JUDICIARY OF
ENGLAND AND WALES

The Judicial Working Group on Litigants in Person: Report

July 2013

Contents

Foreword

Access to justice is the constitutional right of every citizen.

Following the Second World War and the Rushcliffe Report, that right was largely respected by the provision of public funding, through Legal Aid and advice. The amount of funding grew until the mid-1980s. Since then, a series of reforms have resulted in substantial numbers of people being excluded from the scope of Legal Aid. By the beginning of 2013, the number of people benefiting from Legal Aid each year had fallen to one million. From 1 April 2013, as a result of the Legal Aid, Sentencing and Punishment of Offenders Act 2012, that number has been further reduced, by well over a half.

Even bearing in mind the financial constraints to which we are all subject, some feel that a withdrawal of funding of this magnitude has the potential to undermine the right to access to justice and, as a result, the rule of law itself. We offer no views at all on that debate. The reforms are happening. They will, inevitably, result in an enormous rise in the numbers of litigants in person. This report is written with a view to ensuring that the judiciary are optimally prepared to deal with that influx, helping to enable those without legal representation to access the courts and tribunals, and to put their case as effectively as possible.

Our Working Group was formed in December 2012, at the request of the Master of the Rolls. Although the Legal Aid reforms will, of course, affect the criminal justice system, the scope of our review has been restricted to consideration of the civil and family courts, and the tribunals.

We considered it vital to look at the issues before the reforms bit. Time has, therefore, been short and, as a result, many of our recommendations are for further work, particularly in terms of judicial education and consideration of litigants in person by the various rules committees. We make no apology for that. The work we have recommended will need careful consideration and will take time. However, we hope that our recommendations are helpful and that some will reap immediate benefits.

I would like to thank all of those on the Group who have, with enthusiasm and without complaint, put much of their own time and effort into this project. We all owe a considerable debt to, and thank, those in the Judicial Office who have supported and guided us in our task - Peter Farr, Phil Douglas and, especially, Simon Parsons who has provided much day-to-day support.

Gary Hickinbottom

July 2013

1. Introduction

1.1 This report contains the findings and recommendations of **The Judicial Working Group on Litigants in Person**.

1.2 The Working Group was formed in December 2012 following a discussion at the Judges' Council about the implications of the expected rise in the number of litigants in person[1] after the implementation of the Government's Legal Aid reforms in April 2013, the ramifications of which will be felt across the civil and family justice systems, in courts and tribunals. The Master of the Rolls asked Mr Justice Hickinbottom to set up a group to look at the issue. The Group consists of:

- Mr Justice Hickinbottom (Chairman)
- District Judge Ayers
- His Honour Judge Bailey
- Professor Dame Hazel Genn
- District Judge Lethem
- His Honour Judge Martin
- Mrs Justice Parker
- Alison Russell QC
- Regional Employment Judge Carol Taylor
- Penny Williams JP DL

Terms of reference

1.3 During formative discussions we agreed to focus on judicial preparedness for the forthcoming changes. The terms of reference below were then agreed to form the basis of a report to the Lord Chief Justice and the Senior President of Tribunals through the Judicial Executive Board, the Tribunals Judiciary Executive Board, and the Judges' Council.

- Define the main issues facing the judiciary as a result of the anticipated increase in litigants in person from April 2013.

1 The term "litigant in person" (as opposed to "self-represented litigant") is used in this report in line with the Practice Guidance issued in March 2013 by the Master of the Rolls. See: http://www.judiciary.gov.uk/publications-and-reports/guidance/2013/mor-guidance-terminology-lips

- Make recommendations to as to whether the court rules require amendment to give judges sufficient flexibility when dealing with litigants in person; and, if necessary, provide guidance for the judiciary on this subject.

- Review the rules/conventions on whom a court can hear; including a review of the Practice Guidance for McKenzie Friends, and consider, with Heads of Divisions, whether existing Practice Directions require amendment.

- Make recommendations to the Judicial College for the development of training and guidance on dealing with litigants in person.

- Oversee the provision of an accessible resource for all judicial office-holders containing:

    ◊ information and guidance on dealing with litigants in person (general and jurisdiction-specific).

    ◊ information on the availability of support and advice for litigants in person (general, jurisdiction-specific and area-specific).

2. Overview and executive summary

2.1 In November 2011, the Civil Justice Council produced its helpful and informative report 'Access to Justice for Litigants in Person'[2]. The Council's report rightly emphasises that the judiciary has an important part to play in meeting one of the principal challenges posed by the Legal Aid reforms, namely a substantial increase in the number of litigants in person and the types of proceedings in which they appear. This report is focused on equipping the judiciary to fulfil that role.

The context

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[3].

2.3 While there is an acute lack of data on current numbers of litigants in person, and no way to predict accurately how many more will enter the system as a result of the Government's reforms, it would be naïve to assume anything other than a substantial rise in numbers[4].

2.4 The impact of these reforms on individuals will be accentuated by their impact on alternative sources of advice for people who cannot afford a lawyer, which have been a vital source of guidance for many since the 1970s[5]. Other factors to be taken into account include ongoing pressure on the resources of courts' and tribunals', which will affect the capacity of staff to provide litigants in person with administrative services; and the impact of other reforms, such as the Jackson Review and the Family Modernisation Programme following the Norgrove Report.

The importance of a positive approach to litigants in person

2.5 Providing access to justice for litigants in person within the constraints of a system that has been developed on the basis that most litigants will be legally represented poses considerable and unique challenges for the judiciary. As we describe below, cases will inevitably take more time, during a period of severe pressure on judicial time. However, litigants in person are not in themselves "a problem"; the problem lies with a system which has not developed with a focus on unrepresented litigants. We consider it vital that, despite the enormous challenge presented, judges are enabled and

2 For the Report see: http://www.judiciary.gov.uk/about-the-judiciary/advisory-bodies/cjc/self-represented-litigants.htm
3 For the Act see: http://www.legislation.gov.uk/ukpga/2012/10/contents/enacted
4 The little research there is points to litigants in person already being a significant feature of parts of the legal system. A 2005 research study, which looked at first instance civil and family cases, found that litigants in person were common, particularly in family cases; for example, 75% of adoption cases involved one or more litigants in person; and litigants in person made up 85% of county court defendants. However, the April 2013 reforms are likely to increase numbers very substantially, particularly in certain areas. The number of litigants in person in the county court will also be affected by the impending rise in the financial limit for the small claims track, from £5,000 to £10,000. A doubling of this limit will inevitably mean more cases fall within the small claim track with the consequence that there will be more litigants in person, as Legal Aid is not available for small claims.
5 The Citizens Advice Bureau estimates that local advice and community based services will lose over 77% of their Legal Aid funding.

empowered to adapt the system to the needs of litigants in person, rather than vice versa.

2.6 Although we do not underestimate the scale of the challenges posed by the Legal Aid reforms, the Group was encouraged by the significant amount of work that is already underway to meet those challenges, and the significant contribution to those initiatives already made by the judiciary.

2.7 Both the Civil and Family Justice Councils are either leading or contributing to a variety of initiatives, such as producing guidance for litigants in person, in consultation with the RCJ Personal Support Unit, AdviceNow, the Citizens Advice Bureau, the Bar Council, Her Majesty's Courts and Tribunals Service (HMCTS) and others. Individual judges are also making valuable contributions. Mrs Justice Parker, for example, is leading work on financial remedy cases and drafting guidance on appeals; and Mr Justice Foskett has produced a helpful guide for litigants in person on the procedures of the Interim Applications Court in the Queen's Bench Division. Judges in individual courts, such as Manchester Civil Justice Centre, have also assisted in the production of local material.

Our report and recommendations

2.8 We begin our report by setting out some of the key issues that litigants in person present for the courts and tribunals, as a basis for recommending measures to help address those issues. Some of the issues cut across jurisdictional boundaries; for example, the fact that litigants in person may struggle to understand and comply with procedural requirements. Others are more prevalent in particular jurisdictions; for example, the difficulties posed by the highly emotive nature of many cases in the family courts. This part of our report contains recommendations that:

- The Ministry of Justice (MoJ) / HMCTS should devote the necessary work and resources to:
  - ◊ Producing, with judicial involvement, appropriate materials, including, especially, audiovisual materials, to inform litigants in person what is required of them and what they can expect when they go to court.
  - ◊ Undertaking, urgently, a thorough review of its web-based information, to ensure that litigants in person can easily access the information they need to understand and decide on the various courses of action open to them, and to prepare for, and present, their case in a court or tribunal.

2.9 The second substantive part of our report looks at training and guidance. Although litigants in person are already a regular feature in daily working life for some judges, for others they are not yet but soon will be. Equipping the judiciary to deal with this challenge through training and guidance is essential. This part of our report contains recommendations that:

- The Judicial College should consider, urgently, the feasibility of developing a training course (or courses) on litigants in person.

- The design of all future training on practice, procedure, and judge-craft should have regard to the fact that a much higher proportion of court and tribunal users will be litigants in person.

- The Judicial College should begin, urgently, work to develop a 'litigants in person toolkit' for judges, utilising existing draft guidance and the relevant chapter of the Equal Treatment Bench Book.

- The Judicial Office and MoJ/HMCTS should hold, urgently, discussions to establish the most appropriate way to develop a central online resource to which staff and judiciary could easily refer in order to identify nationally available sources of advice and assistance for litigants in person; further work to be informed by the outcome of those discussions.

- Designated civil and family judges, and, where appropriate, chamber presidents, as the most appropriate local judicial figures, should be given joint responsibility for ensuring that the judges in their respective areas are kept fully informed of locally available sources of advice and assistance for litigants in person.

2.10 Recognising that one of the fundamental challenges for judges, particularly in the civil courts, is how to give legitimate assistance to litigants in person while remaining fair to represented parties, the next part of our report considers the procedural rules. This part of our report contains recommendations that:

- The Judicial Office should undertake, urgently, further work to assess the merits of three proposals:

◊ Provision of a dedicated rule that makes specific modifications to other rules where one or more of the parties to proceedings is a litigant in person.

◊ Introduction of a specific power into CPR Rule 3.1 that would allow the court to direct that, where at least one party is a litigant in person, the proceedings should be conducted by way of a more inquisitorial form of process.

◊ Introduction of a specific general Practice Direction or new Civil Procedure Rule that would, without creating a fully inquisitorial form of procedure, address the needs of litigants in person to obtain access to justice while enabling courts to manage cases consistently with the overriding objective.

2.11 In light of the increased significance of the right of litigants in person to call on lay persons for support after 1 April 2013, the next part of our report briefly considers the role of the McKenzie Friend and others who litigants in person may ask to assist them. This part of our report contains recommendations that:

- The Judicial Office should consider, urgently, rationalising the historic differences

between practice in the court system and practice in tribunals, as part of a wider review of lay assistants.

- As part of its review, the Judicial Office should consider, urgently, the merits of introducing into the CPR and FPR, as has recently been introduced in Scotland, rules governing: i) the exercise of the right to reasonable assistance; ii) the right to conduct litigation; and iii) the right to exercise rights of audience.

- The Head of Civil Justice and Heads of Division should consider, urgently, the terminology that should be used, including whether the term "McKenzie Friend" continues to be useful.

2.12 The final part of our report briefly considers the impact of vexatious litigants who, through repeated and often relentless applications, which are without any legal merit, consume an enormously disproportionate amount of judicial (and, particularly, staff) time and resources. This part of our report contains a recommendation that:

- Judges should be strongly encouraged, through appropriate judicial leadership channels, to deal proactively and robustly with vexatious litigants, in particular by declaring appropriate claims and applications "totally without merit" and through the use of orders restraining individuals from issuing and pursuing claims.

3. Issues that arise when dealing with litigants in person

3.1 This part of our report outlines some of the key issues courts and tribunals face in dealing with litigants in person. It is not an exhaustive analysis, but does encapsulate what the Group sees as some of the most common and pressing issues, most, if not all, of which will be considerably greater after 1 April 2013[6].

The essentials of a claim

3.2 Most civil or family proceedings involve, at least, the following steps:

- The identification of a cause of action.
- The identification of the determinative issues.
- The identification and preparation of evidence (including, where appropriate, expert evidence) that is relevant to those issues.
- The preparation of documentation for the substantive hearing.
- Conduct of the substantive hearing.

