



Bar Council response to the Reforming the courts' approach to McKenzie Friends consultation paper

1. This is the response of the General Council of the Bar of England and Wales (the Bar Council) to the Lord Chief Justice of England and Wales' consultation paper entitled "Reforming the courts' approach to McKenzie Friends".¹
2. The Bar Council represents over 15,000 barristers in England and Wales. It promotes the Bar's high quality specialist advocacy and advisory services; fair access to justice for all; the highest standards of ethics, equality and diversity across the profession; and the development of business opportunities for barristers at home and abroad.
3. A strong and independent Bar exists to serve the public and is crucial to the administration of justice. As specialist, independent advocates, barristers enable people to uphold their legal rights and duties, often acting on behalf of the most vulnerable members of society. The Bar makes a vital contribution to the efficient operation of criminal and civil courts. It provides a pool of talented men and women from increasingly diverse backgrounds from which a significant proportion of the judiciary is drawn, on whose independence the Rule of Law and our democratic way of life depend. The Bar Council is the Approved Regulator for the Bar of England and Wales. It discharges its regulatory functions through the independent Bar Standards Board.

Overview

4. The Bar Council welcomes the opportunity to respond to the judicial consultation on the courts' approach to McKenzie Friends. Following the implementation of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO), there has been a reported rise in the number of litigants in person and, anecdotally at least, concern about the role and use of McKenzie Friends offering legal services on a professional basis has been growing. This is particularly the case in the family courts where funding for legal representation was fundamentally changed by LASPO, leaving the majority of private law family cases to be resolved without legal aid funding.
5. The Bar Council believes that the legal services designated as reserved legal activities under the Legal Services Act 2007 (LSA), including 'conducting litigation' and exercising 'rights of audience', are best provided by individuals and organisations that are qualified, subject to professional regulation and hold professional indemnity insurance. We think it wrong that

¹ Lord Chief Justice of England and Wales (2016) Reforming the courts' approach to McKenzie Friends: A Consultation. Available here: <https://www.judiciary.gov.uk/publications/consultation-reforming-the-courts-approach-to-mckenzie-friends/>

McKenzie Friends, who typically are neither properly trained, nor regulated, nor insured, should be allowed to hold themselves out to the unsuspecting (and usually vulnerable) public as providing legal services for reward. We therefore agree with the consultation proposal that a person who seeks to perform the role of a McKenzie Friend should only be permitted to do so where they do not receive remuneration for the assistance that they provide to a litigant. Such a control would, we think, reduce the numbers engaging in this publicly undesirable practice.

6. The Bar Council recognises that little is currently known about the support offered by professional McKenzie Friends. We are therefore working to ensure there is a better understanding of the role of McKenzie Friends, particularly in the family justice system. To achieve this, the Bar Council has commissioned field research, to be undertaken by an independent team led by Dr Leanne Smith from Cardiff University, to look at the role of professional McKenzie Friends in the family courts. This field work will look at the type of work undertaken by professional McKenzie Friends as well as how professional McKenzie Friends handle court work. The research will look at the experience of clients of McKenzie Friends, why they instructed a professional McKenzie Friend and the nature of the service they received. We hope this research will add to the growing body of knowledge about litigants in person, how individuals access legal assistance and the impact of different types of legal assistance on the administration of justice. As such it could contribute to properly informed responses to the changing legal services market.

7. The Bar Council also believes that public access barristers offer an important way of addressing concerns about access to justice for litigants who have some funds to pay for legal assistance, advice and/or representation. Although this option may not be appropriate or available in every case, members of the public, including businesses and corporations, are often able to instruct members of the Bar directly. In the right circumstances, members of the Bar can be instructed for as much or as little work as the litigant requires, meaning they can be an attractive option for litigants who are able to pay for some professional legal assistance. A young barrister will often charge a comparable or cheaper hourly rate than a McKenzie Friend. Having launched the Direct Access Portal² in 2015, the Bar Council is continuing to work to make sure that members of the public understand that they can seek advice and assistance from barristers without a professional or lay intermediary, and to make the process of instructing a barrister directly less daunting for those with little or no experience of the legal professions.

