

To:	Legal Services Board	
Date of Meeting:	9 July 2014	Item: Paper (14) 36

Title:	Consumer Panel report – fee-charging McKenzie Friends	
Workstream(s):	N/A	
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Status:	Unclassified	

Summary:

The Consumer Panel published a constructive report into fee-charging McKenzie Friends (non-authorised individuals who provide varying degrees of assistance to litigants in person) in April 2014. Elisabeth Davies will be presenting the report to the Board. The report's general tenor is that, although there are risks associated with this kind of support, they are outweighed by the benefits of access to justice. With this in mind, the Panel recommends steps to achieve positive recognition of the role they play and some protection for those they assist.

The report contains a number of recommendations, the majority of which are directed toward the judiciary. Two are specifically intended for the LSB and the Panel has indicated that it is primarily seeking a response on these:

- *the LSB should review case law on the definition of the conduct of litigation and publish a document which seeks to clarify its meaning. Depending on the findings of this research, the Board should consider recommending to the Law Commission that the law in this area be reviewed.*
- *the LSB should consider the findings of the Panel's report as part of its ongoing work on simplifying legal services regulation.*

Section 10 of the Legal Services Act 2007 (the LSA) requires the LSB to respond, including on any points with which we disagree. A draft response for publication is attached at Annex A. This addresses points emerging from the report, but also reiterates relevant ones from our work, including how regulators and lawyers can act to address unmet legal needs.

On the recommendations, the response indicates:

- although we agree that clarity on what constitutes the conduct of litigation is desirable, this is a matter for the courts and judiciary rather than the LSB
- we accept the second recommendation and expect the report's findings to correspond with a broad range of our work, for example cost and complexity of regulation and review of the SRA's Separate Business Rule.

This paper provides a brief overview of the report, which is attached as Annex B, and suggests some areas that the Board may wish to discuss with Elisabeth.

Recommendation(s):

It is recommended that the Board decides:

- to reject the first and accept the second Consumer Panel recommendation to the LSB
- to delegate to the CEO and Chair to publish the draft response to the Panel's report attached at Annex A

Risks and mitigations

Financial: N/A

Legal: Rejecting the recommendation that the LSB to seeks to clarify the definition of the conduct of litigation has the potential for disagreement on our remit, given that the Panel explicitly believes that we can and should do this. We have sought to mitigate this through early discussion of our position with the Panel, and also our response at Annex A - by indicating that we will encourage the judiciary to take up the matter

Reputational: Positive positioning on fee-charging McKenzie Friends may result in negative commentary by authorised persons (e.g. solicitors and barristers who perceive them as gaining commercial advantage), ARs and consumer bodies (such as Citizens Advice) in relation to service quality, given that McKenzie Friends' services are unregulated. We have sought to address this in the draft response through text on regulatory reform and existing scope for lawyers to innovate

Resource: N/A

Consultation	Yes	No	Who / why?
Board Members:		X	
Consumer Panel:	X		Steve Brooker
Others:		X	

Freedom of Information Act 2000 (Fol)

Para ref	Fol exemption and summary	Expires
Annex A	Section 22 - information intended for future publication	
Annex B	Section 21 - information reasonably accessible by other means: http://www.legalservicesconsumerpanel.org.uk/publications/research_and_reports/documents/2014%2004%2017%20MKF_Final.pdf	

LEGAL SERVICES BOARD

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Consumer Panel report – fee-charging McKenzie Friends Executive Summary

Background

1. The Consumer Panel published a report (attached at Annex B) on qualitative research into fee-charging McKenzie Friends on 17 April. This forms the first part of a programme of work to investigate regulatory implications of the anticipated rise in litigants in person – individuals who either cannot afford or choose not to use an authorised person when going to court.
2. The term McKenzie Friend is derived from a Court of Appeal case in 1970 that established a litigant in person's right to reasonable assistance. It is used more generically in the report to outline possible sources of such assistance, e.g. friends and family, charities, law schools, authorised persons acting pro bono, but increasingly focuses on non-authorised individuals who charge for their services.