3.3 Of course, some proceedings have additional steps, such as interlocutory applications, hearings for directions and mediation hearings.

3.4 Virtually all of these steps present challenges for any non-lawyer, and particular challenges for those personally involved in the relevant issues, who may be anxious, vulnerable and/or without any particular level of education.

The role of the judge

3.5 Judges are committed to ensuring that the legal process is fair and proportionate, and that the outcome is, consequently, just. Their role remains fundamentally the same whether a case involves litigants in person or not.

3.6 It is, nevertheless, important to stress that an effective judicial approach to dealing with

6 The Working Group is particularly grateful to Professor Dame Hazel Genn for sharing the results of her own research into litigants in person, and for allowing the author to refer to her material in producing this part of the Group's Report.

litigants in person requires an appreciation of the fact that they raise unique issues concerning case management.

3.7 It is also important to emphasise that these issues need to be properly addressed, not for the convenience of the court, but to enable judges to deliver justice – the overarching objective of the recommendations contained within this report.

Litigants in person

3.8 The fact that there is no "typical" litigant in person presents a challenge in itself. Although research has identified some common features – litigants in person tend to be younger than their represented counterparts, for example – they inevitably come from the whole panoply of backgrounds and circumstances.

3.9 The term itself is also broader in scope than it might first appear. While most litigants in person act in an individual capacity, people appearing on behalf of small businesses feature regularly in the Employment Tribunals, for example.

3.10 Although the predominant consideration for most (active) litigants behind a lack of representation is financial, it is not the only one; a belief, rightly or wrongly, that proceedings will be sufficiently straightforward to be handled without a lawyer is just one of numerous other potential influences.

3.11 Ultimately, this all means that, while judges are entitled to expect a certain degree of knowledge and aptitude from legal representatives, the litigant in person's readiness, procedural and legal knowledge, confidence, and general attitude to the proceedings, are largely unknown quantities at the outset of each new case. They will vary greatly.

Some commonly encountered issues

3.12 As has been noted, litigants in person are a diverse group of people. Some demonstrate considerable skill in litigation. However, the following issues are encountered with some frequency when litigants represent themselves:

- Unlike lawyers, who are expected to be familiar with court procedures, litigants in person can struggle to understand basic procedural requirements. They are not helped in this by the technical terminology used in proceedings, readily understood by trained lawyers, but potentially obscure to those who are not.

- They are less likely to comply with procedural requirements, particularly those with a set timescale. This is partly because they can have difficulty in understanding what is required of them, and partly because they do not necessarily understand that court orders are more than aspirational.

- Although rules of evidence in civil and family courts, and tribunals, are lax, litigants in person can have difficulty understanding the concept of evidence and the need for it to prove a factual matter.

- Words are a lawyer's tools of trade. Litigants in person can find it difficult to present their case articulately, or ask appropriate questions by way of cross-examination of witnesses, especially if they are nervous, anxious or emotionally involved in the case.

- They can find it difficult to understand the concept of a cause of action; they tend to consider that if they are aggrieved they ought to be able to come to court to have that grievance aired.

- They can have difficulty in identifying and focusing on the determinative issues in the case.

- They can be guarded against the notion of settlement or mediation, believing that any discussion prior to coming to a substantive hearing might be perceived as a sign of weakness, or simply because they wish to 'have their day in court'. This applies to the agreement of directions, as well as substantive matters. Similarly, they may be wary of forming a working relationship with an opposing party's representative.

- They are more likely to lodge legally misconceived applications and appeals.

- They are more likely to complain about judges, usually on the basis, not of any substantive impropriety, but because they disagree with the findings and conclusions the judge has properly reached.

Practical issues

3.13 Regardless of the jurisdiction concerned, a sharp rise in the number of litigants in person will present various practical issues.

3.14 Litigants in person often contact courts and tribunals several times before a hearing; for example, to apply for orders that would usually be agreed when both parties are represented. As a result, 'box-work' (judicial work that judges do on paper, without an oral hearing) will increase greatly, especially because material is harder to assemble and sift through than when received from lawyers in the standard format. Similarly, some applications are required to be in a particular form, of which a litigant in person may be unaware. Dealing with the additional work will be a very substantial drain on the time of judges, as such work has to be done in addition to their usual sittings.

3.15 There is also likely to be a significant rise in the need for (and the length of) preliminary hearings to deal with issues that have to be resolved before substantive hearings can take place.

3.16 There will be issues in relation to listing. More preliminary hearings will mean more pressure on listing. The date by which hearings can be listed will inevitably go out (i.e. it will take longer for cases to be brought before a court). This will cause delays to the ultimate determination of cases.

Furthermore, judges will need to be sensitive to the fact that emotional factors can affect where, and before whom, litigants in person want cases to be listed; for example, it is not uncommon for a litigant who, due to past experience, believes that the judges at a particular court are against them to press for their case to be listed elsewhere.

3.17 For hearings, it is unlikely that litigants in person will prepare the documents as the rules require; for example, litigants in person often lodge documents in a piecemeal fashion, without any coherence or index.

3.18 All of these issues have the potential to slow down, and to drive up the cost of, proceedings; and to take up judges' time.

Expert evidence and interpreters

3.19 Irrespective of the jurisdiction concerned, a just decision depends upon the judge being provided with appropriate evidence. The Group has already commented on the difficulty litigants in person can have in understanding the general concept of evidence and the need to provide it to prove a fact relied upon.

3.20 The need for expert evidence in an appropriate case is a particular challenge for litigants in person. Such evidence can be crucial to the outcome of a case. Indeed, there are cases where the lack of it could constitute a breach of the fundamental right to a fair trial[7]. But litigants in person can find it difficult to identify the need for experts and then identify an appropriate expert who is willing to act for them. Many experts are reluctant to take instructions from unrepresented parties. Even if this hurdle can be cleared, litigants who lack financial assistance often cannot afford or engage these services.

3.21 Similar issues arise from the need for interpreters/translators. Litigation can be a daunting uphill struggle for an articulate litigant in person, but those difficulties are compounded where English is not a litigant's first language[8]. The potential consequences of effectively curtailing access to these services for those who cannot afford to pay for them are obvious.

3.22 All of these issues, and others like them, have the potential for denying judges evidence that is relevant and necessary for the fair adjudication of the cases they have to decide. Thus, there is the potential for justice being denied or, at least, delayed.

The judge's approach to proceedings

3.23 Obtaining the necessary evidence from litigants in person can be greatly furthered when judges adopt a flexible and interventionist approach to proceedings. However, judges have a fine line to tread in giving legitimate assistance to a litigant in person without eroding the confidence of other

7 The right to a fair trial arises both under common law and by virtue of Article 6 of the European Convention on Human Rights.

8 The Personal Support Unit has estimated that 25% of its 7,000 clients across England speak English as a second language (source: Access to Justice for Litigants in Person, Civil Justice Council).

parties in their impartiality, especially where those other parties are legally represented; a challenge that varies greatly from case to case.

3.24 While an appropriately lenient approach can be of great assistance when dealing with litigants in person, managing cases where one party is represented and the other is not poses particular challenges.

3.25 Represented parties (and their representatives) may perceive an imbalance if judges appear to listen more keenly to litigants in person, put questions arising out of the litigant in person's case, or accede more readily to their requests. Similarly, if represented parties are asked to carry out additional work, which will take time, incur cost and impose a burden on them, the perception of an imbalance may be reinforced.

3.26 The relationship between a litigant in person and their opponent's representative is also a factor. Litigants in person can be wary of, and reluctant to communicate with, opposing counsel. This is apt to create tension, and is a potential impediment to the efficient conduct of the proceedings.

3.27 It will thus be especially important after 1 April 2013 for judges to take the time to explain to litigants in person the benefits of a good working relationship with opposing counsel, and for counsel to use their skills in helping to build those relationships.

Civil proceedings

3.28 While the issue of an appropriate degree of flexibility is not confined to civil proceedings, it is more keenly felt by civil judges because the procedural framework within which they operate is comparatively rigid[9].

3.29 Judicial views may differ on the degree to which a judge can properly assist a litigant in person by giving leeway as to the manner in which the case is presented; but, in any event, the appropriate leeway will depend upon the circumstances of each particular case; for example, in the 'McLibel' appeal, the Court of Appeal approved of the "considerable latitude" shown to the unrepresented defendants in the way they presented their case[10]. However, in another case, it was held that a judge had gone "too far in making allowances for a litigant in person" in granting indulgence when considering failures to comply with court procedures and orders[11].

3.30 The issue of appropriate judicial intervention and flexibility arises on legal points, procedural issues, evidential and presentational matters. While an opponent's legal representative has a duty to the court to bring to a judge's attention relevant law and authority, even if adverse to his or her case, judges have to be extremely cautious about, for example, suggesting a new cause of action, or a new legal point that has not been raised by any party, especially where the point is not obvious.

9 See Part 5 for further discussion of the rules.

10 *Steel v McDonald's Corporation* (1999), Unreported (31 March 1999). The court also said that they had "invariably been impressed by the care, patience and fairness shown by the [trial] judge" in dealing with the defendants who acted in person throughout a trial over a two-and-a-half year period; and the manner in which he had "full regard to them in his conduct of the trial".

11 *Tinkler v Elliott* [2012] EWCA Civ 1289 at [32].

3.31 It will usually be appropriate, indeed necessary, for a judge to point out to a litigant in person what the relevant procedural rules are. A more difficult area is suggesting a procedural step that the litigant might take. It will depend very much on the circumstances whether it is proper for a judge to suggest, for example, that an application for specific disclosure be made; if the judge considers that the case cannot be tried justly without the additional information, it will be appropriate. But some applications are tactical, and judges may find themselves accused of improperly 'descending into the arena', if they are not cautious.

3.32 Evidence and presentation is a particularly difficult area. Judges may reasonably make suggestions that would help an efficient trial, but not to the extent that they could be seen to be assisting in the presentation of a litigant's case.

The Jackson Reforms

3.33 The Working Group has noted that litigants in person can struggle to meet procedural requirements and that a flexible approach to proceedings can be helpful to them. There is, therefore, potential for the reforms flowing from Lord Justice Jackson's Review of Civil Litigation Costs (also effective from 1 April 2013) to impact considerably on litigants in person[12].

3.34 One of the twin philosophies underpinning the reforms to the Civil Procedure Rules (CPR) is the need to enforce compliance with rules, practice directions and orders. The overriding objective in CPR 1.1 and the rule governing relief from sanctions in CPR 3.9 have been amended to embed this objective.

3.35 Judges are being encouraged to be rigorous and robust in their application of the rules, emulating the experience of Singapore; and such an approach needs to be uniformly applied to all parties, whether represented or not[13]. Courts will expect compliance and will be slow to grant relief in the event of a default.

3.36 The challenge is, therefore, to ensure that litigants in person are made fully aware of what is required of them, in order that they are able to meet those requirements; and are made equally aware of the likely consequences of non-compliance.

Family proceedings

3.37 As with civil proceedings, after 1 April 2013, family judges and magistrates (and legal advisers) will be faced with a considerably greater number of litigants in person, in both children and finance proceedings.

3.38 Balancing pragmatism and maintaining confidence in judicial impartiality remains a challenge for the family judge, but one that is made somewhat more achievable by the nature of the rules

12 For more information on Lord Justice Jackson's recommendations see: http://www.judiciary.gov.uk/NR/rdonlyres/8EB9F3F3-9C4A-4139-8A93-56F09672EB6A/0/jacksonfinalreport140110.pdf

13 As stressed recently by the Court of Appeal in *Tinkler v Elliott* (at [32]), cited in footnote 11 above)

and procedures governing family cases. However, the highly sensitive and emotive nature of family proceedings, particularly those involving children, creates challenges of its own.

3.39 In many family cases the relationship between the parties has entirely broken down by the time the court becomes involved. The increasing absence of legal representatives to provide an 'emotional buffer', and a degree of objectivity, is likely to mean a rise in courtroom tensions. This will in turn mean that cases progress more slowly and agreed resolutions are harder to achieve. In some instances, the tensions may be such as to pose risks to the welfare and safety of the parties, or even the judge.