8. More widely, the Bar Council is concerned that the regulation of rights of audience is opaque and uncertain. We have highlighted this issue in relation to solicitor's agents, whereby individuals seek to exercise rights of audience not by obtaining permission from the court (as McKenzie Friends do), but by relying on the operation of paragraph 1(7) of Schedule 3 of the LSA. There may be many occasions on which rights of audience are exercised pursuant to this exemption perfectly properly. Unfortunately, however, the absence of definitive judicial interpretation of this exemption has left the boundaries of its nature, scope and application uncertain. The Bar Council and Personal Injury Bar Association have made all presiding judges on the Circuits aware of the Bar Council's information document for unregistered barristers

² <http://www.directaccessportal.co.uk/>

acting as solicitor's agents.³ Alongside consideration of McKenzie Friends, we would also invite the judiciary to consider whether there is any further work that could be usefully done to clarify the situation for individuals exercising rights of audience under other exemptions provided by the LSA.

Question 1: Do you agree that the term 'McKenzie Friend' should be replaced by a term that is more readily understandable and properly reflects the role in question? Please give your reasons for your answer.

9. Yes.

10. The Bar Council agrees that it is unhelpful that the term 'McKenzie Friend' does not reflect the nature of the role. It is a term that has arisen by an 'accident of history' and it is not readily understood or recognised by individuals, except those who work within the courts system. Even amongst lawyers, the term 'McKenzie Friend' is not used consistently, sometimes referring to those who are granted a right of audience, and sometimes not.

11. The Bar Council supports the movement towards using terms that are more likely to be understood by litigants in person as well as the wider public.

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

12. Although the term "court supporter" fits the nature of the role, we are concerned that it might have connotations of an official position, which might enable the unscrupulous to market themselves as having a more formal role than is the case.

13. We agree that using the term 'lay supporter' or 'lay assistant' in England and Wales has the potential to create confusion, both in terms of the fact that 'lay' may not be readily understood by litigants in person and in light of the use of the term 'lay representative' to describe individuals who come within the ambit of the Lay Representatives (Rights of Audience) Order 1999.

14. We suggest the expression "case helper", "litigant's helper" or just "helper" as simpler and more descriptive titles. (We have continued to refer to "court supporter" in our comments on the draft rules below.)

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

15. In principle, yes, although everything turns on the detailed formulation of the rules. We make a number of comments on the draft rules below, but further consultation would be welcome in due course if there is an amended draft of the rules and a draft of the Notice to be provided to the LIP and McKenzie Friend.

³ Available on the Bar Council website: <http://www.barcouncil.org.uk/practice-ethics/professional-practice-and-ethics/acting-as-a-solicitor's-agent/>

16. The proposal to codify the approach to McKenzie Friends in court rules will go towards providing certainty and clarity in the courts' approach to the rights and role of McKenzie Friends. There is particular advantage in giving control to the rule committees to update and amend provisions as necessary as opposed to being required to wait for court decisions on the issue.

17. The Bar Council does acknowledge, though, that the proposed reforms will only be successful if there is a consistent approach to the implementation of the rules and the exercise of the discretion given to the court. This is a serious concern and is noted in the consultation.⁴ The Bar Council believes that judicial and court staff training on the new court rules would help ensure that they are understood, interpreted and applied as consistently as possible.

18. The Bar Council has specific comments on the draft rules in Annex A of the consultation, which should be read in the light of the general comments above:

18.1. 3.22(1)(1)(b) – This rule refers to a court supporter 'helping to manage the court documents and other papers'. This wording is potentially too broad and may venture into the territory of 'conducting litigation' and/or permitting court supporters to generally manage the matters of litigants in person or to act as their agent. This highlights a wider concern about the drafting, which begins by referring to a hearing being in public, but does not then make clear whether the assistance is only to be given during the hearing, or at other times (which is the more natural implication of managing documents and papers). The wording of 3.22(1)(3) suggests the assistance could be at any time, not just at a hearing – otherwise this provision is most unlikely to be required in practice (and see and 3.22(10)). This issue is potentially important since it affects whether the court should be able to prohibit the court supporter from providing assistance at any time (as we think should be the case), and not just during hearings.

18.2. 3.22(1)(1)(d)(i) – the reference to advising on points of law and procedure is curious, if what is envisaged is non-professionals. Of course, the court supporter might happen to have legal training, but it seems odd expressly to contemplate legal advice being given. Might it be better to keep sub-para (d) general, e.g. "advising the litigant quietly on matters relevant to his or her case"?

18.3. 3.22(1) generally – it might be advisable to spell out somewhere (perhaps in parenthesis after the rule) first, that this rule is intended to replace the rules previously applicable to McKenzie Friends and, secondly, that rights of audience and the right to conduct litigation are dealt with separately and require a formal application to the court.