The Panel report's main points

3. Indications are that numbers of litigants in person are increasing, especially but not exclusively in family law. These people appear likely to be less advantaged than those with legal representation, be vulnerable, in many cases take up more court time, and may achieve less favourable case outcomes.
4. Numbers of fee-charging McKenzie Friends are unknown, but are believed to have increased since last April. Services range from traditional ones (e.g. moral support, note taking, help with case papers, and quietly giving advice in court), through to legal research, case management, document drafting, completing forms, and seeking a right of audience. Although they do not have the right to carry out reserved legal activities like conduct of litigation or exercising a right of audience, the LSA acknowledges that the courts can grant such rights on a case-by-case basis.¹ Practice Guidance issued by the senior judiciary², however, indicates that this should only happen in exceptional circumstances.
5. Points 5.21 to 5.28 of the report discuss that what falls within the scope of the conduct of litigation is ambiguous, and that this causes uncertainty for McKenzie Friends and confusion for litigants. It is defined in schedule 2 (para 4) of LSA as:
 - (a) the issuing of proceedings before any court in England and Wales
 - (b) the commencement, prosecution and defence of such proceedings, and
 - (c) the performance of any ancillary functions in relation to such proceedings (such as entering appearances to actions).

¹ Under schedule 3 (meaning no offence, e.g. under section 14, is committed)

² http://www.familylaw.co.uk/system/uploads/attachments/0000/8125/McKenzie_Friends_Practice_Guidance_July_2010.pdf

This is noted as being supplemented by conflicting case law, and also the Practice Guidance, which lists things that McKenzie Friends may not do (e.g. act as a litigant's agent in relation to the proceedings, or manage litigant's cases outside court). McKenzie Friends are, though, apparently being asked increasingly by some judges to perform such services.

6. Risks associated with fee-charging McKenzie Friends (e.g. agenda driven individuals and substantial bills) and safeguards against these (judicial powers to exclude someone from court or issue a Civil Restraint Order) are discussed. The Panel concludes that access to justice benefits outweigh such risks. Despite individual cases of concern, no evidence was found of widespread detriment.
7. Although experience differs from court to court, attitudes among the judiciary to McKenzie Friends are said to be mostly either positive or neutral, with more senior judges (and lawyers) being more welcoming. Initial judicial scepticism is reported as often softening once assistance in the effective running of the court is recognised. It is suggested that positive attitudes toward and consistent treatment of McKenzie Friends should be encouraged more generally, including through the Practice Guidance.
8. In terms of regulatory response, the Panel advocates treating organised volunteer support, e.g. by charities, law students, and pro bono lawyers, as low risk. This is on the basis that services are limited to more conventional support, quality controls are usually in place and fees are not charged. In addition, the report refers to the LSA recognising "*that 'special bodies' such as charities are low risk entities and the [LSB] has decided not to pursue work ending the transitional arrangements protecting such bodies from regulation until 2015 at the earliest*".³ Such services from fee-charging McKenzie Friends are still, in the Panel's view, relatively low risk.
9. Although fee-charging McKenzie Friends offering wider services are viewed as the highest risk category, the Panel considers that statutory regulation is not needed at this stage. (Indeed, unless and until there was a call for McKenzie Friends to undertake reserved activities, it would not be possible to put a statutorily based scheme in place). It instead calls on the sector to develop a credible system of self-regulation to earn greater trust from judges, the legal profession and the general public alike.
10. In summary, 15 recommendations are made relating to wider awareness and acceptance of fee-charging McKenzie Friends, but also including measures to provide some protection for those using their services. The Panel has indicated that the judiciary, which has just set up a specialist working group on McKenzie Friends and is working on issues associated with litigants in person more generally, is the intended audience for the majority of the recommendations. It has met senior members of the judiciary who are considering the report and how it fits with that work.
11. Accordingly, the LSB's formal response is only sought on two recommendations. These relate to the definition of litigation, and the report's use more generally:

³ Point 6.5 of the report

- *the LSB should review case law on the definition of the conduct of litigation and publish a document which seeks to clarify its meaning. Depending on the findings of this research, the Board should consider recommending to the Law Commission that the law in this area be reviewed.*
- *the LSB should consider the findings of the Panel's report as part of its ongoing work on simplifying legal services regulation.*

