



Reforming the courts' approach to McKenzie Friends consultation paper

Response from the Bar Standards Board

Introduction

1. The Bar Standards Board (BSB) is the independent regulator of barristers in England and Wales, in the public interest. Barristers specialise in providing advice and advocacy in the Courts and Tribunals of England and Wales. It is the responsibility of the BSB to safeguard consumers and protect the public in line with the Regulatory Objectives set out in the Legal Services Act 2007.
2. The BSB is responding to this consultation in light of the fact that our current Strategic Plan for 2016-19 includes the aim of meeting unmet consumer need. McKenzie Friends have developed to fill a gap in the legal services market and so we are interested in how this issue will be addressed in the future. Notwithstanding cuts in legal aid, we are supportive of all litigants having access to assistance in court. The numbers of Litigants in Person (LIPs) are rising but those that cannot afford a legal representative should be supported in their journey through the legal system. We acknowledge that McKenzie Friends can play a useful role in the legal system, but are concerned about the current lack of regulation and redress around people providing these services.
3. We have provided answers to the specific consultation questions below.

Responses to the consultation questions

Q1: Do you agree that the term “McKenzie Friend” should be replaced by a term that is more readily understandable and properly reflects the role in question? Please give your reasons for your answer.

4. Yes.
5. We agree with the statement in the consultation that “the justice system should, as far as possible, seek to use terms that are clear, simple and readily understandable by all court users”. Our regulatory objectives include the aims of protecting and promoting the interests of consumers, and increasing public understanding of the citizen’s legal rights and duties. We believe replacing the term “McKenzie Friend” would be a positive step in helping LIPs and the public to more accurately understand the nature of the role a McKenzie Friend undertakes.

Q2: Do you agree that the term “court supporter” should replace McKenzie Friend? If not, what other term would you suggest? Please give your reasons for your answer.

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6. We believe that the term “court supporter” could promote confusion by implying that the person acting in that role has some kind of approval or permission of the court to do so. We would suggest a more neutral and descriptive term, such as “Litigant’s Assistant”. However, if that suggestion was not adopted, we do believe that “Court Supporter” is preferable to the current term of “McKenzie Friend” as it would be more readily understandable to LIPs.

Q3: Do you agree that the present Practice Guidance should be replaced with rules of court? Please give your reasons for your answer. Please also give any specific comments on the draft rules in Annex A.

7. Yes.
8. Replacing the present Practice Guidance with rules of court will provide more clarity and certainty for those acting as McKenzie Friends, and those LIPs seeking to use their services.
9. Regarding the draft rules in Annex A, it is not clear what the position is intended to be in relation to paid McKenzie Friends. The draft rules at 3.22(7) state permission to act as a McKenzie Friend would be withdrawn if they were receiving payment for exercising a right of audience or conducting litigation, but is silent on whether payment is acceptable for providing general support. If it is decided that there should be a ban on McKenzie Friends receiving any kind of fees, as the consultation suggests, then this would need to be expanded to include the inability to charge fees for providing the general support and assistance laid out in 3.22(1). The BSB’s position on whether McKenzie Friends should be permitted to charge for such services is outlined under Question 9.
10. We would highlight the fact that section 3.22(1) allows only for a McKenzie Friend to be present during a “hearing in public”. It may be beneficial for a LIP to be able to receive the assistance and moral support a McKenzie Friend can provide throughout the legal process, even during private hearings. This would also allow for continuity of assistance. In some cases this may be in the litigant’s best interests and so thought should be given to whether this should be excluded as it is under the current draft rules. Rule 3.22(2) states that, with the court’s permission, a LIP can be assisted in a private hearing. We would question the need for a litigant to have to seek the permission of the court for support in private hearings. We believe that to help ensure access to justice, a litigant should be entitled to receive support whether a hearing is private or public.
11. We would also like to comment on section 3.22 (1) (3). Our understanding is that this section allows litigants to have a McKenzie Friend during periods in which they are not represented by a legal representative, even if at some points of their case they do have such representation. We believe there may be a role for a McKenzie Friend



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in providing support throughout the process even when a litigant is represented. Some litigants may benefit from someone who can provide assistance and help inform them about the court process, when legal representatives have other roles to play.

12. It is also unclear why the draft section 3.22(13) makes reference to the duties owed to the court by a solicitor and not a barrister.

Q4: Should different approaches to the grant of a right of audience apply in family proceedings and civil proceedings? Please give your reasons for your answer and outline the test that you believe should be applicable. Please also give any specific comments on the draft rules.

13. We do not have any evidence which would indicate whether different approaches are necessary, and so do not offer a view on this question.

14. However, we would question whether different approaches should be taken in different jurisdictions. Any difference in availability of support for LIPs in specific jurisdictions would need to be justified and based on strong evidence.

Q5: Do you agree that a standard form notice, signed and verified by both the LIP and McKenzie Friend, should be used to ensure that sufficient information is given to the court regarding a McKenzie Friend? Please give your reasons for your answer.

