Consultation on reforming the courts' approach to McKenzie Friends

JUSTICE response

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Introduction

1. Established in 1957, JUSTICE is an independent, all-party law reform and human rights organisation working to strengthen the justice system – administrative, civil and criminal – in the United Kingdom. JUSTICE believes that access to justice forms the foundation upon which our legal system rests. Without effective access to the justice system, the fundamental rights and freedoms purportedly enjoyed under it are rendered illusory. Since our inception, JUSTICE has worked actively on issues of access to justice in a range of contexts – including in our recent report on *Delivering Justice in an Age of Austerity,*[1] which focusses on improving access to civil justice in the face of state retrenchment and cutbacks to legal aid.

2. We are grateful for this opportunity to respond to the Lord Chief Justice of England and Wales' consultation on reforming the courts' approach to McKenzie Friends, first published in February 2016 (**"the consultation document"**).[2]

3. This document sets out the JUSTICE response to the consultation. We limit our comments to our areas of expertise. Silence on a specific consultation question or issue should not be read as approval.

The JUSTICE response to the consultation

4. The recent history of the justice system has been marked by state retrenchment and the cuts to legal aid introduced by the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (**"LASPO 2012"**). The result has been an increase in both the number of litigants in person (**"LIPs"**) appearing before the family and civil courts,[3] and the number of McKenzie friends accompanying them.[4]

5. In our view, the increase in the number of McKenzie Friends raises a number of concerns. McKenzie Friends are not regulated. This means that the litigants who use them do not enjoy the protections that regulation offers – including preventative measures such as legal training and a code of conduct, as well as remedial measures such as insurance and access to redress mechanisms in cases of poor service. McKenzie Friends do not owe a professional duty to the court. They have been criticised for providing poor quality or agenda-driven advice, failing to respect the proper limitations of their role and failing to have adequate systems in place for protecting confidential information. These concerns apply *a fortiori* to fee-charging McKenzie Friends and McKenzie

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[1] JUSTICE, *Delivering Access to Justice in an Age of Austerity* (2015), available online at
[2] Lord Chief Justice of England and Wales, *Reforming the courts' approach to McKenzie Friends: A Consultation*, February 2016.
[3] An inevitability recognised by the Judicial Working Group on Litigants in Person, *Report* (2013), available online at https://www.judiciary.gov.uk/wp-content/uploads/2014/05/report-on-access-to-justice-for-litigants-in-person-nov2011.pdf.
[4] Justice Committee, *Impact of changes to civil legal aid under Part 1 LASPO 2012* (2015), available online at http://www.publications.parliament.uk/pa/cm201415/cmselect/cmjust/311/311.pdf.

Friends who are granted rights of audience.[5] Particular consideration should also be given to the potential vulnerability of many LIPs, who may lack the knowledge or experience necessary to evaluate the performance of their McKenzie Friend.

6. At the same time, however, McKenzie Friends do have the potential to increase access to justice in the face of legal aid cuts, by providing valuable support for litigants in person. In its chapter on LIPs, the Judicial College's Equal Treatment Bench Book states: *"in a climate where legal aid is virtually unobtainable and lawyers disproportionately expensive, the McKenzie Friend and lay representatives make a significant contribution to access to justice".*[6] A Ministry of Justice Report into litigants in person in private family law cases found that McKenzie Friends often provide invaluable emotional support, preventing LIPs from *"feeling isolated and out of their depth, much as a lawyer provides partisan support to represented parties".*[7]

7. Moreover, McKenzie Friends do not form a homogenous group. Some McKenzie Friends may charge a fee for providing a wide range of legal services, including legal advice and speaking in court (where permitted). Others, however, will simply be family members or personal friends who provide a supportive presence in the courtroom.[8] Many of the concerns outlined above will be less likely to be applicable to this latter type of McKenzie Friend. The courts' approach to McKenzie Friends must therefore be sufficiently nuanced and sensitive to be able to account for the differences in the actual role played by different types of McKenzie Friend. Failure to do so will likely result in an approach to McKenzie Friends which caters only for the highest common denominator - the professional fee-charging McKenzie Friend - where the greatest risk is posed.

8. Whilst JUSTICE therefore welcomes the planned reform of the courts' approach to McKenzie Friends, we consider that any such reform should be underpinned by: i) a desire to maximise the potentially significant role played by McKenzie Friends in enhancing access to justice for LIPs; and ii) a recognition that the level and type of support provided by McKenzie Friends varies widely. Correspondingly, JUSTICE's response to the consultation questions has been informed by these two considerations.

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[5] Legal Services Consumer Panel (**"LSCP"**), *Fee-Charging McKenzie Friends* (2014) (**"LSCP Report"**), available online at http://www.legalservicesconsumerpanel.org.uk/publications/research_and_reports/documents/2014%2004%2017%20MKF_Final.pdf.

