February 2016 Consultation by the Lord Chief Justice of England and Wales and the Judicial Executive Board

on

Reforming the courts' approach to McKenzie Friends

<u>Supplementary</u> Response from the Society of Professional McKenzie Friends, 8/6/2016

Our earlier response, submitted on 25/4/16, remains SPMF's substantive response to the Consultation. This supplementary response addresses some developments since that date.

CONSUMER PROTECTION

1/ At 9.2 of our earlier response we questioned the motive behind JEB proposing a ban on fee recovery on grounds of protecting the vulnerable litigant when those bodies charged with consumer protection in this field; LSB, LSCP and CMA are not calling for it.

2/ LSB and LSCP have since expressed their views, along with SRA, all opposing the ban on fee recovery, as proposed by the consultation paper. CMA's current study is on a longer track, and their views will no doubt be made known in due course.

> SRA: A blanket fee ban would mean litigants in person "may not get access to support, even where there are no quality issues."
>
> LSB: "We do not believe that the consultation paper adequately explains why a ban is necessary, what harm the ban would address or what the consequences of the ban might be for consumers."
>
> LSCP: "Choice is one of the core consumer principles, which the courts have maintained through allowing litigants to use the representation they choose. Prohibiting McKenzie Friends from charging fees removes a litigant's choice to pay for reasonable assistance. This may inadvertently impinge on access to justice as well as exacerbate existing vulnerabilities."

Consumer protection is not properly the business of JEB. Without the support of LSB, LSCP, and CMA the proposed ban on fee recovery should not be implemented.

CARDIFF UNIVERSITY STUDY

3/ LSB and LSCP highlight that the case is not made for a blanket ban on fee charging McKenzie Friends. SPMF's earlier response pointed to a lack of evidence in the consultation paper to support the proposed ban. We learned in May that the Bar Council, which supports the proposed ban on fee recovery, had funded research from Cardiff University to fill this evidential void. While we welcome evidence, we are greatly concerned that the Bar Council's choice of researchers is intended to skew the findings in their favour.

4/ The study is to be conducted by 3 researchers who took part in the 2014 MOJ study, cited at paragraph 3.6 of the consultation paper. At paragraph 9.1 of our earlier response we highlight the deficiencies in that 2014 study, in particular that it proposed a blanket ban on fee charging McKenzie Friends on the strength of a sample of only 3 cases, even though all 3 litigants spoke highly of the MFs who had assisted them, and the researchers themselves spoke highly of one of them. Their conclusion was not supported by the evidence, suggesting a bias or pre-disposition on the part of the researchers, but why would they so pre-disposed?

5/ Implied criticism of Legal Aid policy is a theme throughout the 2014 study. Professional MFs help the court system to function with limited Legal Aid, and this would seem the most likely reason why these researchers made this blanket recommendation: "it is doubtful whether …paid MF's… justify a charge for their services"(P112), on the flimsiest of evidence.

6/ The Bar Council's decision to commission 3 of those same researchers to undertake further work suggests they hope for more of the same prejudice against Professional MFs to emerge.

7/ With reluctance, SPMF has decided to participate in this study and to make available to the researchers details of the 93 consumers whose comments are shown at annex 2 of our earlier response. We remain sceptical that these 3 particular researchers will approach the study with true impartiality. At annex 1 we attach Correspondence between SPMF and the University.

8/ For these reasons, we ask that any findings from the current Cardiff University study, supporting the proposed ban on fee recovery, should be scrutinised with more care than was applied to the 2014 MOJ study when drafting the consultation paper.

RISK OF HARM FROM PRACTISING SOLICITORS AND BARRISTERS

9/ At 9.1 and annex 2 of our earlier response we provide statements from 93 informed consumers, who had used the services of a professional MF, and who oppose the proposed ban on fee recovery. Many describe having previously used the services of barrister and/or solicitor and found the MF not only significantly cheaper but better.

10/ Balanced against any evidence of harm posed by professional MF's to vulnerable litigants must also be set evidence of harm from the alternative: practicing solicitors and barristers.

11/ The consultation paper gives no consideration to this. It is quite misleading to hold that McKenzie Friends pose a risk, but that regulated lawyers do not, and yet that is the premise on which the consultation paper proposes this prohibition on fee recovery.

