LEGAL SERVICES BOARD

Reforming the courts' approach to McKenzie Friends

LSB submission in response to the Judicial Executive Board consultation on the courts' approach to McKenzie Friends

25 May 2016

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Summary

1. We recognise that the justice system is currently going through a period of significant change and that this brings challenges for consumers and the Judiciary. In this context we welcome the JEB's consideration of the courts' approach to McKenzie Friends.

2. Whilst we support some of the proposals, we do not believe that the case has been made out for the proposed prohibition on fee charging, as:

    - the consultation paper does not explain why the Judiciary are unable to deal adequately with any problems created by McKenzie Friends using their existing powers;

    - it does not present evidence of detriment which is specifically caused by the charging of a fee, and

    - the impact of the proposed prohibition on consumers is not considered.

Background

3. The Legal Services Board (LSB) is the independent oversight regulator of legal services within England and Wales. It regulates the eight 'approved regulators' that directly regulate legal services providers. It has eight statutory regulatory objectives, including the protection and promotion of consumers' interests and the public interest and improving access to justice. It is to further those objectives that the LSB submits this response to the consultation published by the Judicial Executive Board (JEB) in February 2016.

4. The consultation paper concerns the judiciary's approach to McKenzie Friends. This term refers to unregulated individuals who attend court with litigants in person to provide support. This support has traditionally involved taking notes, helping with case papers, giving some advice on the conduct of the case and providing moral support. The consultation paper notes that applications are increasingly being made for McKenzie Friends to also exercise rights of audience on behalf of litigants in person, as allowed for under paragraph 1(2)(b) to Schedule 3 of the Legal Services Act 2007 (the Act).

5. In response to perceived increases in the number of McKenzie Friends, particularly those for whom a right of audience is sought and those who charge for their services, the JEB proposes the following:

    - Renaming McKenzie Friends 'court supporters'.
    - Replacing current practice guidance to the judiciary on McKenzie Friends with rules of court.
    - Introducing a standard form of notice to the court for litigants in person wishing to use a McKenzie Friend.

- Developing a plain language guide for litigants in person and McKenzie Friends.
- Banning McKenzie Friends from charging fees or recovering expenses.

The LSB's interest in this issue

6. This issue is directly relevant to the regulatory objectives of protecting and promoting the interests of consumers and improving access to justice.

7. The consultation paper also touches on the reserved legal activities under the Act. Reserved legal activities can usually only be undertaken by providers who are regulated by one of the approved regulators under the Act. However, the Act provides a clear discretion to individual courts, so that a Judge is able to decide whether someone supporting a litigant in person in court can exercise rights of audience or conduct litigation on their behalf. The exercise of this discretion is of relevance to the exercise of the LSB's oversight functions and its powers under section 24 and 26 of the Act concerning recommending changes to the reserved legal activities.

8. LSB research demonstrates that a high proportion of consumers with a legal problem do not seek legal advice. For example, a large scale consumer survey jointly commissioned by the LSB in 2015 (individual legal needs survey) identified that 64% of consumers with a legal problem do not seek independent assistance in dealing with it.

9. The LSB considers that this 'access gap' – the proportion of those who experience a legal problem but do not access advice – can be seen to represent unmet legal need.[1] The LSB has committed to tackling the existing high levels of unmet legal need as one of its three main areas of focus in its 2015-18 strategic plan.

10. Our 2015 individual legal needs survey also revealed that providers who are regulated under the Act assisted 46% of consumers who sought independent advice, whereas 40% of consumers who sought advice used not for profit or fee-charging unregulated providers.[2] This demonstrates that unregulated providers play a prominent role in meeting consumers' needs.[3]

11. Given our interest in this area, we are grateful for the opportunity to respond to this consultation paper.

[1] We do recognise that some consumers may be able to effectively meet their legal need without seeking independent advice.
[2] Most of these not for profit providers are unregulated, although a small number may be regulated under the Act.
[3] During 2015/16 we pursued a project which sought to improve our own understanding of the full range of choices available to consumers, with a focus on improving our understanding of for profit unregulated providers. The outputs from this project should be available by June 2016.

