

IN THE COUNTY COURT AT ANYTOWN

Claim No.

BETWEEN

MS ALICE SAMPLETON

Claimant

and

MR JOHN DOE

Defendant

---

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Divider 1

# STATEMENTS OF CASE



# Claim Form

In the COUNTY COURT AT ANYTOWN

Fee Account no.

For court use only

Claim no.

Issue date

You may be able to issue your claim online which may save time and money.  
Go to [www.moneyclaim.gov.uk](http://www.moneyclaim.gov.uk) to find out more.

Claimant(s) name(s) and address(es) including postcode  
MS ALICE SAMPLETON  
Ambrosia House, 103 Cherry Hill, Anytown S26 9TT



Defendant(s) name and address(es) including postcode  
MR JOHN DOE  
22 Victoria Mews, Anytown S1E 6PP

### Brief details of claim

This Claim is for:

An order that the Defendant must immediately remove a padlock from Churchill Gardens gate; The Defendant shall pay the Claimant's costs and interest under section 69 of the County Courts Act 1984 to be assessed.

### Value

I cannot say how much I expect to recover.

You must indicate your preferred County Court Hearing Centre for hearings here (see notes for guidance)

COUNTY COURT AT CENTRAL ANYTOWN

Defendant's name and address for service including postcode

MR JOHN DOE  
22 Victoria Mews, Anytown  
S1E 6PP

	£
Amount claimed	To be assessed.
Court fee	
Legal representative's costs	0.00
<b>Total amount</b>	

For further details of the courts [www.gov.uk/find-court-tribunal](http://www.gov.uk/find-court-tribunal).

When corresponding with the Court, please address forms or letters to the Manager and always quote the claim number.

**Claim No.**

Does, or will, your claim include any issues under the Human Rights Act 1998?  Yes  No

Particulars of Claim (attached)(to follow)  
Please see attached.

**Statement of Truth**

\*(I believe)(The Claimant believes) that the facts stated in these particulars of claim are true.

\* I am duly authorised by the claimant to sign this statement

Full name ALICE SAMPLETON

Name of claimant's legal representative's firm \_\_\_\_\_

signed \_\_\_\_\_ position or office held \_\_\_\_\_

\*(Claimant)(Litigation friend)

(if signing on behalf of firm or company)

(Claimant's legal representative)

*\*delete as appropriate*

MS ALICE SAMPLETON  
Ambrosia House, 103 Cherry Hill, Anytown, S26  
9TT

email: a.sampleton@supermail.com

Claimant's or claimant's legal representative's  
address to which documents or payments  
should be sent if different from overleaf including  
(if appropriate) details of DX, fax or e-mail.

IN THE COUNTY COURT AT ANYTOWN

Claim No.

BETWEEN

MS ALICE SAMPLETON

Claimant

and

MR JOHN DOE

Defendant

---

PARTICULARS OF CLAIM

---

1. The Claimant is and was at all material times a long term resident at Ambrosia House, 103 Cherry Hill, Anytown S26 9TT which is located within a garden ('the Garden') owned by the Defendant. The Defendant carries on and at all material times carried on business as the Garden Manager.
2. On 7th October 2015 at or about noon the Defendant locked the Garden gate using a padlock. As a result the Claimant cannot pass through the gate in order to enter her home which is left with open windows.
3. As a result of the matters set out above, the Claimant is facing an imminent damage and/or loss of home and personal property.

AND the Claimant claims:

An order that the Defendant must immediately remove a padlock from Churchill Gardens gate; The Defendant shall pay the Claimant's costs and interest under section 69 of the County Courts Act 1984 to be assessed.

MS ALICE SAMPLETON

# Application for Injunction (General Form)

Name of court COUNTY COURT AT ANYTOWN	Claim No.
Claimant's Name and Ref. MS ALICE SAMPLETON	
Defendant's Name and Ref. MR JOHN DOE	
Fee Account no.	

Notes on completion

Tick which boxes apply and specify the legislation where appropriate

- (1) Enter the full name of the person making the application
- (2) Enter the full name of the person the injunction is to be directed to
- (3) Set out any proposed orders requiring acts to be done. Delete if no mandatory order is sought.
- (4) Set out here the proposed terms of the injunction order (if the defendant is a limited company delete the wording in brackets and insert 'whether by its servants, agents, officers or otherwise').
- (5) Set out here any further terms asked for including provision for costs
- (6) Enter the names of all persons who have sworn affidavits or signed statements in support of this application
- (7) Enter the names and addresses of all persons upon whom it is intended to serve this application
- (8) Enter the full name and address for service and delete as required

- By application in pending proceedings  
 Under Statutory provision \_\_\_\_\_  
 This application is made under Part 8 of the Civil Procedure Rules



This application raises issues under the Human Rights Act 1998  Yes  No

**The Claimant<sup>(1)</sup>** MS ALICE SAMPLETON

**applies to the court for an injunction order in the following terms:**

**The Defendant<sup>(2)</sup>** MR JOHN DOE

**must<sup>(3)</sup>** immediately remove a padlock from Churchill Gardens gate;

**The Defendant** MR JOHN DOE

**be forbidden (whether by himself or by instructing or encouraging or permitting any other person)<sup>(4)</sup>**

And that<sup>(5)</sup>

The Defendant shall pay the Claimant's costs and interest under section 69 of the County Courts Act 1984 to be assessed.

**The grounds of this application are** set out in the written evidence

of<sup>(6)</sup> ALICE SAMPLETON

sworn (signed) on 07/10/2015

This written evidence is served with this application.

**This application is to be served upon<sup>(7)</sup>**

MR JOHN DOE, 22 Victoria Mews, Anytown S1E 6PP

**This application is filed by<sup>(8)</sup>** ALICE SAMPLETON

(the Solicitors for) the Claimant (Applicant/Petitioner)

whose address for service is

Ambrosia House, 103 Cherry Hill, Anytown, S26 9TT

Signed

Dated 07/10/2015

\* To\*  
Name and address of the person application is directed to

This section to be completed by the court

**This application will be heard by the (District) Judge**

**at** \_\_\_\_\_ **on** \_\_\_\_\_ **the** \_\_\_\_\_ **day of** \_\_\_\_\_ **20** \_\_\_\_\_ **at** \_\_\_\_\_ **o'clock**

**If you do not attend at the time shown the court may make an injunction order in your absence**

If you do not fully understand this application you should go to a Solicitor, Legal Advice Centre or a Citizens' Advice Bureau

The court office at

is open between 10am and 4pm Mon - Fri. When corresponding with the court, please address all forms and letters to the Court Manager and quote the claim number.

## Application notice

For help in completing this form please read the notes for guidance form N244Notes.

In the COUNTY COURT AT ANYTOWN	
Claim no.	
Fee Account no.	
Warrant no. (if applicable)	
Claimant's name (including ref.)	MS ALICE SAMPLETON
Defendant's name (including ref.)	MR JOHN DOE
Date	07/10/2015

1. What is your name or, if you are a legal representative, the name of your firm?

MS ALICE SAMPLETON

2. Are you a  Claimant  Defendant  Legal Representative  
 Other (please specify)

If you are a legal representative whom do you represent?

3. What order are you asking the court to make and why?  
 An order that the Defendant must immediately remove a padlock from Churchill Gardens gate; The Defendant shall pay the Claimant's costs and interest under section 69 of the County Courts Act 1984 to be assessed.

4. Have you attached a draft of the order you are applying for?  Yes  No
5. How do you want to have this application dealt with?  at a hearing  without a hearing  
 at a telephone hearing
6. How long do you think the hearing will last?  Hours  Minutes  
 Is this time estimate agreed by all parties?  Yes  No

7. Give details of any fixed trial date or period

8. What level of Judge does your hearing need?

9. Who should be served with this application?

- 9a. Please give the service address, (other than details of the claimant or defendant) of any party named in question 9.

10. What information will you be relying on, in support of your application?

- the attached witness statement
- the statement of case
- the evidence set out in the box below

If necessary, please continue on a separate sheet.  
Please see attached.

**Statement of Truth**

(I believe) (The applicant believes) that the facts stated in this section (and any continuation sheets) are true.

Signed \_\_\_\_\_ Dated 07/10/2015  
Applicant(s legal representative)(s litigation friend)

Full name ALICE SAMPLETON

Name of applicant's legal representative's firm \_\_\_\_\_

Position or office held \_\_\_\_\_  
(if signing on behalf of firm or company)

11. Signature and address details

Signed \_\_\_\_\_ Dated 07/10/2015  
Applicant(s legal representative)(s litigation friend)

Position or office held \_\_\_\_\_  
(if signing on behalf of firm or company)

Applicant's address to which documents about this application should be sent

MS ALICE SAMPLETON  
Ambrosia House, 103 Cherry Hill, Anytown, S26 9TT  
  
Postcode 

S	2	6	
9	T	T	

If applicable	
Phone no.	04879367641
Fax no.	
DX no.	
Ref no.	

E-mail address a.sampleton@supermail.com



IN THE COUNTY COURT AT ANYTOWN

Claim No.

BEFORE .....  
..... 2015

IN AN INTENDED ACTION BETWEEN

MS ALICE SAMPLETON

Intended Claimant

and

MR JOHN DOE

Intended Defendant

---

ORDER FOR AN INJUNCTION BEFORE  
THE ISSUE OF A CLAIM FORM

---

**IMPORTANT**

**NOTICE TO THE INTENDED DEFENDANT ('the Defendant')**

(1) **This Order obliges you to do the acts set out in this Order. You should read it all carefully. You are advised to consult a Solicitor as soon as possible. You have a right to ask the Court to vary or discharge this Order.**

(2) **If you disobey this Order you may be found guilty of Contempt of Court and any of your directors may be sent to prison or fined and you may be fined or your assets may be seized.**

An Application was made on the 07/10/2015 by MS ALICE SAMPLETON who is to be the Claimant in a Claim against MR JOHN DOE to the Judge who heard the Application supported by the Witness Statements/Affidavits listed in Schedule 1 to this order, and accepted the undertakings in Schedule 2 at the end of this Order.

**IT IS ORDERED** that up to and including .....2015 ("the Return Date") / the trial of the intended action:

The Defendant must:

1. immediately remove a padlock from Churchill Gardens gate;
2. The Defendant shall pay the Claimant's costs and interest under section 69 of the County Courts Act 1984 to be assessed.

**SUBSTITUTED SERVICE/SERVICE OUT OF THE JURISDICTION**

1) The Claimant may issue and serve the Claim Form on the Defendant at 22 Victoria Mews, Anytown by ..... 2015.

2) If the Defendant wishes to defend the Claim he must acknowledge service within ..... days of being served with the Claim Form.

**VARIATION OR DISCHARGE OF THIS ORDER**

The Defendant may apply to the Court at any time to vary or discharge this Order but if he wishes to do so he must first inform the Claimant in writing.

**NAME AND ADDRESS OF THE CLAIMANT**

The Claimant is:

MS ALICE SAMPLETON, Ambrosia House, 103 Cherry Hill, Anytown S26 9TT, telephone number 04879367641.

**INTERPRETATION OF THIS ORDER**

1) In this Order the words "he" "him" or "his" include "she" or "her" and "it" or "its".

2) Where there are two or more Defendants then (unless the contrary appears)

(a) References to "the Defendant" mean both or all of them;

(b) An Order requiring "the Defendant" to do or not to do anything requires each Defendant to do or not to do it;

(c) A requirement relating to service of this Order or of any legal proceedings on "the Defendant" means on each of them.

**THE EFFECT OF THIS ORDER**

1) A Defendant who is an individual who is ordered not to do something must not do it himself or in any other way. He must not do it through others acting on his behalf or on his instructions or with his encouragement.

2) A Defendant which is a corporation and which is ordered not to do something must not do it itself or by its directors, officers, employees, or agents or in any other way.

**SERVICE OF THIS ORDER**

This Order shall be served by the Claimant on MR JOHN DOE, 22 Victoria Mews,

Anytown S1E 6PP.

**SCHEDULE 1**

**Witness statements/Affidavits**

The Claimant relied on the following Witness Statements/Affidavits:

1. Statement of ALICE SAMPLETON, made on 07/10/2015.

**SCHEDULE 2**

**Undertakings given to the Court by the Claimant**

1. To pay any damages which the Defendant (or any other party served with or notified of this Order) shall sustain which the Court considers the Claimant should pay.
2. To serve on the Defendant the Application Notice and evidence in support this Order as soon as practicable.
3. To file and pay the appropriate fee on this or the next working day.
4. To file and pay the appropriate fee for an Application Notice for the Return Date and to serve the same on the Defendant giving at least three days notice.
5. To issue a Claim Form and pay the appropriate fee on this or the next working day and to serve the Claim Form on the Defendant as soon as practicable.
6. To file a Witness Statement substantially in the terms of the draft Witness Statement produced to the Court and initialed by the Judge / confirming the substance of what was said to the Court by the Claimant.
7. To file an up to date hearing bundle for use by the judge no later than 10.00am the business day before the Return Date to include copies of this Order, the issued application for today's hearing and the issued application for the Return Date, any documents required by the Court to be provided by the previous order, skeleton arguments, reading lists, bundles of authorities and a full bundle for the hearing together with an updated estimate of the length of the hearing.

All communications to the Court about this Order should be sent to the County Court at Central Anytown, Royal Courts of Justice, Marble Building, Royal Courts of Justice, The Square, Anytown, SC2A 2LL quoting the case number. The Court building is open from Monday to Friday between 9 a.m. and 4 p.m. The Court counter is open by Appointment only on telephone number 0902 958 7832.

IN THE COUNTY COURT AT ANYTOWN

Claim No.

BEFORE .....  
..... 2015

BETWEEN

MS ALICE SAMPLETON

Claimant

and

MR JOHN DOE

Defendant

---

DRAFT INJUNCTION ORDER

---

**IMPORTANT**

**NOTICE TO THE DEFENDANT**

(1) **This Order obliges you to do the acts set out in this Order. You should read it all carefully. You are advised to consult a Solicitor as soon as possible. You have a right to ask the Court to vary or discharge this Order.**

(2) **If you disobey this Order you may be found guilty of Contempt of Court and any of your directors may be sent to prison or fined and you may be fined or your assets may be seized.**

An Application was made on the ..... 2015 by the Claimant to the Judge. The Judge heard the Application and read the Witness Statement listed in Schedule 1 and accepted the undertakings in Schedule 2 of this Order.

**IT IS ORDERED that:**

**THE INJUNCTION**

(1) Until after final judgment in this Claim the Defendant must:

1. immediately remove a padlock from Churchill Gardens gate;

**COSTS OF THE APPLICATION**

(2) The Defendant shall pay the Claimant's costs of this Application.

**VARIATION OR DISCHARGE OF THIS ORDER**

The Defendant may apply to the Court at any time to vary or discharge this Order but if he wishes to do so he must first inform the Claimant in writing at least 48 hours beforehand.