12/ It might be said that regulation provides remedies in the event of failings by practising solicitor or barrister, and that same protection for the litigant is not available if assisted by a professional MF. There is clearly some merit in that argument, but in the case of professional MFs who are members of SPMF, all have professional indemnity insurance, and it is that which, in the final analysis, gives greatest security to a litigant, more so than the remedies available through SRA, BSB, or Legal Ombudsman.

13/ A straw poll of articles in the Law Gazette and Legal Futures reveals 2 well-publicised stories of McKenzie Friends, one of whom was barred from acting as a McKenzie Friend and the other who was imprisoned for fraud. There are **two or more stories a week** of solicitors or barristers who are disciplined, struck off or imprisoned for a variety of improper activities.

14/ The scale of risk posed by regulated lawyers is best indicated by the published record of complaints about solicitors and barristers adjudicated by the Legal Ombudsman. In the 12 month period 2014 (Qtr 4) – 2015 (Qtr 3) the Legal Ombudsman handled 2628 complaints. Of these, 931 were upheld (i.e. a remedy was applied).

15/ The data can be viewed on this link http://www.legalombudsman.org.uk/raising-standards/data-and-decisions/ , selecting the table headed "view decisions data file (.csv)". Sort the remedy applied column. It shows a remedy applied in nos. 1698 – 2628 = 931.

16/ Complaints against solicitors and barristers at the rate of 931 a year indicates a significant risk to consumers who engage the services of regulated lawyers. This should be factored into any balancing exercise of the risk posed by professional MF's. The alternative to a professional MF, i.e. instructing a practising solicitor/barrister, is not a risk-free option for the vulnerable litigant.

RIGHT OF AUDIENCE AND CONDUCT OF LITIGATION

17/ At 9.4 of our earlier response, we set out our case that the right to fee recovery is inherent in caselaw, to overturn it would require primary legislation, and therefore prohibiting fee recovery by a rule of court would be ultra vires the power of such secondary legislation. We also point to the likely lack of support from Parliament for any such primary legislation.

18/ It has since been brought to our attention that a court's discretion to allow a right of audience or conduct of litigation to an otherwise unauthorised person (such as a McKenzie Friend) is arguably enshrined already in primary legislation, such that any restriction on that right, such as a prohibition on fee recovery, would require primary legislation. Consideration of this is not reflected in the consultation paper. It appears to have been overlooked.

The relevant statute is Legal Services Act 2007, Sec 19(a) & Schedule 3:

Sec 19: Exempt persons

In this Act, "exempt person", in relation to an activity ("the relevant activity") which is a reserved legal activity, means a person who, for the purposes of carrying on the relevant activity, is an exempt person by virtue of—

(a) Schedule 3 (exempt persons)

Sch 3. 1(2)(b) " This paragraph applies to determine whether a person is an exempt person for the purpose of exercising a right of audience before a court in relation to any proceedings (subject to paragraph 7)... The person is exempt if the person— (b) has a right of audience granted by that court in relation to those proceedings."

Sch 3. 2(2)(b): "This paragraph applies to determine whether a person is an exempt person for the purpose of carrying on any activity which constitutes the conduct of litigation in relation to any proceedings (subject to paragraph 7)... The person is exempt if the person— (b) has a right to conduct litigation granted by a court in relation to those proceedings."

19/ Had it been the will of Parliament to prohibit fee recovery by exempt persons when a court grants a one-off right of audience or litigation to an MF, it would surely have done so as part of LSA 2007, and incorporated it in these paragraphs. The fact it did not must raise significant doubts as to whether a prohibition on fee recovery would now meet with the approval of Parliament. It would be wholly wrong to introduce by secondary legislation what Parliament chose not to introduce in primary legislation.

ANNEX 1

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27 May 2016

Dear Mr Barry,

I am writing in response to the concerns you raised about the ethical integrity, specifically the impartiality, of the research project I am leading to explore the work of McKenzie Friends in family cases.