18.4. 3.22(2) – We query whether it makes sense to maintain the distinction between hearings in public and in private. First, a LIP is not always aware which applies and this may, sometimes, be a technical distinction with no obvious reason. Secondly, the rules are made unnecessarily complicated by the two possibilities. Thirdly, there does not seem to be any rational basis for the distinction: why should it be harder for a LIP to have the benefit of a court supporter just because the hearing is in private? In any case, it seems to

⁴ Paragraph 4.11

be accepted that the presumption is in favour of permitting a court supporter, even where permission is required, (see para 2.6 of the consultation paper), so why not make the rule the same in all cases – a right to have a supporter with an overriding discretion to prohibit it?

18.5. 3.22(4)(b) – The statement should require the court supporter to confirm that he/she is not receiving any remuneration. The requirement that the court supporter has “no interest” in the case is too broad. We agree that the court supporter should not stand to receive a share of any recoveries in the case. But a relative might often be said to have an interest in the case. A husband might assist his wife in a claim about a property owned by her in which they both live. That surely would not be a ground for excluding him from acting as a court supporter. Perhaps all that is required is disclosure of any interest which the court supporter has, so that the court is fully informed when exercising its discretion?

18.6. 3.22(4)(b)(ii) – there is a typo: the word “that” at the beginning is out of place. More importantly, we doubt whether the litigant in person or the court supporter can be expected to know what the “duty of confidentiality” involves: this is potentially complex (possibly involving data protection rights, for example) and its scope is arguably uncertain even to a lawyer. It is not something which a non-lawyer could reasonably be expected to understand. Either the rule needs to spell out what the court supporter can and cannot do, or else breaches of confidentiality should be left to be dealt with under the general law.

18.7. 3.22(7) – There are a number of oddities about the rule as currently drafted. Firstly, it refers to permission granted under rule 3.23(3), when it is presumably permission under 3.22(2) which is relevant. Secondly, it speaks of permission being withdrawn, but presumably permission should not be granted in the first place if the court supporter is remunerated? Thirdly, as drafted, the rule only impacts on the situation where a litigant requires permission. In the more usual case, where a litigant is entitled to a court supporter as of right, the prohibition on charging does not appear to be engaged. Fourthly, the rule only deals with remuneration in respect of exercising a right of audience or carrying out the conduct of litigation, but, as we understand it, the intention is that any assistance is prohibited if it is to be paid for. The third and fourth points could both be remedied by providing that the court will prohibit a court supporter from assisting a litigant under rule 3.22(5) if the court supporter receives remuneration. Finally, the rule refers to a court supporter receiving ‘either directly or indirectly, remuneration from the litigant’. It would perhaps be useful to have it made clear that this includes situations where a third party, such a relative or friend, makes payments to the court supporter. There is an obvious enforcement issue about this rule – how is the court to know whether the court supporter is charging or not? As suggested above, the proposed standard form notice to be signed by the LIP and the court supporter must contain confirmation that the court supporter is not receiving any remuneration for his or her assistance.

18.8. 3.22(10) – Typo: omit the second “or withdrawn”.

18.9. 3.22(12) –As drafted, the rule refers to “expenses”. Presumably this should also expressly refer to any fees charged by the court supporter?

18.10. 3.22(13) – We have concerns about making the court supporter an officer of the court and/or imposing the duties of a solicitor to the court on them for two reasons. First, an unscrupulous person seeking to market his services might seek to give himself an air of respectability by saying that he is, or been, or will be, an officer of the court, or that he is to be treated as if he were a solicitor. Secondly, how is an honest court supporter supposed to know what these duties involve? Solicitors undergo careful training to ensure an understanding of these duties. And, even if the duties could be explained in plain language, would it not be extremely onerous to impose them on someone who was simply trying to help out a vulnerable friend? A responsible and careful person (who might otherwise be a valuable court supporter) might decline to assist on this basis. What is more, there is no sanction – if the court supporter is not a solicitor, he cannot be struck off or disciplined. We suggest simply providing that the court supporter must comply with the Court’s rules and procedure in the same way as if he or she were the litigant.

18.11. 3.23(3) – We consider that the expression “conduct of litigation” is opaque, even for lawyers. A LIP has no prospect of understanding what it means. The expression “right of audience” is less problematic, but still rather arcane. Given that this part of the rules will need to be read and understood by non-lawyers, we consider that some guidance as to the meaning of these expressions ought to be included, either in parenthesis at the end of the rule itself, or in a practice direction.

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

19. At this stage, the Bar Council does not have specific evidence indicating whether different approaches should be applied in family and civil proceedings.