**NAME AND ADDRESS OF CLAIMANT**

The Claimant is:

MS ALICE SAMPLETON, Ambrosia House, 103 Cherry Hill, Anytown S26 9TT.

**INTERPRETATION OF THIS ORDER**

- 1) In this Order the words "he" "him" or "his" include "she" or "her" and "it" or "its".
- 2) Where there are two or more Defendants then (unless the contrary appears):
  - (a) References to "the Defendant" mean both or all of them;
  - (b) An Order requiring "the Defendant" to do or not to do anything requires each Defendant to do or not to do it;

**THE EFFECT OF THIS ORDER**

- 1) A Defendant who is an individual who is ordered not to do something must not do it himself or in any other way. He must not do it through others acting on his behalf or on his instructions or with his encouragement.
- 2) A Defendant which is a corporation and which is ordered not to do something must not do it itself or by its directors, officers, employees or agents or in any other way.

**SERVICE OF THIS ORDER**

This Order shall be served by the Claimant on MR JOHN DOE, 22 Victoria Mews, Anytown S1E 6PP.

**SCHEDULE 1**

**Witness Statement**

The Judge read the following Witness Statement before making this Order:

Statement of ALICE SAMPLETON, dated 07/10/2015.

**SCHEDULE 2**

**Undertaking given to the Court by the Claimant**

1. If the Court later finds that this Order has caused loss to the Defendant or any

other Party served with or notified of this Order and decides that the Defendant or other Party should be compensated for that loss, the Claimant will comply with any Order the Court may make.

All communications to the Court about this Order should be sent to the County Court at Central Anytown, Royal Courts of Justice, Marble Building, Royal Courts of Justice, The Square, Anytown, SC2A 2LL quoting the case number. The Court building is open from Monday to Friday between 9 a.m. and 4 p.m. The Court counter is open by Appointment only on telephone number 0902 958 7832.

Divider 2

# EVIDENCE



Made on behalf of Claimant  
Witness: ALICE SAMPLETON  
1st Statement of Witness  
Exhibit: AS-1  
Dated: 07/10/2015.

IN THE COUNTY COURT AT ANYTOWN

Claim No.

BETWEEN

MS ALICE SAMPLETON

Claimant

and

MR JOHN DOE

Defendant

---

WITNESS STATEMENT OF ALICE SAMPLETON

---

1. I am a self employed domestic carer and have lived in a detached house at Ambrosia House, 103 Cherry Hill, Anytown S26 9TT ('the House') since the 18th December 2010. I am the Claimant and make this statement in support of my application for an interim injunction against the Defendant. The matters set out below are within my own knowledge, except where I indicate to the contrary.
2. When I today returned home I found the garden gate locked with a padlock and the Defendant refused to open so I cannot return home which is inside the garden and also the House's windows are open so there is a risk of burglary. I refer to Exhibit AS-1.
3. I believe that unless restrained by this honourable Court, the Defendant will continue keeping the garden gate locked and I will not be able to go home. I therefore respectfully ask this honourable Court to issue the injunction.

ALICE SAMPLETON

STATEMENT OF TRUTH

I believe that the facts stated in this witness statement are true.

ALICE SAMPLETON

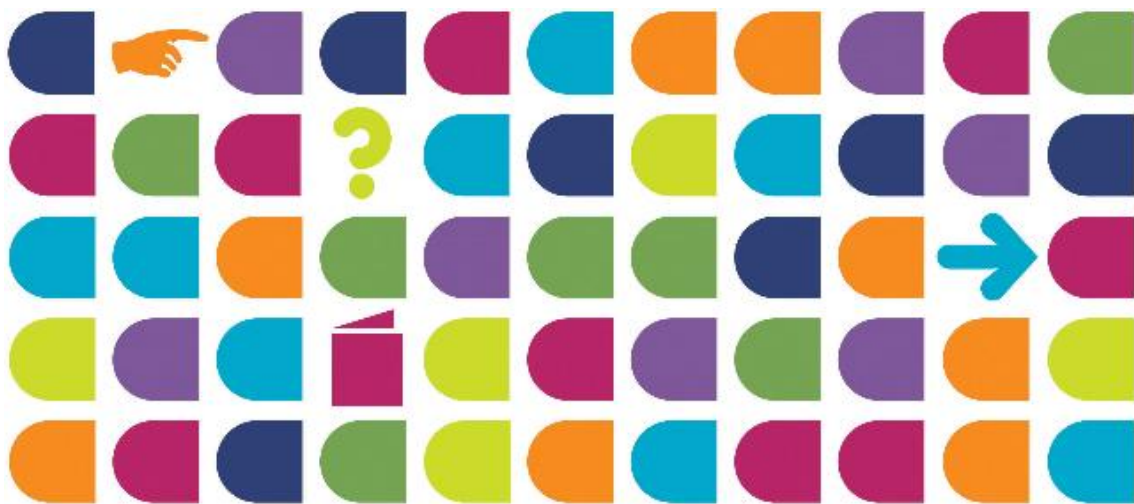
Dated 07/10/2015.

Documents should be sent to:

MS ALICE SAMPLETON , Ambrosia House, 103 Cherry Hill, Anytown S26 9TT

Divider 3

# DOCUMENTS



# Fee-charging McKenzie Friends

April 2014

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# 1 Executive summary

## An emerging market

### The issue

- 1.1. For approaching 50 years, litigants in person have used McKenzie Friends to provide moral support, take notes, help with case papers, and quietly give advice on any aspect of the conduct of the case. Traditionally, this lay support has been provided on a voluntary basis by a family member or friend, although for some time there have been people who charge a fee for this service. However, there are reports of a rise in fee-charging McKenzie Friends aiming to meet the needs of litigants who are no longer eligible for legal aid funding but cannot afford legal representation.
- 1.2. Such McKenzie Friends divide opinion. One school of thought is that this lay assistance improves access to justice by providing valuable support for litigants in person who face challenges using a court system which is designed around the needs of lawyers. This help is also seen to benefit other litigants and the courts. However, another view worries that McKenzie Friends may provide poor advice that harms their client and third parties, offer little in the way of consumer protection, prey on the vulnerable and exploit litigants as parrots to promote personal causes.
- 1.3. Little is known about these McKenzie Friends and their services. The Panel saw there was a need to build a better evidence base on the current situation in order to develop policy that strikes

the right balance between access to justice and consumer protection. We did this by gathering information through a website trawl and interviews with McKenzie Friends, discussions with stakeholders and obtaining case studies to illustrate the benefits and risks to consumers in this market.

### A typology of McKenzie Friends

- 1.4. We have classified McKenzie Friends into four types. This is important as we think the policy response to each should differ, in particular volunteer initiatives present a lower risk profile:
  - The family member or friend who gives one-off assistance
  - Volunteer McKenzie Friends attached to an institution/charity
  - Fee-charging McKenzie Friends offering the conventional limited service understood by this role
  - Fee-charging McKenzie Friends offering a wider range of services including general legal advice and speaking on behalf of clients in court
- 1.5. The focus of this report is on the last two categories, although we also draw parallels with voluntary schemes to inform our assessment of risk. These initiatives are variously run by charities, local government, advice agencies and law schools, many using pro bono support from lawyers.
- 1.6. Some key characteristics of the market are summarised in the table overleaf.

Issue	Emerging picture
<b>Business type</b>	Vast majority are sole traders; some engaged on a commission basis
<b>Background</b>	Most interviewees decided to become a McKenzie Friend following own negative experience of courts during divorce or child contact case. Others have relevant previous career experience. Few have legal qualifications
<b>Services</b>	Two types: i) conventional role based on moral support and lay assistance with mechanics of case; ii) wider role including: legal research; legal advice; case management; drafting documents; completing forms; quite commonly seeking a right of audience, which is often granted
<b>Marketing</b>	Word of mouth, websites, social media, referrals from charities
<b>Scale</b>	Two types: i) part-time: help handful of litigants a year; conventional role; turnover of £hundreds/low thousands ii) full-time: help 50+ litigants a year; wider range of services; turnover of less than £50,000 but some much more
<b>Practise areas</b>	Most specialise in family law, although other quite common areas include employment tribunals, consumer disputes and housing issues
<b>Fees</b>	Hourly rate of £15-89, but typical range is £35-60. Day rate range £100-400, but typical range is £150-200. Some other charging models exist
<b>Insurance</b>	Majority are not insured. Some report difficulty in sourcing insurance
<b>Clients</b>	Increasingly varied, but mostly male fathers on lower incomes. Another type is someone who could afford to use a lawyer, but prefers a McKenzie Friend

## Benefits and risks

### Benefits

- 1.7. McKenzie Friends can principally benefit consumers by improving access to justice and enabling greater equality of arms, especially when the other side is represented. For many litigants in person, the real choice is actually between using a McKenzie Friend or being entirely unsupported – lawyers are beyond their means and free support is not universally available. Family law clients, in particular, may not litigate out of choice, but are forced by circumstances to fight over hugely important matters, at a time of great emotional stress, in an environment that is unfamiliar and daunting to them.
- 1.8. These benefits are being increasingly recognised by judges and lawyers, as they see that cases tend to progress more smoothly when McKenzie Friends can assist the court by encouraging litigants to separate emotion from the facts, facilitate cooperation with court processes and other parties, help with case papers and so on. At a time when the court system is under strain, this is an important public interest benefit.
- 1.9. Fee-charging McKenzie Friends can be seen to also widen choice for consumers and promote competition. There is a type of client which could afford a lawyer, but prefers a McKenzie Friend – perhaps because they want closer control over how the case runs or feel that lawyers do not provide the emotional support that a McKenzie Friend could offer. Arguably, lawyers

and McKenzie Friends are not in direct competition as their roles are meant to be different and the client base using McKenzie Friends is uneconomic for lawyers to serve. Increasingly, though, the McKenzie Friend role is evolving to mirror the end-to-end service provided by lawyers – they will offer any form of assistance the client requests. For example, rights of audience are meant to be granted to fee-charging McKenzie Friends only in exceptional circumstances, but some McKenzie Friends told us this is the rule rather than the exception.

### Risks

1.10. Many of the risks consumers face when using a fee-charging McKenzie Friend are also present with lawyers, although the key difference is the absence of the protections that regulation offers. This includes preventative measures such as qualifications and a code of conduct, as well as remedial measures such as insurance and access to redress.

1.11. Nevertheless, there are particular risks associated with fee-charging McKenzie Friends, as follows:

- Agenda-driven McKenzie Friends – this includes those who deliberately set out to be disruptive or pursue a cause, with or without their client’s consent. There is another category of individual who is motivated by their own negative experience and wants to help, but lacks objectivity and may inadvertently push a personal viewpoint on to the client
- Poor quality advice – some confine their advice to the mechanics of the process, but others advise on points of law or tactics. Litigants may rely heavily on what the McKenzie Friend suggests despite this person not being legally qualified and

potentially uninsured. While some McKenzie Friend websites make it clear that the individuals are not lawyers, others make claims about their expertise. The maxim that ‘something is better than nothing’ may not hold if litigants are badly advised

- Not understanding the limitations of the McKenzie Friend role – again, while many websites clearly explain the role of a McKenzie Friend, some fail to do this or even exaggerate the assistance they can provide. There have been cases (detailed later in this paper) where the courts have decided a McKenzie Friend has overstepped their boundaries, for example by conducting litigation as an unauthorised and non-exempt person. McKenzie Friends who conduct litigation when unauthorised are conducting a criminal offence
- Escalating fees – while fees that exceed the initial estimate are not unique to McKenzie Friends, the impact is greater given their clients tend to be on lower incomes and the service is marketed as low cost. There are examples of overcharging and services being paid in advance but not being delivered. There are risks of litigants paying upfront for court assistance which a judge later refuses permission to provide. Further, the cost recovery rules are a potential source of confusion
- Breach of privacy – McKenzie Friends may be entrusted with highly sensitive information, but they are less likely than lawyers to have robust systems in place to protect this and, based on our telephone interviews, there seems to be low awareness of the need to register with the Information Commissioner’s Office. There are examples of



personal details being deliberately disclosed on social media or inadvertently through client testimonials and references

- Struck-off lawyers acting as McKenzie Friends – they are likely to be unsuitable individuals to offer help to litigants; although rumours persist, we found no hard evidence of this is happening in practice

1.12. While these are genuine risks, and we have heard stories about fee-charging McKenzie Friends who have behaved very poorly and caused real consumer detriment, crucially, there is no evidence of this occurring on any scale.

1.13. Importantly, judges also can use their discretion to help mitigate these risks, for example by not allowing the McKenzie Friend to assist and by refusing to grant a right of audience. Judges may also use tools, such as Civil Restraint Orders, to marginalise the minority of worst offenders.

### The regulatory response

1.14. Some McKenzie Friends would like to be regulated, as they consider this would give them greater recognition and help to raise standards. Some representatives of lawyers want McKenzie Friends to be regulated too, in order to provide a level playing field and to better protect consumers.

1.15. However, the cost and administrative burden of regulation could drive McKenzie Friends from the market, or put their prices out of reach of a client base which uses them mainly for affordability reasons. Moreover, we consider that regulation would be a disproportionate response to the risks given the lack of evidence of consumer detriment and the discretion and tools available to judges. Some of the worse

trading practices in the case studies seem to be matters of general law and perhaps are for trading standards and others to address.

