chapter, a "lay representative" means a person who is not—

(a) a solicitor;
(b) an advocate; or
(c) someone having a right to conduct litigation, or a right of audience, by virtue of section 27 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1990.

Rule 12B.2 – Lay representation for party litigants

1) In any cause depending before the court in respect of which no provision as mentioned in rule 12B.1(1) is in force, a party litigant may apply to the court for permission for a named individual (a lay representative) to appear, along with the litigant, at a specified hearing for the purpose of making oral submissions on behalf of the litigant at that hearing.

(2) An application under paragraph (1) is to be made—

(a) by motion and accompanied by a document, signed by the litigant and the named individual, in Form 12B.2; and
(b) subject to paragraph (3), prior to the date of the hearing at which the litigant wishes the lay representative to make oral submissions.

(3) The court may grant an application made on the day of the hearing at which the litigant wishes the lay representative to make oral submissions if it is satisfied that there are exceptional reasons why the application could not have been made prior to that day.

(4) The court may grant an application under paragraph (1) only if it is of the opinion that it would assist the court to grant it.

[80] Legal Services Act (Scotland) 2010, section 126; Court of Session Act 1988 (as amended), sections 5(ef) and 5A; Act of Sederunt (Rules of the Court of Session 1994) 1994 (SI 1994/1443), <https://www.scotcourts.gov.uk/docs/default-source/rules-and-practice/rules-of-court/court-of-session/chap12b.pdf?sfvrsn=8>

(5) It is a condition of permission granted by the court that the lay representative does not receive directly or indirectly from the litigant any remuneration or other reward for his or her assistance.

(6) The court may grant permission under paragraph (1) in respect of one or more specified hearings in the cause; but such permission is not effective during any period when the litigant is legally represented.

(7) The court may, of its own accord or on the motion of a party to the proceedings, withdraw permission granted under paragraph (1).

(8) Where permission has been granted under paragraph (1), the litigant may—

(a) show the lay representative any document (including a court document); or
(b) impart to the lay representative any information,

which is in his or her possession in connection with the proceedings without being taken to contravene any prohibition or restriction on the disclosure of the document or the information; but the lay representative is then to be taken to be subject to any such prohibition or restriction as if he or she were the litigant.

(9) Any expenses incurred by the litigant in connection with lay representation under this rule are not recoverable expenses in the proceedings.