**Reforming the courts’ approach to McKenzie Friends -
The Lord Chief Justice’s Consultation**

# **Response of the Transparency Project**

**About the Transparency Project**

The Transparency Project is a registered charity, whose aims are :

1. *To advance the education of the public in the subject of family law and its administration, including the family justice system in England and Wales and the work of the family courts, in particular but not exclusively through the provision of balanced, accurate and accessible information about the work of family courts and the facilitating of public discussions and debates which encompass a range of viewpoints.*
2. *To promote the sound administration and development of the law in England and Wales, in particular, family law, by encouraging and contributing to the transparency of processes in the family justice system, contributing to public legal education concerning family law and matters of family justice, enhancing access to justice in matters of family law and by such other means as the trustees may determine.*

The Transparency Project operates collaboratively through a project committee, and this consultation response has been collaboratively prepared by that project committee. Where possible we operate on a consensus basis but where there is a divergence of opinion we have set out the range of views on a particular question or issue.

**Preliminary points**

The narrow remit of the Consultation, by way of prescribed questions, inevitably limits the scope of responses and potential solutions to the bigger-picture issues that sit behind, such as:

* The very different interests of litigants in person (LiP’s), ‘Mckenzie friends’, represented parties, the legal profession and the judiciary; and fairness to each.
* The direction of travel politically in respect of legal services, regulation and the law on reserved legal activities.
* The ‘legal aid’ context, particularly in family law. (Legal aid for most private law family matters has ended; automatic legal aid for parents in public law family cases is limited to ‘care and related proceedings’, while more public law cases seem to be being decided outside care proceedings; rates of payment to legal aid suppliers continue to fall in real terms, apparently incentivising some to operate as paid McKenzie friends)

These broader issues are not issues over which the judiciary has influence or control and as such it is difficult to respond without making suggestions or observations that could not be implemented or actioned by those issuing the consultation. We do not think that it is either possible or helpful to attempt to ask or answer these narrow questions without giving consideration to the wider context.

The topic is a pressing one, but with respect we do not think the questions grapple with the breadth, depth or complexity of the issues, in particular in family law.

Strengthening the evidence base upon which decisions are to be made and reviewing regulation of legal services, the law on reserved legal activity and legal aid for public law family cases post-care proceedings may assist.

For example in family law, it is unhelpful to focus on the 'problem' of some paid Mckenzie friends while overlooking a bigger problem for LiPs (as opposed to the legal profession itself) of some *unpaid*, agenda-led McKenzie friends. Loss of access to a spectrum of paid Mckenzie Friends would effectively deliver highly vulnerable LiPs into the hands of some unpaid, agenda-led, often high-profile McKenzie Friends. Whilst we understand the arguments for the restricting LiPs right to rely upon paid McKenzie friends, we respectfully wonder whether the restriction of a litigant’s choice of supporter ought to be a matter for Parliament rather than the judiciary.

**The specific context in family matters**

The nature of the issue is rather different in family than in other areas. For example, where some practitioners in other fields of work raise concern about a phenomenon of “sham lawyers”, where litigants may be misled into thinking they are receiving advice or representation from regulated lawyers who are no such thing (see here for example : <http://www.legalvoice.org.uk/2016/05/25/clients-are-at-risk-of-getting-burned-by-straw-legal-services-providers/>), we are not sure that the “market” for Mckenzie friends in family proceedings operates in the same way. In family matters the tendency seems to be for individuals who have direct experience of family proceedings to offer support and services to others now in that position – sometimes paid, sometimes not. Although they may assert experience and some level of expertise we think that the primary issue in the field of family law is the competence, impartiality and nature of the advice offered, which may place a litigant at risk of a negative outcome in the proceedings – in the worst scenario the loss of a relationship with a much loved child. In the field of family law the fact that a McKenzie friend is not a lawyer is the “unique selling point” : many parents have absorbed a narrative that lawyers are poor value for money, untrustworthy and corrupt and actively seek out a McKenzie friend and actively avoid a lawyer. In the view of the members of The Transparency Project the risks to litigants arising from inappropriate advice from McKenzie Friends are equally applicable to paid for and voluntary McKenzie friends, indeed they may be greater in the case of unpaid McKenzie friends who may advise in the background and may be unseen as far as the court is concerned (Here we use the term McKenzie friend as it is widely used by parents who are reliant on such support – it incorporates work done outside of the ambit of the court, rather than just the support offered during a hearing with the sanction of the court, which we think is merely the tip of the iceberg). Whilst an increasing number of McKenzie friends have professional looking websites we have not noticed websites that “hold out” or give the impression a McKenzie Friend is a practising lawyer, although a number do hold some legal qualifications. More often than not however, McKenzie friends in family proceedings operate through a loose network of connections, often seeking or being found through private groups on Facebook where family cases are discussed. These websites are often themed around the perceived corruption, incompetence or bias of the family courts and legal professions, and are populated by those who have had or fully expect a poor experience with the family courts, or who distrust lawyers.

