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# Public Consultation Draft Code of Conduct in relation to McKenzie Friends and revised Practice Note 03/2012

Consultation Response

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## Introduction

1. The Bar Council is the regulatory and representative body of the Bar of Northern Ireland. Members of the Bar specialise in the provision of expert independent legal advice and courtroom advocacy. Access to training, experience, continual professional development, research technology and modern facilities within the Bar Library enhance the expertise of individual barristers and ensure the highest quality of service to clients and the court.
2. The Bar welcomes the opportunity to comment on the draft Code of Conduct and revised Northern Ireland Practice Note. This exercise offers an opportunity to look at the existing case law and consider the rules of the court in light with recent developments and the experience of practitioners around Litigants in Person and their use of McKenzie Friends.

## General Position re Litigants in Person

3. The Bar of NI notes an increase in the number of self-represented litigants, or Litigants in Person (LIP) in recent years. There is, however, a gap in research around LIP, including numbers of LIP. An Access to Justice Review, published by the Department of Justice in 2015 included a focus on LIP. The Review did not provide any baseline figure from which to measure any increase, or decrease, in the numbers of LIP in the system and there was no modelling conducted to predict future trends. From 2012-2017, NICTS management information data indicated that the number of LIPs in Northern Ireland varies across the different business areas and from year to year, averaging out at approximately five per cent of the litigant population, around 4,500 LIP (excluding those in Small Claims cases). These figures may have changed since then but the data is not routinely collected or available.
4. The review also did not establish whether LIP were experiencing barriers in accessing justice, the extent to which this might be the case, or the nature of the barriers that might exist to determine how to facilitate or improve access to justice. There was no empirical data to assess whether there were any specific risks which might block the access to justice rights for LIP.
5. The University of Ulster published research on Litigants in Person in 2018, "Litigants in Person in Northern Ireland: Barriers to Legal Participation". The research set out a "complex mosaic" of reasons for self-representing with financial reasons often being a factor, including access to Legal Aid. The Bar has repeatedly highlighted issues around Legal Aid policy in recent years to the

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Consultation Response

---

Department of Justice. During this time the DOJ has conducted reviews on access to justice in 2011 and 2015 focused largely on making cost savings. There remains a need for strategic direction and stability in this policy area to ensure that Legal Aid is properly recognised as an indispensable part of our justice system which allows individuals to enforce their basic rights.

6. The Bar therefore takes as its starting point that everyone should be entitled to meaningful access to justice. Cuts to the scope and legibility of Legal Aid appear to have been one of the main cited reasons forcing individuals to represent themselves in court. We think that it is wrong and that it causes individuals to incur stress and anxiety in trying to navigate a highly complex but also highly regulated system.
7. We have noted that Ulster University has recently published updated research which has examined the situation of LIPs from a human centred perspective. But in addition to the human toll it undoubtedly causes for those individuals who are litigants in person, a system that involves a large number of LIPs. It has the potential to adversely affect the wellbeing of others and also the timeliness and quality of the hearings being conducted.
8. We think before accepting that this is an inescapable reality and designing support mechanisms to address it, a collective challenge should be posed back to government to do more to reduce the number and range of litigants in person. This would, in our view, have much greater benefit than any other mechanism.
9. We would like to make clear that in stating this position, we are not speaking from self-interest on behalf of the Bar. Various studies and research projects have all examined the financial and social benefits that can be achieved from investing in Legal Aid.
10. In September 2023, the Law Society of England & Wales spoke of how families continue to be victims of a broken justice system and explained, “There are also a high number of litigants in person (LiPs) – parties without representation. The statistics show that the number of cases where neither party had legal representation has trebled since January to March 2013. This was during a time when we saw large areas of legal aid cuts”; and that, “Cuts to legal aid have driven up the number of people who have no choice but to represent themselves through highly stressful legal proceedings, where life changing decisions are likely to be made.”

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Consultation Response

---

- 11.** The UK government appears to have take some heed of these issues and engaged in measures to attempt to address the underfunding of Legal Aid. In May 2023, the UK government announced that domestic abuse victims and children would be among millions more people who will have access to Legal Aid under major government investment to support those who need it most. The move will see over six million more vulnerable people and families able to access funded legal support as the government pledges £25 million to boost the Legal Aid system every year. It means, for example, that domestic abuse victims in receipt of universal credit and seeking a protective order for themselves or their children against their attacker can access Legal Aid more readily without facing a means test.
- 12.** In addition, one of the most recent (but not isolated) examples of why the focus should be on investing in Legal Aid to include parties that are currently having to self-represent came from work published in 2023 by PWC in Australia. It had two main headlines:
- The analysis estimates that Legal Aid services deliver approximately \$601 million in benefit each year. This corresponds to a Benefit Cost Ratio (BCR) of 2.25 when considering the \$267 million in annual Commonwealth funding that the (LACs) receive. So, every dollar spent on Legal Aid brings 2.5 times that in terms of benefits.
  - In addition to these quantitative benefits, the services delivered also lead to a host of non-quantifiable benefits, including efficiency of early intervention services, avoided costs through alternative pathways and avoided mental health and societal costs.
- 13.** So, whilst recognising the importance of considering the human-based considerations on Litigants in Person we must consider the situation in its full context. It is appropriate to ask whether rather than researching and engineering solutions to a problem might be reframed as an opportunity for government to yield economic and social benefits by investing in Legal Aid – reframing it as a value rather than a cost.
- 14.** The Ulster University research has also identified that many LIP reported that part or all their motivation for litigating in person was due to dissatisfaction with the legal services they had previously received. The Bar believes that independent practitioners in open competition with each other serves to drive up standards and represents an important guarantee of quality for clients. However, any issues experienced by the public when dealing with our members is a matter that the Bar takes very seriously.