I would like to reassure you that I and the other members of the research team take very seriously the need to conduct research and analyse findings objectively. I understand your concern in relation to the funding for the research being provided by the Bar Council, which has – as you note – expressed some strong views about regulation of the work of McKenzie Friends. It was an issue that I and the research team considered carefully before taking on the project and I took steps to ensure that the independence of the research team and the impartiality of the research report would be protected. In particular, I stressed that the research findings might not support the Bar Council's position on McKenzie Friends. The Bar Council does acknowledge and support the need for independence in relation to this research and has agreed that the research team will be able to publish the results of the research with or without their support. I have now amended our project information sheet (see attached document) to clarify our independence from the Bar Council.

As researchers, we are first and foremost concerned that policy decisions should be informed by evidence as far as possible and our aim in undertaking this research is to build a stronger evidence base from which decisions about McKenzie Friends may be taken. The mixed view we obtained from the '*Litigants in person in private family law cases'* study that you mentioned in your letter is one of the reasons that we are convinced of the need for this research; there is not enough evidence at present to support strong views either against or in support of further regulation of the work of McKenzie Friends. Incidentally, I am sure you noted that we did comment on the extremely high quality of the work done by one of the McKenzie Friends we observed in that study, in addition to reporting our concerns about the others.

I cannot predict the results of this study, but it is entirely possible that we will find sufficient examples of positive practice to question the recent proposals from the judiciary. In connection with our desire to build a fuller picture of the work of McKenzie Friends, may I draw your attention to our plans to interview clients, which is something that the LSCP did not do. You have mentioned that many clients are very satisfied with the work of McKenzie Friends and if you would like to assist us in obtaining the views of clients by advertising the project, that would be very helpful.

You do not, of course, have to participate in this research. However, it would be a shame not to be able to include your views. It is important that the study reflects the views of as diverse a range of McKenzie Friends as possible. Your views as a member of the new self-regulating body for McKenzie Friends are of interest to us, particularly as that body did not exist when earlier research on this topic was conducted. We also think it likely that the market has developed further in other ways during the last two or three years and you are likely to have good insight into this.

If you still have concerns, I would be grateful for an opportunity to discuss them with you.

Yours sincerely,

Dr Leanne Smith

A study of McKenzie Friends in family law cases

About the research
We are researchers carrying out a study to find out about professional McKenzie Friends and the role that they play in supporting litigants in person through family law cases.

To find out more about McKenzie Friends and the work they do, we will be conducting interviews with professional McKenzie Friends and with litigants who have used them. In a later phase of the study, we will also be observing a number of court hearings attended by professional McKenzie Friends and speaking to the people involved about their experiences.

We would very much like to interview you as part of our research and we have prepared this leaflet to give you some information about it.

Who is in charge of the study?
This research study is led by Dr Leanne Smith from Cardiff University. The other researchers are Dr Emma Hitchings from Bristol University and the research assistant, Mark Sefton. Each of us has many years of experience of research on separating families' experiences of the legal system.

The research is funded by the Bar Council. However, the research team is independent of the Bar Council and will be free to publish their findings whether or not the Bar Council agrees with them.

The study has been approved by the Cardiff University Research Ethics Committee.

Why are we doing this research?
There are suggestions that, since substantial restrictions on the availability of legal aid were introduced in 2013, more litigants are using professional McKenzie Friends to help them with their family law cases. McKenzie Friends are increasingly in the spotlight – for example, senior judiciary have recently published proposals for new rules covering what fee-charging McKenzie Friends in particular, but also McKenzie Friends more generally, should and should not be able to do. We want to learn more about what professional McKenzie Friends do and what difference their support makes to people who do not have a lawyer to help them throughout their family law case. The research will help us to make suggestions about the use of McKenzie Friends.

The results of the research will be published in a report, which will be available online, and in specialist academic journals. We can send you a copy of the support if you wish.

How you can help us
For this research to be useful we need to find out as much as we can about professional McKenzie Friends and the assistance they provide to their clients both inside and outside of the family courts.

We would like to conduct an interview with you to find out about your experiences of being or using a professional McKenzie Friend.

Participation in an interview is entirely voluntary.

What will the interview involve?
A researcher will arrange to visit you at a mutually convenient time and place and ask you questions about your work as a McKenzie Friend. The interview will last around one hour and the format will allow you to answer questions in your own words. With your consent, we would like to audio record the interview – this makes it much easier for the interviewer to listen to what you are saying.

