

Judiciary
Reforming the courts' approach to McKenzie Friends



A response by the Association of Personal Injury Lawyers
April 2016

The Association of Personal Injury Lawyers (APIL) was formed by claimant lawyers with a view to representing the interests of personal injury victims. The association is dedicated to campaigning for improvements in the law to enable injured people to gain full access to justice, and promote their interests in all relevant political issues. Our members comprise principally practitioners who specialise in personal injury litigation and whose interests are predominantly on behalf of injured claimants. APIL currently has around 3,800 members in the UK and abroad who represent hundreds of thousands of injured people a year many of whom use the court system.

The aims of the Association of Personal Injury Lawyers (APIL) are:

- to promote full and just compensation for all types of personal injury;
- to promote and develop expertise in the practice of personal injury law;
- to promote wider redress for personal injury in the legal system;
- to campaign for improvements in personal injury law;
- to promote safety and alert the public to hazards wherever they arise; and
- to provide a communication network for members.

Any enquiries in respect of this response should be addressed, in the first instance, to:

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Introduction

APIL welcomes the opportunity to respond to the Judiciary's consultation on reforming the courts' approach to McKenzie Friends. We agree with the judiciary's proposals for reform – we believe that the changes proposed will address the risks posed by this unregulated area and will help the court to protect litigants in person. We are particularly supportive of proposals to introduce a standard form notice which is signed and verified by both the litigant in person and McKenzie Friend to ensure that sufficient information is given to the court regarding the McKenzie Friend, and, most importantly, to prohibit McKenzie Friends from making money from their role.

We are concerned that, unchecked, "professional" McKenzie Friends would essentially become an unregulated arm of the legal profession, ripe to exploit the inevitable increase in personal injury litigants in person should the proposals to increase the small claims court limit go ahead.

Q1 Do you agree that the term "McKenzie Friend" should be replaced by a term that is more readily understandable and properly reflects the role in question?

We agree that "McKenzie Friend" should be replaced with a more readily understandable term. This will help to tackle the problem of litigants in person being led astray by McKenzie Friends who charge for services, and who may not have the authority to carry out the services that they purport to offer (as set out in paragraph 4.3 of the consultation). Clear, easy to understand terminology will allow vulnerable people to understand the support that a McKenzie Friend can offer – avoiding confusion and possible exploitation of the litigant in person.

Q5 Do you agree that a standard form notice, signed and verified by both the LiP and McKenzie Friend, should be used to ensure that sufficient information is given to the court regarding a McKenzie Friend? Please give reasons for your answer.

Judges must be able to act upon any concerns they have with the person taking on the role of McKenzie Friend. The more upfront information the judge has, the better, and the provision of a standard form notice will, as the consultation states, enable the court to properly manage the exercise of rights by the litigant in person and McKenzie Friend, and help to ensure that the McKenzie Friend does not overstep the mark in terms of what they are allowed to do. McKenzie Friends cannot lawfully exercise the right of audience unless granted such a right by the court, and this is decided on a case by case basis. Requiring the litigant in person to put the court on notice that they intend to seek a right to conduct litigation or a right of audience for the McKenzie Friend, and requiring the McKenzie Friend to state that they have no interest in the litigation and understand that their role is limited to providing reasonable assistance unless otherwise specifically authorised, will ensure that the court can properly control the exercise of those rights and prevent any McKenzie Friends who may have an ulterior agenda, from exploiting the vulnerable person.

Q6 Do you agree that such a notice should contain a Code of Conduct for McKenzie Friends, which the McKenzie Friend should verify that they understand and agree to abide by?

We agree. This will again protect the litigant in person from unscrupulous behaviour from a purported “professional” McKenzie Friend, and will demonstrate to the court that the McKenzie Friend is aware of what they can and cannot do.

Q9 Do you agree that codified rules should contain a prohibition on fee-recovery, either by way of disbursement or other form of remuneration?

A voluntary system of McKenzie Friends, which includes charities providing support and assistance to those who are unable to instruct a solicitor, can be a helpful tool in ensuring that litigants in person can access justice. It is important, however, that McKenzie Friends are not allowed to develop further into an unregulated branch of the legal profession – which is what appears to be happening with the rise of “professional” McKenzie Friends. Vulnerable litigants in person are in danger of being overcharged for services that – in the end- the McKenzie Friend may not even be permitted to provide, or exploited for the McKenzie Friend’s own agenda. There is a lack of insurance cover for the litigant in person should anything go wrong. Simply, there are no consumer safeguards in place to prevent vulnerable people being exploited by McKenzie Friends who are holding themselves out to be professionals, but who do not have to prove that (and therefore may not have) the necessary skills, training or permission to carry out the work they may be charging for. Removing the ability of McKenzie Friends to charge money for their services will go a long way towards removing this problem.

Q10 Are there any other points arising from this consultation that you would like to put forward for consideration?

We urge the Lord Chief Justice and Judicial Executive Board to act on the recommendations within the consultation paper. The imminent proposals to further increase the small claims limit for personal injury claims, should they be brought into force, will lead to a surge of personal injury litigants in person who will be unable to afford legal representation, and who will turn to alternative forms of support. As pointed out by the consultation at paragraph 2.2, the National Audit Office reported a 30% increase post-April 2013 in family proceedings where one or both parties were litigants in person, due to the changes to legal aid provision, and there is no reason why similar increases will not be experienced in the personal injury sector.

While those acting on a voluntary basis, who have no reason to go beyond the clear remit of the McKenzie Friend role, are likely to be helpful to the injured person faced with the prospect of attending court alone, some unregulated fee-charging McKenzie Friends would likely exploit this influx of potential new clients, and the problems experienced with McKenzie Friends in family cases – as demonstrated to the extreme in the case of *Re Baggaley*¹ - will simply be repeated in the personal injury sector.

- Ends -

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¹ [2015] EWHC 1496 (fam)