**Question 1: Do you agree that the term ‘McKenzie Friend’ should be replaced by a term that is more readily understandable and properly reflects the role in question? Please give your reasons for your answer.**

There are different views within the Transparency Project membership on this question:

(a) No. Whilst an alternative label might have been preferable if starting from a clean slate we consider it would cause more confusion to attempt to change the terminology, as was seen with short lived attempts to move from “litigant in person” to “self-represented litigant”. We think the disadvantages of a change outweigh the advantages. The term is widely used, and correctly used does not currently import any notion of rights of audience or to conduct litigation. It can be combined with “professional” or “fee paying” or “volunteer” to indicate the relationship to the litigant. Any problems with McKenzie Friends exceeding their powers are not because of the name but because of lack of clarity as to what those powers are.

Any lack of clarity as to what a McKenzie Friend is or does is as nothing compared with the lack of clarity about most aspects of civil litigation, court rules, and the law. Nor does it help that precise legal terms are often “translated” by the media into emotive and misleading “simpler” language. Whatever term is used will need to be explained and a definition provided in some form of written guidance.

And (b) Yes. The opportunity should be taken to change the term ‘Mckenzie friend’. Parents and family members rarely know what this means when at their most vulnerable and searching for appropriate support and advice. It is important to have clear terms that mean what they say and can be understood by the lay person. ‘McKenzie friend’ is a clear example of jargon that makes sense only to those ‘already in the know’ (but see above because in some circles it is widely used and understood in a particular way).

**Question 2: Do you agree that the term ‘court supporter’ should replace McKenzie Friend? If not, what other term would you suggest? Please give your reasons for your answer.**

Again there are different views:

(a) No. The term McKenzie Friend should remain because it is already widely used and its colloquial nature helps prevent it sounding too official.

To introduce a new term, such as Court Supporter, would risk creating a perception there were two different types of person who could help LIPs, and give rise to confusion as to what role each had.

The expression Litigant in Person was restored after a proposed change of name to Self-Represented Litigant simply failed to catch on and people continued to use the old description. The same would probably happen if McKenzie Friend were changed to another term.

Further, the term court is itself likely to cause confusion – a court supporter might be understood to be a person who helps the *court* not the litigant. If the terminology had to change we would suggest something less ambiguous such as “litigant’s helper” or “litigant’s supporter”.

And (b) Yes. McKenzie Friend should be changed but not to Court Supporter for the above reasons. ‘Litigant Supporter’ would be preferable. ‘Legal Supporter’ would distinguish between a Legal Advisor and Supporter albeit the provision of legal advice is not a reserved activity (although it may imply some legal qualification is held).

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

No. The concept of a McKenzie Friend is an informal one, created by the courts exercising their inherent jurisdiction and subject to their discretion and control.

The draft rules would amount to a form of legislation by the back door, effectively amending or extending the Legal Services Act 2007, and would crystallise the development of a new branch of the legal professions without proper democratic or regulatory scrutiny.

The rules as drafted seem problematic in several ways:

* They are complicated and verbose, the antithesis of the 2010 practice guidance which is written in plain English, and much more clear and simple.
* The proposed rules appear (at r 3.22(1) to contemplate the giving of advice on points of law, which does not appear to be subject to the restriction placed elsewhere on the court supporter charging for their services. Although giving of advice is not a reserved legal activity (para 2.9 of the Consultation paper), it would be unthinkable to allow someone to charge for, say, financial advice, or medical advice, without being subject to regulation and the same should be true of court supporters. However, there are many examples of *unpaid* mckenzie friends giving poor advice, behaving inappropriately or coaching litigants into adopting a position or approach to litigation that is ultimately likely to prejudice their prospects of success. We do not consider the problem is limited to those mckenzie friends who charge fees, nor do we have evidence to suggest that all paid mckenzies do their “clients” a disservice – the issue is that litigants are more vulnerable when selecting an adviser / supporter who is unregulated and more vulnerable in the event that poor service or bad advice is given.
* Under r 3.22(13) a court supporter is deemed to be acting as an officer of the court and to owe such duties as would be owed by a solicitor, which again appears to create a new office by the legislative back door and imposes on an unregulated individual a liability and duties equivalent to those imposed on a reserved legal activity.
* Some members of the committee take the view that notwithstanding the LSCP study, there is no good reason why the underpaid and over-regulated legal professions should have to compete with an unregulated and unqualified fee-charging alternative and that either there should be a prohibition on charging for providing services a “reserved legal activity”. An alternative view is that the public ought to be entitled to enlist the assistance of their choice (even if it is a poor choice) providing it does not interfere with the proper administration of justice. All agree that the courts should not assist in any development that will in the end erode the protections which consumers should be able to expect of the properly regulated and qualified professions.
* However, there is a consensus that at present the public are at risk of making poor choices due to poor understanding of the comparative risks and benefits of “instruction” of a paid for Mckenzie friend versus a qualified lawyer, and are highly vulnerable as legal consumers and litigants. We consider that this would be better tackled by the provision of good quality information to enable the public to make informed choices rather than by restricting their right to enlist the support they consider is appropriate for them. If there were to be a restriction on or regulation of paid for McKenzie services we would respectfully suggest that should be a matter for Parliament, which has clearly considered this area, but elected not to make the provision of such services “reserved legal services” (save insofar as they may stray into the conduct of litigation).
* A complementary approach would be to make the courts and the law more transparent and accessible to those who need to use it without the assistance of legal professionals. The Transparency Project intends to contribute to that by preparing a Guide for Parents and Family Members on Choosing and Using lawyers and Mckenzie Friends – we have paused the drafting of this document pending the outcome of the consultation.

Any guidance or amendment to the procedure rules should be clearly underpinned by reference to the statutory prohibitions on reserved legal activities, in particular setting out a clear process for applications for the right to conduct litigation on behalf of a litigant (which in our anecdotal experience is often carried out with tacit acknowledgment from the court, but without formal application or grant of rights). We consider this failure to deal consistently with the conduct of litigation exposes litigants / consumers to unnecessary risk.

We would question the practical advantage of rules placing duties and obligations on a McKenzie Friend (court supporter) – how will these be scrutinised, regulated, enforced and breach punished, other than by withdrawal of rights of audience / litigation rights / permission to act as McKenzie friend?

**Question 4: Should different approaches to the grant of a right of audience apply in family proceedings and civil proceedings? Please give your reasons for your answer and outline the test that you believe should be applicable. Please also give any specific comments on the draft rules.**

No. Rights of audience should be granted on a case by case basis following a brief examination of the proposed court supporter / McKenzie Friend.

It is more likely they will be needed in family proceedings but not unlikely in civil proceedings where legal aid is not available.

The test should be that, in the court’s assessment, the case for the litigant would be

1. more fairly and effectively presented by someone other than the litigant and
2. the proposed representative understands and will comply with the duty
	1. to not knowingly mislead the court and to respect the court’s process, while
	2. acting in the interests of the litigant and not for some ulterior purpose or agenda.

For reasons given above the proposed rules are excessively formal and restrictive of the court’s ability to control its own process.

**Question 5: 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 your reasons for your answer.**

Yes. A standard notice is a good idea and could be incorporated into the court’s guidance or a new practice direction (which has slightly stronger force than guidance, without amounting to a form of legislation). No procedure should however preclude a litigant from using a Mckenzie friend without such notice where appropriate for example where only able to obtain one at the last moment.

**Question 6: Do you agree that such a notice should contain a Code of Conduct for McKenzie Friends, which the McKenzie Friend should verify that they understand and agree to abide by? Please give your reasons for your answer.**

A form should include a declaration and undertaking by the McKenzie Friend, to act in the best interests of the litigant, to respect the procedures and directions of the court, and not knowingly to mislead the court. It should also make clear that breach of the undertaking would amount to a contempt of court, and how this may be punishable (including the risk of adverse costs orders against the Mckenzie friend personally) – i.e. in the form of a penal notice.

To describe such an undertaking as a “Code of Conduct” is problematic because any code of conduct applying to those acting as McKenzie Friends otherwise than in a purely informal capacity, needs to encompass conduct outside court proceedings as well. There already exist voluntary codes of conduct but for the court to act as a regulator is unwise. If McKenzie Friends would benefit from more formal regulation it should be done formally by a recognised regulator.

We note that the court already has powers to restrict the involvement of a McKenzie Friend in proceedings in the form of Civil Restraint Orders (See Re Baggaley [2015] EWHC 1496 Fam).