[6] Judicial College Equal Treatment Bench Book, *Litigants in Person* (2013), available online at https://www.judiciary.gov.uk/wp-content/uploads/JCO/Documents/judicial-college/ETBB_all_chapters_final.pdf.

[7] Trinder et al. for the Ministry of Justice, *Litigants in Person in Private Family Law Cases* (2014) (**"Ministry of Justice Report"**), available online at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/380479/litigants-in-person-in-private-family-law-cases.pdf.

[8] The LSCP Report identifies four categories of McKenzie Friend. These are: traditional McKenzie Friends (i.e. family members or personal friends who provide a supportive presence in the courtroom and limited non-legal assistance); volunteer McKenzie Friends attached to an institution or charity; fee-charging McKenzie Friends offering the conventional limited service understood by that role and; fee-charging McKenzie Friends offering a wider range of services including general legal advice and speaking on behalf of clients in court where permitted.

Questions 1 and 2 – Replacing the term 'McKenzie Friend'

9. JUSTICE agrees that the term 'McKenzie Friend' should be replaced with the term 'court supporter'.[9]

10. We echo the position taken in the consultation document at [4.4]. Complex or inaccessible terminology can be a significant barrier to individuals understanding and exercising their rights. The principle of access to justice demands that, in so far as is possible, legal terminology should be clear, simple, and easily understandable by all court users. Vague or ambiguous terms should be avoided.

11. Judged against these principles, the term 'McKenzie Friend' is lacking. It offers very little by way of a clear description of the role actually played by a McKenzie Friend. Its meaning cannot be fully understood without recourse to an accompanying explanation, or prior knowledge of the concept of a McKenzie Friend.

12. Whilst much legal terminology requires specialist training before it can be properly understood, the lack of transparency surrounding the term 'McKenzie Friend' is of particular concern, given that it is most likely to impact on the LIPs who use them. There is no compelling justification for retaining the term 'McKenzie Friend' in the place of a lay-centric term aimed at helping LIPs better understand what they can expect from a McKenzie Friend. The replacement of the term 'McKenzie Friend' with a more accessible term would also serve as a symbolic break with the former rules on McKenzie Friends and a clear indication that the role is being reformed.

13. JUSTICE further agrees that 'court supporter' is an appropriate replacement term. It accurately describes the role performed by a McKenzie friend, and will be more readily understandable by lay court users. It avoids possible connotations of legal authority. Replacing the term 'McKenzie Friend' with a single term, rather than multiple terms which reflect the different levels of support they may provide, is to be preferred for the reasons set out in the consultation document at [4.6]. Use of a single, catch-all term also avoids confusion in the scenario where a single McKenzie Friend provides a range of levels of support, depending on the litigant in question, or the stage of a litigant's case.

Question 3 – Replacing Practice Guidance with rules of court

14. JUSTICE agrees that the existing Practice Guidance should be replaced with rules of court which codify the law on McKenzie Friends. The Practice Guidance does not have the force of law. Consequently, the extent to which the best practice standards laid down in the Guidance are complied with has varied

[9] For ease of understanding, the term 'McKenzie Friend' has been used throughout this response, instead of 'court supporter'.

considerably between courts.[10] Particular variation has been observed in courts' approaches to granting rights of audience.[11] Such inconsistencies make it difficult for LIPs to predict how the court will address their request to have a McKenzie Friend participate in the proceedings. It may also make it more likely that rights of audience will be granted in situations where it is not in the interests of the efficient administration of justice to do so.

15. Codification of the law in relation to McKenzie Friends by means of rules of court would do much to address the current inconsistencies in court practice. It would also, by bringing McKenzie Friends within the remit of the rules committee, make it possible to reform this area of law in a principled manner, as and when necessary.[12] This approach has been adopted in Scotland, where the Sheriff Court Ordinary Cause Rules and the Court of Session Rules make explicit provision for McKenzie Friends.

16. The draft rules set out at Annex A of the consultation document provide a good starting point for such codification. JUSTICE considers that they provide adequate protection against many of the potential risks posed by McKenzie Friends (outlined above). In particular, the codification, in draft rule 3.23(8), of the Practice Guidance's restrictive approach to granting McKenzie Friends rights of audience, is to be welcomed.

17. However, in drafting the final version of these rules, further consideration should be given to the following matters:

    a. Adding the words "and/or" to the end of rule 3.23(3). This would reflect the position, emphasised in the Practice Guidance, that rights of audience and the right to conduct litigation are separate rights, the grant of which must be justified individually, and which are granted and withdrawn by the court independently of each other.[13]

    b. The variety of individuals who provide McKenzie Friend services. Whilst compliance with the requirements set out by the draft rules may not be particularly onerous for McKenzie Friends attached to an institution or charity which provides the service on a regular basis, it may be significantly more so for family members or personal friends whose sole role is to provide a supportive presence in the courtroom.