Overview of response

12. We recognise that the justice system is currently going through a period of significant change and that this brings challenges for consumers and the Judiciary. These changes mean that judges are operating in an environment that is very different to that present when the Act received Royal Assent.

13. Significant increases in the prevalence of litigants in person is placing additional burdens on judges and the perceived increase in applications from McKenzie Friends to exercise rights of audience is one aspect of this. We welcome the JEB's review of the 2010 guidance concerning McKenzie Friends in the light of the changes and support some of the proposals set out in the consultation paper (see below).

14. Our concern relates to the question of whether there is sufficient evidence to support some of the proposals in the consultation paper. In particular we do not believe that the case has been made out for the proposed prohibition on fee charging. In this regard we make the following observations:

    (i) The Act gives individual courts a discretion as to whether to permit McKenzie Friends to exercise rights of audience in specific cases. The consultation paper does not explain why this discretion does not enable the Judiciary to deal adequately with any problems created by McKenzie Friends. There is no explanation of why this discretion (which is as intended by Parliament – see paragraph 15 below) is not sufficient to manage any specific risks or problems and therefore why the discretion should be removed and replaced with a blanket ban on fee charging or recovery of expenses.

    (ii) There is limited consideration of consumer detriment. In particular, the consultation paper does not identify detriment which is specifically caused by the charging of a fee or recovery of expenses. The risks that are mentioned would appear to relate to the general provision of services by all McKenzie Friends.

    (iii) The consultation paper does not examine the potential impact of the prohibition. As set out above, our research has identified that most consumers do not seek assistance in addressing a legal need. Of those who do seek assistance, a significant proportion currently use unregulated providers and some of these use McKenzie Friends. Against this backdrop of high levels of unmet legal need, the impact of any additional restrictions on consumer choice should be carefully considered and explained.

15. In addition, we note that one justification given in the consultation paper for preventing McKenzie Friends from charging fees is that not to do so would be contrary to the intention of Parliament. We believe that the alternative view on parliamentary intention could be equally valid. The Act provides significant scope for the provision of legal services outside of the regulatory framework and it provides a specific discretion to courts to grant a right of audience or permission to conduct litigation to non-authorised persons. Moreover, the Act does not

generally distinguish between regulatory protections for pro bono or paid for legal services.

16. In addition to these general points which apply to the consultation as a whole, we have also set out below our more detailed responses on the individual questions in the consultation paper. We would be happy to discuss our submission further with the JEB if they would find it useful.

Response to specific questions

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?

17. We support the use of clear, accessible plain English communication in legal services (see our recent report on lowering barriers to accessing services).[4] On this basis we agree that it is preferable to replace the term McKenzie Friend with a more accurate and accessible term to assist consumer understanding.

Question 2: Do you agree that the term 'court supporter' should replace McKenzie Friend?

18. Whilst we support the principle of renaming, we note that "court supporter" could be interpreted as suggesting that the individual is part of the court infrastructure.

Question 3: Do you agree that the present Practice Guidance should be replaced by rules of court? Please give any specific comments on the draft rules.

19. As stated above, the Act provides courts with a discretion, on a case-by-case basis, to allow unregulated individuals to exercise rights of audience or to conduct litigation (Schedule 3 paragraph 1(2) and 2(2)). The proposed rules of court would seem to fetter this discretion so that no judge would be able to allow individuals to exercise these rights if they are charging a fee or seeking to recover costs for their services.

20. We note that the draft rules presented for consultation do not reflect the policy position set out in the consultation paper. The consultation paper states at 4.21 that reform should provide *"that the provision of reasonable assistance in court, the exercise of a right of audience or of a right to conduct litigation should only be permitted where the McKenzie Friend is neither directly nor indirectly in receipt of remuneration."* (Emphasis added). However, in the proposed rules, new rules 3.22(7) and 3.23(6) and 3.23(11) appear to only prohibit remuneration for exercising a right of audience or conducting litigation and not for the provision of reasonable assistance in court. We raised this with the JEB prior to responding. We were informed that the position set out in paragraph 4.21 of the consultation is what the JEB is proposing (i.e. to prohibit charging of fees for all McKenzie

[4] Legal Services Board, Lowering barriers to accessing services, March 2016 (see here)

Friend services including providing reasonable assistance). The rules as presented in the consultation paper do not accurately reflect the policy position as a result of a drafting error).

