Elisabeth Davies Chair Legal Services Consumer Panel One Kemble Street London WC2B 4AN



The Chief Executive's Office Legal Services Board 7<sup>th</sup> Floor Victoria House Southampton Row London WC1B 4AD

T 020 7271 0043 F 020 7271 0051

www.legalservicesboard.org.uk

2 September 2014

Dear Elizabeth

# Fee-charging McKenzie Friends report

Thank you for your stimulating and valuable report. The opportunities and challenges raised by fee-charging McKenzie Friends are a relatively unexplored facet of the market and the issues discussed in your report touch on many of the regulatory objectives of the Legal Services Act 2007 (the LSA), not least improving access to justice. You have made a material and important contribution to ongoing thinking and I welcome your work in continuing to stimulate debate after publication of the report.

A collective aim is plainly that all litigants have access to competent and affordable support at the time they need it. Sometimes this will be full representation, sometimes support and advice which can be provided by McKenzie Friends. Both economic conditions and judicial practice are beginning to blur the traditional hard and fast boundaries between the regulated sector and the unregulated, which makes the report very timely. It represents a call for action to all participants in the legal sector, from the Ministry of Justice, the judiciary, regulators beyond the Legal Services Board (the LSB), representative bodies, to the profession itself. However, whilst the LSB is not the principal audience for much of the report or its recommendations, we have considered it in full below and highlighted specific points where we believe action may be appropriate.

In the main, we welcome the report. It offers timely consideration of an area of increasing significance, both in terms of the growing numbers of individuals facing legal problems as litigants in person and the implications of that for the efficient functioning of the courts.

## The role of McKenzie Friends in the legal services market

You provide a clear and thoughtful examination of benefits and risks associated with McKenzie Friends and in particular those who charge for their services. We value your report and its proposals, noting in particular the contribution that these services can make to improving access to justice. However, some of the observations in the report mean that we are cautious about formally accepting fee-charging McKenzie Friends as a legitimate feature of the evolving legal services market. In particular, we are concerned that they may be misleadingly perceived as offering a service underpinned by the same standards and consumer protections that are provided by a regulated professional.

This is not to say, however, that we are advocating the regulation of the services provided by McKenzie Friends. To do so might drive such provision out of the market and in any event, the basis on which this would be done is unclear given that many of the services are unreserved. In so far as the activities of any McKenzie Friend bleeds across into unauthorised provision of a reserved legal activity such as exercising rights of audience, the appropriate controls lie with the judiciary who are ultimately responsible for allowing this to happen in any particular case. As you are aware, as the primary audience for much of the report (the judiciary) is already giving consideration to it, and to litigants in person more generally. In particular, the LSB welcomes the establishment of the judicial working group announced by the Lord Chief Justice.

## The Panel's recommendations to the judiciary

In terms of the Panel's recommendations to the judiciary, we agree that addressing the needs of and complexities associated with litigants in person points to the desirability of including content on McKenzie Friends within judicial training. We also agree that consistent treatment of McKenzie Friends is desirable, and that the Practice Guidance can have a role to play in achieving this. We can see sense in the Guidance explaining the role of McKenzie Friends, highlighting their possible merits and drawbacks, and setting out the types of safeguards that may be needed. These might include consistent sharing of information within the judiciary or perhaps more formal quality assurance on the performance of individual practitioners.

In relation to rights of audience, we agree that judges should continue to have the discretion to grant this when it would be in the interests of justice. Such rights should certainly not be automatic given that this is quite rightly a regulated activity. Moreover, the LSB recognises the need for effective measures including consistent use of tools akin to CVs to assess credentials The recommendation in the Panel's report that details of judgements where McKenzie Friends have been subject to Civil Restraint Orders should be published on Gov.uk seems to us to merit further consideration in the same context, namely that of mitigating potential risks to consumers from both free and fee-charging McKenzie Friends.

#### Challenges for the legal sector's stakeholders

The LSB recognises the sceptical – and indeed sometimes hostile - viewpoint of many within the legal sector on the issue of McKenzie Friends, and the reasons for it. It is important, though, for the profession and its approved regulators to respond positively to this challenge; engagement on consumer information is one potential

way to do this. The LSB therefore agrees that there is a need for clear, targeted information to help potential litigants understand possible options for support and the positive and negative aspects of each. The Panel's proposal to develop a "white label" consumer guide is very positive. While recognising constraints faced by the voluntary sector, developing such a document appears to present an opportunity for wider coordination (including with professional bodies) to develop more comprehensive information on possible sources of help.