If you do take part you can refuse to answer any questions which make you uncomfortable and you can change your mind about taking part in the study at any point - just tell the researcher that you no longer wish to take part and we will withdraw you from the study.

Confidentiality
If you choose to participate in the research your views may be used in the research report but your identity will remain strictly confidential. The researcher will not record any names or addresses in their notes and if you agree to an audio recording of your interview, we will make sure that no names or identifying details will be transcribed. Nobody from outside the research team will be able to identify you from any comments you make. Neither you nor any court case you are involved in will be identified in the research report.

Any questions or worries?
If you would like more information about the research, please contact Leanne Smith who is leading the research study:

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1) Prof John Harrington, Director of Research, Chair, School Ethics Committee, School of Law and Politics, Cardiff University.

2) Prof. Colin Riordan, Vice Chancellor, Cardiff University: by email v-c@cardiff.ac.uk

3rd June 2016

Dear Dr Smith,

Thank you for your letter of 27 May. We appreciate you looking into this and the courtesy of your reply. In particular we welcome your assurance that "..the research team will be free to publish their findings whether or not the Bar Council agrees with them." However, that is not the essential nature of our concern. Rather, it is that the Bar Council has commissioned 3 researchers whose involvement with the 2014 MOJ study indicates a likely bias against Professional McKenzie Friends, leading to a likely skew of the findings in the Bar's favour.

You rightly say that your previous research commented on the extremely high quality of the work done by one of the 3 McKenzie Friends in that sample. However, your blanket recommendation: "it is doubtful whether… paid MF's… justify a charge for their services." (P112) still damned that MF along with all the rest. Are we not right to fear that your current study may again support a blanket ban, regardless of whatever positives you may observe?

In respect of the other 2 cases in that sample, there is insufficient information to comment on one, but the other suggests a lack of understanding and a bias on the part of the researchers:

P97 " In B034, a children case, the resident mother had unwittingly recently employed a paid MF linked to a father's rights group. She appeared to have considerably weakened her case by agreeing, presumably on his advice, to a shared residence order for a very young child despite having previously been opposed to unsupervised contact."

1) If the researcher knew the MF was linked to a father's group, surely the mother must have known also? If so, the term "unwittingly" suggests the researcher's disapproval of the mother's choice, rather than the mother being tricked in some way by the MF.

2) "Shared residence" is simply a type of order, and is no indication of the amount of time the child shall spend with each parent. The researchers either did not know this, or were deliberately misleading the reader, implying contact went from zero to 50%.
3) Anyone who works in this field knows it is common, in the early stages of children proceedings, for a resident mother to oppose unsupervised contact, and later withdraw her objection on receiving legal advice. An experienced solicitor, barrister or MF would advise a mother to withdraw any such objection at an early stage unless it is well founded; otherwise, if her concerns are subsequently found to have been exaggerated, a court might question whether she is acting in the child's best interests. The researchers showed no understanding of this pattern and instead attribute the McKenzie Friend's advice to his being a "covert foe" (page 112), undermining his client's case in order to pursue his own agenda. The views of the mother, who was "very positive about the MF's efforts" (P112) were dismissed out of hand: "..one cannot expect lay consumers to always know what they need to know. .." (P112)

A qualitative methodology carries the potential for researchers to introduce their own agendas and prejudices, and pass them off as research findings. There appears to be an element of that in the 2014 study, and it would seem that is the very reason why the Bar Council has now chosen 3 researchers from that study, in the hope that the same prejudices and agendas will surface on this occasion too. Frankly, we are concerned that the views and experiences of our own clients may be treated in the same dismissive, patronising way in your current project.

Having said that, we take the view that it is better to participate in this project than not to do so. Individual SPMF members will decide for themselves whether to take part. For myself, I intend to.

You ask "… if you would like to assist us in obtaining the views of clients by advertising the project, that would be very helpful." Attached to our response to the current McKenzie Friend consultation were signed statements from 93 people who had used the services of one of our members. We would be willing to forward a letter from you to each, inviting their participation.

Yours sincerely,

Ray Barry
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