Response to the report

12. Section 10 of the LSA requires the LSB to consider representations made to it by the Panel. If we disagree with a view expressed, or proposal made, we must give a notice to that effect stating our reasons for disagreeing. A draft response is at Annex A.
13. The Panel's analysis of a relatively unknown but seemingly growing segment of unregulated legal service providers is welcome. Generally speaking we agree with the tenet of the report – that it is better for individuals to have some support, despite associated shortcomings.
14. Our draft response not only addresses points emerging from the report, but also reiterates relevant wider concerns emerging from our own work. Specifically, it highlights that reducing cost and complexity of regulation may enable lawyers to innovate and reduce their fees. This, in turn, may help to address unmet legal needs. For example, review by the SRA of its Separate Business Rule might see conceivably solicitors working alongside McKenzie Friends. In addition, it highlights that lawyers can already tackle non-cost barriers (e.g. customer service) to individuals seeking their help.
15. There is one specific detailed issue. On the issue of risk posed to consumers discussed above at paragraph 6, there appears to be some misunderstanding by the Panel of the LSA's intent. Once commenced, section 108 of the LSA will define a limited form of alternative business structure called a low risk body. This is wholly distinct from not for profit⁴ bodies (which benefit from transitional protection from regulation by virtue of section 23).⁵ LSB work on special/non-commercial bodies has stated that proportionate regulation is needed (with next steps to be considered in 2015). Given the views expressed by the Panel and the effect of section 10, the point is addressed in our response.
16. The response also highlights that our work with special bodies identified practices that may be of assistance to fee-charging McKenzie Friends if they follow the Panel recommendation of forming a trade association. These include measures adopted by charities and regulatory bodies to mitigate risks to consumers, such as membership agreements and performance standards, block insurance cover, advice, training, accreditation and audit services.

⁴ Defined in section 207 of the LSA

⁵ The LSA does not envisage transitional protection for low risk bodies. Once section 108 and section 106 are commenced, both not for profit bodies and low risk bodies would be forms of special body and are entitled to ask a licensing authority to modify the application of its ABS licensing rules

17. Turning to the recommendations directed to the LSB, the first was discussed with our legal team during the report's development, where the position reflected below and in the draft response was explained. While in principle we agree that having clarity on what constitutes the conduct of litigation is desirable, this is ultimately a matter for the courts rather than the LSB and there is danger in an LSB pronouncement paradoxically producing greater uncertainty if it is subsequently undercut by an individual case. Moreover, in practice, a possible outcome of the judicial working group recently announced by the LCJ to consider the wider use of McKenzie Friends is that the point may be addressed through the Civil and Family Procedure Rules in due course. We will work with the Panel and the Judiciary to press for that outcome.
18. The second more general recommendation is accepted. The findings are expected to resonate with a broad range of work, including the cost and complexity of regulation (as discussed above).

Questions for the Consumer Panel

19. Some possible areas for discussion with the Panel are suggested below.
- If not already given as part of the Panel's presentation of its report, a short update on progress since publication, including discussions with the judiciary, and any implications for the recommendations to the LSB.
 - What the Panel plans to do next.
 - Does the Panel plan to raise this issue at sector events, e.g. via conference presentations and panels? For example, the recent international conference on access to justice and legal services seemed to be a possible opportunity.
 - The Panel's view on the appetite among fee-charging McKenzie Friends for self-regulation and the likelihood of this coming to fruition.
 - Why the Panel advocates voluntary regulation in this case, but not elsewhere (for example for will writing).
 - A possible response to this issue is that it is regrettable that individuals need to use McKenzie Friends, and so these services should be made as safe as possible. Does the Panel have a view on this, and on responding to it?
 - The Panel's response to criticism from authorised persons and professional bodies, notably CILEX, that regulation to obtain rights of audience is adding costs to their business, while the judiciary allows unqualified fee-charging individuals to operate.
 - The extent to which authorised persons currently work with fee-charging McKenzie Friends, and if regulatory barriers to this happening were identified.
 - In terms of the second recommendation for the LSB and our business plan, whether the Panel has particular ideas/priorities in mind.

Recommendations

20. It is recommended that the Board decides:

- to reject the first and accept the second Consumer Panel recommendation to the LSB
- to delegate to the CEO and Chair to publish the draft response to the Panel's report attached at Annex A