

Consultation on reforming the courts approach to McKenzie Friends

**A submission by
The Chartered Institute of Legal Executives (CILEx)**

June 2016

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June 2016

1. Introduction

- 1.1. The Chartered Institute of Legal Executives (CILEx) is the professional association and governing body for Chartered Legal Executive lawyers, other legal practitioners and paralegals. CILEx has around 20,000 in membership, including approximately 7,500 qualified Chartered Legal Executive lawyers.
- 1.2. As an Approved Regulator under the Legal Services Act 2007 we are authorised to grant practice rights in relation to litigation, advocacy, probate, reserved instrument activities, immigration services and the administration of oaths. We have delegated our regulatory functions to the independent regulator CILEx Regulation Ltd.
- 1.3. Education and training and maintaining standards are part of our core functions as an approved regulator under the Legal Services Act 2007. CILEx is also a nationally recognised Awarding Organisation, regulated by the Office of Qualifications and Examinations Regulation (Ofqual) and Qualifications Wales (QW).
- 1.4. CILEx has been recognised as being a key contributor to social mobility and ensuring access to professional qualifications to those from a more diverse background. That has to be done within a framework of maintaining standards in the public and consumer interest.
- 1.5. The explicit consideration of the Regulatory Objectives enshrined in the LSA is relevant when considering the issue of McKenzie Friends. The objectives give consistency in ensuring those affiliated in the courts' wider work are evaluated fairly. The LSB have taken a special interest in the unregulated sector and have devoted resources to further analysis and predicting trends across legal services. The Competition and Markets Authority Review is also considering this as part of their review, with interim findings due to be published in July 2016.

2. 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.

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.

- 2.1. Legal assistance is a vital part of our justice system and lay advice deserves to be viewed as a welcome addition to consumer choice, but only if consumers are well informed of the options available.
- 2.2. CILEx agrees with the current proposal to change the title McKenzie Friend to ‘Court Supporter’. This would provide clarity and would dispel some of the myths that appear to surround the use of the term. This would not inhibit those who are genuinely there to support the court and the smooth operation of the justice system. To classify McKenzie assistants as support rather than a service or as a legal provider would more accurately reflect their role.
- 2.3. We would modestly suggest that if the term is to be changed to something other than ‘Court Supporter’, it could be replaced by other terms such as court-user supporter, client supporter, client assistant, or lay adviser. It is important that there is no room for confusion with victim, witness and other court support services.

3. 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 in Annex A.

- 3.1. CILEx supports this and has for some time been concerned that outdated practice guidance may have contributed to the confusion. There should be a universal code of practice, written in plain language, which clearly defines what any court supporter or attendee can do, how judges should treat them, and the process by which any lay advisers can come before the court, and what precisely should happen when those individuals seek out rights of audience. There must be a robust pre-authorisation process, with those who

wish to attend court asking the judge's permission beforehand. This would enable the individuals concerned to know where they and their clients stand, preferably in a timely way so there is no consumer detriment or disruption to the court process. CILEx would be happy to support in the development of these rules to ensure professionals, such as our members, are appropriately consulted.

- 3.2. Revised guidelines for judges may be required as they might need to approve such an application and lay advisers will need to be able to understand why their application may have been turned down, and this would ensure transparency in the justice process. The guidance could clearly define the grounds upon which a judge might approve or turn down such an application.
- 3.3. Any such codes should not prevent those with appropriate training and regulation being able to appear in court with the court's permission, as is the case for many Chartered Legal Executives.
- 3.4. The following are some specific comments on the Proposed New Civil Procedure Rules:
 - 3.4.1. Rule 3.22 (2) sets out that the court's permission is required where proceedings are in private, CILEx would like this rule to have a wider application.
 - 3.4.2. Rule 3.23 (6) this rule leaves open the possibility of other types of remuneration as it is limited to remuneration for exercising the right of audience or right to conduct litigation, a more comprehensive provision should be incorporated.
 - 3.4.3. There needs to be clarity about the position of recovery of expenses and fees incurred by McKenzie Friends, as inconsistency could lead to ineffective reform of the new arrangements. If any costs are to be awarded, they should be standardised and aligned with the appropriate banding in the Guideline Hourly Rates.

4. 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.

- 4.1. CILEx can see no reason to vary the test, although some considerations should be made that will particularly affect chartered legal executives specialising in this area.
- 4.2. In Family proceedings, CILEx members representing clients on behalf of their firm often use the appropriate exemptions under Schedule 3 section 1(7) of the Legal Services Act 2007. Schedule 10, section 98 of the Crime and Courts Act 2013 amended these exemptions following the creation of the single family court. However the exemption does not extend to when family cases are assigned to be heard in front of a single lay magistrate or a bench of lay magistrates.
- 4.3. This anomaly means that a chartered legal executive lawyer, who may have overseen a case from its earliest days and is the most specialised person at the firm in family law, is not able to represent their client based on the listing decision of whether it should be heard by a District Judge or a Magistrate.
- 4.4. In such circumstances currently, the chartered legal executive is able to seek permission for a right of audience before the magistrate(s). In circumstances like these, where an insured, regulated and qualified lawyer must seek the courts permission to appear, they should not inadvertently be caught up in rules that may affect McKenzie Friends, such as not being allowed to charge.

5. 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.

- 5.1. This is welcomed by CILEx and the standard notice should ask searching questions about indemnity, training, whether there is payment for services and could ask questions about prior conduct of individuals, to ensure that there is

adequate protection for the consumers from those struck off from other parts of the legal profession.

6. 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.