1.16. The Panel considers that a combination of measures would strike a better balance between access to justice and consumer protection than exists now. This includes the following:

- At the heart of this report is the challenge of shifting attitudes so that the legitimate role of fee-charging McKenzie Friends is recognised. At present, these individuals encounter mixed though improving attitudes among judges and lawyers, while the advice sector is nervous about referring clients to routes other than where they will receive qualified legal advice. The legal community tends to view McKenzie Friends as one homogenous group, rather than the typology we have described. This lack of legitimacy bleeds into other problems, such as consistency of treatment and gaps in information provision. The Panel considers that fee-charging McKenzie Friends should be viewed as a source of potentially valuable support that improves access to justice and contributes to more just outcomes
- Fee-charging McKenzie Friends have responsibilities to demonstrate they merit this recognition, through effective self-regulation. This could start with establishing a trade association with a wide membership base supported by a code of practice which addresses both court procedure and commercial practices. Such a body could give these McKenzie Friends a collective voice, common standards to work towards and greater recognition among the public and stakeholders

- A more permissive regime via some limited changes to the Practice Guidance issued by the senior judiciary, from which the courts take their steer. The Practice Guidance reflects the law as it stands so the scope to change this is limited. However, this document could benefit from a more positive tone and treat fee-charging and volunteer McKenzie Friends more equally
- Ideally, judges should have a wide discretion to grant a right of audience when, having regard to the needs of the litigant, suitability of the McKenzie Friend and circumstances of the case, this would assist the court in securing more just outcomes. However, we do not think that McKenzie Friends should have an automatic right of audience, as some of them would like. While we instinctively support freedom of choice, this is outweighed by consumer protection concerns, as well as potential harm to other litigants and third parties. In our view, the risks in advocacy are such that regulatory protections are needed before rights of audience are granted automatically
- Greater consistency of treatment of McKenzie Friends across the court system. While, of course, the quality of McKenzie Friends varies, the evidence indicate that attitudes towards them vary considerably. There is a general consensus that judges and lawyers are more welcoming the more senior they are. Clearer guidance, better training support and more use of tools such as requiring a CV or completion of a form for McKenzie Friends to seek to appear in court, would give judges more confidence to use their discretion and do so consistently
- Judges should be robust in using powers available to them, such as Civil Restraint Orders, to tackle the few disruptive and poor McKenzie Friends that serve very little or no benefit to their clients. There should also be greater transparency to expose this minority; this would give assurance about the overall standards of McKenzie Friends and deter and penalise the substandard ones. Also, public enforcement agencies need to be aware of unfair or poor commercial practices and act where necessary
- Consumers and advisors need help finding a reliable McKenzie Friend who is right for their circumstances. There is much good work around improving information provision for litigants in person. The benefits of using a McKenzie Friend should be part of this provision
- Finally, the issue of fee-charging McKenzie Friends has highlighted areas, such as the scope of the conduct of litigation as a reserved legal activity and the question of whether to regulate general legal advice, which stem from structural flaws in the current framework of legal services regulation. This report adds to the evidence base which supports a wider strategic approach to legal services regulation in future which asks fundamental questions about who should be permitted to do what, and the level and type of regulation needed, in order to further the interests of consumers

## Recommendations

1. Fee-charging McKenzie Friends should be recognised as a legitimate feature of the evolving legal services market.
2. The training course on litigants in person which the Judicial College has been asked to consider should include content on McKenzie Friends.
3. Guidance notes issued by professional bodies on litigants in person should include content on McKenzie Friends.
4. The Practice Guidance (issued by the senior judiciary) should be reviewed and amended to portray McKenzie Friends in a more positive way.
5. Education and advice directed towards litigants in person should set out the benefits of using a McKenzie Friend as one form of support available to them.
6. A white label consumer guide on McKenzie Friends should be produced, with the assistance of Law for Life, for use by the advice sector.
7. More details of judgments, which highlight where the rights of McKenzie Friends who have behaved improperly have been restricted by the use of Civil Restraint Orders, should be routinely published on Gov.uk.
8. The Legal Services Board 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.
9. The Legal Services Board should consider the findings of this report as part of its ongoing work on simplifying legal services regulation.
10. Automatic rights of audience should not be granted to McKenzie Friends.
11. The Practice Guidance should be updated to take account of recent case law. In an ideal world, the Panel would like judges to have a wide discretion to grant a right of audience when this would be in the interests of justice.
12. There should be consistent use of CVs, notices or other simple tools that can help assess the credentials of McKenzie Friends when considering applications for a right of audience to be granted.
13. External regulation of McKenzie Friends should not be introduced.
14. Fee-charging McKenzie Friends should form a recognised trade association.
15. The Civil Justice Council's draft code of practice should be updated to include measures targeted at the unfair commercial practices described in this report.

## 2 Introduction

### The role of McKenzie Friends

- 2.1. There is widespread concern about the consequences for individuals and the courts of a rise in litigants in person following changes to the scope of legal aid funding in April 2013. The Civil Justice Council has predicted that such litigants will soon become the norm rather than the exception.<sup>1</sup> For some types of family law, including divorce, the data shows this already happens.<sup>2</sup>
- 2.2. Against this background, the Consumer Panel has started a programme of work on the regulatory implications of this development. However unwelcome the recent legal aid reforms might be, it is unlikely they will be reversed in the short-term. Our focus is on dealing with the impact of these changes on legal services consumers. Importantly, our remit enables us to define consumers as anyone with a potential legal need, not just users of the system. The latter group includes those people acting on their own, as well as those who access legal representation, either through a regulated or unregulated provider.
- 2.3. The first project within our programme of work considers McKenzie Friends. The role of McKenzie Friends is clearly defined in Practice Guidance issued by the senior judiciary.<sup>3</sup> This sets out that

litigants have the right to reasonable assistance from a McKenzie Friend who may provide moral support for litigants, take notes, help with case papers, and quietly give advice on any aspect of the conduct of the case. McKenzie Friends have no right to act as advocates (i.e. have a right of audience) or carry on the conduct of litigation. A judge may grant such rights on a case-by-case basis, but only in exceptional circumstances.

- 2.4. The right of litigants to reasonable assistance from a McKenzie Friend was acknowledged by the Court of Appeal in 1970.<sup>4</sup> Although in many cases a McKenzie Friend may be an actual friend or family member, in fact they come in a range of guises. These include volunteers working for charities or community groups, law students and solicitors who act as a McKenzie Friend rather than as the person appearing on the court record as responsible for the conduct of the case. However, this study focuses on McKenzie Friends who charge a fee for their services. Such businesses are variously referred to as 'Professional' or 'Fee-charging' McKenzie Friends; we use the latter term in this report as it is more neutral.

### The controversy

- 2.5. The Practice Guidance issued by the senior judiciary clearly explains that litigants may pay fees to McKenzie Friends for their services. This practice

<sup>1</sup> Civil Justice Council, *Access to Justice for Litigants in Person (or self-represented litigants)*, November 2011.

<sup>2</sup> Court statistics quarterly, 27 March 2014.

<sup>3</sup> Practice Guidance: McKenzie Friends (Civil and Family Courts), July 2010.

<sup>4</sup> *McKenzie v McKenzie*, Court of Appeal, 1970.

is not new, but the issue has attracted attention now due to a perceived rise in numbers of businesses filling the gap left by the withdrawal of legal aid. Indeed, while numbers of fee-charging McKenzie Friends are not possible to quantify, anecdotal evidence supports the view that numbers have increased since April last year and we heard concerns about people seeing this as a 'gravy train' and 'jumping on the bandwagon'. The subject is on the Justice Select Committee's radar and has been addressed as a part of major reports on litigants in person.<sup>5</sup> However, as far as we know, the Panel's report is the first dedicated study on the subject.

- 2.6. Fee-charging McKenzie Friends divide opinion. One school of thought is that this lay assistance improves access to justice by providing valuable support for litigants in person who face challenges using a court system which is designed around the needs of lawyers. This help is also seen to benefit other litigants and the courts. However, another view worries that such McKenzie Friends may provide poor advice that harms their client and third parties, offer little in the way of consumer protection, prey on the vulnerable and exploit litigants as parrots to promote personal causes.
- 2.7. The Panel started this study with an open mind since there are both benefits and risks for consumers. Like a number of policy issues we face this involves making some difficult trade-offs, for example: balancing access to justice

<sup>5</sup> For example: Civil Justice Council, *Access to Justice for Litigants in Person (or self-represented litigants)*, November 2011; *Judicial Working Group on Litigants in Person Report*, July 2013; Lord Justice Briggs, *Chancery Modernisation Review: Final Report*, December 2013; The Low Commission, *Tackling the advice deficit: A strategy for access to advice and legal support on social welfare law in England and Wales*, January 2014.

and consumer protection; and allowing individuals to take responsibility for important decisions affecting their lives while safeguarding people from risks which they are poorly placed to identify or deal with. We are acutely conscious that going to court is an intimidating prospect for even the most confident of people and often that family cases involve vulnerable adults and children.

## Our approach

- 2.8. While there are lots of strongly held views about fee-charging McKenzie Friends, there is very little information about who they are, the services they offer and those who use them. Only with a better understanding of this emerging market can there be a fully informed debate on the subject. The Panel's approach has been to start to build a picture of this market by talking directly to McKenzie Friends – both of the volunteer and fee-charging variety – and discussing our findings with interested organisations.
- 2.9. Our evidence base includes:
- A trawl of 34 websites offering McKenzie Friend services for a fee
  - Interviews with 28 fee-charging McKenzie Friends about their backgrounds, services and experiences
  - A roundtable discussion attended by both volunteer and fee-charging McKenzie Friends, the judiciary and representatives of lawyers, regulators and the advice sector
  - A call for case studies issued to members of the public, lawyers, local citizens advice bureaux and trading standards officers

- Questions on our Tracker Survey to find out public awareness and understanding of McKenzie Friends
  - Bilateral discussions
- 2.10. An omission from this evidence base is research with consumers of McKenzie Friend services. Funding was not available for such research, which would anyway present challenges in finding a representative sample given the relatively small number of clients with experience to contribute.
- 2.11. The Civil Justice Council Working Group on litigants in person has taken a key leadership role in this area. We have liaised with them during the study and wish to place on record our thanks for their assistance. By working closely with them and other stakeholders, we have sought to build a consensus on solutions that are workable and will improve outcomes for consumers.
- 2.12. We are also grateful to the McKenzie Friends and other individuals and organisations who assisted us.

### Structure of report

- 2.13. The structure of the report is as follows:
- Chapter 3 provides a picture of the market for fee-charging McKenzie Friends based on our website trawl and interviews with providers
  - Chapter 4 discusses the benefits and risks to consumers
  - Chapter 5 discusses some of the policy issues identified in our study
  - Chapter 6 discusses what the regulatory response should be
  - Chapter 7 summarises the report's recommendations
  - Annex 1 includes descriptions of organised voluntary services that

provide McKenzie Friend support. We wanted to include these as they provide a valuable service but have not always achieved the recognition they deserve for this work. Also, the differences between volunteer and fee-charging McKenzie Friends have informed our risk assessment.

- Annex 2 shows how the Panel has assessed the consumer interest on this issue using the consumer principles tool we published in January 2014. The principles are intended to help regulators think about the consumer interest in a structured way by acting as a set of reference points or prompts designed to identify issues and questions for looking into further.

# 3 An emerging market

## Our approach

- 3.1. Due to sample sizes the information below should be read as qualitative research. Further, there is likely to be an element of self-selection as those McKenzie Friends willing to participate in our study may be more established and work on a full-time basis. Our sample was found via a website trawl.

## About the individuals

### Scale

- 3.2. The majority of McKenzie Friends interviewed were sole traders, although there were a couple of businesses with two or three McKenzie Friends working as partners. In one business model, McKenzie Friends were engaged on a commission basis. The sample split roughly half and half between those working on a full and part-time basis.
- 3.3. Nearly six in 10 of the sample had been a McKenzie Friend for more than five years and one-third for over ten years. Often the individuals started on a voluntary basis fitting this around their day jobs but later decided to make it their living as demand for their services grew. The most experienced McKenzie Friends suggested there are a small group of people who are well-known and established within the court system, but that the market is fluid with individuals trying it out and not lasting very long. They also reported a large

number of new McKenzie Friends since the legal aid changes.

- 3.4. The numbers of clients assisted by McKenzie Friends varies greatly. Those working full-time helped in excess of 50 or even 100 people last year, although this did not always extend to support in court. Some at this end of the market reported £100,000 or more of turnover, although such amounts tended to be the exception with sums below £50,000 being more typical. At the other end of the scale were those helping a handful of clients and generating turnover in the £hundreds and low thousands. In the interviews, McKenzie Friends were normally willing to disclose financial information, but quite often they were only able to offer a rough guess or conceded they did not keep accounts.

### Motivation

- 3.5. It was striking that very many people became a McKenzie Friend following a personal negative experience of the court system following their divorce or child custody battle. They decided to draw on this experience to help others in similar circumstances. Some had personally benefited from having the support of a McKenzie Friend. Some other McKenzie Friends interviewed had experience of the court system in earlier careers, for example as social workers or guardians. They described being disillusioned with the family justice system and being motivated by a desire to help people navigate a

system they saw as confusing and which can result in unjust outcomes.

### Marketing

- 3.6. McKenzie Friends tend to find their clients through word of mouth and referrals from organisations and other McKenzie Friends with too much work. Referral organisations include charities which support parents seeking contact with children, and more occasionally, local citizens advice bureaux, solicitors and agencies such as Cafcass. About two-thirds of those interviewed have a website – this is likely to over-represent the true picture as many interviewees were identified through a website trawl. Some McKenzie Friends use social media to market their services.

### Qualifications and protections

- 3.7. The large majority of McKenzie Friends interviewed had no legal qualifications, although some had other professional qualifications and experience which they drew on. This included mediation, social work and accountancy. Likewise McKenzie Friends are rarely members of relevant professional bodies or trade associations, although some are members of paralegal bodies.
- 3.8. No recognised trade association for McKenzie Friends exists. There are networks of McKenzie Friends and specialist charities which refer clients. One described vetting new McKenzie Friends by seeking references, putting them on a training course and obtaining client feedback. However, another charity website states there is no accreditation procedure and they are not responsible for the work or conduct of McKenzie Friends. Some individual McKenzie Friends referenced the draft code of practice in the Civil Justice

Council's report as guidelines which they follow voluntarily.

- 3.9. A small number of McKenzie Friends have professional indemnity insurance with cover amounts ranging widely from £50,000 to over £2m. Some told us they wanted to get insurance but could not find cover, while others said they struggled to renew existing premiums following the legal aid changes. Those with insurance tend to operate on a larger scale and the policy might cover their McKenzie Friend activities as part of a wider range of professional advice services. We think there is an issue around insurers lacking awareness of what McKenzie Friends do. However, there is a more fundamental issue: when McKenzie Friends describe their services as lay assistance, by definition they are not providing professional advice and so insurance is unavailable. This would benefit from further study.

### About their services

#### Practise areas

- 3.10. The large majority of McKenzie Friends in our website trawl and interviews provided help in family cases only. Some specialised more narrowly, for example in child contact disputes. This finding is unsurprising given the original motivation behind these individuals becoming McKenzie Friends as well as the changes to legal aid. Other areas of law recorded in the interviews included consumer/money claims, employment and housing. There were a handful of McKenzie Friends who had assisted in motor offences, crime, judicial reviews and immigration/asylum cases.
- 3.11. We asked McKenzie Friends in which levels of the tribunal and court system they had worked. Their responses reflected the focus on family work but it is evident that many McKenzie Friends



operate in complex cases that reach the highest tiers of the court system. Over 80% of those interviewed had assisted in the High Court and half in the Court of Appeal. Two individuals had assisted in the Supreme Court.

- 3.12. Around two-thirds of McKenzie Friends in our interviews offer services anywhere in England and Wales, with the remainder specifying a radius around where they live.

### Services offered

- 3.13. The McKenzie Friend concept has traditionally been understood to involve giving assistance in court, although the Practice Guidance also refers to help with case papers. It is clear from our research that the concept has evolved to embrace a far wider service offering that covers any form of assistance a client might request relating to their case, both inside and outside of court. The large majority of respondents stated they provided the following related services: legal research; giving advice on points of law and the conduct of the case; case management; drafting documents; completing forms; and obtaining expert evidence. Additional services mentioned less often included formal coaching courses for litigants in person; mediation; peer support; and referrals for alcohol and drug testing. McKenzie Friends also described counselling or pastoral care as a key part of their role, although not a service in a formal sense that they would sell.
- 3.14. Over 8 in 10 McKenzie Friends in our interviews said they had been granted a right of audience to speak on their client's behalf as a lay advocate in court. The proportion of occasions when a right of audience is successfully requested varies significantly; the same number reported that this is granted rarely as claimed the rights are granted

on most of the times requested. Some McKenzie Friends reported that judges grant a right of audience without being asked as they can see the client is unable to represent themselves and/or feel this would expedite proceedings.

