

NATIONAL BARGEE TRAVELLERS ASSOCIATION (NBTA)

Consultation Response: Reforming the courts' approach to McKenzie Friends

Introduction

The National Bargee Travellers Association (NBTA) is a volunteer organisation formed in 2009 that campaigns and provides advice for itinerant boat dwellers on Britain's inland and coastal waterways. The term Bargee Traveller includes anyone whose home is a boat and who does not have exclusive use of a permanent mooring for their boat with planning permission for residential use. The NBTA is the only national organisation in Britain dedicated to upholding and defending the rights of itinerant boat dwellers. The NBTA has members on all the major navigation authorities' waterways and beyond. The NBTA trains and provides volunteer caseworkers who assist individual itinerant boat dwellers in cases where enforcement action is being taken against the boat dwellers (which in most cases could result in the loss of their home) and in cases where the rights of itinerant boat dwellers are being violated. The assistance provided by these volunteer caseworkers may include acting as the itinerant boat dweller's McKenzie Friend in civil proceedings. Membership of the NBTA is free of charge. The NBTA is entirely funded by donations from members and supporters. The Association's annual income is currently less than £1,000. The NBTA's volunteer caseworkers do not receive any remuneration. However the donations received by the NBTA do include donations from clients whom the volunteer caseworkers have assisted where the clients have been subject to civil enforcement proceedings by navigation and similar authorities.

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.

We do not have a view on this question.

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.

If a decision is made to replace the term McKenzie Friend, we propose that 'court assistant' (if paid) and 'voluntary court assistant' (if unpaid) would be appropriate terms because they provide a more accurate description of the role of McKenzie Friend than 'court supporter'.

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.

We believe that while the Practice Guidance may need to be amended and updated, it should remain as Practice Guidance because this would give more scope for discretion by Judges in making decisions regarding McKenzie Friends and particularly in granting rights of audience to McKenzie Friends. It is important that Judges retain this discretion because each case is different and involves a different level of complexity that the Litigant in Person may need more or less assistance with.

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.

We do not have experience of family proceedings so we cannot comment on the first part of this question. Regarding the draft rules, the NBTA is very concerned about the statement in the draft rules that:

“the grant of a right of audience or a right to conduct litigation to lay persons.....who seek to exercise such rights on a regular basis, whether for reward or not, will however **only** be granted in exceptional circumstances”.

The NBTA has certain volunteer caseworkers who are experts in specific areas of law and court procedure and are equipped to act as a McKenzie Friend including speaking on behalf of the client in court. The NBTA is a small organisation with around 20 volunteer caseworkers. Not all of these volunteers have the expertise to act as a McKenzie Friend. It is inevitable that only two or three key volunteer caseworkers will be able to take on acting as a McKenzie Friend if this is required by the client. To prevent the NBTA's clients receiving such expert assistance simply because the volunteer caseworker has been deemed to have “seeking to exercise such rights on a regular basis” would be contrary to the interests of justice and would violate the Article 6 rights of the Litigant in Person.

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.

We agree that sufficient information should be provided for the Court to decide whether a specific McKenzie friend is acceptable. However this can be provided by other means than a standard form notice.

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.

We agree that there should be a Code of Conduct for McKenzie Friends, but any Code of Conduct must also allow for Judicial discretion to permit a McKenzie Friend to diverge from this Code of Conduct if it is necessary for the effective conduct of the case.

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.

We agree that a Plain Language Guide LIPs and McKenzie Friends would be of assistance to both. This is because the language used in Practice Guidance can be difficult for a lay person to understand.

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.

We agree that a non-judicial body with the relevant expertise should produce such a guide but the final draft should be reviewed by a judicial body to ensure that it reflects the Practice Guidance accurately.

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.

We do not agree with a prohibition on fee recovery or on the recovery of expenses (although we note that this consultation is silent on the issue of the recovery of expenses). The majority of Litigants in Person who are assisted by the NBTA are on low incomes but just above the level at which they would be eligible Legal Aid. Others have had applications for Legal Aid refused because although receiving minimal income, they live a hand-to-mouth existence doing casual work; do not keep many financial records and so cannot prove their income. In addition some have literacy difficulties. Those Litigants in Person need to be able to recover the legitimate expenses (as opposed to fees) incurred by the McKenzie Friend, such as train fares, photocopying and printing costs and overnight accommodation, from the opposing party in principle.

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 need for McKenzie Friends is a direct result of the cuts to the Legal Aid budget since the Legal Aid, Sentencing and Punishment of Offenders Act 2012. Litigants in Person should not be penalised for being the victims of these cuts by having restrictions placed upon the assistance provided by McKenzie Friends.

The type of civil proceedings in which NBTA volunteer caseworkers act as McKenzie Friends involve an area of law that is extremely obscure; that includes legislation dating back three or more centuries and that frequently contains contradictory provisions. Navigation authorities are known to exaggerate their legal powers and to act *ultra vires*. There are very few legal professionals who have a comprehensive knowledge of this area of law. It has been described by a recently retired senior barrister thus: "of all niche areas of law, this is one of the most niche". It is therefore very difficult to find a legal professional who is equipped to represent a boat dweller facing eviction, even if they do qualify for Legal Aid.

A few of the NBTA's volunteer caseworkers have carried out considerable research into the law relating to living on boats on the UK's inland and coastal waterways. It is these few volunteer caseworkers who are most likely to act as a McKenzie Friend to a boat dweller who cannot obtain Legal Aid.

In addition these proceedings always involve the potential seizure of an itinerant boat dweller's home and eviction of the boat dweller from the waterways under the jurisdiction of the Claimant. Many cases also involve an injunction preventing the boat dweller from keeping their home on the waterways of the Claimant. It would be wholly unjust for a boat dweller who is facing the loss of their home to be deprived of assistance from a McKenzie Friend when they do not have the capacity or the confidence to conduct their own case and they do not qualify for Legal Aid but do not have the means to pay for legal representation.

Any revised Practice Guidance or rules must be worded to prevent an opposing party from objecting to the other party being assisted by a specific McKenzie Friend specifically because this would reduce their chance of winning the case. We are aware of a situation where a navigation authority objected to a party being assisted by a specific McKenzie Friend for no apparent reason other than this. The McKenzie Friend had recently won a six-year court case against the navigation authority in the Court of Appeal and the circumstances of the case in which he is acting as McKenzie Friend are similar.

Itinerant boat dwellers are a wide cross-section of society but a substantial proportion lack the articulacy required to represent themselves in court and in addition some have either mental health issues or poor literacy. Therefore the NBTA's clients have more need for the McKenzie Friend to address the Court directly. This assistance from a McKenzie Friend should not be restricted any further.

Organisations such as NBTA should not be prevented from assisting their clients as McKenzie Friends in the event that the organisation (as opposed to the individual volunteer caseworker) receives a voluntary donation in return for the work that the McKenzie Friend has carried out.

**National Barge Travellers Association
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