15. Yes.

16. We agree that it is appropriate for the court to be informed as to the background of a McKenzie Friend to whom it may grant a right of audience or the ability to conduct litigation. We also support the introduction of a standard form notice that would outline the role of a McKenzie Friend, and the limitations of such a role, to the LIP. As stated above, we support efforts to provide the public with better information about their rights, and the processes of the justice system.

Q6: Do you agree that such a notice should contain a Code of Conduct for McKenzie Friends, which the McKenzie Friend should verify that they understand and agree to abide by? Please give your reasons for your answer.

17. Yes.

18. As the market for McKenzie Friends has expanded, so has concern that they remain unregulated and uninsured and therefore that users of their services lack the protections they would receive if they were represented or supported by a regulated legal professional. Requiring McKenzie Friends to agree to a Code of Conduct will go some way towards helping hold them to a uniform, appropriate standard and ensure LIPs have an understanding of what they can expect when using a McKenzie Friends' services.



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19. We would however like to see it made clear what penalties or opportunities there would be for redress, if a McKenzie Friend were to breach the Code of Conduct. Without some way to enforce the Code of Conduct, it will be of little use or protection to those using McKenzie Friends.

Q7: Irrespective of whether the Practice Guidance (2010) is to be revised or replaced by rules of court, do you agree that a Plain Language Guide for LIPs and McKenzie Friends be produced? Please give your reasons for your answer.

20. Yes.

21. We support efforts to simplify legal language and make legal information more readily accessible for the public and those that use legal services. A Plain Language Guide for LIPs and McKenzie Friends would be beneficial for both parties, and would help to ensure that LIPs have realistic expectations as to what a McKenzie Friend can do for them.

22. We would suggest that any advice for litigants on using a McKenzie Friend should also signpost ways in which they can instruct legal representation, if they should need it. It is our understanding that organisations that provide advice to members of the public recommend that it is best to get some kind of legal representation if at all possible, and so it may be useful for ways of obtaining such help to be signposted in the Plain Language Guide.

Q8: If a Plain Language Guide is produced, do you agree that a non-judicial body with expertise in drafting such Guides should produce it? Please give your reasons for your answer.

23. Yes.

24. An organisation with expertise and experience drafting such documents for the public would be the appropriate choice. They will be best placed to draft a guide that will ensure clarity and ease of understanding for those lay people making use of it. We have used organisations with expertise in drafting for consumers in the past and know that this has been appreciated by members of the public accessing that information. However, we do suggest that there be appropriate input from judicial bodies to ensure that the guide accurately reflects the courts' position on McKenzie Friends.

Q9: Do you agree that codified rules should contain a prohibition on fee recovery, either by way of disbursement or other form of remuneration? Please give your reasons for your answer.



25. Yes; in relation to McKenzie Friends who are granted a right to conduct litigation or a right of audience.
26. We agree that it is appropriate that McKenzie Friends who are applying to be granted a right to conduct litigation or a right of audience should not be able to charge for their services. These are reserved legal activities under the Legal Services Act 2007 and allowing McKenzie Friends to charge for these services would essentially be creating a new type of legal service provider, who would not be regulated. This would undermine both the concept of an authorised person in relation to reserved legal activities, and the Legal Services Act 2007 itself. It also presents a significant risk to those using their services, as users of those services would lack protections and the ability to seek redress.
27. An alternative could be that those who wish to apply to be granted a right to conduct litigation or exercise a right of audience could be required to pay an application fee to the court. This could effectively be a light step towards the regulation of McKenzie Friends and could be used to help fund the court, to help improve access to justice or as a source of redress for those who have negative experiences with McKenzie Friends. We do not however want to impose so many codes, fees or sanctions on McKenzie Friends as to discourage or disincentivise people from acting in this role. We acknowledge that sometimes the use of a McKenzie Friend can be preferable to forcing an LIP to represent themselves, and would want to ensure that LIPs were not left to navigate the court process on their own when this may not be in their best interest. However, as long as McKenzie Friends remain completely unregulated, we will continue to maintain the position outlined in paragraph 26.
28. We do not, however, agree that McKenzie Friends providing general support in court, without conducting litigation or exercising a right of audience, should be prohibited from charging a fee. Any member of the public can provide legal services like advice and support as a “non-legal representative” and charge for it. These types of services are not reserved legal activities. To prohibit those acting as McKenzie Friends from doing so would therefore make no sense. This would limit consumer choice and stifle competition in the market. We would however, want to see more clarity around the nature and extent of services that can be provided by a McKenzie Friend, and issues around lack of insurance and access to redress addressed.

Q10: Are there any other points arising from this consultation on that you would like to put forward for consideration? Please give your reasons for your answer.

29. We would suggest that, if it is decided that the present Practice Guidance should be replaced with rules of court, a separate consultation should be held on the draft rules. Until the issues and questions outlined in the consultation are resolved, it is



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difficult to comment on how the rules should be formulated.

30. We also would like to suggest that we would be prepared to explore taking responsibility for some form of regulation of McKenzie Friends. We will look forward to the analysis and outcome of this consultation and will consider further possible steps at that time.