We note the very creditable effort that is already put into assisting litigants in person, some of which is discussed in the report. Of course, this has limitations in terms of geographical coverage and the availability and continuity of resources. As such, it represents a response to the problem, rather than a long-term solution. In this respect, reference may also need to be made to the pro bono services offered by regulated professionals. For some, these may be an alternative to fee-charging McKenzie Friends. In time, there should be an increase in availability of cheaper charged for services as regulated professionals respond to the market.

Responses from the regulated sector are already evident, with lawyers offering unbundled services that mean some, if not all, of an individual's legal needs are within his or her means. Opportunities also exist for lawyers to address non-price barriers to individuals seeking their help, such as those related to how services are delivered, as discussed in the LSB's 2013 research into consumer use of legal services. Such work has the potential to enable individuals to obtain the services they need at a price they can afford.

The LSB's <u>blueprint</u> for reforming legal services regulation, published in response to the Ministry of Justice's review of the legal services statutory framework, discussed the potential impact of the cost and complexity of regulation in stifling innovation. The need for the frontline regulators overseen by the LSB to press ahead with delivering appropriately targeted and proportionate regulation remains clear. This may see business models emerge that can address unmet legal needs, for example by delivering comprehensive services at lower cost. The challenge is to ensure that appropriate quality is maintained; your report highlights both relevant opportunities and potential risks in this regard.

Given your report's indication that McKenzie Friends are an emerging market, the LSB agrees that it will be important for them to form a widely recognised trade association. I understand that this proposal is already gaining some traction within the sector. An urgent focus in doing so must obviously be introducing measures to protect clients, including some form of accreditation and indemnity insurance to mitigate the risks posed to consumers.

Steps put in place by bodies providing legal advice and support (for example to assure competence and quality) may well be of interest to any emerging McKenzie Friends' trade association when developing safeguards against risks to potentially vulnerable individuals. The discussion of some of these in the LSB's April and December 2012 documents on the regulation of special bodies/non-commercial

<sup>&</sup>lt;sup>1</sup> Understanding consumers who don't use, don't choose or don't trust legal services providers: <a href="https://research.legalservicesboard.org.uk/wp-content/media/Understanding-Consumers-Final-Report.pdf">https://research.legalservicesboard.org.uk/wp-content/media/Understanding-Consumers-Final-Report.pdf</a>

bodies may therefore be helpful. Equally, suitable updates to the Civil Justice Council's draft code of practice would be desirable.

#### Regulation of organised volunteer support under the LSA

Turning to some specific points in the report for a moment, we note the view expressed in the report that McKenzie Friend support provided by charities, law students, and lawyers acting pro bono should be treated as low risk and therefore not regulated. This appears to be on the basis that (i) services are limited to conventional support, (ii) supporting infrastructure is typically in place, (iii) fees are not charged, (iv) the LSA recognises that 'special bodies' such as charities are low risk entities, and (v) the LSB is not taking forward work to introduce regulation until 2015 at the earliest.<sup>2</sup>

I should clarify that organised volunteer support (including charities) is **not** defined as low-risk *per se* by the LSA. It may, however, be included in the definition of "not for profit bodies" which benefit from transitional protection from regulation. In contrast, once commenced, section 108 of the LSA will define a limited form of alternative business structure called a "low risk body". These (and not for profit bodies) will be types of "special body" once section 106 is commenced. This is reflected in the LSB's work on the regulation of special/non-commercial bodies, which has identified the need for proportionate regulation that targets the risks posed.

Our position remains that, on balance, the additional protection provided to consumers (in particular the right to complain to the Legal Ombudsman) by licensing special bodies/non-commercial bodies within a proportionate regime is consistent with the regulatory objectives. We anticipate publishing an update on this area of work later this year.

## The Panel's recommendations to the LSB

Finally, the remainder of my response focuses on the two recommendations directed toward the LSB itself, which are that:

"The LSB 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", and

"The LSB should consider the findings of this report as part of its ongoing work on simplifying legal services regulation."

We appreciate the rationale for the first of these proposals, and agree that more certainty on this point is desirable. The interpretation of case law and statute, however, is a matter for the courts. As the LSB does not have a statutory power to declare the meaning of legislation, nor to provide advice on how to do this, it appears to us that it is more appropriate for this to be addressed by the courts. The LSB will be writing to the judicial working group that is considering McKenzie Friends and will

<sup>&</sup>lt;sup>2</sup> Discussed at 6.5 of the report

also commend the Panel's proposal to it. In the light of the outcome of that, we will consider what else might properly be done.

More generally, the LSB welcomes the second of the Panel's recommendations. We anticipate the report's findings will be relevant to a broad range of our work, notably but far from exclusively, our current work on cost and complexity of regulation, and will continue to bear them in mind.

Yours sincerely

Mike Pitt Chairman