- 3.15. Therefore, McKenzie Friends are not a homogenous group and it is important to segment them. Some are volunteers who act alone or as part of a third sector advice organisation. Among providers who charge, some operate part-time on a small scale, while others work full-time and generate significant business. Some perform the limited conventional role of a McKenzie Friend, but others provide much wider support.
- 3.16. The schematic overleaf describes a way of segmenting McKenzie Friends. Segmenting is important since the risk they pose to consumers, and thus the correct regulatory response, may be different (see discussion from page 37). Although the boundaries are not neatly drawn, volunteer support tends to stick to the conventional role while McKenzie Friends charging a fee split between conventional and expanded roles. This report focuses fee-charging McKenzie Friends in both types of role.

### Fees

- 3.17. Fee structures and amounts vary between McKenzie Friends so it is hard to describe a 'typical' picture – some examples are provided in Table 1 at the end of this chapter (see page 16).
- 3.18. Often initial advice over the telephone is provided free of charge. After this, clients are most commonly charged on an hourly basis. This amount may vary depending on the nature of the service (inside and outside court being one distinction), the complexity of the case and perception of what the client can afford. The range of fees discovered in

our research was £15-89/hr, with most falling within a scale of £35-60/hr. It is also common for McKenzie Friends to charge a half-day or full-day rate. Full-day rates quoted ranged from £100 to £400 with £150-200 being most typical. Travelling expenses are normally extra to these rates.

3.19. There were some more unusual fee structures, including fixed packages for certain case types and online pay-as-you-go accounts. Another approach

mentioned is to fix a cost up to a certain stage in proceedings and then review further support needs. Our sense is there is a flexible approach to fees depending on the client and case. This may often mean making a deal, which may not be followed up with a contract or formal paperwork. Finally, it is important to record that fee-charging McKenzie Friends report often doing pro bono work on behalf of those who genuinely cannot afford to pay.

**Figure 1 – Types of McKenzie Friend**

<p style="text-align: center;"><b>Volunteer</b></p> <p style="text-align: center;">Family and friends Charities Law schools Lawyers acting pro bono</p>	<p style="text-align: center;"><b>Fee-charging</b></p> <p style="text-align: center;">Mix of full-time, part-time £15-89/hr, £100-400 day</p>
<p style="text-align: center;"><b>Conventional role</b></p> <p style="text-align: center;">Moral support, taking notes, help with case papers, prompting</p>	<p style="text-align: center;"><b>Expanded role</b></p> <p style="text-align: center;">Advice on law, tactics Case management, form-filling etc Seek reserved activity rights</p>

## About their clients

- 3.20. No data is available on the numbers of litigants using McKenzie Friends as this is not centrally recorded or reported. Some courts use forms which record whether a McKenzie Friend was used, although we gather this is not universal across the country, so there is scope to improve the evidence base. On litigants in person more generally, some data on family cases is available and the Ministry of Justice has commissioned a study, as yet unpublished, based on detailed analysis of 150 live cases in county and family proceedings courts.<sup>6</sup>
- 3.21. A Ministry of Justice literature review<sup>7</sup> suggests that litigants in person are more likely to have lower incomes and educational levels than those who have legal representation, and are likely to be younger. Further, that men are more likely to be unrepresented and usually are the respondents in proceedings. There is also some evidence that a significant minority of unrepresented litigants in family cases had a specific indication of vulnerability (such as being victims of violence, having depression, having a problem with alcohol/drug use, having a mental illness or being extremely young parents). Also, while financial reasons were a factor in being unrepresented, some chose not to be represented, because they deemed the matter simple enough to handle on their own or felt that lawyers were not the best placed to advance their interests.
- 3.22. In our interviews, we asked McKenzie Friends to describe their typical client.

While only a qualitative snapshot based on the recollections of a small sample of businesses, the picture they describe is broadly consistent with the literature review. Their client base is varied, but mainly male fathers at the lower end of the income spectrum. We emphasise two things here that bear on our policy analysis later. First is the emotionally vulnerable state of clients, coupled with disorganised paperwork and confusion about the court process. Second is a section of the client base who actively choose a McKenzie Friend instead of hiring a lawyer. This is for a range of reasons: a desire to exercise close control over their case; frustration that a case has dragged on and eaten up funds without much progress when a lawyer is involved; and a perception that lawyers find it difficult to deal with clients in emotional circumstances.

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<http://www.bris.ac.uk/policybristol/research/litigants.pdf>

<sup>7</sup> Kim Williams, *Litigants in person: a literature review. Research Summary 2/11*, Ministry of Justice, June 2011.

**Table 1 – Example fees**

Business	Fees quoted on website
Carter Brown	Initial consultation £99 (up to 2hrs); £50/hr court appearance (up to 3hrs); all fees paid in advance and non-refundable
Court Without a Lawyer	Free initial consultation; £25 to complete a contact application form; £25/hr work from office; £40/hr 'on location' work (in court, meetings with professionals); £10/hr waiting at court; £10/hr travel
Derby McKenzie Friends	Free for first instance guidance by phone or email; £40 for a short, simple hearing in Derby or Nottingham and £20/hr other guidance including travel; Further afield, £90 for short, simple hearing or whole day hearing at £150 plus expenses
Familia	£40/hr plus expenses
Family Court Decisions	Free initial phone consultation; preparation for a hearing, telephone and email support £50/hr; fixed fees including travel for court hearings from £150 depending on location and availability
Family Law Clinic	£89/hr attending/in court plus £45/hr travel; a wide range of fixed fees for specific types of work; £349 all-inclusive half-day coaching clinic for litigants in person; £2,499 fully inclusive service for applicants and respondents designed for co-operative couples
Family Court Support	Free consultation; cost of document and case preparation is based on 3hrs at £40/hr which is non-refundable (although unused time can be carried over to future stages); obtain quote for hearings
Friend4litigants	Free 30 minute phone/email consultation; £50 upfront on account before proceeding; advice and discussion £32/hr in 15 min increments; preparation of documents, review of material, involvement with other parties £48/hr in 15 min increments; attendance at court £60/hr in 15 min increments or flat rate per day of £240; disbursements payable in advance; travel at 45p/mile plus £32/hr in 15 min increments
Lawfriend	Free initial telephone conversation; £50/hr for attendances, written work and assistance; £100 for a half day in court, £200 for full day.
Mc-kenzie-Friend.info	£25/hr 9-5 Mon-Fri, £50/hr weekends and other times; £35/hr attending court for minimum of 3hrs; £100 court deposit per day, non refundable unless hearing adjourned; online account on a pay as you go system with the amount paid converted to hours and deducted as work is instructed; discounts for introducing clients
Pro-Adas	15 minutes free consultation; £40/hr plus 60p per mile of travel
Your McKenzie Friend	"All we ask is for you to pay us what you feel our advice, support and guidance is worth to you, and most importantly, what you can afford to pay"

# 4 Benefits and risks

## Enabling a balanced debate

- 4.1. In this section of the report, we set out the benefits and risks to consumers of using fee-charging McKenzie Friends. Our purpose is to enable a balanced debate and provide a basis on which to make reasoned recommendations on the best way forward. It is only natural for a report that seeks to improve outcomes for consumers to spend longer discussing risks than benefits; this should not imply bias on our part.
- 4.2. It is not possible to quantify the level of consumer detriment due to the small numbers of people using these services, absence of data collection or a complaints handling body, and a lack of transparency in the family courts. Therefore, the discussion and case studies should be treated as illustrative rather than as a representative picture. However, our call for case studies had little response, which may suggest any detriment is not on a large scale.
- 4.3. It has been pointed out to us that some risks of using a fee-charging McKenzie Friend are also present when using lawyers, as there are good and bad McKenzie Friends just as there are good and bad lawyers. While true, the key difference is that the regulation of lawyers offers consumers preventive safeguards and a means of redress not available for McKenzie Friends.

## Benefits

### Improving access to justice

- 4.4. Improving access to justice is one of the eight regulatory objectives in the Legal Services Act 2007. Access to justice in the context of this report should cover both potential users of legal services as well as those people who have used a McKenzie Friend.
- 4.5. Litigation through the courts on a family matter can be expensive and beyond the means of a great many individuals. Added to this is the withdrawal of legal aid funding, while 'matrimonial disputes' tend to be excluded from most legal expenses insurance policies. Therefore, for those who cannot afford legal representation, the real choice is between using a McKenzie Friend or being entirely unsupported during proceedings.
- 4.6. An objection to this argument is that affordability is improving due to lawyers offering unbundled services and that the advice sector and volunteer McKenzie Friends provide alternatives to other paid-for services. However, unbundled services do not appear to be widespread or well-advertised, the advice sector faces funding pressures and free services provided by charities do not offer universal coverage in areas of law or full geographic reach. Free McKenzie-Friend support also tends to be limited to the conventional role.

Regardless of whether these sources of help are superior to fee-charging McKenzie Friends, they are simply not available to all litigants in person.

- 4.7. The other 'choice' is not to go to court at all, either for financial reasons or due to fear of the process. For those who are daunted by the prospect of going to court and fighting their case against lawyers, or a spouse they have fallen out with, and with so much riding on the outcome, a McKenzie Friend can give people the confidence they need to take that step. In family cases, such as seeking contact with a child, litigation is not a free choice, but a reaction to circumstances. Whatever progress has been made in making the courts more accessible, the perception remains that they are a confusing and intimidating environment for litigants in person.

#### Improving the administration of justice

- 4.8. Equality of arms is a central principle of our justice system. There is some research evidence to suggest that lack of representation negatively affects case outcomes, for example, in social security child support appeals, while 47% of all appeals were successful in 2012-13 this figure is 63% with representation.<sup>8</sup> There is also research which shows that in some cases specialist lay representatives are just as effective as legally qualified ones.<sup>9</sup> Therefore a possible benefit is that the assistance of a McKenzie Friend may lead to more just outcomes.
- 4.9. Litigants in person face a series of challenges: they are likely to be unfamiliar with court procedures and

rules of evidence; get confused by the often arcane language of the courts; can find it difficult to present their case or to cross-examine witnesses effectively, especially if they are nervous or emotionally involved in the case; and may find themselves up against opposing counsel for whom words are their tool of trade.<sup>10</sup>

- 4.10. This may be particularly true in relation to vulnerable clients who struggle to present the case by themselves. There is some case law to support this. In a case where rights of audience were being sought, the judge concluded that: *"the grant of rights of audience to a McKenzie Friend will, to adopt the President's words, be of advantage to the court in ensuring the litigant in person receives a fair hearing. Sometimes, indeed, it will be essential if justice is to be done and, equally importantly, perceived by the litigant in person as having been done."*<sup>11</sup>
- 4.11. However, this claim should be qualified. There is little research on the impact of McKenzie Friends, poor advice from a McKenzie Friend could negatively affect case outcomes and judges have an important role to level the playing field, especially in cases where one party is unrepresented. It has also been suggested that judges may be less likely to intervene when a litigant is assisted by a McKenzie Friend.
- 4.12. The consensus view among the small number judges we spoke to, as set out in the Civil Justice Council's report, is that some help for litigants in person is better than none at all. They recognise that a McKenzie Friend can encourage litigants to separate emotion from the facts, facilitate cooperation with court

<sup>8</sup> HMCTS, Social Security appeal tribunals and representation statistics (FOI/80708).

<sup>9</sup> Kim Williams, Litigants in person: a literature review. Research summary 2/11, Ministry of Justice, 2011.

<sup>10</sup> The Judicial Working Group on Litigants in Person: Report, July 2013.

<sup>11</sup> N (A Child) [2008] EWHC 2042 (Fam).

processes and other parties, aid with preparation of case papers and so on. These same factors may also help to expedite proceedings. This is relevant since a common concern about a rise in litigants in person is a growing backlog due to delays caused by cases taking longer to reach their conclusion. Certainly our research generally found a pragmatic attitude among judges: if McKenzie Friends help to progress the case, they are to be welcomed.

#### Widening choice for consumers

- 4.13. There is clearly a consumer demand for fee-charging McKenzie Friends as otherwise their services would not be used. As highlighted in the previous chapter of this report, some people can afford a lawyer but prefer to use a McKenzie Friend in order to exert closer control over their case, due to the greater emotional support offered, or due to disillusionment with lawyers. The role of McKenzie Friends is more limited than that which lawyers may offer, but this may be sufficient for an individual's needs. As long as this is explained to consumers, and McKenzie Friends are not encroaching on rights reserved to lawyers under the Legal Services Act 2007, this situation can be expected to enhance competition. All consumers can then enjoy the usual benefits of competition, such as innovation in services and lowering prices across the market as a whole.

### Risks

#### Agenda-driven McKenzie Friends

- 4.14. When we asked McKenzie Friends what worries them about some other McKenzie Friends, the most common answer was those 'with an axe to grind' who exploit vulnerable clients as puppets to pursue a personal agenda.

Moreover, they encourage clients to pursue meritless cases at a financial and emotional cost to clients, while also wasting court time. Alternatively, their aggressive behaviour may antagonise the court and harm their client's prospects of a successful outcome.

- 4.15. We described earlier how the vast majority of providers decided to become McKenzie Friends following their own negative experience in the family courts. The Panel recognises that one benefit of McKenzie Friends in family courts is that for most this is not just a job, but they are doing something they think is worthwhile and gives back. Clients also value someone who can directly relate to their experience.
- 4.16. That said, while the best McKenzie Friends channel their experiences in a positive and responsible way, others may do so negatively, even though they may genuinely want to help. Effective support requires objectivity in order to help people get the outcome they want; this may be compromised if a McKenzie Friend brings a strong personal viewpoint to the case.
- 4.17. With some of the McKenzie Friends being fathers assisting other fathers, there is greater scope for people to be pursuing personal agendas that may not be assisting the clients or, crucially, longer term family relations. There are anecdotal instances of ex-wives and mothers being subject to intimidating behaviour in these situations.
- 4.18. Commonly McKenzie Friends are affiliated with charities promoting the rights of fathers – we are told that some of these organisations are respectable, but others less so and some set out to be deliberately disruptive. It seems that many clients find their McKenzie Friend through these charities and so should have a good idea about their ethos.