**Question 7: Irrespective of whether the Practice Guidance (2010) is to be revised or replaced by rules of court, do you agree that a Plain Language Guide for LIPs and McKenzie Friends be produced? Please give your reasons for your answer.**

Yes. But this is another reason for not making the rules too detailed and for making it clear that the scope of what a McKenzie Friend can do will depend on the court’s discretion based on its perception of the ability of the MF to assist in the case. We see no reason for revised Practice Guidance / Rules of Court AND a Plain Language Guide for LiPs and McKenzie friends – if the rules / Practice Guidance is drafted in plain English no further explanation will be necessary and a second explanatory document will be redundant. However, the relevant rules / guidance might usefully be produced in a single discrete leaflet to be made available at court issue desks PSUs and reception / sign in desks / Justice website for ease of reference.

**Question 8: If a Plain Language Guide is produced, do you agree that a non-judicial body with expertise in drafting such Guides should produce it? Please give your reasons for your answer.**

Yes. But it should checked for accuracy by lawyers, to ensure that any simplification does not give rise to a mistaken understanding of the law/procedure. We consider there is an urgent need for the vast FPR and practice directions to be made more accessible both in terms of volume, format and language used. They are a challenge or lawyers and judges to navigate let alone litigants, whether or not assisted by a McKenzie friend.

**Question 9: Do you agree that codified rules should contain a prohibition on fee recovery, either by way of disbursement or other form of remuneration? Please give your reasons for your answer.**

No. There seems no reason to prevent a person, who provides a service of helping a litigant to prepare a case, prepare their materials, take notes and perform other non-reserved tasks, being paid for doing so. It is open to a litigant to contract with an individual to do so.

What should be prohibited is the provision of any reserved legal activity, or (to the extent that it is not a reserved legal activity) providing legal advice whether for money or otherwise, by persons who are not qualified, trained, insured or regulated to do so (we are aware that some McKenzie friends hold insurance but it remains unclear what protection such policies really offer, or how meaningful claims in negligence or contract would ever be). Such a prohibition should not be confined to court hearings but to any holding out as offering or providing any legal advice services to the public – this would need to be dealt with by Parliament.

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

The Transparency Project is concerned that the proposal to restrict the use of paid-for McKenzie friend presupposes that such McKenzie friends are necessarily and always a problem / the problem. In our view the problems are far wider than this, and whilst we hold concerns about the risks for the public of reliance upon McKenzie friends and of being compelled to litigate without access to professional legal advice or representation, anecdotally McKenzie friends (paid or not) can on occasion ameliorate some of the difficulties in securing access for justice (and a number of judgments emanating from the High Court and above expressly say as much – for example S v AG (Financial Remedy: Lottery Prize) [2011] EWHC 2637 (Fam) (14 October 2011)). Conversely, the involvement of a McKenzie friend (paid or not) can on occasion be profoundly unhelpful – even or perhaps particularly in cases where the McKenzie friend is never seen in court, but is advising and “assisting” in the background.

Whilst we hold serious concerns about these issues, we are worried that the isolated prohibition on the use of paid for McKenzie friends will further adversely affect the chances of securing access to justice for some litigants.

We are also further concerned that a prohibition of this sort, which is focused upon those McKenzie friends who are remunerated (and thereby seen as in competition with the legal profession) will be *perceived* as improper protectionism of the legal profession by the judiciary (indeed we have seen material on the internet by prominent McKenzie friends which suggests this in terms). Whilst we acknowledge that there is an increasing element of direct competition between paid-for McKenzie friends and practising lawyers, and that it is essential to the justice system that the regulated professional legal professions can remain economically viable, we think there is a danger of conflating the interests of litigants with the interests of lawyers. We are concerned that the development of a narrative about the judiciary banning litigants from relying on the supporters of their choice and compelling them to pay for lawyers whose ranks from whom the judiciary were once drawn may be contribute to a further diminution in public confidence in the judicial system, and in particular the Family Court, which is typically seen and described as secret and corrupt. It is precisely this sort of perception which in our experience drives litigants to seek out and act upon the advice of agenda led (often unpaid) McKenzie friends who may actively discourage their constructive engagement in proceedings or otherwise advice action that is damaging to their prospects of success.

Between them, members of The Transparency Project have significant anecdotal experience of McKenzie friends – some good some bad. We are particularly concerned about advice that is offered to parents that may lead them to refuse to cooperate with professionals or disengage from proceedings, or even to flee the jurisdiction of the court, or which otherwise encourages the belief that the system will fail them so that they do not participate in proceedings in ways which will advance their case.

We consider that there is an urgent need for a better evidence base in this area, not just of concerns of the professionals who work in the system, but exploring the issues of risk and of the nature and extent of any actual harm caused by the involvement of McKenzie friends as compared to the benefits that we acknowledge they can and do offer for some litigants.

Document finalised by Lucy Reed, Chair of The Transparency Project, incorporating the views of the Project committee

8 June 2016