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Consultation Response

---

**15.** Every barrister called to the Bar of Northern Ireland is subject to the Bar's Code of Conduct which sets out the standards of professional conduct and practice required of barristers in this jurisdiction. Any member who fails to comply with any of their duties or the standards required may be referred to the Professional Conduct Committee for professional misconduct under Section 8 of the Code which can impose a range of penalties.

### **A Code of Conduct for McKenzie Friends**

**16.** Notwithstanding our views above, we recognise that the current reality is one where there are many LIP, giving rise to an active question about the role of McKenzie Friends. Due to some of the concerns we have touched upon above, which relate to sensitive and difficult issues being the subject of self-litigation, the Bar Council's position has evolved over time to a position whereby if, regrettably, McKenzie Friends are to exist it is essential that they have a very clearly defined remit and that measures are taken to protect the interests of all involved to the fullest extent possible.

**17.** In a 2018 response to the University of Ulster Report on LIP, the Bar of NI initially expressed concern around the development of a Code of Conduct for McKenzie Friends. The Bar stated that this could be perceived as an indication that McKenzie friends operate as Part of a regulated profession.

**18.** McKenzie Friends, who typically are neither properly trained, nor regulated, nor insured, should not be allowed to hold themselves out to the unsuspecting (and usually vulnerable) public as providing legal services. It is worth noting that a young barrister, with all the regulatory oversight and other protections, may charge a comparable or cheaper hourly rate than a McKenzie Friend.

**19.** The Bar of NI is continuing to ensure that members of the public understand that they can seek advice and assistance from barristers without a professional or lay intermediary, and to make the process of instructing a barrister directly less daunting for those with little or no experience of the legal system.

**20.** In the content of this consultation, the Bar would agree that there is merit in having a clear of Conduct and revised Practice Note for McKenzie Friends in the context of an increase in the number LIPs across our legal system. These should not, individually, or collectively, be deemed as an encouragement of the use of McKenzie Friends nor the granting of a professional qualification or standing.

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## Public Consultation Draft Code of Conduct in relation to McKenzie Friends and revised Practice Note 03/2012

Consultation Response

---

Instead, they perform the valuable role of establishing clear parameters and expectations and eliciting important details about the interest, ability and motive of the McKenzie Friend. The Code of Conduct and associated paperwork serves to document the use of a McKenzie Friend and explicitly sets out their duty to the court.

21. It is therefore important that the Court retains the right to either approve or deny the involvement of a McKenzie friend and thereby make its provisions enforceable.
22. We consider that The Practice Note is helpfully clear in differentiating what a McKenzie Friend can and cannot do. It may therefore perform a useful purpose is setting out the requirements placed upon an individual undertaking the role of a McKenzie Friend in either a paid or unpaid capacity and should serve to manage expectations and denote the responsibilities and limitations associated with the role.
23. As mentioned above, we consider that there are existing concerns around how cases involving personal litigants can on occasion have an adverse impact upon the wellbeing of others and also the timeliness and quality of the hearings being conducted. It would therefore be helpful if a Code of Conduct for McKenzie Friends could, without implying that the role requires a legally qualified person, make additional provisions help to mitigate any such issues.
24. Part II of the Revised Practice Note sets out that rights of audience and the right to conduct litigation on behalf of another are not part of the function of a McKenzie Friend. Most significantly, it is a criminal offence to exercise rights of audience unless qualified and authorised to do so by an appropriate regulatory body. It is welcome that the Revised Practice Note makes this explicit.
25. The Bar of Northern Ireland is content, therefore, that the Code of Conduct and the revised Practice Guidance are adequate in ensuring that a McKenzie Friend clarify their status as a McKenzie Friend through completion of the form and the submission of a CV. This requirement serves the public interest and ensures that the duty owed to the court when acting as a McKenzie Friend is set out and complied with by all individuals involved.

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**26.** The Bar Council serves the public interest in regulating all practising barristers in Northern Ireland through the Professional Conduct Committee (PCC). The PCC is responsible for:

- setting the standard of conduct for barristers through the Bar Code of Conduct;
- investigating complaints against barristers and taking disciplinary or other action where appropriate;
- circulating update advice and guidance to barristers;
- monitoring the service provided by barristers to maintain quality.

**27.** The Bar Council requires that should a situation ever arise where a barrister was called upon to act as McKenzie friend, in a lay capacity, that they should first check and establish how they could do so in a manner that would be compatible with their professional obligations. It is however the Bar Council's clear position that a barrister called in Northern Ireland cannot be paid to act as a McKenzie friend.