### Case studies: bad behaviour

In January 2014, the High Court issued an Interim Civil Restraint Order which prevented the individual concerned from acting or holding himself out to act as a McKenzie Friend in any family proceedings without court permission. The order followed an earlier general restraint order issued in April 2012 by a County Court on the grounds that the person had issued on his own behalf eleven sets of proceedings described by the court as being totally without merit and were struck out. Evidence concerning a hearing in January 2013 described him as having been abusive and aggressive in a court building before and after a hearing in which he attempted to act as a McKenzie Friend. In a separate case, his client, a mother, made a statement alleging that he insisted on being her single point of contact and that he acted in a grossly abusive manner towards her and her colleagues. At the hearing for the case, in December 2013, the father's counsel alleged that when he approached the mother for discussions before the hearing, the McKenzie Friend responded in an aggressive and frightening manner, leading him to fear for his safety. There is evidence after the hearing that the McKenzie Friend made intimidating phone calls to the father's counsel and solicitor. The McKenzie Friend disputed this account and published his version of events on Facebook. He notified the solicitors that he would be taking civil action against them and counsel and that his wife, who is his business partner, would now act as McKenzie Friend for the mother.

The High Court ruled that a judge had been entitled to refuse an application for a particular person to act as a McKenzie Friend within care proceedings despite that individual not being present in court at the time of the application. The Court of Appeal upheld that decision. The applicant's two children had been taken into care and findings had been made that one of them had suffered a non-accidental injury inflicted by the applicant. Thereafter, a final care order was made and the Local Authority applied for adoption and to terminate contact. The applicant then sought publicity for her case, which was prohibited by the court. The applicant applied for permission to appeal against the care order and was assisted in this application by her McKenzie Friend as, by then, she was not entitled to public funding and had no legal representation. Within the appeal, the applicant produced a statement supported by a number of documents which raised concerns with the Local Authority regarding the McKenzie Friend acting for the applicant. They opposed the application for her to act as a McKenzie Friend. The judge had seen the statement produced by the proposed McKenzie Friend, made clear she had embarked on a campaign concerning the family justice system and the conduct of the local authority; that she did not respect the confidentiality of the family justice system in other cases and in the instant case; and that she did not understand the role of a McKenzie Friend, which was to assist with presentation of the case in court in a neutral manner. It was clear that the McKenzie Friend had a personal interest in the instant case and expected to give evidence to make good her contentions. The judge ruled that her ability to be a McKenzie Friend had been compromised by the statement. She claimed that she had the permission of those involved to disclose details of other cases, but it was ruled that the confidentiality of family proceedings was a matter for the court. Although the applicant was entitled to a McKenzie Friend, her current choice was not suitable for that role. The High Court ruled that the judge had acted within the ambit of his discretion on the basis that the McKenzie Friend might not respect the confidentiality of the proceedings.



- 4.19. However, one of the main challenges of the role is persuading clients to leave emotions at the courtroom door and focus on the legal aspects of their case. People see injustice in the system very quickly and at the same time are trying to manage a difficult relationship, for example with an ex partner. This situation leaves people vulnerable to exploitation, especially when they have a poor understanding of how the court system is intended to work.
- 4.20. The discretion available to judges to exclude McKenzie Friends (as set out in the case studies above) is a helpful safeguard in these situations, although the Practice Guide states that the court should not refuse litigants assistance from a McKenzie Friend on the grounds they belong to an organisation that promotes a particular cause. Judges may refuse McKenzie Friends their permission to provide support in court and, for the worst offenders, use orders restraining individuals from bringing or pursuing claims and applications without the express permission of the court. The Judicial Working Group has urged a proactive and robust approach to vexatious litigants, which it stresses are few in number. In our view, this should also apply to the small minority of vexatious McKenzie Friends.
- 4.21. It is important not to tar all McKenzie Friends with the same brush; indeed, McKenzie Friends worry about the actions of a small minority tarnishing the reputation of all. While there are examples of McKenzie Friend websites using extreme language railing against the family justice system, and instances where judges have excluded someone from a court due to their behaviour or used Civil Restraint Orders, we have no evidence to suggest this is anything more than a minority element.

### Poor quality advice

- 4.22. Our interviews found that McKenzie Friends rarely have legal qualifications, although some have other relevant professional qualifications or previous career experience to draw on. Others have built up experience of family law during their time as a McKenzie Friend. We have seen comments from judges in judgments praising the competence of McKenzie Friends who had an active role in the case. Clearly, however, a lack of knowledge of the law or failure to keep this up-to-date, could leave clients exposed to poor advice and bad decision-making, which could have profound consequences. It was

#### Quality claims – good and bad

“It is important to note that Amanda is not a qualified lawyer”

“Please note that friend4litigants is not a lawyer based service and does not provide legal advice and legal services”

“Our McKenzie Friends are fully trained and kept up to date on changes in the legal system, but they know their limits: if we think you need formal legal advice from a solicitor, we’ll point you in the right direction”

“For the majority of people we can help you fight your case to a higher standard, and with more conviction, than a solicitor could”

“[We can] help you to achieve at least the same results as a lawyer”

“We are among the best London divorce and litigation lawyers around”

### Case studies: poor quality advice

A firm of solicitors acted for the grandparents of a 4 year old who took a residence order at his birth as an alternative to him being taken into care. The father, who has mental health needs, used a McKenzie Friend. There have been procedural errors, demands for things the grandparents cannot by law be required to do, failure to respect precedent and the social worker's patience seems to have been tried severely. Costs have increased where a registered solicitor would have told the parents from the outset that their case was hopeless. The McKenzie Friend appeared to have ignored the risks inherent in the particular circumstances that the parents could end up with no contact at all.

A firm of solicitors was involved in a matrimonial case where the McKenzie Friend acted for the husband. As time went on, the case became fully contested, and whilst not complex in itself, had quite high values and various international elements. The case settled on the morning of the final hearing, with the husband expressing substantial bewilderment as to how he had arrived at the stage he was at, when a settlement could have been negotiated much earlier. It transpired that he had received doubtful advice, although Counsel had been instructed to attend preliminary hearings, and the husband was urged to adopt very aggressive tactics. The husband had paid fees of £65,000, much higher than the solicitors own costs even though the wife was the Respondent. From the documents available, there didn't appear to be a "retainer" or "terms of business", only demands for payments on account to be sent to (sometimes) offshore personal accounts.

suggested that clients are often desperate and will take anyone's help and follow the advice they suggest. The maxim that 'something is better than nothing' is often used in relation to McKenzie Friends, but this may not hold if litigants are badly advised.

- 4.23. However, the degree of risk of poor quality advice depends on the nature of support offered. Arguably this should not be a concern because McKenzie Friends are intended to provide moral support and lay assistance primarily focused on the mechanics of the legal process. Mastering how the court process works, and knowledge of the law and advising on the course of action that would best serve the client's interests, are different matters entirely. It is further argued that the client is firmly in control of the case and decides how to proceed, with the judge able to curb any abuses by McKenzie Friends.
- 4.24. Yet the strength of this argument relies on whether the activities of McKenzie Friends are limited to this narrow role in practice. In our interviews, the majority of McKenzie Friends said they provided advice. Among those who were careful to describe their role as helping people to understand their options, some also described being put in a position where they felt there was no option but to go further and provide advice on how to proceed, because they could see their client was vulnerable and about to make a mistake they would later regret. Furthermore, much provision of advice takes place before the case reaches court and so invisible to scrutiny.
- 4.25. General legal advice is not a reserved activity under the Legal Services Act 2007. This means that anyone is free to offer such advice without restrictions. Research on the history of the reserved activities has established that they lack

a clear rationale<sup>12</sup>; the current list was passported into the 2007 Act. Evidence of the impact of reserving general legal advice would be needed before the Panel took a view on this. However, for now, we note this is one example where there is not a neat fit between reserved activities and how legal services are delivered in practice.

- 4.26. The courts have a quality monitoring role to the limited extent that McKenzie Friends are meant to submit a short CV or other statement setting out relevant experience to inform judges' decisions permitting litigants to be assisted by the McKenzie Friend. Transparency by McKenzie Friends about their qualifications and limited role would mitigate quality risks and aid litigants to make informed choices. Our website trawl found mixed results: some stated very clearly they were not lawyers and were not legally qualified, while others claim to mirror the service offered by lawyers and underline the credentials which they claim gives them expertise. Clearly, the more active the McKenzie Friend's role in the case – provision of legal advice and speaking in court – the more important these safeguards are.

#### Not understanding what a McKenzie Friend can and cannot do

- 4.27. A linked risk is litigants not grasping the limited assistance that McKenzie Friends are permitted to provide. Having false assumptions about this could leave people in difficulty at a later point in the case and unprepared to fill the gap. Similarly, McKenzie Friends differ in the level of support they offer and it is important for consumers to have clear expectations of the service when choosing which provider to use.
- 4.28. The key difference between McKenzie Friends and lawyers is that the former do not have automatic rights to conduct litigation or have rights of audience. Consumers can also expect lawyers to advise them on how to proceed, while McKenzie Friends may limit themselves to moral support or assistance with the mechanics of the process, or present options on how to proceed without suggesting the best course of action.
- 4.29. It may be argued that the wider range of activities performed by some McKenzie Friends is not a McKenzie Friend service, but instead 'legal consultancy' or 'lay assistance'. However, when looked at from the consumer journey perspective, on their websites, providers often describe the full service offering we have outlined under the banner of McKenzie Friend support. The regulatory response should start by looking at this issue from the consumer's viewpoint.
- 4.30. There is scope for consumer confusion due to the nature of the environment in which McKenzie Friends operate. The public is generally unfamiliar with how the family courts work. Likewise most people use lawyers rarely and research suggests they think all legal services are tightly regulated. As we explore in the next chapter, the precise meaning of 'conduct of litigation' is a grey area. And judicial discretion over whether to grant rights of audience also creates uncertainty, although this is only one factor that needs to be considered in relation to rights of audience.
- 4.31. The main safeguard is for McKenzie Friends to clearly explain what they may or may not do. Again, our website trawl found examples of good and bad practice. Some set this out very clearly in a prominent position on their sites, often copying directly from the Practice Guidance in a bullet by bullet format.

<sup>12</sup> Professor Stephen Mayson, *Reserved Legal Activities: History and Rationale*, Legal Services Institute, August 2010.

### Overstepping the mark

The Judge at first instance had refused the particular McKenzie Friend who was assisting the father. The Judge had felt that the particular McKenzie Friend had gone further than the guidance and had caused the mother to feel intimidated. She was at pains to make clear that the father could obtain another McKenzie Friend for the hearing. She had adjourned the case on a previous occasion in order to ensure that she could familiarise herself with the papers and she heard a number of submissions from the solicitor acting for the children, including evidence that the father's McKenzie Friend had overstepped the mark and prepared a document in the case template which referred to the name of a child who was nothing to do with the proceedings, even though the father asserted that 80 percent of the work had been done by him.

The judge concluded her short judgment with these words: "I am concerned about the fact that there is a crossing over it seems to me here of a McKenzie Friend into the realms of conducting litigation. So far as I am concerned, the documentation does cross the line, and even if it is only twenty per cent it is twenty per cent too much." In referring to the Practice Guidance, the Court of Appeal decided this was a case management decision the judge was entitled to make and therefore dismissed the appeal.

*Re H (Children [2012] EWCA Civ 1797*  
*Unavailable on Bailii website – Summary*  
*taken from suespiciousminds.com.*

Similarly the types of services offered are listed in detail. However, other sites claim their service mirrors that provided by lawyers, or appear to exaggerate the likelihood of being granted rights of audience. For example, one site offers litigants in person to purchase (for £24.99 plus postage of £1.99) "*this tried and tested and successful letter which can be used to apply to the Court judge for your McKenzie Friend to speak on your behalf in Court and be your agent out of court*".

### Escalating fees

- 4.32. In the previous chapter, we set out the range of fees charged by McKenzie Friends. Predominantly services are charged at an hourly rate, plus travel. There is also an element of making deals. The level of support that a client needs and the duration of a court case is not always easy to predict. For this reason the prevailing hourly rate billing method is entirely understandable. However, as with any legal service charged by the hour, there are incentives for providers to carry out more work than is needed and for bills to escalate far beyond the original estimate. There is little special about McKenzie Friends in this respect, although the consumer detriment may be proportionately greater because their clients tend to be on low incomes. Further, McKenzie Friends commonly claim their services are considerably cheaper than lawyers, which creates an expectation about low costs.
- 4.33. On the whole we found a reasonably high level of price transparency in our website trawl, although some websites do not state any price information. However, our search did reveal a high variation in fees, which suggests it pays consumers to shop around. As some family matters can end up being drawn

out affairs, involving multiple hearings, the total cost may be substantial. There is no way for consumers to compare costs other than by researching each McKenzie Friend service in turn. Where an informal deal is made and the case takes an unexpected path, litigants may find themselves presented with a far higher final bill than they expected.

- 4.34. As the case studies illustrate, there is a risk that consumers are grossly overcharged, get duped or do not receive the services they pay for in advance. Litigants may not meet their McKenzie Friend until the court hearing. The tendency towards making informal deals without a contract or formal paperwork leaves litigants vulnerable to abuse and there is normally no insurance or consumer redress scheme to fall back on.
- 4.35. One specific risk highlighted by judges is what happens when a litigant pays for services in advance, but the judge refuses the individual permission to act as a McKenzie Friend. Our research found that payment on account is quite common so this is a risk, although instances when a court does not allow a McKenzie Friend to act should be rare. Such litigants may be disillusioned with the court for refusing them the help they had expected and let down by a McKenzie Friend who may have given them false expectations, or at least not disclosed this risk. As contracts are not always made and there is no redress scheme to turn to, there may be no come back for the litigant except through the small claims court. Given they are already litigating once, this route is unlikely to be appealing.
- 4.36. Costs rules which apply to McKenzie Friends add another dimension. Fees to McKenzie Friends for the provision of reasonable assistance in court or out of court, cannot be lawfully recovered

### Case studies – being duped

A woman engaged a McKenzie Friend to help in a civil case. After contacting the McKenzie Friend, she agreed to transfer £1,500 up front for his services on account. However, despite doing very little work on the case so far, the McKenzie Friend was now asking for many hundreds of pounds more. The woman asked for a breakdown of costs to show where her money has been spent so far, but feared that the McKenzie Friend could do something to jeopardise her case if she upset him. The situation was urgent because the woman needs help filling out a form in time for the court case.

A woman asked a McKenzie Friend for help on a contact case involving her daughter. She paid him for completing and filing the papers with the court. After waiting a week she called him and was told a hearing was taking place the following week that he didn't need to attend and that her ex had been served with papers. She heard nothing from her ex, who she was sure would have contacted her, but the McKenzie Friend advised this was because he was going to contest it. After the first hearing date, she called again and was told there was another hearing she would need to attend in three weeks. She asked for papers to confirm this, which the McKenzie Friend agreed on three occasions to send, but nothing arrived. She then phoned the court to see what was happening, but they had never heard of her or her case. The woman then asked to meet the McKenzie Friend but he twice failed to show up. The McKenzie Friend agreed to refund the money and return her papers, but she had heard nothing.

from the opposing party. However, fees said to be incurred for carrying out the conduct of litigation or exercising rights of audience, when these rights are granted by the judge, are in principle recoverable from the litigant for whom this work is carried out. It is important that litigants are aware of the potential costs implications and we would expect McKenzie Friends to make their clients aware of potential costs exposure as this could well affect their decision over choice of representation. However, we did not often find this information on their websites. More widely, the costs rules place McKenzie Friends at a market disadvantage to lawyers whose costs are recoverable. Moreover, it could impose a barrier to access as litigants may decide this is a financial risk they cannot afford to take.

