Solicitors Regulation Authority

SRA response

Consultation by Lord Chief Justice of England and Wales on reforming the courts' approach to McKenzie Friends

Published on 20 May 2016

Download consultation paper: Reforming the courts' approach to McKenzie Friends (PDF 36 pages, 240K) [https://www.judiciary.gov.uk/wp-content/uploads/2016/02/mf-consultation-paper-feb2016-1.pdf]

- 1.

  The Solicitors Regulation Authority (SRA) is the regulator of solicitors and law firms in England and Wales, protecting consumers and supporting the rule of law and the administration of justice. The SRA does this by overseeing all education and training requirements necessary to practise as a solicitor, licensing individuals and firms to practise, setting the standards of the profession and regulating and enforcing compliance against these standards.

- 2.

  In deciding how we regulate we pay regard to the regulatory objectives outlined in the Legal Services Act.

- 3.

  We are writing in response to the consultation published by the Lord Chief Justice of England and Wales on reforming the courts' approach to McKenzie Friends. Whilst we do not regulate McKenzie Friends, our regulatory objectives mean we have an interest in a legal services market which promotes access to justice, protects consumers and is competitive.

Responses to consultation 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? Please give reason for your answer.

- 4.

We agree. We welcome proposals to clarify the term “McKenzie Friend” so that the remit of the role is clear, simple and readily understandable by all court users.

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.

- 5.

  We agree the term "court supporter" is clearer than McKenzie friend. We agree that term "lay" may not be well understood by litigants in person. We also agree that "supporter" communicates the core function of the McKenzie friend to support the litigant in person, who is representing themselves and has responsibility for controlling the conduct of their own litigation.

Question 3: Do you agree that the present Practice Guidance should be replaced with rules of court? Please also give any specific comments on the draft rules set out at Annex A.

- 6.

  We agree. Replacing Practice Guidance with rules of court provides greater certainty, is more transparent and provides for proper judicial, executive and parliamentary oversight.

- 7.

  We welcome the suggestion that a plain language guide be written for litigants in person and McKenzie friends. In addition, we would suggest that thought be given to drafting the rules themselves in plain English, and in a way that either avoids technical terms (e.g. Civil Restraint Order, Statement of Truth) or explains them through a footnote within the text (instead of in the glossary or elsewhere in the rules), so that a litigant in person can understand them easily. It would also be helpful to litigants include an explanation of what "good reason" or "exceptional circumstances" mean in the rules themselves, so that all relevant information is conveniently provided in one place.

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

you believe should be applicable. Please also give any specific comments on the draft Rules.

- 8.

  A miscarriage of justice in family proceedings is more likely to be incapable of remedy through financial redress. This makes a stronger case for some access to support for an impecunious litigant in person.

Question 5: Do you agree that a standard form notice signed and verified by both the Litigant in Person 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.

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 reasons for your answer.

- 9.

  We are not in favour of making the process for appointment of McKenzie friends unduly bureaucratic or complicated. However, provided simple guidance can be given to litigants in person and prospective McKenzie friends about how to complete the notice, and provided courts have a discretion to grant permission for a McKenzie friend to exercise rights of advocacy or litigation even when no notice has been filed, we can see that this requirement could enable litigation to be conducted more efficiently by ensuring that relevant information is provided in a timely fashion.

- 10.

  We can also see advantages with a Code of Conduct for McKenzie friends, making clear their role and obligations, breach of which would make it easier for the court to make appropriate orders refusing to permit an individual to act, or continue to act as a McKenzie friend.

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 litigants in person and McKenzie Friends be produced? Please give your reasons for your answer.

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 you answer.

- 11.

  We welcome proposals to increase information available for litigants in person and McKenzie Friends through a plain language guide. We agree that this should include guidance on what McKenzie Friends can and cannot do, the right to receive reasonable assistance and the court's approach to granting rights of audience and the right to conduct litigation.

- 12.

  Our view is that guidance should also contain information that reduces consumer confusion and enables a litigant in person to make an informed choice as to whether use a McKenzie Friend. For example, information could be provided about the questions to ask, risks and benefits of the various options open to them (cost, experience, training and availability or not of consumer protections).

- 13.

  We would welcome the involvement of organisations that have expertise in producing information for public consumption in the development of a plain language guide. We would be happy to promote any material through the Legal Choices website.

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.

- 14.

  We recognise the potential challenges for the effective administration of justice which arise from the increase in the number of McKenzie friends. However, as the consultation points out, the court has a wide discretion under its inherent jurisdiction to regulate proceedings before it. In addition, the draft rules of court which are the subject of the consultation provide that an order permitting a McKenzie friend to be granted rights of audience or rights to conduct litigation in open court should be granted only where there is good reason to do so (draft rule 3.23(7)) and, where

they have been granted rights of audience or litigation in other proceedings, only where there are exceptional circumstances (draft rule 3.23(8)).

- 15.

  These powers enable the court to control the use of McKenzie friends, and limit or prevent their involvement in litigation where it would not further the effective administration of justice. The Tribunals are experienced in handling non lawyer representatives, including those of dubious quality and behaviour, and it may be that learning lessons from the Tribunal judiciary would be more effective than a ban on fees.

- 16.

  Given the extent of these powers, we are unconvinced of the case for introducing a prohibition on fee recovery. A blanket fee prohibition means litigants in person may not get access to support, even where there are no quality issues. For example, it would limit the ability of charities to charge a small amount to cover their costs. The fee prohibition would also be difficult to enforce and would be easy to circumvent.

- 17.

  Although the ways in which people find and use legal services are changing, and there is innovation in the legal services market, many people still cannot get access to the legal advice that they need at an affordable price. 81% of the public find the justice system intimidating and 63% of the public do not believe professional legal advice is affordable. 36.6% of people handle their legal problems without seeking advice. 83% of small businesses with a legal problem do not obtain professional help from regulated providers.

- 18.

  The current Regulators' Compliance Code makes it clear at paragraph 2.4 that the duty to have regard to the Code is a general one and does not apply directly to the exercise of specific regulatory functions by regulators in individual cases. This is an extremely important statement of the legal position under the LRRA which should be included in any revised Code. A failure to do so may lead to confusion, unnecessary disputes, increased cost and delay. The failure to include this statement is exacerbated by the fact that the Consultation at paragraph 3.8 talks of the requirements of the code being "delivered by regulators in their day to day activities" and in paragraph 3.15 it refers to regulators having regard to the Code "when delivering their enforcement responsibilities".

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

- 19.

  We do not wish to raise any further issues.