- 6.1. There should be a universal code of practice, written in plain language, which clearly defines what any court supporter or attendee can do and how judges and other lawyers should respond to that.
- 6.2. The only difficulty that CILEx can foresee is that the mention of a code of “conduct” may mislead the consumers of legal services and they may be given the impression that the individual can be called to account by an approved regulator. If there is to be a code of conduct, then it would need to make clear how it would be enforced and where accountability would lie. It should also deal with what precisely should happen when those individuals seek out rights of audience.

7. 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.

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.

- 7.1. CILEx would welcome simplification of court guidance; all documents should be easily accessible and understandable to the public whom the courts are there to serve. This could be achieved in a number of different ways and CILEx would not wish to be prescriptive about the way in which this is approached. It is recognised that some aspects of process, procedure and rules, have, of necessity, some degree of complexity. Court user groups, those working for the Personal Support Unit and a range of Pro Bono and

litigant in person support groups could be asked to contribute. The CILEx Pro Bono trust could also lend some expertise.

8. 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.

- 8.1. CILEx is firmly against allowing McKenzie Friends to charge. It is acknowledged that McKenzie Friends may come from a variety of sources and may find their way into the justice system through a range of routes. They can be family or friends, or pro-bono scheme volunteers who may have quite a detailed legal background; and then there are those who charge for their services, possibly selling an expertise that is not explicitly described to the client or the court and they may not be qualified to operate at the level of complexity that may be required.
- 8.2. CILEx would welcome simplification of some aspects of court process procedure and rules but while we have the system as it is today there are real dangers to consumers and clients if there is no clarity about service provision, redress and remedy. McKenzie Friends are unregulated, uninsured and mostly unqualified. They should not be allowed to charge people. We concur with the assessment that, in passing the Legal Services Act 2007, it was not Parliament's intention for appropriate exemptions to be used as loopholes for such practitioners to charge fees for providing reserved legal activities, by gaining the court's permission on a case by case basis.
- 8.3. The level of charging that anecdotally appears to be happening is a concern as this is not necessarily a cheaper option. Barristers, solicitors and chartered legal executives are highly regulated and deliver a high standard of quality service. That service is underpinned with the quality assurance of sound training, requirements to demonstrate continuing competence and the reassurance of a disciplinary sanction being available in the event of a complaint to the regulator.
- 8.4. Membership of particular membership bodies in and of itself should not be seen as providing adequate assurance.

8.5. There needs to be clarity about the position of recovery of expenses and fees incurred by McKenzie Friends, as inconsistency could lead to ineffective reform of the new arrangements.

9. 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.

9.1. CILEx has been concerned about the time delay in issuing this consultation and in the meantime it seems that the difficulties that can be caused have become higher profile in the media. This has the potential to damage public trust and confidence in the justice system and those operating within it. CILEx would like to see these reforms expedited, with early evaluation and implementation.

9.2. The predicted expansion of the unregulated sector is a cause for concern. Consumers are not always confident about identifying which legal service providers are regulated or unregulated. The expansion of the unregulated legal sector will most certainly be detrimental for consumers as there are limited options to seek redress, for example consumers are unable to submit a complaint/claim to the Legal Ombudsman. We note that the LSB has previously said it would work with the Legal Ombudsman to support the expansion of redress to cover unregulated legal services. We have expressed concerns in previous consultation responses that this could give legitimacy to a group of unregulated individuals and we welcome recent decisions not to pursue this.

9.3. Although this might have enhanced consumer protection, practical questions need to be asked about how this expansion will be achieved, and how it will be funded. Also the growth of the unregulated sector could lead regulated legal service providers to exit the market, leaving consumers with poor choice and inhibiting competition, innovation and growth.

9.4. We are working to empower consumers through the information on our website and the Legal Choices website. This includes a survey which

encourages consumers to provide feedback on the quality of services provided by our regulated community.

- 9.5. CILEx is open to adopting a shared approach to education, training and diversity with other approved regulators. As an approved regulator, we have been supportive of the initiatives proposed by the LSB to encourage regulators to co-ordinate their rules and arrangements more closely where appropriate, for example client protection and disciplinary procedures.

10. Summary of recommendations

- 10.1. The title McKenzie Friend should be changed to 'Court Supporter'. This would provide clarity and would dispel some of the myths that appear to surround the use of the term.
- 10.2. There should be a universal code of practice, written in plain language, which clearly defines what any court supporter or attendee can do, how judges should treat them, and the process by which any lay advisers can come before the court, and what precisely should happen when those individuals seek out rights of audience.
- 10.3. A 'code of practice' is recommended over a 'code of conduct', which may mislead consumers and give the impression that the individual can be called to account by an approved regulator.
- 10.4. The Regulatory Objectives enshrined in the Legal Services Act 2007 should be considered to give consistency in ensuring those affiliated in the courts' wider work are evaluated fairly.
- 10.5. McKenzie Friends are unregulated, uninsured and mostly unqualified. They should not be allowed to charge people.
- 10.6. Membership of particular membership bodies in and of itself should not be seen as providing adequate assurance.
- 10.7. There must be a robust pre-authorisation process, with those who wish to attend court asking the judge's permission beforehand.

- 10.8. The test for granting a right of audience should be the same for family and civil proceedings, with particular consideration for the anomalies that apply to chartered legal executives.
- 10.9. The standard form notice should include questions on indemnity, training, any payment for services, and prior conduct, to ensure that there is adequate protection for the consumers from those struck off from other parts of the legal profession.
- 10.10. CILEx is open to adopting a shared approach to education, training and diversity with other approved regulators.