       In particular, rule 3.22(13) deems a McKenzie Friend to be an officer of the court, and thereby subject to such duties to the court as if they were a solicitor. This goes further than the approach taken in Scotland, where neither the Sheriff Court Ordinary Cause Rules, nor

[10] Ministry of Justice Report.
[11] See the LSCP Report, which notes that, since some fee-charging McKenzie Friends are rarely granted rights of audience, whilst others receive them as the norm, *"current practice does not seem to reflect what the Guidance says should happen"*.
[12] As set out in the consultation document at [4.10].
[13] Practice Guidance, at [25]-[26].

the Court of Session Rules, impose such a duty on McKenzie Friends. The current lack of any professional duty owed by McKenzie Friends to the court is clearly a key concern surrounding their use – particularly when rights of audience are granted.[14] However, care must be taken to avoid adopting an overly strict interpretation of this rule in relation to McKenzie Friends who simply provide emotional support without engaging in the 'legal side' of the proceedings.

Question 4 – Rights of audience in family vs civil proceedings

18. JUSTICE does not believe that there is any compelling reason for adopting different approaches to the grant of a right of audience in family and civil proceedings. The need to balance the potential risks of LIPs using McKenzie Friends against the benefits McKenzie Friends can offer in terms of access to justice remains the crucial issue in both types of proceeding. Moreover, a uniform approach across the jurisdictions would promote clarity – not only for LIPs and McKenzie Friends, but also for District and Circuit judges sitting in both family and civil proceedings.

Questions 5 and 6 - Standard form notice and Code of Conduct

19. JUSTICE agrees that a standard form notice, signed and verified by both the LIP and the McKenzie Friend, should be used to ensure that the court is provided with sufficient information regarding a McKenzie Friend.

20. The suggested content of the standard form notice should be as set out in draft CPR 3.22(4)(a)-(b). This would provide the court with sufficient information on the proposed McKenzie Friend to make an informed evaluation of the desirability of that particular McKenzie Friend's involvement in the proceedings. Subject to the considerations set out below, it would not impose an overly onerous burden on either the LIP or the McKenzie Friend. It would also help to standardise court practice in relation to McKenzie Friends: the Ministry of Justice Report found that some of the family courts observed adopted a largely informal approach to the use of McKenzie Friends, whilst others required a formal application complete with CV.[15]

21. However, consideration should be given to the following matters:

    a. The requirement in draft rule 3.22(4)(a) of a short CV or "other statement setting out the [McKenzie Friend's] relevant experience" should not be interpreted as imposing a requirement of prior experience of acting as a McKenzie Friend. Such an interpretation would exclude family members or friends who are simply providing a supportive presence in the courtroom in a single set of proceedings. For this type of McKenzie Friend, a short description of the personal

[14] Judicial Working Group Report.
[15] Ministry of Justice Report.

connection with the litigant should suffice to comply with draft rule 3.22(4)(a).

b. Although proportionate overall, the use of a standard form notice will impose at least some incremental burden on many litigants in person. This burden should be minimised by including details on the standard form notice – including where to find it, and how to fill it in – in the proposed Plain Language Guide for LIPs and McKenzie Friends (see below).

22. JUSTICE further agrees that the standard form notice should contain a Code of Conduct for McKenzie Friends, which the McKenzie Friend should verify that they understand and agree to abide by. Whilst full regulatory oversight of McKenzie Friends would clearly be impractical, the absence of a regulatory body leaves LIPs vulnerable to misconduct and poor practice by McKenzie Friends. A Code of Conduct would give McKenzie Friends themselves a clearer understanding of the responsibilities of their role, and go some way to providing a lay explanation of what is expected of an "officer of the court".[16] A serious breach of the Code of Conduct may also provide a basis for a finding by the court that the McKenzie Friend is an unsuitable person to act in that capacity under draft rule 3.22(7).

23. A Code of Conduct would also help LIPs to appreciate the standards of conduct that they should expect from McKenzie Friends. This is particularly important given that LIPs are at greater risk of being unable to evaluate the standard of service or advice which they receive from a McKenzie Friend.[17]

24. The Civil Justice Council's suggested draft Code of Conduct for McKenzie Friends provides a useful starting point.[18] It would clearly require updating to accurately reflect the law on McKenzie Friends as set out in the updated rules of court. However, its approach of using plain English, and emphasis on clearly stating McKenzie Friends' responsibilities, is to be commended.