3.40 While the safety and vulnerability of parties and their children is a constant feature of family law, it is not always possible to tell from the evidence or papers that it is going to be a feature of a particular case. This presents handling difficulties; in a domestic abuse case, for example, should the judge allow the accused, who is unrepresented, to cross-examine the alleged victim? Again, there are obvious welfare and safety issues.

3.41 Judges will have additional issues to consider in respect of children, not just their welfare and safeguarding, but also to ensure that their voices are heard as required[14]. The vulnerability of parties, and of the children who are involved in the proceedings, may not have been adequately screened by pre-proceedings assessments[15]. As such, judges will have to be particularly alert to children's welfare and to issues relating to litigants in person specific to family courts, including the possible need for a child to be represented, or for the relevant local authority to be alerted as to their welfare[16].

3.42 There is likely to be a significant impact on the ability of CAFCASS to provide safeguarding information at the first hearing dispute resolution appointment. This may result in increased adjournments to complete safeguarding checks, and will further impact on the ability of the court to make an order at first hearing.

3.43 These challenges will not just be confined to cases about children. Financial remedy cases present their own difficulties due to their complex and emotive nature[17].

Tribunals' proceedings

3.44 In tribunals, while a high proportion of applicants traditionally do not have legal representation and the procedural framework is comparatively flexible, the Legal Aid reforms will nevertheless have a significant effect.

3.45 A particular issue for tribunals (albeit one that applies to some extent across all jurisdictions) is the impact Legal Aid reform will have on the valuable triage role lawyers and advice agencies have

14 The best interests of children have to be ascertained (where necessary by seeking the views of the relevant children) and taken into account in respect of any decision which involves children (Article 3 of the United Nations Convention on the Rights of Children, *ZH (Tanzania) v Secretary of State for the Home Department* [2011] UKSC 4 and *HH v Deputy Prosecutor of the Italian Republic, Genoa; F-K v Polish Judicial Authority* [2012] UKSC 25.)

15 For example, Mediation Information and Assessment Meetings.

16 Such as who will be responsible for funding in FPR 16.4 cases when the court decides, pursuant to FPR 2010; rule 16.2 and PD 16A, that a child should be made party to proceedings; or the need to order a report by a local authority under s 7 and 37 of the Children Act 1989.

17 The Working Group is grateful to Mrs Justice Parker for her ongoing work to produce guidance in this area.

traditionally carried out. In practice, this has meant that:

- People with claims that had little prospect of success have been diverted from commencing a claim.
- Those with justified grievances, particularly against public authorities, have been steered towards more appropriate sources of help, such as Ombudsmen.
- People with sound claims have been supported in achieving a satisfactory resolution without going before a tribunal.

3.46 Thus tribunals are likely to see an increase in legally meritless claims that would otherwise have been filtered out early by good advice.

3.47 As with civil and family cases, no matter how user-friendly a tribunal may be it cannot step beyond its impartial judicial role to assist litigants in person to prepare their case; and, as in the courts, if tribunals are not supplied with the relevant evidence access to justice will suffer.

Recommendation

3.48 All of the aforementioned issues underscore the need for litigants in person, irrespective of the nature of the proceedings they are involved in, to be fully informed, in a clear and straightforward manner, about the process, what is required of them, the consequences of a failure to comply, and the proper role of the judge.

3.49 While the judiciary can help to meet this objective; for example, by explaining clearly the relevant procedures and the reasons for the outcome of any application, or the claim itself, it is vital that HMCTS/MoJ direct sufficient work and resources towards ensuring that litigants in person have the information they need **before** they commence proceedings, **before** they are required to take any particular step in proceedings, and **before** they appear in front of a judge.

3.50 The Working Group recommends that particular emphasis is placed on the production of audiovisual material, such as online videos. This can be a highly effective way of informing litigants in person about what is required of them and what to expect when they go to court.

3.51 The Working Group was encouraged to note that some work has already been undertaken in this area, particularly in tribunals, with judicial involvement. The Group would strongly encourage HMCTS/MoJ to seek judicial involvement in the production of further material and is prepared to assist by brokering such involvement, if it would be helpful to do so.

3.52 The Group also considers that access to comprehensive and up to date online information will be increasingly important for litigants in person. The Group, therefore, recommends that HMCTS/MoJ undertakes, urgently, a thorough review of its web-based information, to ensure that litigants in person can easily access the information they need to understand and decide on the various courses of action open to them, and to prepare for, and present, their case in a court or tribunal.

4. Training and guidance for the judiciary

4.1 This part of our report considers the role of training and guidance for the judiciary in dealing with litigants in person – both vital for ensuring that judges (and magistrates) are equipped to deal with increasing numbers of litigants in person. It also refers to the importance of the judiciary (and staff) being aware of sources of advice and guidance for litigants in person.

The Judicial College

4.2 The Judicial College provides training to the courts and tribunals judicial office holders, both salaried and fee paid, and magistrates and legal advisers. For courts judiciary, the College operates in the following major fields:

- Induction courses.
- Civil law.
- Criminal law.
- Family law.
- Cross-jurisdictional courses (which may be attended by courts and tribunals judiciary).

4.3 The College also publishes bench books to assist the judiciary.

Training on litigants in person

4.4 There is no course exclusively dedicated to the subject of litigants in person. The issues they present are woven into the fabric of the different modules presented by the College. This recognises that the issues have traditionally been seen as jurisdiction-specific. The following table sets out the existing courses that have learning involving litigants in person:

Civil law	• Capacity Issues • Equality Act • Case Management • Trial Management
Criminal law	• None
Family law	• Private Law Induction • Vulnerable Parties – Private Law • Case Management – Private Law
Induction courses	**Deputy District Judge Induction** • Pre-reading – 'In the Steps of the Self representing Party' • Fairness and equality module has litigant in person scenarios • Litigants in person appear in two role-plays concerning debt and a Family Law Act injunction • There are six litigant in person scenarios in the 'enforcing the FPR' module **Recorder induction** • A one-hour presentation on litigants in person
Cross-jurisdictional Courses	• Dealing with high conflict and unexpected situations in the court or tribunal. Complete module – Business of Judging Course

4.5 Courses are constantly updated and altered, with consequent changes in content.

4.6 The Magistrates' Training Team uses scenarios and materials to enhance magistrates' and legal advisers' skills and knowledge in dealing with litigants in person; for example, so that chairmen can demonstrate competence 4.2 of the Competence Framework – "as the chairman managing court proceedings using appropriate communication skills".

4.7 Most tribunals have training programmes, at both induction and continuation level, covering subject-matter expertise, judicial skills and the social context of judging, all of which are relevant to conducting cases with litigants in person. Tribunals use various other measures to assist their judicial office holders in dealing with litigants in person. Typical of other tribunals, the Criminal Injuries Compensation Tribunal, for example, employs a number of approaches, including:

- Training course material.
- The Tribunal's Good Practice Guide addresses common issues in dealing with litigants in person.
- Non-judicial role players at training events provide feedback about their experience of role-playing a litigant in person.

4.8 In light of the increase in litigants in person in the higher courts, Mr Justice Foskett (the judge in charge of the High Court training programme) has organised after-court seminars on dealing with cases in which litigants in person feature, to which every High Court Judge has been invited.

Recommendation

4.9 The Working Group regards training on dealing with litigants in person as absolutely vital and acknowledges the valuable work of the Judicial College in this area.

4.10 The Group believes that the impact, across the board, of the Legal Aid reforms is likely to be such that the College should consider, urgently, the feasibility of developing a training course (or courses) on litigants in person. The format and content of such a course (or courses) should be a matter for the College.

4.11 The Working Group fully appreciates that this recommendation has financial implications for the Judicial College, and would very much wish to see it provided with the necessary additional resources to do the work, which the Group considers imperative.

4.12 It is further recommended that the design of all future training on practice, procedure, and judge-craft should have regard to the fact that a much higher proportion of court and tribunal users will be litigants in person.

Guidance on dealing with litigants in person

4.13 It is critical that high quality training is complemented by coherent, effective and up to date guidance.

4.14 While many judicial office holders in the civil and family courts, the tribunals, and the magistrates' courts, have experience of dealing with litigants in person, the need to provide guidance to those judicial office holders with less experience, and for the part-time judiciary, is obvious and pressing.

4.15 The Working Group was encouraged to note that the Judicial College has already begun work in this area, the Family Law Course Directors having asked Alison Russell QC to prepare guidance for family judges. The Group is also grateful to His Honour Judge Bailey for his work to adapt, at short notice, Ms Russell's draft guidance for use by civil judges (and for Ms Russell's cooperation in this task).

4.16 The aforementioned **draft** guidance (**Annexes A** and **B**) has been prepared with two aims in mind - to provide the judiciary with some immediate support and to promote a consistent approach. This should assist by providing guidance based on the legal framework of case law, procedural rules, and practice directions and, in so doing, promote a consistency of approach in their application to cases which feature litigants in person.

4.17 The Group has also noted that helpful guidance on litigants in person is contained within the Judicial College's Equal Treatment Bench Book and that District Judge Michael Anson has been asked to update the relevant chapter[18].

Recommendation

4.18 While recognising that there are differences in both the rules and the nature of the procedures which govern civil and family cases, and that these should be reflected as necessary in specific areas of guidance, the Working Group believes that there should be a single coherent source of guidance available to judges.

4.19 The Group, therefore, recommends that the Judicial College should begin, urgently, work to develop a 'litigants in person toolkit' for judges, utilising the aforementioned draft guidance and the relevant chapter of the Equal Treatment Bench Book. The overarching objective should be to draw together and rationalise this material into a single, consistent, and readily available resource for judges.

The importance of judicial awareness about guidance **for** litigants in person

4.20 In the context of Legal Aid reform, it is impossible to overstate the importance of litigants

18 The Equal Treatment Bench Book is available at http://www.judiciary.gov.uk/publications-and-reports/judicial-college/Pre+2011/equal-treatment-bench-book. The relevant part is at pages 21-40.

in person having access to proper sources of advice and assistance. While many of these services will themselves be affected by the reforms, they will remain an invaluable, if overstretched, source of assistance for litigants in person.

4.21 For judges (and staff) to be able to point litigants in person to these resources will become increasingly important after 1 April 2013. In order to be able to this, judges (and staff) need to be fully aware of what is available, both nationally and in their own areas. This is important because relatively well known organisations, such as the Citizens Advice Bureau, are complemented by numerous area-specific resources.

Recommendation

4.22 While many judges will be conversant, at least to some extent, with what is available in their locale and/or jurisdiction, a more structured and coordinated approach to making such information available to them, and to ensuring that it is kept up to date, is needed.

4.23 The Working Group, therefore, recommends that:

- The Judicial Office and MoJ/HMCTS should hold discussions, urgently, to establish the most appropriate way to develop a central online resource to which staff and judiciary could easily refer in order to identify nationally available sources of advice and assistance for litigants in person; further work to be informed by the outcome of those discussions.

- Designated civil and family judges, and, where appropriate, chamber presidents, as the most appropriate local judicial figures, should be given joint responsibility for ensuring that the judges in their respective areas are kept fully informed of locally available sources of advice and assistance for litigants in person.

5. The rules

5.1 For this part of our report, we have considered three types of court rules – those which govern civil proceedings, family proceedings, and proceedings in tribunals – and their effect on the ability of judges to adopt an appropriately flexible approach when dealing with litigants in person.

The context

5.2 The Group considers that the judiciary need to be given the confidence through training, judicial leadership, and support from appeal courts, to use their powers fully in order to ensure that litigants in person have effective access to justice.

5.3 Most procedural rules have an express overriding objective to deal with cases justly and, where that is not express, it is implied[19]. Generally, insofar as not inconsistent with any express rules, this enables a court or tribunal to adopt any procedure that results in a fair disposal of the case.

5.4 Although, to a great extent, these powers are already available, the Group considers that the relevant rules committees could usefully consider changes to rules in a few areas.

Civil proceedings

5.5 One of the key outcomes of Lord Woolf's extensive review of the rules governing civil proceedings was the recommendation for a shorter and simpler set of rules. It was intended that the Civil Procedure Rules (CPR) would be simple, clear and certain.