#### Breach of privacy

- 4.37. Family law cases may involve the most sensitive of matters involving litigants, children and others. Litigants entrust McKenzie Friends with this information and it is vital they take the proper steps to protect this adequately.
- 4.38. The Data Protection Act 1998 requires every organisation processing personal data to register with the Information Commissioner's Office (ICO), unless they are exempt. We think that McKenzie Friends are likely to need to register with the ICO. Based on our interviews, we do not think there is a high awareness of this obligation among McKenzie Friends. Moreover, since McKenzie Friends process 'sensitive personal data', because information about these matters could be used in a discriminatory way, and is likely to be of a private nature, the law states this needs to be treated with greater care than other personal data.
- 4.39. McKenzie Friends were aware of some instances where personal information has been compromised. On one level, this may be inadvertent, for example revealing a child's identity by including a named testimonial from a satisfied client. Alternatively, disclosure may be reckless or deliberate, for instance by citing cases on Facebook as a tool to protest against a perceived injustice. The possibility of being in contempt of court should be a significant deterrent, but we were told that such disclosures are not uncommon.

#### Struck-off lawyers

- 4.40. There is speculation that there are some McKenzie Friends who were former lawyers who had been struck-off the roll. In our interviews, McKenzie Friends claimed to know of some individuals. This would be a concern as a lawyer would need to have done something gravely wrong before being struck-off and this would raise serious questions about their suitability to provide McKenzie Friend assistance.
- 4.41. However, the Panel found no hard evidence of this in our investigation, although this would be difficult to know without a register of McKenzie Friends. We searched the Solicitors Regulation Authority and Solicitors Disciplinary Tribunal electronic records against names of McKenzie Friends identified in the study but did not find evidence of sanctions. Indeed, we note that the majority of McKenzie Friends in our interviews were not legally qualified, which would also suggest this is rare.

# 5 Issues

## Policy challenges

- 5.1. In this section of the report, we set out the main policy issues identified from our evidence-gathering and provide a consumer interest perspective on how these might best be addressed.
- 5.2. Five issues are considered below:
  - How to achieve greater acceptance at official level of the legitimate role of fee-charging McKenzie Friends
  - Improving consistency of treatment of McKenzie Friends in the courts
  - Raising public awareness of the full range of options available to them including McKenzie Friends
  - The grey area of what is included within the reserved legal activity of 'the conduct of litigation'
  - Rights of audience

## Acceptance

- 5.3. The Civil Justice Council's report on litigants in person found that some react positively to McKenzie Friends, others negatively. It concluded: "*it will become more important to ensure that the approach to McKenzie Friends is one of readiness to welcome and value the contribution that some can make rather than one of over-caution about*

*the harm that some can do.*"<sup>13</sup> In many ways this statement broke new ground, but the report still drew a distinction between volunteer helpers and those charging a fee for their services. For example, the next paragraph, states: "*By contrast it is hoped that courts would be very resistant to allowing a right of audience to a McKenzie Friend who was taking payment.*"<sup>14</sup>

- 5.4. Some 'conscientious objectors' reject the notion of a fee-charging McKenzie Friend altogether by suggesting this practice corrupts the meaning of the term 'friend'. However, the Practice Guidance is clear that fees may be charged. Providing lay assistance is not a reserved legal activity so seeking to restrict payment for such work would seem to undermine the will of Parliament. While preference for free support is natural, in reality this is not universally available.
- 5.5. There is some evidence of resentment towards McKenzie Friends, among junior lawyers in particular, who feel they are unfairly losing potential clients to businesses which can offer cheaper prices because they are not subject to the same regulatory safeguards. In our

<sup>13</sup> Civil Justice Council, *Access to Justice for Litigants in Person (or self-represented litigants)*. A Report and Series of Recommendations to the Lord Chancellor and to the Lord Chief Justice, November 2011.

<sup>14</sup> Ibid.

view, McKenzie Friends and lawyers provide quite different services so we do not think there is unfair competition. McKenzie Friends offer lay assistance; they do not act as the client's agent and rights of audience are granted on a case-by-case basis, perhaps only for one part of a hearing. The competition concerns would hold more weight if McKenzie Friends had an automatic right of audience, however. The challenge here is to help consumers understand these differences and make informed choices. In addition, McKenzie Friends may not directly compete with lawyers because the majority of consumers who use McKenzie Friends could not afford to purchase a lawyer's services.

- 5.6. In the end, although many stakeholders are instinctively uncomfortable with the idea of fee-charging McKenzie Friends, they agree some help is better than none at all. The Panel views this group of providers more positively as serving a client base that is uneconomic for lawyers to serve. Indeed, they might be seen as an inevitable response to the legal aid reforms: if state funding is taken away yet most consumers cannot afford a lawyer, there is an opportunity for alternative providers to fill the gap by offering a different type of service.
- 5.7. Official acceptance by government and the judiciary of fee-charging McKenzie Friends as a legitimate feature of the market would be welcome. This signal would help address other challenges discussed below, such as consistent treatment by judges and raising public awareness of McKenzie Friends as one of the range of options available.

***Recommendation 1: Fee-charging McKenzie Friends should be recognised as a legitimate feature of the evolving legal services market.***

## Attitudes of judges and lawyers

- 5.8. Judges sit at the apex of the civil justice system, develop practice and help drive change, and hold the key to case management.<sup>15</sup> They hold the greatest influence in shaping the environment in which McKenzie Friends operate and their treatment of them sets the tone for others to follow. How lawyers representing other litigants in the case treat McKenzie Friends may also have a significant impact on the latter's ability to provide effective support.
- 5.9. Around two-thirds of McKenzie Friends in our interviews described judicial attitudes overall as either positive or neutral, with the rest suggesting they are negative. However, it is hard to generalise as experience differs from court to court. To the extent there is a pattern, the more senior the judge, the more welcoming they tend to be of McKenzie Friends. Magistrates were said to be least welcoming. The reasons suggested by McKenzie Friends for this are: lack of awareness; wrong advice from legal advisers; and nervousness about using the discretion afforded to them in the Practice Guidance.
- 5.10. Another common experience is that judges are initially sceptical, but soften once the case starts as they can see that the McKenzie Friend is helping matters to run more smoothly than would otherwise be the case. Where McKenzie Friends are experienced, and have successfully appeared before a judge previously, they are recognised and immediately welcomed. In overall terms, the longest-serving McKenzie Friends suggested that attitudes had changed for the better in recent years.

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<sup>15</sup> Ibid.



- 5.11. The attitudes of lawyers on the other side were described in similar terms; the general experience is quite positive, but there is also some suspicion and occasionally outright hostility. Again, more senior lawyers were found to be more welcoming than junior ones, who McKenzie Friends suggest see them as either a threat or a weakness to exploit. The pattern of attitudes softening as the case progresses also occurs here. However, there was a feeling that the behaviour of lawyers is often worse outside of the courtroom away from judicial scrutiny. Others felt lawyers were hostile towards McKenzie Friends because their presence harmed their chances of success, whereas the other experience was that lawyers welcomed knowledgeable and effective McKenzie Friends as they help to move the case along in line with proper processes and help manage the client's emotions.
- 5.12. The improving treatment of McKenzie Friends is a welcome finding, although there still appears to be inconsistency of treatment across the courts that needs to be addressed. This makes it hard for McKenzie Friends and their clients to know where they stand and risks unjust outcomes, but it may also suggest judges and lawyers need more support in dealing with these situations.
- 5.13. There are already initiatives designed to strengthen training and guidance for the judiciary. For example, the Judicial Working Group recommended that the Judicial College should consider, urgently, the feasibility of developing a training course (or courses) on litigants in person. In the Panel's view, any such course should include content on McKenzie Friends. Similarly, while of course regulators should be vigilant of improper conduct, greater awareness and guidance is most likely to change attitudes and improve behaviour among

lawyers. The professional bodies have a role to play here in the guidance they issue on litigants in person.

- 5.14. Additional mechanisms for achieving greater consistency need considering. North of the border, Consumer Focus Scotland suggested that a strong presumption in favour of (volunteer) McKenzie Friends should be enshrined in primary legislation, supplemented by court rules. In England and Wales, the Practice Guidance is the primary steer given to judges. The Practice Guidance describes the law as set down by the Court of Appeal, common law and a limited amount of statute. It is therefore something that cannot be revised by simple redrafting, but would need to form part of a judgment or statute. However, the Practice Guidance was last issued in 2010 so there may be scope to update this in light of case law since then. In addition, in a policy paper of this type, there is value in setting out what we consider to be good practice.
- 5.15. Ideally, the Practice Guidance should be strengthened before new laws are contemplated. For example, the current guidance states the court retains the power to refuse McKenzie Friends permission to assist clients if it is satisfied that, in that particular case, the interests of justice and fairness do not require the litigant to receive such assistance. In our view, this approach unduly restricts choice for consumers and sets a negative tone that could lead to inconsistency or overly cautious treatment of McKenzie Friends.

***Recommendation 2: the training courses on litigants in person which the Judicial College has been asked to consider should include content on McKenzie Friends.***

***Recommendation 3: Guidance notes issued by professional bodies on***

***litigants in person should include content on McKenzie Friends.***

***Recommendation 4: the Practice Guidance should be reviewed and amended to portray McKenzie Friends in a more positive way.***

### Public awareness

- 5.16. A poll commissioned for this report reveals that 6.5% of the general public has an accurate basic understanding of what a McKenzie Friends does. Only a minority of people will ever require the services of a McKenzie Friend. Therefore, the challenge is to ensure the public is aware of the full range of options available to them, including McKenzie Friend assistance, *at the point when they have a legal need.*
- 5.17. There has been a great deal of focus on improving information and support directed at litigants in person, including publication of some useful guides. This activity is very welcome, but these materials are not always as positive about the contribution of McKenzie Friends, fee-charging or otherwise, as they might be. The greater acceptance of McKenzie Friends discussed earlier needs to extend throughout the range of organisations that litigants may come into contact with. For example, some local advice agencies said they would be nervous about referring clients to anyone except a qualified lawyer. However, if this is not affordable, this cautious approach, albeit well-intended, could limit access to justice.
- 5.18. Once people know what a McKenzie Friend can do, it is quite easy to find one through an internet search. Although, of course, not everyone is online and those on low-incomes – the typical client of a McKenzie Friend – are less likely to access the internet than the general population. However,
- while fairly easy to find a McKenzie Friend, it is less easy to tell between a good and bad one. As when choosing any provider, there are a series of sensible questions consumers should ask to satisfy themselves as to the credentials of McKenzie Friends and whether they are able to provide the right level of support for them.
- 5.19. The Legal Services Consumer Panel is not a public facing organisation and so does not provide educational materials. However, through this study we have developed expertise that, if harnessed effectively, could equip consumers with the knowledge to make more informed decisions. Therefore, we have decided to produce a ‘white label’ guide for consumers in partnership with Law for Life, which together we will encourage the courts and advice sector to use.
- 5.20. Finally, there will inevitably be a small number of McKenzie Friends that consumers would be advised to avoid. One idea suggested to us was to create a blacklist, but this leaves difficult questions about what behaviour would justify inclusion on such a list and who would administer it and keep it updated, as well as risks of satellite litigation. There are already tools which judges can use to tackle disruptive McKenzie Friends. However, a lack of transparency limits the effectiveness of this action. For example, the names of individuals subject to Civil Restraint Orders are listed on Gov.uk but it is not easy to find out what this is for. Greater transparency in the operation of the family courts more generally, as is currently being pursued by the President of the Family Division, would assist in meeting this wider objective.

***Recommendation 5: education and advice directed towards litigants in person should set out the benefits of***

**using a McKenzie Friend as one form of support available to them.**

**Recommendation 6: A white label consumer guide on McKenzie Friends should be produced, with the assistance of Law for Life, for use by the advice sector.**

**Recommendation 7: More details of judgments, which highlight where the rights of McKenzie Friends who have behaved improperly have been restricted by the use of Civil Restraint Orders, should be routinely published on Gov.uk.**

### Litigation: a grey area?

- 5.21. The conventional role of a McKenzie Friend has traditionally been understood as giving assistance to litigants in person while they are at court. However, our research has established that it is very common for McKenzie Friends to offer a wide range of additional services as requested by their clients including legal research, case management, drafting documents and completing forms. Indeed, the ability to offer such an end to end service is a marketing claim on some of the websites of these businesses.
- 5.22. Conducting litigation is a reserved legal activity under the Legal Services Act 2007. Carrying on reserved legal activities without being entitled to do so is a criminal offence – section 14 of the Act. Schedule 2 of the Act states that ‘the conduct of litigation’ means:
- (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)
- 5.23. It goes on to say that the ‘conduct of litigation’ does not include the activities mentioned above, in relation to any particular court or in relation to any particular proceedings, if immediately before the appointed day no restriction was placed on the persons entitled to carry on that activity.
- 5.24. Schedule 3 states that persons may be exempt from this restriction in certain situations. For our purposes, one relevant situation is when the court grants a McKenzie Friend a right to conduct litigation in relation to those particular proceedings. This is supplemented by case law and the Practice Guidance. The latter lists two things McKenzie Friends may not do as: act as the litigants’ agent in relation to the proceedings; and manage litigants’ cases outside court, for example by signing court documents.
- 5.25. Some McKenzie Friends suggested the lines are blurred and were conscious of straying into conducting litigation. They emphasised their role is to assist the litigant to conduct their case, not to conduct the case on behalf of the litigant. However, some litigants require more assistance than others and it may not always be clear when assistance turns into something more. McKenzie Friends reported judges, especially in cases with vulnerable clients, taking a pragmatic approach, sometimes asking them to perform certain services, such as accepting correspondence, which would commonly be recognised as part of conducting litigation.
- 5.26. Inclusion of the ‘performance of any ancillary functions’ within the definition of the conduct of litigation, makes establishing the scope of this reserved legal activity a potentially grey area. The scope of ‘ancillary functions’ was considered in the case of *Agassi v*

Robinson<sup>16</sup>, where it was decided that the words should be construed narrowly and limited to the formal steps required in the conduct of litigation. For example, the judgment said that corresponding with the other side's solicitor in the context of litigation does not amount to 'conducting litigation', in the narrow sense which the law has ascribed to that term. The judgement also suggested that giving legal advice in connection with court proceedings does not come within the definition.