Question 4: Should different approaches to the grant of a right of audience apply in family proceedings and civil proceedings?

21. The consultation paper does not explain why a different approach should be taken and does not present any evidence to support this.

Question 5: Do you agree that a standard form of 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?

22. The Legal Services Consumer Panel (LSCP) recommended, in its 2014 report on fee-charging McKenzie Friends that is referenced in the consultation, that *"consistent use of CVs, notices or other simple tools"* could be used when considering applications for McKenzie Friends to exercise a right of audience. We can see the merits of such an approach. We note that the proposed approach in the consultation goes beyond what was envisaged by the LSCP, as it extends to all use of McKenzie Friends (including for reasonable assistance).

23. We are concerned that any additional burdens on litigants in person may impact disproportionately on the most vulnerable consumers and particularly those who have less time to plan and prepare for a court hearing. It is important that the impact of any notice requirements is assessed before being implemented.

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?

24. We can see that a code of conduct could be of value but there is insufficient detail about the development, ownership, scope and enforcement of a code for us to support this proposal.

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?

25. We support the principle of a plain language guide that would explain the role of McKenzie Friends to help consumers to understand one of the options available for assistance with their legal need.

Question 8: If a Plain Language Guide is produced, do you agree that a non-judicial body with expertise in drafting such guides produce it?

26. In order for the guide to be accessible and user friendly it will be important for consumers to be involved in its drafting and content. This will require both expertise and testing with consumers.

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?

27. As set out above in our overview, we do not believe that the case has been made out for this prohibition as currently proposed. Please refer to our observations above in paragraph 14 for further detail.

28. The consultation suggests that if a prohibition is not imposed, it would amount to the creation of a new branch of the legal profession, contrary to the intention of Parliament. It states that this would arguably be a matter for Parliament and/or the Legal Services Board.

29. The Act provides a clear discretion to individual courts so that a Judge is able to decide whether to allow someone supporting a litigant in person to assist in court and, if the Judge also agrees, to exercise rights of audience or to conduct litigation (which are reserved activities and which aside from this discretion can rightly only be undertaken by individuals who are regulated). We are not convinced that the fact that a fee is being charged or that litigants in person are increasingly asking courts to exercise their discretion, mean that a new branch of the legal profession is being created.

30. We have recently obtained some data on the prevalence of fee-charging McKenzie Friends, which suggests that usage remains relatively low overall. Our 2015 individual legal needs survey was completed by 8,912 consumers who had experienced a total of 16,694 legal problems over the preceding 3 years. Respondents who sought advice or assistance were asked who their main provider was. Out of the 5,512 problems where assistance was sought, there were only 7 instances in which a McKenzie Friend was recorded as the main provider. Of these, 4 paid a fee (0.07% of all incidences). These figures do not suggest to us that McKenzie Friends are emerging as a new branch of the legal profession.

Question 10: Are there any other points arising from this consultation that you would like to put forward for consideration?

31. We recognise that the justice system is currently going through a period of significant change and that this brings challenges for consumers and Judges. Changes in consumers' usage of McKenzie Friends is just one aspect of this. We appreciate that the increase in litigants in person (most of whom will not use McKenzie Friends) presents significant issues more broadly.

32. We believe that it is important to consider the wider systemic changes that the justice system is undergoing when deciding what role McKenzie Friends should play. This might be best achieved by considering this issue as part of, or in the light of, wider reviews such as the Civil Courts Structure Review. For example, it could be that changes to court processes could be another response to the increasing numbers of litigants in person.

33. It is also important to consider that this consultation paper comes at a time when the Competition and Markets Authority is undertaking a market study of legal

services. The CMA will be looking at the operation of the existing regulatory framework, including regulated and unregulated providers. In order to develop an approach to McKenzie Friends that takes into account wider developments, there could be value in awaiting the outputs from the CMA's market study.