5.6 In fact, ten years or so on, the two volumes and supplements to Civil Procedure ('the White Book') now account for nearly 7,000 pages. In practice, the sheer breadth, use of technical terms, need to cross-refer, and supplementation by a host of Practice Directions, Practice Guides, protocols and court forms, present a picture of complexity that can be daunting for lawyers. It is a substantial challenge for any litigant in person.

19 *R (Deeds) v Traffic Appeal Tribunal* [2011] EWHC 1921 (Admin) at [15].

5.7 However, as we have indicated, the CPR do provide the basis for civil proceedings to be actively managed in a way that can, to some extent, ease the practical difficulties litigants in person face. The overriding objective set out in CPR Rule 1.1 places a duty on the court to deal with cases justly. This is supplemented by CPR Rule 1.3, which requires parties to assist the court in furthering the overriding objective, and by CPR Rule 1.4, which requires the court to actively manage cases so as to further the overriding objective. CPR 1 is further supplemented by CPR 3.1(2)(m), which provides the court with what Sir Henry Brooke (former Vice-President of the Court of Appeal [Civil Division]) described, extra-judicially, as an unfettered discretion to make any order to manage cases so as to further the overriding objective.

5.8 Taken together, these provisions can be used to facilitate access to justice for litigants in person; for example, by ensuring that, as far as possible, the parties are on an equal footing. A judge can, for instance, make case management directions that require a represented party to take practical steps to assist a litigant in person, such as providing photocopying facilities[20].

5.9 However, as noted earlier in this report, the Court of Appeal has recently emphasised that there are limits to the extent that such latitude may be applied[21].

5.10 The Working Group considers that, given the broad case management power and the need to ensure that it is used effectively and consistently with the overriding objective, a number of steps might be considered that would assist litigants without being procedurally overindulgent, or unfair to other parties.

5.11 Without pre-empting the result of any such consideration, the Group believes that the Head of Civil Justice and the Civil Procedure Rule Committee could usefully consider whether one or more of the following should be adopted:

- Provision of a dedicated rule that makes specific modifications to other rules where one or more of the parties is a litigant in person[22].
- Introduction of a specific power into CPR Rule 3.1 that would allow the court to direct that, where at least one party is a litigant in person, the proceedings should be conducted by way of a more inquisitorial form of process.
- Introduction of a specific general Practice Direction or new Civil Procedure Rule that would, without creating a fully inquisitorial form of procedure, address the needs of litigants in person to obtain access to justice while enabling courts to manage cases consistently with the overriding objective.

Family proceedings

5.12 The family justice system is currently undergoing wide ranging reform through the Family

20 See *Maltez v Lewis* (*The Times*, 4 May 1999).
21 See paragraph 3.29 above.
22 See Sorabji, *Promptly setting aside a judgment given in a party's absence:* Tinkler v Elliot, Civil Justice Quarterly (2013) 32(1) 9 at 13.

Justice Modernisation Programme[23]. The reforms will introduce a new procedural landscape, enabling judges, in appropriate cases, to adopt a properly inquisitorial approach to the conduct of cases. This is being adopted in order to support access to justice in light of the expected increase in litigant in person numbers.

5.13 The aim is to develop effective processes in private law cases to focus on the key issues and to keep to a timetable laid down by the court. For public law cases, the reforms also propose a more inquisitorial approach.

5.14 Changes to the Family Procedure Rules (FPR) to accommodate the new approach are being developed and are to be introduced, initially, on a pilot basis.

Tribunal proceedings

5.15 The position here is more complex due to the subject-specific and specialist nature of tribunals, including the various chambers of the First-tier and Upper Tribunals of the reformed system, each of which has its own procedural rules.

5.16 Although, as previously noted, tribunals will not be immune to the impact of the Legal Aid reforms, the tribunals were specifically developed to provide a more informal mechanism for resolving disputes. Most have traditionally had little or no legal representation of parties. As such, their proceedings are more attuned to the needs of litigants in person; and the greater prevalence of litigants in person, combined with the relative informality of proceedings, undoubtedly makes for a less intimidating environment on the whole than the courts.

Recommendation

5.17 The Working Group is of the view that, in light of the ongoing reforms to the family justice system and the already generally satisfactory arrangements in the tribunals, the most pressing issue is the operation of the CPR. The possible approaches outlined above will require careful consideration, by the Head of Civil Justice and the Civil Procedure Rule Committee, who have the expertise to do so.

5.18 The Group, therefore, recommends that the Judicial Office undertakes, urgently, further work to assess their merits. Any subsequent work would be informed by the outcome of that assessment.

23 For information on the Family Justice Programme see: http://www.judiciary.gov.uk/publications-and-reports/reports/family/the-family-justice-modernisation-programme

6. McKenzie Friends and other lay assistants

6.1 For this part of our report, the Working Group has considered the role of the McKenzie Friend and others who, as lay persons, may assist a litigant in person[24]. From April 2013, it is likely that there will be more such individuals, particularly in the court system; and there will be pressure to allow them to play an ever-increasing role.

The context

6.2 Litigants in person have the right to reasonable assistance from a lay person, and in refusing such assistance the right to a fair trial (protected by Article 6 of the European Convention on Human Rights) is engaged.

6.3 Traditionally, practice with regard to the use of such assistance has varied between different jurisdictions and, in particular, between the courts and tribunals respectively. The practice of the courts has evolved from the higher courts' inherent powers to allow representatives to speak and act on behalf of a litigant, although that position is now informed by Parliamentary intervention. The practice of tribunals has evolved through their express or implied power to manage their own procedure.

The current position in Courts and Tribunals

6.4 The courts have long since recognised the right to assistance in the form of a "McKenzie Friend" or lay assistant, i.e. a person who attends court as a friend of a litigant in person to take notes, quietly to make suggestions and to give advice. A court will only refuse if acceding would be inimical to the interests of justice; for example, if the individual is likely to be disrupt the proceedings. Refusals are rare.

24 The term 'McKenzie Friend' derives from *McKenzie v McKenzie* [1971] P 33, a decision by the Court of Appeal. Levine McKenzie, a petitioner in divorce proceedings, lodged an appeal on the basis that the trial judge had denied him the opportunity to receive limited assistance from an Australian barrister, Ian Hanger, who was not qualified to practice in the UK. The judge ruled that Mr Hangar must sit in the public gallery during the hearing, and that he could only advise Mr McKenzie during adjournments. The Court of Appeal subsequently ruled that the trial judge's decision had denied Mr McKenzie rightful assistance, in the form of taking notes, and quietly making suggestions and advice as the hearing proceeded.

6.5 Where the litigant in person wishes a lay person to conduct the litigation, or act as their advocate, different issues arise. The rights to conduct litigation and to act as an advocate in the court system are governed by the Legal Services Act 2007. Under that Act, both rights are restricted to professional lawyers whose professional body authorises them to act as advocates. Other than litigants in person themselves (who are the subject of a specific exemption), under the Parliamentary scheme lay persons can neither conduct litigation nor act as advocates for litigants in person; nor has a litigant in person any right to receive such assistance or to authorise such a lay person to act in such a way under a power of attorney[25].

6.6 However, prior to statutory intervention in this field, the court had inherent power to allow any individual to act as an advocate before it in relation to a particular case. That power is maintained in the 2007 Act by exempting the rigorous requirements of the statutory scheme for "a person who has a right of audience granted by that court in relation to those proceedings"[26].

6.7 Nevertheless, as it is clear from the 2007 Act and its predecessors that Parliament wishes, ordinarily, to restrict the right to act as an advocate to professionals, the courts have adopted a cautious approach to allowing lay assistants to be advocates in any case, although they have in practice been more flexible since the advent of the CPR.

6.8 Generally, the practice has been that where it will be beneficial to the fair and just determination of a case to have a lay person conduct a hearing on behalf of a litigant in person, then the right is granted in the interests of justice. However, there has in recent years been a substantial increase in "professional" lay advocates who, without the requisite training or regulation of a professional lawyer, seek to act as advocates for litigants in person in court on the payment of a fee. Some of these representatives charge fees which are similar if not more than those of a professional lawyer. Some are unable effectively to represent the litigant. Some are positively disruptive to the proceedings.

6.9 The courts have a similar power to allow lay persons to conduct litigation for litigants in person. Although litigants in person, without doubt, often have assistance in preparing their case, the power to allow a lay person to conduct litigation is very infrequently exercised, for obvious good reason; such individuals are not legally trained; they are unregulated and hence owe no obligations derived from such professional regulation; and they do not owe any obligation to the court.[27] These requirements are generally regarded as essential for the protection of other parties and to the proper administration of justice.

6.10 The representation of those acting in person has developed differently in the tribunal system, where the statutory constraints do not apply. Generally, lay representatives are far more frequent, often speaking for and even acting for an individual. These lay representatives are often from a charity or other voluntary organisation, which provide a vital resource to individuals in the tribunal system who would otherwise be without any support in often technical areas.

6.11 Lay assistants are, therefore, not a homogenous group. They may or may not be friends or family of the litigant. They may or may not have some legal training. They may provide their assistance free of charge, or for remuneration. They may be involved only in one case, or assist one or

25 *Gregory & Another v Turner & Another* [2003] 1 WLR 1149
26 Paragraph 1(2) of schedule 3 to the Legal Services Act 2007 (See, however, CPR PD 27 para. 32).
27 This has been underlined by the Court of Appeal's recent decision in *Re H (Children)* [2012].

more litigants in person on a regular basis. They may be provided by a voluntary organisation intent on assisting those who have become involved in a dispute in their field, or they may be a purely commercial organisation which gives assistance for monetary reward; or they may simply be 'busy-bodies'.

6.12 There are, however, broadly three different types of lay individual who help litigants in person; first, individuals who simply attend court with them to provide moral support or to help take notes; second, individuals who speak as advocates on behalf of the litigant during the hearing; and, third, individuals who conduct the claim for the litigant.

6.13 Although the term 'McKenzie Friend' is technically apt to describe only persons who fall into the first category, in practice the term is used in different ways to describe one or more, or all, of these categories[28].

The current Practice Guidance

6.14 In 2010, the Master of the Rolls and President of the Family Division issued Practice Guidance in relation to the role, right to receive assistance from, and remuneration of, lay assistants, including McKenzie Friends properly so-called. The Guidance is applicable only to the court system, not to tribunals.

6.15 The Guidance has been the subject of some criticism for its formal wording. The Group considers that the criticism misunderstands the role and purpose of the Guidance. It seeks to sets out a summary of the applicable law and principles established in various Court of Appeal authorities concerning the provision of assistance to litigants in person from any unqualified individual, not only in the role of McKenzie Friends, but also as lay advocates, providing a useful guide for judges and lawyers to the law in this area.

6.16 The usefulness of the Guidance has recently been emphasised in *Graham v Eltham Conservative & Unionist Club and Ors* [2013] EWHC 979 (QB), in which Mr Justice Hickinbottom also gave further suggestions as to the practical approach to applications by litigants in person to be allowed a lay advocate, including information a court may require to enable it to make a properly informed decision on whether to grant a lay person the right to speak. That additional guidance is attached at Annex C.

6.17 When it was originally conceived and issued in 2004, the Practice Guidance was not intended to be aimed at, or assist, litigants in person directly; it was intended to be complemented by a specific guide prepared by HMC[T]S for litigants in person[29].

6.18 There is no formal guidance covering all tribunals. Generally, without the statutory constraints and with the availability of good quality representatives from voluntary organisations, a more flexible approach has been adopted in tribunals.

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28 The Practice Guidance (McKenzie Friends: Civil and Family Courts) [2010] 1 WLR 1881 defines the role of McKenzie Friends as limited to that defined in that case itself (paragraph 2). It expressly reiterates the prohibition on McKenzie Friends, as such, from addressing the court (paragraphs 3 and 18). The Practice Guidance goes on (in paragraphs 18-26) to consider the court's powers in granting a lay person a right of audience and/or a right to conduct litigation.