5.27. By contrast, in the case study involving a McKenzie Friend overstepping the mark, described on page 23, one blog notes that the Court of Appeal seems to have given a degree of backing to a very broad construction of the prohibition on the guidance that they must not "manage litigants' cases outside court, for example by signing court documents" as including also having a hand in the construction of such documents, even if this is a relatively small proportion of the work.<sup>17</sup>

5.28. As a lay organisation, the Panel cannot offer further clarity on what litigation actually means or what the definition should include. However, it is unhelpful when statutory boundaries can be inadvertently crossed, or turned a blind eye to, since this causes uncertainty for McKenzie Friends and is confusing for litigants. The Legal Services Board cannot stipulate what the meanings of the reserved activities are or what their scope entails; this can only be a matter for the courts in each case to interpret. However, the Board can try to help to illuminate understanding. Reviewing existing case law would be a useful starting point. Such work would likely

be of benefit beyond the narrow issue of McKenzie Friends discussed in this report. Ultimately, in light of any such review by the Board, it would be for Parliament to seek to amend the definition in the Legal Services Act 2007 through primary legislation.

***Recommendation 8: The Legal Services Board 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.***

***Recommendation 9: The Legal Services Board should consider the findings of this report as part of its ongoing work on simplifying legal services regulation.***

## Rights of audience

5.29. McKenzie Friends do not have rights of audience, which is another reserved activity under the Legal Services Act, but again these rights can be granted by a judge on a case-by-case basis upon application by the litigant at the start of proceedings. The Practice Guidance suggests the courts should be slow to grant such rights, and should only do so when there is good reason taking into account all the circumstances of the case. Examples of the type of special circumstances which may lead to the granting of this right include: the person is a close relative of the litigant; health problems preclude the litigant from addressing the court and they cannot afford to pay for a lawyer; and the litigant is relatively inarticulate and the need for the person to be continuously prompted would unnecessarily prolong the proceedings.

<sup>16</sup> Agassi v Robinson [2005] EWCA Civ 1507

<sup>17</sup> <http://suesspiciousminds.com/tag/is-there-a-limit-to-what-a-mckenzie-friend-can-do-re-h-children-2012/> Re H (Children) [2012] EWCA Civ 1797.

- 5.30. The Guidance also specifically states that a right of audience should be granted to lay persons who hold themselves out as professional advocates or professional McKenzie Friends or who seek to exercise such rights on a regular basis, whether for reward or not, only in exceptional circumstances, as to do otherwise would tend to subvert the will of Parliament. Therefore, a distinction is drawn between the occasional and regular McKenzie Friend.
- 5.31. The most common ask of McKenzie Friends is to be given an automatic right of audience. They argue that it is hard to prepare for a case without knowing in advance whether or not they will be allowed to speak for their client. Also that the majority of clients would be better off if McKenzie Friends had a right of audience, as would the courts, since McKenzie Friends are more effective at putting the case across than their clients who generally suffer from a lack of expertise and are under stress. Finally, McKenzie Friends point to the absence of restrictions in tribunals where lay representatives work successfully and argue that the current court system is protectionist.
- 5.32. However, the Panel does not consider that McKenzie Friends should be granted an automatic right of audience. These restrictions are not there to protect lawyers from competition, but to protect clients and others with an interest in the case. The need to have restrictions reflects that advocacy is a relatively high risk legal activity due to the potentially serious consequences of poor quality or unethical practice. The exercise of rights of audience requires certain knowledge and skills in order for an individual to perform effectively. Regulation ensures that advocates are trained; that they subscribe to a code of conduct and an overriding duty to the court; they are insured against negligence; they are subject to a consumer redress scheme; and they can face disciplinary action if their performance is substandard and leads to a breach of the code of conduct.
- 5.33. There is some force in the argument that litigants should be free to use the representative of their choice. Free choice is, after all, a core consumer principle. However, in addition to the consumer protection concerns above, this also has to be balanced against the potential adverse consequences for other litigants and third parties, such as children, who are affected by the case, as well as knock on impacts on the courts that affect all potential users.
- 5.34. The Judicial Working Group on Litigants in Person recommended that the Judicial Office consider, urgently, rationalising the historic differences between practice in the court system and practice in tribunals, as part of a wider review of lay assistants. More specifically, the Group recommended consideration of the merits of introducing into the Civil Procedure Rules and Family Procedure Rules, as was recently introduced in Scotland, rules, among others, which would govern the entitlement to exercise a right of audience. It suggested that a Practice Direction or rule or both, could provide guidance as to how the court's jurisdiction to grant such rights should be exercised. This could replace, revise or codify the present case law authorities. The Panel would welcome such a review.
- 5.35. We have no doubt that some McKenzie Friends carry on a right of audience, when granted, effectively. However, there are also concerns about the quality of other McKenzie Friends and alarm about those who use their clients

as puppets. In the absence of even any voluntary standards or self-regulation, the case for their having automatic rights of audience would seem weak. Indeed, the logical extension of such a policy would be to deregulate these activities so that anyone could speak in court without authorisation.

- 5.36. Nevertheless, the current situation is imperfect, not least as our findings indicate that, for some fee-charging McKenzie Friends at least, being granted rights of audience is the norm rather than the odd occasion and some judges are giving McKenzie Friends these rights unsolicited. Current practice does not seem to reflect what the Guidance suggests should happen.
- 5.37. The Panel would like to see a more permissive approach, but one which remains within the confines of the Legal Services Act 2007. For example, in the Practice Guidance, those ‘special circumstances’ listed when rights of audience may be granted are in fact not that unique. When faced with the unfamiliar court setting, procedure and rules, and trying to cope with the stress of the situation, it is likely that many litigants may struggle to articulate themselves effectively. Yet by treating occasional and regular McKenzie Friends separately, the Guidance does not start from this client perspective.
- 5.38. We reiterate that the Practice Guidance describes current law and cannot simply be redrafted, but there may be scope to update it to take account of case law since the last version was written. If the distinction was removed, which would be consistent with our earlier points about acceptance, this would allow greater judicial discretion. This is particularly important in the lower courts, where McKenzie Friends tend to operate the most, where we were told that magistrates and judges

tend to stick closely to the Guidance. Ideally, we would like judges to have a wide discretion to grant a right of audience when, having regard to the needs of the litigant, suitability of the McKenzie Friend and circumstances of the case, this would be in the interests of justice.

- 5.39. Any changes which it is possible to make to the Practice Guidance at this point in time should be supplemented with additional support for judges in assessing applications for granting a right of audience. For example, the Practice Guidance suggests McKenzie Friends should submit a CV, but we understand this is not consistently asked for in courts across the country. Similarly, the Civil Justice Council has suggested a form or notice for the courts to use containing a few standard questions for McKenzie Friends. Again, however, we understand such a notice is used only in some courts.

***Recommendation 10: an automatic right of audience should not be granted to McKenzie Friends.***

***Recommendation 11: the Practice Guidance should be updated to take account of recent case law. In an ideal world, the Panel would like judges to have a wide discretion to grant a right of audience when this would be in the interests of justice..***

***Recommendation 12: there should be consistent use of CVs, notices or other simple tools that can help assess the credentials of McKenzie Friends when considering applications for a right of audience to be granted.***

# 6 Regulatory response

## Is regulation needed?

- 6.1. It was not uncommon for us to hear during our research that fee-charging McKenzie Friends want to be regulated. In our discussions some representatives of lawyers also thought this was the right course: if McKenzie Friends are mirroring their services, they should be subject to the same obligations. However, other McKenzie Friends and lawyers suggested self-regulation was the correct way to go.
- 6.2. In discussing the appropriate regulatory response, the various risk profiles that different types of McKenzie Friends present should first be considered.
- 6.3. We return to our four categories of provider, although these boundaries are not always clearly distinct:
  - The family member or friend who gives one-off assistance
  - Volunteer McKenzie Friends attached to an institution/charity (currently none we spoke to charge but some said they might in future)
  - Fee-charging McKenzie Friends offering the conventional limited service understood by this role
  - Fee-charging McKenzie Friends offering the wider range of services outlined in previous chapters (which may extend into the carrying on of a reserved legal activity where the boundaries are blurred)

## Family member or friend

- 6.4. This is low risk since the McKenzie Friend's lack of legal expertise should be well-known to the litigant. They are likely to provide conventional support and not charge a fee for this help. Although there is a risk of well-meaning but poor advice, this is the McKenzie Friend in its purest form and there is no suggestion this should be restricted or regulated in any way beyond limitations in the Practice Guidance.

## Organised volunteer support

- 6.5. This category covers McKenzie Friend support provided by charities, law students and lawyers acting pro bono. In the Panel's view, this category should also be treated as low risk and therefore not be regulated. Our research suggests these services are limited to conventional McKenzie Friend support. The individuals are usually supported by an infrastructure, which offers training, supervision and other quality controls. The absence of charging a fee removes another risk. The Legal Services Act recognises that 'special bodies' such as charities are low risk entities and the Legal Services Board has decided not to pursue work ending the transitional arrangements protecting such bodies from regulation until 2015 at the earliest.

6.6. The Panel wholeheartedly supports efforts to increase resources for this volunteer support. Many of these organisations are in a financially critical state and introducing any restrictions or regulation could lead them reluctantly to abandon McKenzie Friend support. While some organisations we spoke to, such as universities, would welcome some form of accreditation to help with quality assurance and achieve greater recognition, this should be a purely voluntary initiative on their own part. We suggest that informal networks and relationship building with key local partners is likely to deliver the desired outcomes at the least cost.

#### Fee-charging, limited support

6.7. We also consider this type of McKenzie Friend support to be relatively low risk. Since these McKenzie Friends offer limited support, which does not involve giving legal advice, the risks to quality are small. The litigant is taking the lead prompted and assisted by a lay person. While they charge a fee, the limited nature of the service means this risk is likely to be on a lower scale than the next category of McKenzie Friends. Such individuals are more likely to work on a part-time basis; the inconvenience and cost of regulation could well lead many to walk away from the market and thus damage access to justice.

#### Fee-charging, full support

6.8. This is the highest risk category. Some McKenzie Friends to a large extent mirror the service that lawyers provide, often including offering legal advice and having a right of audience, but without legal qualifications or other regulatory protections. The total fees that litigants might pay could be substantial, especially given the relative low income of these clients.

6.9. Even so, the Panel does not consider that external regulation of these McKenzie Friends should be introduced. This is because:

- We expect that McKenzie Friends are underestimating the impact of regulation. Most McKenzie Friends, even those working full-time, do not earn high incomes – the burden and cost of regulation could lead to many exiting the market because it is no longer worth their while. For those who remain, the extra costs of regulation would be passed to their clients. Since affordability is the main reason why litigants choose to use a McKenzie Friend, regulation could reduce access to justice
- While there are real risks and some examples of things going badly wrong, there is no evidence of consumer detriment on any scale
- There are checks and balances built within the current system, especially through the discretion and tools available to judges. We do not pretend that judges are all-seeing or can alleviate every problem, but they have and do use powers to reject or remove McKenzie Friends or sanction through tools such as Civil Restraint Orders. By controlling access to having a right to conduct litigation and having a right of audience, judges can limit a McKenzie Friend to providing relatively low-risk activities
- While true that poor advice by a McKenzie Friend can cause harm before a case reaches court, providing legal advice is not a reserved legal activity. Further consideration of the benefits and risks to consumers of regulating general legal advice is needed



before any restrictions are placed on McKenzie Friends here

- The worst unfair trading abuses by McKenzie Friends, such as those in our case studies, are likely to be in breach of general law. Regulation would not prevent illegal behaviour; trading standards and other enforcement agencies have responsibilities to police this

**Recommendation 13: External regulation of McKenzie Friends should not be introduced.**

### Self-regulation

- 6.10. McKenzie Friends have important responsibilities, both individually and collectively, to demonstrate ethical and competent standards. There is currently no recognised association of McKenzie Friends. This places this group of individuals at a disadvantage as there is no collective voice and no seat at the decision-making table. There is also no shared code of conduct (except that suggested by the Civil Justice Council) developed with the input of McKenzie Friends, which enables clients, judges and others to know what service standards they can expect to receive. There is no central place where the public can look to find a McKenzie Friend or a register of providers to which the courts and advice organisations can refer.
- 6.11. Consumers tend to be sceptical that codes of practice are worth the paper they are written on, although there are some regimes which have built trust. Changes to the law have given added weight to self-regulation, as failure by a business to deliver on promises made in a code of conduct is a potential breach of the Consumer Protection Regulations. Therefore, it is important that the design of any self-regulatory

regime is based on sound principles. The code criteria that form the basis of the Consumer Codes Approval Scheme, operated by the Trading Standards Institute, are a good starting point. At this embryonic stage, having an approved code of practice could be a long-term aim, but the codes criteria would serve as useful guiding principles for a new trade association.

- 6.12. The Civil Justice Council's draft code is a useful starting point on the content of a code, especially in relation to court procedure. However, since McKenzie Friends have a service relationship with litigants a code of practice should also address the risks of poor commercial practices described in this report. This should include areas such as terms of business, marketing, pricing, data protection and complaints-handling.
- 6.13. Finally, there may be scope to create incentives for self-regulation as part of the overall regulatory response. For example, if court forms completed by McKenzie Friends included a question on membership of a recognised trade association, judges could use this information to inform decisions on granting a right of audience.

**Recommendation 14: Fee-charging McKenzie Friends should form a recognised trade association.**

**Recommendation 15: The Civil Justice Council's draft code of practice should be updated to include measures targeted at the unfair commercial practices described in this report.**

### Our preferred approach

- 6.14. The Panel considers that a combination of measures would strike a better balance between access to justice and consumer protection than exists now. Taken together, these steps should

help litigants to find and use a good McKenzie Friend with confidence. These measures would also benefit other litigants, third parties and the courts. The approach we suggest below draws together themes from earlier sections of this report.