Questions 7 and 8 – Plain Language Guide for LIPs and McKenzie Friends

25. JUSTICE agrees that a Plain Language Guide for LIPs and McKenzie Friends should be produced, irrespective of whether the Practice Guidance is to be revised or replaced by rules of court. We echo the consultation document's assessment of the potential benefits of such a Guide (set out at [4.17]-[4.18]).

26. Moreover, a Plain Language Guide would complement the increased protection offered by any new rules of court. As noted by the Ministry of Justice Report, much of the problematic behaviour sometimes demonstrated by paid McKenzie Friends – for example, the giving of poor advice - will occur out of sight of the

[16] Draft rule 3.22(13).
[17] Ministry of Justice Report.
[18] Civil Justice Council, *Access to Justice for Litigants in Person* (2011), Appendix 5.

court, limiting the court's ability to provide protection.[19] JUSTICE therefore emphasises the importance of supporting codification with informational initiatives, such as the Plain Language Guide, which are aimed at better informing LIPs, and McKenzie Friends themselves, of the proper scope of the McKenzie Friend role.

27. In order to be effective, and in clear contradistinction to the court-focussed approach adopted by the Practice Guidance, the Plain Language Guide should place lay court users at its heart. This includes, but goes beyond, using clear and accessible language. It also extends to actively considering the issues that are most likely to be of particular use or concern to LIPs and McKenzie Friends. To maximise dissemination amongst LIPs, the Plain Language Guide should be widely available online, and in hard copy in courts, Citizens Advice Bureaux and other centres offering legal support services.

28. JUSTICE agrees that a non-judicial body with experience drafting such guides should be responsible for producing the Plain Language Guide. However, we emphasise that even if such a body is given primary drafting responsibility, there should be judicial input into the content of the Guide, ensuring that it correctly represents the legal position on McKenzie Friends.

Questions 9 – Prohibition on fee recovery

29. JUSTICE agrees that the codified rules should contain a prohibition on fee-recovery, either by way of disbursement or other form of remuneration. This prohibition should take the form – as is done in draft rules 3.22(7) and 3.23(6) – of a prohibition on the provision of reasonable assistance, the exercise of a right of audience or of a right to conduct litigation where the McKenzie Friend is directly or indirectly in receipt of remuneration.

30. The presence of a fee-charging arrangement between a litigant in person and their McKenzie Friend clearly has the potential to exacerbate the concerns relating to the use of McKenzie Friends more generally. The Ministry of Justice Report found that overall, non-fee charging McKenzie Friends made a positive and appropriate contribution to proceedings. Of the three paid McKenzie Friends observed, however, only one made such a contribution; the 'expertise' and motivations of the other two were highly questionable.

31. Moreover, fee-charging puts the LIP at risk of escalating bills. The level of support that a client needs and the duration of a court case are not always easy to predict. Hourly billing accounts for this uncertainty, but creates a clear risk of incentivising providers to 'drag out' their work. Whilst similar risks exist when instructing a professional advocate, the impact if they eventuate is greater for those LIPs using McKenzie Friends, who are likely to be litigants on lower

[19] Ministry of Justice Report.

incomes who were attracted to the service precisely because it was marketed at low cost.[20]

32. On balance, therefore, JUSTICE supports the Ministry of Justice Report's conclusion that whilst McKenzie Friends can be an important means of increasing access to justice for LIPs, they do not provide sufficient value to justify charging for their services:

> *"Overall, although the potential value of a supporter should not be discounted, it is doubtful whether formal [McKenzie friends] (particularly paid [McKenzie friends]) are clearly of sufficient value to justify a charge for their services. If emotional support is the strongest function of a [McKenzie friend] then the focus should be on friends/families/third sector support workers as informal supporters coupled with more inquisitorial judicial styles, rather than an expansion of paid [McKenzie friends], especially with rights of audience. Help with legal tasks may be more reliably and cost effectively provided by legal professionals."*[21]

33. As set out in the consultation document (at [4.20]-[4.22]) the prohibition on fee recovery mirrors the approach taken in Scotland.

34. Finally, JUSTICE notes that the Judicial Executive Board, as set out in the consultation document at [4.23], supports its provisional conclusion on prohibiting fee recovery by reference to the fact that a range of alternative sources of pro bono legal advice exist. JUSTICE agrees that such sources of free legal advice play a crucial role in enhancing access to justice. However, JUSTICE's endorsement of the prohibition on fee recovery, and the importance of such support services, should not be read as suggesting that these services provide adequate access to justice, on their own, in the face of legal aid cuts. Legal representation by a professional advocate, funded where necessary by legal aid, continues to provide the best access to justice.

[20] LSCP Report, which also noted that the tendency towards making informal deals without a contract or paperwork leaves litigants vulnerable to such abuse.
[21] Ministry of Justice Report.