29 The Working Group has been unable to establish the existence of such a document.

The Civil Justice Council's recommendations

6.19 The Civil Justice Council made two recommendations about McKenzie Friends in its report (which, again, are only directed to civil justice in the court system)[30]:

- A Court Notice of McKenzie Friends should be adopted. This would be filled in by the claimant/defendant and handed to the court usher before a hearing. It would provide the judge with information on why the party wanted to exercise their right to have a McKenzie Friend, the nature of their relationship with the McKenzie Friend, and the McKenzie Friend's contact details. The Notice would also to require the McKenzie Friend to specify whether they had read the Practice Guidance (which would be made available at all courts).

- A Code of Conduct for McKenzie Friends should be agreed. Unlike the Practice Guidance, this would be aimed at McKenzie Friends and litigants in person, and would state very clearly the 'do's and don'ts'.

6.20 The Working Group also noted that the Civil Justice Council's report provided drafts of these documents. The family judges in Manchester have prepared similar documents, which are already in use there.

Recommendations

6.21 The Group notes that the experience of lay assistants varies according to jurisdiction. In the court system, there is an increasing incidence of lay individuals seeking permission to act as a lay advocate for payment: generally, they are not allowed to act as advocates as such representation is not permitted by the statutory provisions, is unregulated, is subject to no duty to the court and is generally not in the interests of justice. On the other hand, there are many in the court system who benefit from having a more articulate friend speak on their behalf; and there are sections of the tribunal system in which representation by voluntary section lay representatives is very valuable.

6.22 The Group recommends that the Judicial Office considers, urgently, rationalising the historic differences between practice in the court system and practice in tribunals, as part of a wider review of lay assistants. That review should have as its objective the issuing of further guidance – if possible, covering both courts and tribunals – that focuses on the overriding objective of dealing with cases justly and at proportionate cost, and seeks to maximise the positive benefits that lay assistants can provide to the effective administration of justice, whilst ensuring that the possible negative effects are also addressed. The Group considers that, where lay representation is allowed for a particular case, then it is vital that all are fully aware of the role the representative is playing, and the scope and restrictions on that role. Consideration should also been given to how the documents already being used in Manchester are working in practice and whether they could be adopted generally.

30 See 'Access to Justice for Litigants in Person', Chapter 11.

6.23 More specifically, the Group recommends consideration of the merits of introducing into the CPR and FPR, as has recently been introduced in Scotland, rules governing: i) the exercise of the right to reasonable assistance; ii) the right to conduct litigation; and iii) the right to exercise rights of audience[31]. Whether by way of Practice Direction or rule or both, in the latter two cases, such provision could provide guidance as to how the court's inherent jurisdiction to grant such rights, which is preserved by the Legal Services Act 2007, should be exercised. Such Practice Direction or rule could helpfully replace, revise or codify the present case law authorities.

6.24 The Group also recommends that consideration is given to the terminology used in respect of those who assist litigants in person. The term "McKenzie Friend" strictly applies only to those who sit quietly by and assist a litigant in person in court; but increasingly it has been used to cover all lay assistants no matter how extensive their role, including those who have been given the right to speak for a litigant in a particular case. It has led to a misunderstanding by some that lay assistants have a right to be an advocate.

6.25 In the Working Group's view, the Head of Civil Justice and Heads of Division should consider, urgently, the terminology that should be used, including whether the term "McKenzie Friend" continues to be useful.

6.26 That review of terminology should, in the Group's view, include consideration of whether different terms should be adopted to reflect the various roles that a lay person may play in assisting a litigant in person, for example where the litigant simply seeks to exercise their right to receive reasonable assistance from a lay individual, where a lay person is granted a right to exercise rights of audience, and where a lay person is granted the right to conduct litigation.

6.27 The use of such differential terms might act as a helpful reminder to the court in each particular case to identify precisely the role that a lay assistant is playing. However, the Group is sensitive to the fact that some lay assistants who are "professionals" may try and use such terms for the purposes of publicity and advertising. The Group considers that would be unfortunate and unhelpful, and may lead to members of the public being misled as to the rights and abilities of such individuals. Therefore, there may be advantages in using a single term to cover all of these roles; with appropriate guidance to judges to ensure that the role of any assistant in each particular is clearly identified.

6.28 In the Group's view, the term "McKenzie Friend", despite its current misuse, and even abuse, should not be abandoned unless and until a considered conclusion on the best terminology is reached.

6.29 The Working Group hopes, and recommends, that the terminology settled upon will form part of the Practice Direction or rule referred to above.

31 Chapters 12a and 12b of the Rules of the Court of Session: http://www.scotcourts.gov.uk/rules-and-practice/rules-of-court/court-of-session-rules

7. Vexatious litigants

7.1 As the Civil Justice Council reported, the vast majority of litigants in person are "legitimate users of the system"[32]. However, a very small proportion of litigants, through repeated and often relentless applications, which are without any legal merit, consume an enormously disproportionate amount of judicial (and, particularly, staff) time and resources.

7.2 The Group considers it is important also to address the problem posed by such individuals, few as they are. Access to justice does **not** mean an unfettered access to the courts to pursue frivolous claims and applications. Justice involves a proportionate amount of time and resources being devoted to a particular case. Where the time and resources devoted to one case are disproportionate, that effectively denies parties in another case their fair and timely share; and hence denies them justice.

7.3 The courts need to be vigilant. With the further pressures on court and judicial time and resources, those who, after due warnings and opportunities to cease, continue to waste time with meritless claims and applications need to be identified and dealt with robustly and swiftly.

7.4 Action may include declaring claims and applications "totally without merit", where appropriate; and the use of appropriate orders restraining individuals from bringing or pursing claims and applications without express permission of the court[33]. Such orders do not deny any individual justice (where any claim or application has any possible merit, permission will be granted), but they do prevent the wastage of the time and resources of opponents, and the court, on matters of no possible merit.

Recommendation

7.5 The Working Group recommends that judges are strongly encouraged, through appropriate judicial leadership channels, to take a proactive and robust approach to dealing with vexatious litigants, in particular, where appropriate, by declaring claims or applications "totally without merit"; and the use of appropriate orders restraining individuals from bringing or pursing claims and applications without express permission of the court.

32 'Access to Justice for Litigants in Person', Civil Justice Council, paragraph 31

33 Such orders include Civil Restraint Orders under CPR Rule 3.11 and CPR 3 PD3C; Civil Proceedings Orders under section 42(1) of the Senior Courts Act 1981; orders under the Prevention of Harassment Act 1997; and orders made under the inherent powers of the court (see Ebert v Venvil [2000] Ch 484). For CPR 3 PD3C see www.justice.gov.uk/courts/procedure-rules/civil/rules/pd_part03c. Mr Justice MacDuff has prepared templates for Civil Restraint Orders, which the Group commends.

8. Conclusions and summary of recommendations

8.1 The challenges created by the Legal Aid reforms began in earnest, rather than ended, on 1 April 2103. Work to support the judiciary in helping to meet those challenges will be an ongoing task requiring commitment and cooperation from all of the key interests.

8.2 We trust that the recommendations contained within this report, and summarised below, will contribute to the productive and good work that is already ongoing under the auspices of the Civil and Family Justice Councils, and within HMCTS/MoJ, towards enabling the courts and tribunals to ensure that litigants in person are provided with their fundamental right to have access to justice.

8.3 Subject to the views of the Master of the Rolls, who constituted the Group, the Working Group proposes to remain extant beyond the completion of this report to oversee the implementation of its recommendations (if they are accepted) and to produce a 'stock take' report in twelve months' time, or earlier if requested to do so by the Lord Chief Justice and Senior President of Tribunals.

Summary of recommendations

Information

i. MoJ/HMCTS should devote the necessary work and resources to:

- Producing, with judicial involvement, audiovisual material to inform litigants in person what is required of them and what they can expect when they go to court.

- Undertaking, urgently, a thorough review of its web-based information, to ensure that litigants in person can easily access the information they need to understand and decide on the various courses of action open to them, and to prepare for, and present, their case in a court or tribunal.

Training and guidance

ii. The Judicial College should consider, urgently, the feasibility of developing a training course (or courses) on litigants in person.

iii. The design of all future training on practice, procedure, and judge-craft should have regard to the fact that a much higher proportion of court and tribunal users will be litigants in person.

iv. The Judicial College should begin, urgently, work to develop a 'litigants in person toolkit' for judges, utilising existing draft guidance and the relevant chapter of the Equal Treatment Bench Book.

v. The Judicial Office and MoJ/HMCTS should hold, urgently, discussions to establish the most appropriate way to develop a central online resource to which staff and judiciary could easily refer in order to identify nationally available sources of advice and assistance for litigants in person; further work to be informed by the outcome of those discussions.

vi. Designated civil and family judges, and, where appropriate, chamber presidents, as the most appropriate local judicial figures, should be given joint responsibility for ensuring that the judges in their respective areas are kept fully informed of locally available sources of advice and assistance for litigants in person.

Procedural rules

vii. The Judicial Office should undertake, urgently, further work to assess the merits of three proposals:

- Provision of a dedicated rule that makes specific modifications to other rules where one or more of the parties to proceedings is a litigant in person.
- Introduction of a specific power into CPR Rule 3.1 that would allow the court to direct that, where at least one party is a litigant in person, the proceedings should be conducted by way of a more inquisitorial form of process.
- Introduction of a specific general Practice Direction or new Civil Procedure Rule that would, without creating a fully inquisitorial form of procedure, address the needs of litigants in person to obtain access to justice while enabling courts to manage cases consistently with the overriding objective.

Lay assistants

viii. The Judicial Office should consider, urgently, rationalising the historic differences between practice in the court system and practice in tribunals, as part of a wider review of lay assistants.

ix. The Judicial Office should consider, urgently, the merits of introducing into the CPR and FPR, as has recently been introduced in Scotland, rules governing: i) the exercise of the right to reasonable assistance; ii) the right to conduct litigation; and iii) the right to exercise rights of audience.

x. The Head of Civil Justice and Heads of Division should consider, urgently, the terminology that should be used, including whether the term "McKenzie Friend" continues to be useful.

Vexatious litigants

xi. Judges should be strongly encouraged, through appropriate judicial leadership channels, to deal proactively and robustly with vexatious litigants, in particular by declaring appropriate claims and applications "totally without merit" and through the use of orders restraining individuals from issuing and pursuing claims.

Annex A: Draft Guidance (Civil Proceedings)

Draft Guidance for judges conducting case management conferences and hearings involving litigants in person (Civil proceedings): His Honour Judge Edward Bailey, April 2013

Introduction

1. Many, if not most, members of the judiciary will have had considerable experience in dealing with cases where a party, or both, is in person and it is not intended that this guidance should seek to replace that knowledge or prescribe the manner in which each judge deals with litigants in person.

2. It is, however, intended particularly to assist part-time judges and those less experienced in dealing with litigants in person, and to provide a framework which will promote a consistency of approach in applying current procedure rules to cases where there is no legal representation.

The legal framework

3. The role of the judiciary remains the same whether the case involves represented or unrepresented parties.

4. Whilst the approach may differ, the law and legal framework for cases involving litigants in person is no different; the need to conduct proceedings in a manner that is ECHR compatible and consistent with the CPR remains.

5. Article 6 applies to all civil and family proceedings. The components for a fair trial include:

- The right to be heard.
- The right to challenge evidence.
- All parties having access to the same evidence/documents (equality of arms).
- The right to know the case against you.
- The right to a decision affecting a person's rights (the court's decision).

- To be present and participate in hearings pertinent to the case.
- A reasoned decision.

Preliminary – identify the issues

6. Proper pleading, effective preparation for trial, and efficient trial hearing is dependent on identifying the issues in the case, both factual and legal.

7. First and foremost, where the litigant in person is the claimant, or is bringing a counterclaim, judges should check that there is a cause of action known to law.

8. Many cases will be relatively straightforward, involving only a few easily identifiable issues; for example, possession claims where there is no doubt as to the nature of the tenancy held by the defendant and the ground on which the landlord seeks possession, or consumer disputes where it is clear that the plaintiff purchased the goods from the defendant and the issue is the quality of the goods sold. Other cases will be more complicated, involving several issues of fact and, perhaps, issues of law.

9. Even in straightforward cases it is important for the judge to be aware of the issue(s), both when the trial starts and when he comes to give judgment.