- 6.15. **A proportionate regulatory response to the risks to consumers of using fee-charging McKenzie Friends built around voluntary self-regulation**, as discussed above. Initiatives to develop self-regulation must come from McKenzie Friends, but public agencies can help to facilitate and there may be scope for the courts to create positive incentives for membership of credible self-regulatory arrangements.
- 6.16. There needs to be a **cultural shift so the legitimate role of fee-charging McKenzie Friends is recognised and accepted by all stakeholders**. Many of the other measures described below would flow more easily if this occurred. An aversion to McKenzie Friends who charge for their services is slowly giving way to a pragmatic, if reluctant, view that this support is preferable to the wholly unsupported litigant in person. But this attitude needs to be replaced by positive recognition that, in the large majority of cases, McKenzie Friends provide valuable support that improves access to justice and contributes to achieving more just outcomes.
- 6.17. Reflecting this, we have suggested a **more permissive regime via limited changes to the Practice Guidance** to the extent this is possible given the purpose of this document is to describe existing law. This relates to the overall tone of the document and removing differences in approach between occasional and regular McKenzie Friends. Ideally, judges should have a wide discretion to grant a right of audience when, having regard to the needs of the litigant, suitability of the McKenzie Friend and circumstances of the case, this would be in the interests of justice. The Panel welcomes recommendations to rationalise differences between the courts and tribunals, but we do not think the case for granting an automatic right of audience has been made.
- 6.18. **Greater consistency of treatment of McKenzie Friends in the courts** is needed. Clearer guidance and training for judges, at all levels, would help deliver this objective. So too would use of simple tools already successfully deployed in some courts, such as the notice or form that McKenzie Friends are invited to complete. Consistent implementation of established good practice, for example requiring a CV, would also assist with this. Professional bodies for lawyers have a training and support role. **Regulators need to exercise vigilance over the minority of lawyers** who behave improperly towards McKenzie Friends.
- 6.19. **Tools that help to prevent McKenzie Friends from harming others are already available to judges and should be used robustly**. The small numbers of McKenzie Friends who antagonise the court serve little or no benefit to their clients and tarnish the reputation of all McKenzie Friends; this defeats the struggle for legitimacy that lies at the heart of this report. **Transparency to marginalise the minority of bad McKenzie Friends** would give litigants, advice agencies and the courts assurance about the overall standards among McKenzie Friends and help consumers to avoid the small minority of truly bad ones.
- 6.20. In relation to commercial practices, **enforcement agencies need to be aware of illegal behaviour and take action**. We fully recognise the resource

pressures facing trading standards and would not expect fee-charging McKenzie Friends to be a national enforcement priority, but we are aware of one local authority which has investigated a McKenzie Friend. Although on a small scale, the severity of impact on litigants may be high enough to warrant action. To this end, the Panel will write to the Consumer Protection Partnership to alert them to the findings of this investigation.

**6.21. Consumers and advisors need help to find a reliable McKenzie Friend who is right for their circumstances.**

There is low public awareness about the service that McKenzie Friends provide, but some advisors are also reluctant to suggest alternatives to traditional legal advice. Armed with some simple questions, litigants can find the right service for their needs and help protect themselves against the risks. There is already a lot of activity to improve the quality and coordination of information and advice for litigants in person. Specific action in relation to McKenzie Friends should harness, not duplicate, these efforts.

**6.22. Finally, discussions on the regulatory response to McKenzie Friends should inform a wider strategic approach to legal services regulation.** This report has touched on issues, such as the desirability of regulating general legal advice and the precise meaning of the conduct of litigation, which relate to underlying flaws in the regulatory framework for legal services. The Legal Services Board has started to address the scope of the reserved activities and, along with Panel, highlighted the need for reform to Government. The outcome of the Ministry of Justice's Simplification Review should be known soon. Fee-charging McKenzie Friends is just one example of the flaws in the

current system becoming exposed in harsher focus as the market adapts to the legal aid and competition reforms. As the market continues to evolve, new sorts of providers may emerge in other fields of legal activity. In this context, there needs to be better evidence and a proper discussion about who should be permitted to do what, and the level and type of regulation needed, in order to further the interests of consumers.

# 7 Recommendations

1. Fee-charging McKenzie Friends should be recognised as a legitimate feature of the evolving legal services market.
2. The training course on litigants in person which the Judicial College has been asked to consider should include content on McKenzie Friends.
3. Guidance notes issued by professional bodies on litigants in person should include content on McKenzie Friends.
4. The Practice Guidance (issued by the senior judiciary) should be reviewed and amended to portray McKenzie Friends in a more positive way.
5. Education and advice directed towards litigants in person should set out the benefits of using a McKenzie Friend as one form of support available to them.
6. A white label consumer guide on McKenzie friends should be produced, with the assistance of Law for Life, for use by the advice sector.
7. More details of judgments, which highlight where the rights of McKenzie Friends who have behaved improperly have been restricted by the use of Civil Restraint Orders, should be routinely published on Gov.uk.
8. The Legal Services Board 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.
9. The Legal Services Board should consider the findings of this report as part of its ongoing work on simplifying legal services regulation.
10. Automatic rights of audience should not be granted to McKenzie Friends.
11. The Practice Guidance should be updated to take account of recent case law. In an ideal world, the Panel would like judges to have a wide discretion to grant a right of audience when this would be in the interests of justice.
12. There should be consistent use of CVs, notices or other simple tools that can help assess the credentials of McKenzie Friends when considering applications for a right of audience to be granted.
13. External regulation of McKenzie Friends should not be introduced.
14. Fee-charging McKenzie Friends should form a recognised trade association.
15. The Civil Justice Council's draft code of practice should be updated to include measures targeted at the unfair commercial practices described in this report.

# Annex 1 – Volunteer McKenzie Friends

## **Free Representation Unit (FRU)**

The FRU was founded in 1972 and is a registered charity. It provides legal advice, case preparation and advocacy in tribunal cases within the Greater London and Nottingham areas for those who could not otherwise obtain legal support, for want of personal means or public funding. To provide this service it trains volunteer law students and legal professionals in the early stages of their career in the skills required to give confident and competent support for the rights of others. All FRU's representatives are volunteers who are trained by FRU and work under the supervision of case workers. It receives cases via referral agencies who pay an annual subscription, such as advice agencies, law centres, CABx, trade unions and law firms. The FRU does not take referrals directly from the public. There are about 270 volunteer representatives active in any year.

## **Exeter University, Community Legal Helpdesk**

The Community Legal Helpdesk exists to improve access to justice and address the high volume of unmet legal need in Exeter. Student caseworkers, supervised by a qualified lawyer, run three drop-in sessions each week at Exeter County Court, providing free information and guidance to members of the public involved in legal disputes. It also runs outreach sessions at community venues across the city, targeted to address specific priority issues such as debt. The public can seek advice on any legal matter, but the most common queries concern housing, small claims, family and employment. The Helpdesk offers four main services: assistance with completing court and other forms; explaining court procedures; assisting in court hearings; and signposting sources of legal and other advice. The McKenzie Friend role is primarily one of providing moral support and guidance for Helpdesk clients; the law students do not seek rights of audience. The initiative is now in its third year and was awarded the Best New Student Pro Bono Activity prize in 2013.

## **Keele University, Community Legal Companions**

The CLC initiative, which has been developed from the “McKenzie Friend” principle, trains second and third year Law students to act as intermediaries to assist access to legal services and provide practical assistance to litigants-in-person. Students wishing to become CLCs undergo intensive training from members of the Law School, the courts, the local legal profession and third sector organisations. This training covers the ethos and standards expected from CLCs, basic skills and competencies, and the commercial and social awareness needed to understand the difficulties faced by litigants-in-person. CLCs subsequently volunteer for a number of hours each week in the local courts, law firms and charitable partners.

Primarily, the CLCs act as intermediaries, referring to and then assisting legally-aided and affordable legal services within law firms and the third sector partners. There is an official CLC desk in Stoke Combined Court Centre from which they provide direct assistance to litigants who are unable to access services, through form-filling, note-taking and accompanying in court hearings. In its first year of existence, the initiative trained 60 CLCs and provided assistance to over 248 litigants. It received widespread media attention and interest from professional associations, courts and other law schools. Since the legal aid reforms came into effect in April 2013, the increase in litigants has risen steeply, with the CLCs assisting 181 litigants in the month of February 2014 alone.

### **National Centre for Domestic Violence (NCDV)**

NCDV offers a specialist legal service to survivors of domestic violence irrespective of their financial circumstances. It achieves this by working alongside existing firms of local solicitors and training volunteers to act as McKenzie Friends. Those whose income or capital takes them above the threshold for public funding are provided with a McKenzie Friend to assist in drafting the relevant paperwork and making the application in Court. The scheme allows volunteers to: act as a litigant assistant for domestic violence survivors; prepare and assist emergency injunction applications; practise court room advocacy in real litigation; practise real case management; and develop client relation skills. NCDV continually train law students from universities and training centres throughout the country and provide ongoing in-case support and supervision. The McKenzie Friends are provided with a letter to hand to the judge to explain the support they offer and their connection with NCDV. Although NCDV does not ask its volunteers to seek rights of audience, increasingly judges are inviting them to speak on behalf of clients. Centre staff have access to a qualified lawyer 24 hours a day, 365 days a year should they encounter circumstances beyond their own experience and expertise. The McKenzie Friend network was established in 2007 and last year around 5,500 domestic violence victims were supported by its volunteer network.

### **Norfolk Community Law Service**

NCLS is a registered charity dedicated to providing access to justice and equality in Norfolk. Its aim is to identify unmet legal need and to provide free and independent legal advice services for those who cannot afford to pay. The services include: legal advice covering general legal matters, family and employment; welfare benefits representation; debt advice; domestic abuse advice and support; advice and representation for migrant workers on their employment and benefit rights; and discrimination advice. Since the legal aid changes demand for advice in family law has grown disproportionately to other matters. In response, NCLS has started a pilot in the Norwich Combined Court, with the court's support, to provide a McKenzie Friend Service for parents around contact issues. In future it hopes to extend this support for domestic abuse clients. It is training volunteers for this role, which is supervised by two qualified family law solicitors acting pro bono. The service is experiencing strong demand but needs to find funding to sustain it beyond the pilot stage. NCLS does not see its model as replacing publically funded legal advice, but sees that for certain people it can support self-representation.

### **Personal Support Unit (PSU)**

This charity's vision is that every person in England and Wales attending civil and family courts or tribunals alone should have access to a PSU volunteer. In 2013, over 300 volunteers assisted more than 19,000 litigants, an increase of 54%. By 2016 it is planning to help 30,000 clients a year by expanding the services it offers in existing PSUs and opening many more. The number of family cases, especially dealing with contact and care of children, trebled in 2013 and went from 27% to 42% of the caseload. Other clients are involved in cases relating to financial difficulties, including housing, debt, bankruptcy and small claims. PSUs are concentrated in major cities across England and Wales. Clients are often multiply disadvantaged through unemployment, serious health problems (often mental health), a disability, plus literacy or language issues. The PSU volunteers do not give legal advice, but can support by listening to clients tell the story of what has happened so far as well as what their current worries are; prompting clients to order their thoughts; tidying paperwork into a rational order and indexing it; helping clients to find out which forms they need to fill in, to complete them if they know what they want to say, and to take the paperwork to the appropriate customer service desk or court office; helping people find their way around court or tribunal buildings and offices; assisting in discussions with court or tribunal staff; going into court or tribunal hearings with clients and sitting by their side; and by signposting clients to free legal advice or representation, or to access relevant advice online.

### **Royal Courts of Justice Citizens Advice Bureau**

RCJ Advice Bureau exists to *'tackle inequality and poverty by ensuring access to justice for people who need help enforcing or defending their rights'*. In 2011/12 it assisted 8,830 people – a 94% increase on the previous year. Over one quarter of clients had either mental health problems, physical disabilities, health problems or language needs. Its civil and family teams saw 2,109 clients in this period. They assist unrepresented county, high and appeal court users on the procedural aspects of their case and, where complex substantive advice is required, make referrals to the Bar Pro Bono Unit. The Bureau is supported by a range of city law firms and barristers. In addition, it uses 'legal assistant volunteers' who have finished their academic legal training but in the main have been unable to find permanent full time training contracts. The volunteers make referrals, prepare case summaries, handle routine post and, where appropriate, interview clients, allowing the more technical and advisory work to be directed to qualified lawyers and thus make the most efficient use of their resources. The Bureau has worked with Advicenow to produce a series of leaflets for litigants in person and developed an online tool, CourtNav, to enable clients to complete relevant court forms and have them checked by a solicitor.

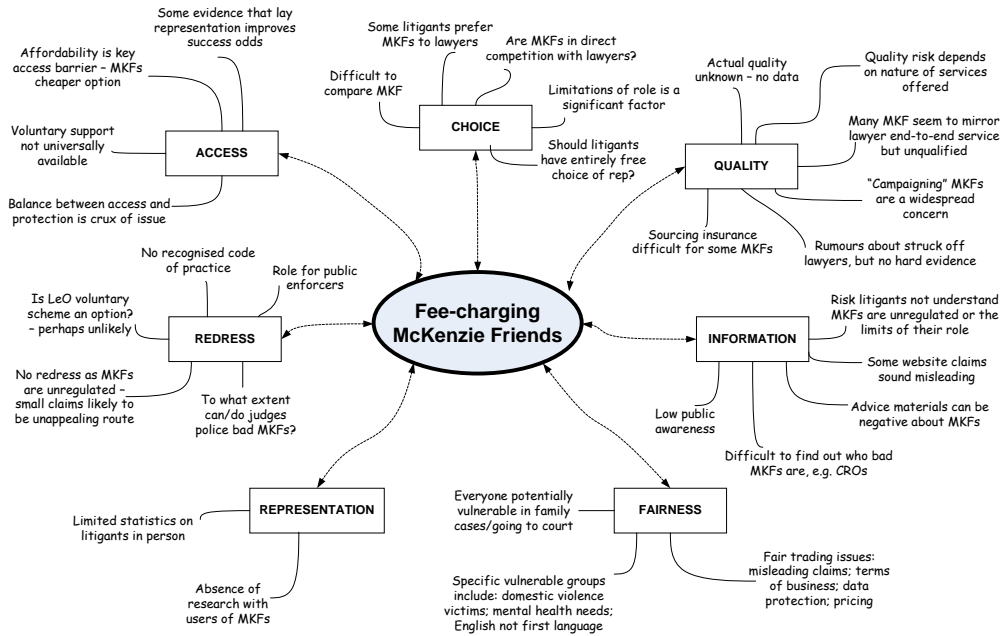
### **Zacchaeus 2000 (Z2K)**

Zacchaeus 2000, more commonly known as Z2K, is a London-based charity addressing poverty issues caused by unfairness in the law, legal and benefits systems. It started as a volunteer organisation in the early 1990s by a group of concerned Christians who refused to pay the poll tax on the grounds it was unjust. The volunteers helped other poll tax defaulters as McKenzie Friends. This spread to work with vulnerable debtors. Today it helps over 1,200 clients annually with a variety of debt and benefit related problems. Many people live on incomes well below the official poverty line which leads them into financial problems resulting in issues such as getting into arrears with rent, council tax, gas and electricity; non-payment of

TV Licence; fare dodging; and child truancy. Many are also victims of mistakes by DWP. Z2K and its volunteers become friends to those it helps, speaking on their behalf to the statutory authorities, utility companies and other organisations – going with them to meetings and hearings to explain their situation. Their “McKenzie Friending” activities are currently focused in the Magistrates Court, County Court and Social Security Tribunals.



Annex 2 – Consumer principles worksheet



The Legal Services Consumer Panel was established under the Legal Services Act 2007 to provide independent advice to the Legal Services Board about the interests of consumers of legal services in England and Wales. We investigate issues that affect consumers and use this information to influence decisions about the regulation of legal services.

**Consumer Panel Members**

Elisabeth Davies (Chair)  
Andy Foster  
Cathy Gallagher  
Dr Michelle Goddard  
Frances Harrison  
Dr Philip Marsden  
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