20. The research that has been commissioned by the Bar Council (but which will be conducted by an independent research team) looking at the role of professional McKenzie Friends in the family courts may be of interest and use in determining whether, and if so how, the approach to McKenzie Friends should differ between civil and family proceedings.

21. In principle, whilst we believe that the formulation of the test to be applied when deciding whether to grant a right of audience ought to be the same in civil and family cases (“good reason” and “in the interests of proper administration of justice”), we can see force in an argument that the test ought generally to be applied more liberally in family proceedings. Such cases frequently involve issues which are highly emotional and distressing for the parties and there is often merit in allowing someone less closely affected to address the court (assuming there is no other reason for refusing to do so). It is difficult, however, to enshrine such considerations in a rule, since so much depends on exercising discretion in the light of the particular facts of the case.

22. At this stage we are not aware that professional McKenzie Friends are of concern in the criminal courts. However, we would recommend that consideration be given to also codification of rules relating to McKenzie Friends in the criminal courts. Recent research by Transform Justice has given some insight into the experience of unrepresented defendants in the criminal courts.

Question 5: Do you agree that a standard form notice, signed and verified by both the LiP and McKenzie Friend, should be used to ensure that sufficient information is given to the court regarding a McKenzie Friend? Please give your reasons for your answer.

23. Yes.

24. Providing for a standard form notice would help ensure that McKenzie Friends and litigants in person were provided with the same information and complied with the same requirements throughout England and Wales. The ad hoc use of different types of forms currently used in courts throughout England and Wales means that, in practice, different courts have sought to implement different standards which can result in confusion and uncertainty.

Question 6: Do you agree that such a notice should contain a Code of Conduct for McKenzie Friends, which the McKenzie Friend should verify that they understand and agree to abide by? Please give your reasons for your answer.

25. No.

26. Whilst it is important that McKenzie Friends and litigants in person are provided with the necessary information to understand the scope and limits of the role of a McKenzie Friend, we are concerned that the development of a "Code of Conduct" is a step on the road to McKenzie Friends seeking to portray themselves, wrongly, as part of a regulated profession. We wonder whether it is necessary to do more than say that a McKenzie Friend must comply with the Court's rules and procedure in the same way as if he or she were the litigant, but if more is required, we suggest it could be contained in a Practice Direction, which follows the pattern of other Parts of the CPR and preserves flexibility to make changes where appropriate.

Question 7: Irrespective of whether the Practice Guidance (2010) is to be revised or replaced by rules of court, do you agree that a Plain Language Guide for LIPs and McKenzie Friends be produced? Please give your reasons for your answer.

27. Yes, although for the reasons given in answer to the previous question, this should be aimed more at the LIP and should not give the appearance of a code for McKenzie Friends.

28. With a growing number of litigants in person at court, it is important that they are provided with clear and easy to understand information about the options for support in court that are available to them. It may be appropriate to provide litigants in person with a link to and/or a copy of the plain language guide when they file a claim with the court.

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

29. Yes.

30. Translating complex legal requirements and processes into plain English is a specialist skill in itself. The work of organisations such as Advice Now highlights the importance of utilising available expertise to ensure that litigants in person are able to access accurate and clear information.

Question 9: Do you agree that codified rules should contain a prohibition on fee-recovery, either by way of disbursement or other form of remuneration? Please give your reasons for your answer.

31. Yes, and see our comments on the draft rules above. Those who regularly provide legal services or assistance to members of the public (as opposed to helping out a friend on a one-off basis) should be properly trained, regulated and insured.

32. We consider that there might also be merit in making amendments to the costs rules to ensure that any remuneration paid to a court supporter is disallowed on assessment.

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

33. As noted in the Overview above, the Bar Council has commissioned field research, conducted by an independent research team led by Dr Leanne Smith from Cardiff University, looking at McKenzie Friends in the family courts. The results of this research are expected to be published in early 2017. We hope that this research will be able to contribute to properly informed responses to the changing legal services market.

34. In the Overview section we have also highlighted that Bar Council is concerned about other issues that have arisen in relation to individuals exercising rights of audience. In particular, the interpretation and application of the exemption provided by paragraph 1(7) of Schedule 3 of the Legal Services Act remains unclear. The Bar Council is anxious about this issue as, anecdotally, many unregistered barristers are working as solicitor's agents and may not be aware of when they are entitled to exercise a right of audience. As exercising a right of audience without an entitlement to do so is a criminal offence, the Bar Council is keen to ensure that steps are taken to clarify the interpretation and application of the exemption.

**Bar Council
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