10. In more complex cases, identifying the issues helps to avoid an unstructured trial with irrelevant evidence and unnecessary documentation, inappropriate points being pursued in questioning and, ultimately, an unsatisfactory judgment being delivered.

11. There will be some cases which first come before a judge at trial. Primarily, these will be possession claims. Guidance on handling these claims, provided by District Judge Paul Ayers, is at (**Paragraph 80** onwards).

12. In **small claims cases**, it is anticipated that judges will adopt a very 'hands-on' approach, which will avoid any unnecessary formality. Nevertheless, judges must have a firm eye on the relevant law. This will require a clear identification of the issues, at least in the judge's mind, even if it is not considered essential in every case to explain all of the legal concepts of an issue to the parties or to require the issues formally to be identified.

13. The following sections apply to **fast-track** and **multi-track** cases.

Early and thorough case management

14. Early identification of the issues is essential once it is clear that there is a proper cause of action in the claim (and any counterclaim). This applies to all cases, whether or not one or both parties are litigants in person.

15. In every case where judges cannot be absolutely sure that all parties are aware of the issues in

the case (and will be able to address those issues), the judge should assist the parties to identify the issues and to clarify them when necessary.

16. The parties should ordinarily be directed to prepare and agree a written list of issues. Parties should be made aware that issues may be added, deleted or clarified by reformulation or sub-division as the case progresses through its interim stages, and even at trial.

17. Judges may decide, preferably in discussion with the litigants, whether it is helpful to have sub-issues or use an "if yes then.. if no then…" formulation of the issues.

18. Parties will usually need to be advised that additional issue(s) may be raised, subsequent to the first case management conference, as the case progresses through its various phases.

19. Requiring the parties to identify any additional issue(s) in writing is useful, as is an order which makes clear that only issues identified in writing may be contested at trial (subject to the discretion of the trial judge).

20. Where there is a litigant in person, identifying the issues will require the judge to identify the cause(s) of action arising in the claim (and any counterclaim).

21. It may also be helpful to give a brief explanation as to the concept of a legal cause of action, and the need to have a cause of action to found a claim. The essential ingredients of the cause(s) of action in the case being managed will need to be identified. Against this background, the parties should be asked to identify the issues in the case.

22. It is entirely appropriate for judges, particularly when dealing with litigants in person, to assist in identifying the issues. Indeed, it should be seen as the judge's duty to manage the case so that the issues are clearly identified.

23. Whether a formal list of issues should be required will depend on the nature of the case and the manner in which the respective parties have settled their pleadings; it may be clear from the particulars of claim and defence (and any counterclaim) that both sides have a good grasp of the issues. However, if pleadings appear to be set out in a discursive or disjointed manner, this can help to alert judges to the need for clear and formal identification of the issues.

24. Once the issues have been identified and, where appropriate, clarified, judges will usually need to:

- Ensure that each side's pleadings have properly addressed the issues in the case, and give an order for amendment, or additional pleading as necessary. (It may be necessary to inform the parties that the trial judge is not allowed to give judgment for a claim or counterclaim that is not pleaded.)

- Advise the parties that the issues are of paramount importance when considering disclosure, the preparation of witness statements, and any need for expert evidence.

25. It is perfectly proper for the case management judge to advise the litigant in person to look at his claim or defence objectively and ask himself how an independent judge might see it. But this

requires sensitive handling; litigants in person should never be left with the sense that the court is simply not interested in their case.

A chronology

26. In most cases it is very helpful for both the parties and the court to have a chronology.

27. Advising or ordering the litigant in person and their opponent to prepare, and if possible agree, a chronology will therefore frequently be of assistance. Having to set out the substance of the dispute in date order can assist a litigant to see how the matter unfolded. This can aid objectivity.

28. A chronology will also usually be helpful to the trial judge. Many judges include an order to agree the chronology, if possible. In the absence of agreement, judges may consider advising or ordering a chronology which includes everything both sides want included, but with any disputed date or event highlighted in some way. Typically, a three column chronology will suffice, as follows:

- Date.
- Event.
- Reference (to a document or witness statement).

Robust case management

29. Following the introduction of new case management and costs regime following the Jackson Report, judges are required to manage cases much more robustly. That will apply, whether or not there are parties who are in person. It is essential that litigants in person are informed in advance that a strict approach will be taken to compliance with orders, and of the likely consequences of noncompliance.

30. Judges should bear in mind that litigants in person may have received, or may be receiving, advice from a Citizen's Advice Bureau, law centre, or pro bono unit. Litigants may have been told, in good faith and in the context of the pre-Jackson regime, that, for example, the court will not apply a sanction without first imposing an 'unless order'. It will take time for the adoption of a stricter approach to percolate through to the volunteer advice sector. That makes it all the more important that a litigant in person is informed as part of the court process of what is required of him, and the sanction if he fails to comply.

Particular aspects of case management

Disclosure

31. Judges should consider that many litigants in person will find it helpful to have some

explanation of the concept of disclosure and their duties in that respect. Most cases, whether multi-track or fast-track, will benefit from the first case management conference (CMC) taking place before an order for disclosure is made.

32. In multi-track non-personal injury cases, litigants in person may unwittingly breach the new CPR Part 31.5(3) with its requirement that each party must file and serve a disclosure report not less than 14 days before the CMC is held. If so, judges should consider giving an explanation of the requirements and request, in effect, an oral disclosure report to the court.

33. Whether or not the court has received a disclosure report (in writing or orally) from the litigants, judges who have the issues before them should be in a position to make a preliminary decision as to the type of disclosure order that is appropriate for the particular case, against the background of CPR Part 31.5(7).

34. Usually, it will be advisable to raise the practicality of this order with the litigants, but judges may, if appropriate in the circumstances, reasonably consider the default position of standard disclosure. The duties of standard disclosure can usually be explained in two sentences, but explanation may also be helpful on such matters as:

- The concept of a document being in a party's control.
- The need for any copies of documents containing modifications or obliterations to be disclosed, as well as the original version.
- The continuing nature of the duty to disclose.

35. Electronic disclosure is an increasingly important aspect of disclosure. Judges need to ascertain from the litigants the extent to which a detailed order may be required with respect to electronic documents, and the possible need to require the parties to exchange electronic documents questionnaires.

36. Judges are asked to be very wary of making an order dispensing with disclosure. This will be a very unusual order. Before making it, judges should consider the risk that a trial hearing may have to be aborted because a document is produced by one party which has an important bearing on the outcome of the case, but which catches the other party by surprise.

Witness statements

37. The new CPR Part 32.2(3) gives judges considerable discretion to control witness statements. Please give serious consideration to using this discretion. In particular:

- Stress to the litigants, both represented and in person, that the witness statements should a) address the issues and b) not address anything else (apart from essential background).
- Advise litigants in person that while their statement, and in the occasional case the statement of another prime mover in the relevant events, may properly give the essential background to the dispute, the statements of supporting witnesses should be carefully

confined to the issues they deal with. Judges may usefully discuss with litigants in person the issue(s) each of their witnesses will cover, and an order may be made restricting the witnesses to those issues. Where no order is made to limit the issues covered by individual witnesses, it may still be helpful to require litigants to identify each issue covered by the witness in the witness statement itself.

- Require numbered paragraphs.

- Stress that witness statements should be confined to factual matters and should never contain statements of opinion.

- Where the witness does not have English as a first language, the litigant should be informed that the manner in which the statement has been prepared must be clear on the face of the statement. (Ideally the witness should make the statement in their mother tongue and it should be translated by a competent interpreter who should make a suitable endorsement to the statement. Alternatively, if the statement has been written in English and translated, it must be explained how the witness's words came to be written in English and who translated it when the statement of truth was signed.)

Expert evidence

38. Judges should consider whether it is necessary to explain to litigants in person what 'expert evidence' is and stress that only an 'expert' witness may express an opinion.

39. Expert evidence is an area where the judge may very properly engage in a discussion as to the need for such evidence, the expertise required, where an expert witness may be found, the extent of expert evidence, and whether there should be a single joint-expert rather than each party calling its own expert. Where one party is a litigant in person, and cost is a particular issue, there is added benefit to having a single joint-expert.

40. Litigants in person will almost invariably need to be directed to CPR Part 35, and perhaps have the basic requirements explained. However, most professional organisations give advice to, and even run courses for, their members, so that an individual expert may be able to assist the litigant in person as to the requirements of CPR Part 35.

41. It may often be advisable to inform litigants in person of their right to ask questions; and if an order is made specifying the date by which questions have to be posed, this will usually be sufficient to alert the litigant to the possibility.

42. Where the court decides that each party should have its own witness, the case management judge should give thought to the appropriate order for reports and 'without prejudice' meetings.

43. The standard approach is to order exchange of reports, a 'without prejudice' meeting (with or without an agenda agreed by the parties), and a joint statement of matters agreed and not agreed, with reasons for any disagreement. The order might also cover questions to the experts and the time by which they have to be submitted. Where one party has already obtained an expert report, this approach will usually follow. But the alternative approach is to order the experts to hold their

'without prejudice' meeting before reports are exchanged, for the experts to prepare a list of agreed and not-agreed issues, and then serve their individual reports limited to those issues which are not agreed. This approach has two advantages:

- An expert who has not already committed himself in writing is the more likely to consider and see the merits of another argument.
- The restriction of expert reports to those matters which are not agreed keeps each report shorter and the cost of the report lower.

44. These are important considerations in every case, but all the more important where one party is a litigant in person who has a particular concern about the cost of expert evidence.

CPR Part 18: Further information

45. There will be cases where litigants in person raise concerns about, or otherwise appear unsure of, an aspect of the other side's case. Case-managing judges should consider whether it would be appropriate to direct the litigant's attention to the possibility of making a request under CPR Part 18.

Costs management in multi-track cases

46. Cost management is inseparable from case management. Judges will need to inform litigants in person what proportionality, in the context of proceedings, means. Litigants in person who face represented litigants should be informed that, while they have no obligation in this respect, the represented litigant is required to file a budget, and that the litigant in person has the right to make submissions when the court makes a costs management order. However, the judge always has an obligation to give proportionate directions, so the potential future cost of any step in the litigation will be relevant in any event.

47. The litigant in person should be told about, if not introduced to, 'Precedent H'.

48. Understandably, few litigants in person will have any expertise on costs. To avoid unnecessary representations about an opponent's 'Precedent H' it is suggested that litigants in person are informed that their primary concern should be that the other side does not make the case seem over-complicated, or suggest that there are more issues between the parties than there are, so as to justify higher costs.

49. Litigants in person should be informed that while they are entitled to challenge any matter raised by an opponent, challenges should be restricted to the determinative issues raised in the opponent's claim or counterclaim, which can properly be contested. The more issues there are, the higher the costs bill that an opponent can justify. It is for the court to ensure that the issues are restricted to those that will be determinative.

Interim applications

50. When making interim applications, litigants in person will vary in their articulacy. Some may struggle to make sufficiently clear what they are seeking and why, and applications may be not supported by evidence.

51. In cases where applications are clearly legally misconceived, they may properly be disposed of summarily. In all other cases, if it is reasonably apparent to the other side what the litigant is seeking, it will be inappropriate to dismiss an application summarily simply because a litigant in person in unfamiliar with court procedure. The court must grapple with the merits of such an application.

52. In some instances, court staff may detect a defective application and put if before a judge. A carefully framed order; for instance, "the applicant is to specify clearly what order he is hoping to obtain, to serve the evidence in support of his application, and to produce for the judge a bundle comprising pleadings, list of issues, etc.." should then ensure that the application proceeds smoothly, particularly if the respondent is required to serve any evidence on which they wish to rely well before the hearing, and there is a requirement for skeleton arguments.

53. In all other instances, judges will have to be guided by the circumstances; judges should, however, be prepared to make some efforts to ascertain what the applicant is seeking and whether, without doing injustice to an opposing party, an appropriate order may be made. Remember that the overriding objective, which requires the court "to deal with cases justly and at proportionate cost", applies as much to the judge's approach to progressing the case as to the parties' behaviour before, and at, a hearing.

Pre-Trial Review

54. Ideally this review should be carried out by the trial judge, but this may not always be possible.

55. The pre-trial review (PTR) in a case with at least one litigant in person should ordinarily be carried out at a court hearing. The order for a PTR may usefully specify that the claimant produce a bundle for the judge, comprising the pleadings, case management and other interim orders, lists of documents, witness statements and any expert reports, together with "any other document to which the court might be referred during the hearing".

56. If the judge conducting a PTR is not the trial judge, it is important to make sure that everything is done which the trial judge might reasonably expect to ensure a smooth and expeditious hearing.

57. The trial bundle is particularly important. Where the claimant is a litigant in person and the defendant is represented, the defendant's lawyer might be invited to prepare the trial bundle, but only after the claimant has been advised that this task usually falls to claimants, and he is entitled to do so if sufficiently conversant with what is required.

58. Individual courts have their own approach to bundles; some prescribe in detail while others refer to the Practice Direction or the relevant Guide in specialist cases. Whatever approach the individual judge adopts, it is important to ensure that the party who prepares the bundle knows precisely how it is required to be done for that particular court.

59. Some litigants in person may be surprised to receive a draft index for a trial bundle from the solicitors for their opponents without an accompanying letter with a clear explanation that the litigant in person is expected to check through the index, add any documents which are not included already, and may object to any document. A brief explanation at the PTR of what is required will be helpful in this regard.

60. The parties should always be ordered to file skeleton arguments. However, simply ordering a 'skeleton argument' is usually not enough, particularly where a litigant in person is involved. The order needs to set out precisely what is required of the document. Unless there is a very good reason not to do so, the order should recite that the party filing the skeleton argument should identify the issues in the case and set out their own case in respect of each issue. The order should also make it clear how the skeleton argument is to be filed.

Judicial boundaries

61. In the past, judges have differed on their approach to giving assistance to the litigant in person. This is a difficult and sensitive area, that is necessarily context-specific, depending always upon the circumstances of a particular case.

62. Issues will always have to be defined, and it is a responsibility of the judge to ensure they are identified. Litigants in person may need some assistance in identifying those issues that will determine the case. Once the issues have been defined, it must be made clear to a litigant in person that it will be necessary for him to adduce the evidence needed to make his case on each issue, in respect of which the burden of proof lies on him, and any evidence he relies upon to undermine the case of his opponent. However, beyond that, litigants will usually have to be told that judges cannot involve themselves in the identification of possible sources of evidence, or how to tap such sources. The case management judge may usefully consider the following questions:

- Is my discussion with the litigant in person directed to a matter which may assist the trial judge to conduct an orderly, expeditious, and cost proportionate trial of the issues?
- Am I, or might I be seen to be, descending into 'the arena'?

The hearing

63. While this is a matter for the individual trial judge, all trial judges should aim to put the litigant in person at ease, while maintaining the dignity of the court. No judge should allow procedure to override substance.

64. Trial judges should consider a short introductory exchange with a litigant in person, where

the judge discovers whether the litigant has previous court experience and outlines how it is proposed the trial should proceed, even where (as will usually be the case) the judge proposes to follow the standard order of doing things.

65. Judges should be pragmatic where it assists a smooth trial in which both sides consider that they had a fair opportunity to present their case. Allowing some questioning in chief, interposing a witness, recalling a witness to deal with a particular matter which was not covered when they originally gave evidence, having witnesses, (particularly expert witnesses), who deal with the same subject matter heard one after the other are all examples of effective trial management.

66. Given the cost of expert witnesses, good trial management will endeavour to keep their attendance to the necessary minimum.

67. Taking the expert witnesses in a separate section of the trial is a regular practice. The practice of 'hot-tubbing' has proved extremely successful in many TCC cases and there is no reason why it should not be adopted in other trials. However, care needs to be taken; in a TCC case, with two professional experts essentially talking the same language, going through a lengthy 'Scott Schedule', 'hot-tubbing' is an ideal approach for both the parties and the judge, who can hear the experts on each of many issues before moving to the next. However, it is a practice which may not lend itself to expert evidence in other cases.

68. There is every reason for the judge to advise litigants in person that they should cross-examine an opponent's witnesses on those issues where they do not agree with the opponent's case, pointing out potential flaws in their reasoning, or inconsistencies with relevant contemporary documents.

69. It is perhaps even more important for the judge to point out, gently, that cross-examination is not a time to make submissions or a speech. There will be occasions where the judge needs to explain the concept of cross-examination as to credit, and where the litigant is bound by answers given.

70. The judge will wish to restrict cross-examination on wholly extraneous material. A gentle comment along the lines of "where is this going" or "how is this going to help me" is usually sufficient.

71. Where the only litigant in person is the defendant, it is frequently better to have the claimant's advocate make their speech first, allowing the defendant to respond to the points made.

72. Points of law should be carefully explained, particularly where the judge's preliminary view is against a litigant in person.

McKenzie Friends

73. There is already Practice Guidance on McKenzie Friends and others who a litigant in person may wish to assist them, e.g. as a lay advocate[34]. This Guidance is very useful, and it is expected that more will follow. For the present, judges should be aware of and follow this guidance, bearing in mind

34 Practice Guidance (McKenzie Friends:Civil and Family Courts), 12th July 2010 ([2010] 1 WLR 1881).

that litigants in person have the right to reasonable assistance from a lay person (and that refusing that right will engage Article 6), but that the court should approach an application for a lay advocate to speak on behalf of a litigant in person with caution. Allowing a lay person to conduct litigation requires extraordinary circumstances, and will be very rare.

74. For many judges the approach will depend upon the credentials of the individual, the circumstances of the litigant in person, and the nature of the case and hearing.

75. It is perfectly proper for judges to vary their approach, on the one hand between the litigant in person who is reasonably articulate and the litigant in person who really cannot do himself justice in the court room; and between a proposed lay assistant who is a close family member or friend who adopts a helpful tone and approach to the proceedings, and one who appears to offer the litigant in person no help whatever. Any decision needs to be taken in the light of the Practice Guidance and the overriding objective.

Judgment

76. It is important that every litigant understands what it is that the court has decided, and why it has reached that decision. In most cases it will be clear to the litigant in person from the judgment who has won and who has lost, and why. But there will be some cases where it is not so obvious. It will fall to the judge to explain the result to the litigant.

77. Questions of costs, interest, permission to appeal, and the correct court to which to appeal will also usually need to be explained.

78. Judges are required to inform the litigant of the appropriate route of appeal, and the judge must be ready to complete Form N460 in terms that the litigant in person will understand.

79. Where the decision against a litigant in person is wholly or partly dependant on the law, this should have been explained when final submissions are being made; if not, and if the point of law concerned has not been clearly explained in the judgment, it is good practice for the judge to give a brief explanation to a disappointed litigant who has shown willingness to listen and engage with the issues during the trial.

Possession claims

80. It will usually fall to District Judges to face a busy list of possession claims where no more than a few minutes have been allowed for each case.

81. This can impose quite a strain on the judge, and this may become more so following the changes in Benefits, in particular the fact that Housing Benefit will no longer be paid direct to landlords. Arrears will probably rise more quickly and Ground 8 claims become more common.

82. However, it is insufficient to listen shortly to a defendant's story, and then merely say 'I have to find against you', even where, as a matter of law, the application is clear cut.

83. It takes only a minute or so to think about the steps the judge has to go through out loud so that the litigant who is prepared to listen can at least understand the general process, particularly when mandatory grounds are invoked. Something along the lines of:

> *"Parliament has closely controlled the law here in the Housing Act. I have to be satisfied that the strict rules have been complied with based upon your tenancy. The tenancy complies with the requirements as does the notice bringing it to and end. I am satisfied that the Landlord has proved the ground for possession.*
>
> *I must make a possession order/but it is reasonable for me to suspend that and give you a chance to clear the arrears. This means you must make the payments and a failure to do so may lead to your Landlord enforcing the order by applying for a warrant of possession*
>
> [Or]
>
> *I must make a possession order as I have no power not to as the Housing Act makes it compulsory. Initially this must be in 14 days and I should warn you that no judge has power to extend that beyond 6 weeks from today which includes any application to suspend the execution of a warrant of possession."*

Annex B: Draft Guidance (Family Proceedings)

Draft guidance for judges conducting hearings involving litigants in person (family proceedings): Alison Russell QC, April 2013

Introduction

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2. It is, however, intended particularly to assist part-time judges, and those less experienced in dealing, with litigants in person and to provide a framework which will promote a consistency of approach in applying current procedure rules to cases where there is no legal representation.

The legal framework

3. The role of the judiciary remains the same whether the case involves represented or unrepresented parties.

4. Whilst the approach may differ, the law and legal framework for cases involving litigants in person is no different; the need to conduct proceedings in a manner that is ECHR compatible, and consistent with the FPR 2010, remains.

5. Article 6 applies to all civil and family proceedings. The components for a fair trial include:

- The right to be heard.
- The right to challenge evidence.
- All parties having access to the same evidence/documents (equality of arms).
- The right to know the case against you.
- The right to a decision affecting a person's rights (the court's decision).
- To be present and participate in hearings pertinent to the case.
- A reasoned decision.

6. The FPR 2010 were not designed to answer every procedural question. However, the over-riding objective provides the compass to guide the courts and parties.

Rules

7. The essential aspects of case management are set out in rule 1.4(2), which provides for active case management. This includes: (b) identifying at an early stage (i) the issues (c) deciding promptly (i) which issues need full investigation and hearing and which do not; and (ii) the procedure to be followed in the case (g) fixing timetables or otherwise controlling the progress of the case (h) considering whether the likely benefits of taking a particular step justify the cost of taking it (l) giving directions to ensure that the case proceeds quickly and efficiently.

Evidence

8. Control of evidence by the court is provided for in FPR 2010 rule 22 and forms part of case management. Rule 22.1 provides that:

(1) The court may control the evidence by giving directions as to –

- (a) the issues on which it requires evidence;
- (b) the nature of the evidence which it requires to decide those issues; and
- (c) the way in which the evidence is to be placed before the court.

(2) The court may use its power under this rule to exclude evidence that would otherwise be admissible.…

(4) The court may limit cross-examination.

9. Prior to any hearing, ascertain what support and guidance is available either in the court or in the vicinity, such as FRU, CABs and pro-bono representation. This will vary from court to court, with some having very little or none.

Directions

10. Consider listing all litigant in person cases for directions[35] prior to any substantive hearing. Explain to the parties at the outset how the case will be heard and the evidence put before the court. Tell them of any assistance available.

35 FPR 2010, rule 1.4 – the court's duty to case manage (2) (l) giving directions to ensure that the case proceeds quickly and efficiently.

11. There is a duty, and a need, to consider at the outset what facts need deciding, to identify the issues in the case and what facts are relevant to the determination of those issues. Having listened to the parties, inform them of need to limit the evidence to the relevant facts determined by the issue/s to be decided and exclude extraneous matters.

12. Identify the issues; the necessary evidence and the form in which it will be put before the court. **Provided the parties are always told clearly in advance** there is a great deal of flexibility to manage the case.

13. Litigants in person will need help to prepare evidence; this will include informing them of where to go to get the necessary information.

14. Decide the shape and form of the hearing and the evidence; the order of witnesses; cross-examination and the time allocated to each witness; set it out in an order, which will form the basis for the hearing itself[36].

15. In cases of domestic abuse, or other vulnerable witnesses, consider the challenge - whether it is necessary to allow cross-examination by the litigant in person, or to be permitted in another form; for example, by written questions put by the court.

Safety and safeguarding

16. The safety and vulnerability of parties is a constant feature of family law. However, it is not always possible to tell from the evidence or papers before the court that it is a feature in the case.

17. In addition, not all mediators or providers of ADR are trained to identify potential victims of abuse, who may not disclose their abuse out of fear, embarrassment or simply because they do not think it relevant themselves.

18. Judges need to be aware of this as a problem. Public funding will be available to victims of abuse and the case can be put off to allow them representation.

McKenzie Friends and other support

19. This guidance should be read in conjunction with the current Practice Guidance.[37]

20. Litigants in person have the right to reasonable assistance from a lay person and in refusing such assistance the right to a fair trial is engaged[38]. Consider allowing litigants in person to be accompanied by a McKenzie Friend or other support, including a member of the family or friend.

21. There is no reason why a support worker from a reputable group (such as Women's Aid) should be not be allowed to accompany a litigant in person into court.

36 FPR 2010, r 1.4 – Courts duty to manage cases. Rule 1.4 (2) Active Case Management includes (g) fixing timetables or otherwise controlling the process of the case and (i) dealing with the as many aspects of the case as it can on the same occasion.
37 Practice Guidance 12th July 2010; McKenzie Friends (Civil and Family Courts) Citation [2010] 2 FLR 962.
38 Ibid. Paragraph 2 & paragraph 8.

22. Consider allowing the McKenzie Friend to speak on behalf of the litigant in person if that is what he or she wants and everyone agrees; it may be of assistance to allow the McKenzie Friend to prompt the litigant in person (and the court).

23. Conversely, McKenzie Friends who are unhelpful, abusive or intent on either disrupting or derailing the proceedings can and should be excluded as they will undermine the efficient administration of justice[39].

The hearing: Time allocated and listing

24. Recognising the difficulties inherent in having litigants in person, keep in mind the duty of the court to allocate to such cases a proportionate share of the court's resources, taking into account the need to allocate sufficient time to other cases.

The hearing

25. Again, start by setting out what is going to happen and how the case will be conducted; remind the parties during the hearing itself; it is helpful to hear from the litigants in person first, to foreshorten matters.

Role of lawyers for represented parties

26. All representatives are under a duty to help the court to further the overriding objective[40].

27. Their duty to help does not extend to providing cover for the deficiencies or lack of facilities of the litigant in person in presenting his or her case; nor can they be expected to do so in a way that is onerous or allows them to bear a disproportionate cost[41].

Outstanding issues

28. There remain some specific issues relating to litigants in person in respect of the family courts. These include who will be responsible for funding FPR 2012 rule 16.4 cases when the court decides pursuant to rule 16.2 and PD 16A that a child should be made party to proceedings; and, where an expert report/evidence is required, but the litigant in person cannot afford to pay for it (DNA testing, for example). The lack of such evidence could be a breach of Article 6 rights, in addition to which

39 Ibid. Paragraph 13.
40 FPR 2010, r 1.3.
41 This must be the case for publicly funded parties with the restraint on their costs imposed by the LSC.

most experts will not accept instructions from a party acting in person.

Annex C: Extract from the Judgment of Hickinbottom J in Graham v Eltham Conservative & Unionist Club and Ors, [2013] EWHC 979 (QB) at [26]-[38]

26. Section 13 of Volume 2 of Civil Procedure (the White Book) contains valuable material on the rights to conduct litigation and to act as an advocate, including the Practice Guidance issued most recently in 2010 jointly by the Master of the Rolls and the President of the Family Division (Practice Guidance (McKenzie Friends: Civil and Family Courts) ([2010] 1 WLR 1881) ("the Practice Guidance") which, at paragraphs 18-26, deals with "Rights of audience and rights to conduct litigation". I acknowledge the assistance I have gained from that section in the White Book, and particularly that Practice Guidance, which I commend.

27. Historically, at common law, the right to act as an advocate was governed entirely by the inherent power of the court to regulate its own procedure. That discretion was absolute, save that, by ancient usage in the superior courts, barristers and others similarly qualified could not be prevented from acting as advocates (Collier v Hicks (1831) 2 B & Ad 663, 668, 672 cited by Lord Pearson in O'Toole v Scott [1965] AC 939, 952C-F).

28. Rights of audience have been the subject of legislation since Part II of the Courts and Legal Services Act 1990, as subsequently amended by Part III of the Access to Justice Act 1999. Those provisions allowed solicitors to have rights of audience in the higher courts, and permitted other professional bodies, once themselves authorised by statutory instrument, to authorise rights of advocacy. Professional bodies which have taken advantage of that provision include the Institute of Legal Executives (SI 1999 No 1077), the Chartered Institute of Patent Agents (SI 1999 No 3137), the Institute of Trade Mark Attorneys (SI 2005 No 240), and the Association of Costs Draftsmen (SI 2006 No 3333). The provision of legal services is now governed by the Legal Services Act 2007, which set up the Legal Services Board to regulate the now various regulators approved to authorise rights of audience. The regulation of advocates, through the statutory scheme, is therefore highly detailed and sophisticated, and subject to rigorous procedures and discipline.

29. Under the 2007 Act, the right to conduct litigation and the right to act as an advocate are limited to persons authorised under the statutory scheme; but it is recognised by section 19 of, and paragraphs 1 and 2 of schedule 3 to, the Act that a litigant in person has the right to represent himself in proceedings to which he is a party, which carries with it the right to conduct the litigation (paragraph 2(4) of schedule 3) and the right to act as his own advocate (paragraph 1(6)). Furthermore, CPR Rule 39.6 and CPR PD 39A paragraph 5 allow a company or other corporation to be represented at trial by an employee duly authorised by the corporation. Although this formally only applies to trials, in practice courts generally allow such employees to appear at any hearing involving a corporate party, to enable that party, in effect, to represent itself as a litigant in person.

30. Additionally, paragraph 1(2) of schedule 3 (which replicates section 27(2)(c) of the 1990 Act) effectively reserves the inherent power of the superior courts to allow an individual other than a litigant himself to act as advocate before it, by exempting from the detailed procedural requirements "a person who has a right of audience granted by that court in relation to those proceedings". This statutory provision recognises that at least the superior courts continue to have the power to grant a special right of audience to any advocate to act for a litigant (ALI Finance Ltd v Havelet Leasing Ltd [1992] 1 WLR 455, and D v S (Rights of Audience) [1997] 1 FLR 724). Whilst an inferior court has no inherent jurisdiction, no doubt for such courts a similar power can properly be implied as part of their general powers in respect of their own procedure.

31. In exercising the discretion to grant a lay person the right of audience, the authorities stress the need for the courts to respect the will of Parliament, which is that, ordinarily, leaving aside litigants in person who have a right to represent themselves, advocates will

be restricted to those who are subject to the statutory scheme of regulation (Clarkson v Gilbert [2000] 2 FLR 839, D v S especially at page 728F per Lord Woolf MR, and Paragon Finance plc v Noueri (Practice Note) [2001] EWCA Civ 1402; [2001] 1 WLR 2357 at [53] and following per Brooke LJ). The intention of Parliament is firm and clear. Section 1(1) of the 2007 Act sets out a series of "statutory objectives" which includes ensuring that those conducting advocacy adhere to various "professional principles", maintained by the rigours of the regulatory scheme for which the Act provides, and without which it is considered lay individuals should not ordinarily be allowed to be advocates for others, appoint also emphasised by the Practice Guidance (at paragraph 19). The strength of this interest and will is enforced by (i) specific legislative provisions allowing lay representation in types of claim in which such representation is considered appropriate, e.g. in small claims in the county court (section 11 of the 1990 Act which is unaffected by the 2007 Act, and the Lay Representatives (Rights of Audience) Order 1999 (SI 1999 No 1225), and (ii) the fact that to do any act in purported exercise of a right of audience when none has been conferred is both a contempt of court and a criminal offence (see sections 14-17 of the 2007 Act).

32. Consequently, it has been said by the higher courts that "the discretion to grant rights of audience to individuals who did not meet the stringent requirements of the Act should only be exercised in exceptional circumstances", and, in particular, "the courts should pause long before granting rights to individuals who [make] a practice of seeking to represent otherwise unrepresented litigants" (Paragon Finance at [54] per Brooke LJ, paraphrasing comments of Lord Woolf in D v S). In D v S, Lord Woolf indicated (at page 728F) that it would be "monstrously inappropriate" and totally out of accord with the spirit of the legislation habitually to allow lay advocates. The Practice Guidance, in more measured terms, at paragraph 19, states that:

> ◊ "Courts should be slow to grant an application from a litigant for a right of audience… to any lay person…. Any application… should… be considered very carefully…. Such grants should not be extended to lay persons automatically or without due consideration. They should not be granted for mere convenience."

33. Of course, in line with the overriding objective of dealing with cases justly (CPR Rule 1.1), the court will be more open to exercising its discretion and granting a right of audience in a particular case when it is persuaded it will be of assistance to the case as a whole if a litigant in person were to have someone who is not an authorised advocate to speak for him or her. That will especially be so if the litigant in person is vulnerable, unacquainted with legal proceedings or suffering from particular anxiety about the case he or she is conducting. As a result, courts have in practice become more flexible about allowing litigants in person to have assistance at a hearing. In particular, they do not infrequently allow a relative or friend to speak on a party's behalf. Often, that relative or friend is well-attuned to the

party's case and wishes, and puts the matter more articulately and coherently than the party could himself or herself. As a result, the hearing can become more focused, more efficient and shorter. Such flexibility has become more important as the result of legal aid reforms (including those in the Legal Aid, Sentencing and Punishment of Offenders Act 2012, effective from 1 April 2013), which have resulted in a very substantial reduction in those entitled to public assistance and hence a substantial increase in litigants in person who now appear before the courts.

34. However, even though the legal world has in many ways moved on since the time of the authorities to which I have referred, in my view, as those authorities and the Practice Guidance stress, due deference to the will of Parliament, and general caution, are still required.

35. Therefore, as required by the Practice Guidance (paragraph 24), without undue formality, when a litigant in person wishes to be heard by way of a lay advocate, he should make an appropriate application to the court at the first inter parties hearing. The application should be made by the litigant in person, and not by the person who he or she wishes to be the advocate: although, often, in practice that other person may in fact be heard on the application. The application should be inter partes, to enable any opponent who may have objections to raise them. Generally, once the right to appear as an advocate has been given to lay person, that right will extend to all hearings in that claim, unless specifically directed otherwise or the right is revoked. The court may always revoke the right, any decision to revoke being informed by the same principles that apply to the grant of the right. It may, for example, be appropriate to revoke the right if, contrary to hopes and expectations, the lay advocate proves unhelpful or even positively disruptive.

36. The authorities and Practice Guidance provide little assistance with regard to how the court's discretion should be exercised; and this is an area in respect of which the Head of Civil Justice may wish to consider giving further guidance in due course.

37. However, in the meantime, it seems to me that at any application, to put the court into a position to make an informed decision, the court will wish to provided with information as to (i) the relationship, if any, between the litigant in person and the proposed advocate, including whether the relationship is a commercial one; (ii) the reasons why the litigant wishes the proposed advocate to speak on his behalf, including any particular difficulties the litigant in person might have in presenting his own case; (iii) the experience, if any, the proposed advocate has had in presenting cases to a court; and (iv) any court orders that might be relevant to the appropriateness of the proposed advocate (e.g. orders made against him or her acting in person or as an advocate in previous proceedings, including any orders restraining him or her from conducting litigation or from acting as an advocate). Given the importance of the role of advocate, there is a duty of frankness on both the litigant in person and the proposed advocate in relation to these issues. Often it will be appropriate to deal with such enquiries quite informally, and they will usually take only a short time; but they

are essential to ensure that proper respect is given to the principle that, ordinarily, advocates should be restricted to regulated advocates and litigants in person.

38. As with the exercise of any power, whether a lay person is given the right to be an advocate in a particular case or for a particular hearing will depend upon all of the circumstances. However, as I have indicated, given the overriding objective, the court will take particular account of the extent to which allowing the individual to speak will assist the fair and just disposal of the case. The Practice Guidance stresses, at paragraph 22, that the burden of showing that it is in the interests of justice for a lay person to be granted the right to be an advocate at a hearing lies upon the litigant who wishes him to do so. It will only be granted in "special circumstances". Paragraph 21 of the Practice Guidance gives examples of the type of special circumstances which in the past have been held to justify the grant of a right of audience to a lay person, as follows: (i) that person is a close relative of the litigant; (ii) health problems which preclude the litigant from addressing the court or from conducting litigation, and the litigant cannot afford to lay for professional representation, and (iii) the litigant is relatively inarticulate and prompting by that person may unnecessarily prolong the proceedings. Those examples are helpful in indicating the sort of circumstances in which a grant will be made. The Guidance makes clear that those who represent litigants professionally or regularly will only be granted the right in "exceptional circumstances" (paragraph 23).