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Public Petitions Committee  
The Scottish Parliament  
Holyrood  
EH99 1SP

Dear Public Petitions Committee

**Petition PE1247: Calling on the Scottish Parliament to urge the Scottish Government to introduce a McKenzie Friend facility in Scottish courts as a matter of urgency.**

As you are aware the Scottish Human Rights Commission (SHRC) was set up by the Scottish Commission for Human Rights Act 2006 with a duty to promote human rights in Scotland.

Stewart Mackenzie, the Petitioner in this matter recently contacted SHRC to ask us to comment on the human rights issues raised by his petition.

We note that since the petition was lodged and the Committee sought evidence from relevant parties the Report of the Scottish Civil Courts Review has been published and makes recommendations in relation to access to justice and the use of McKenzie Friends.

Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) provides that in the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.

The choice of means to ensure practical and effective access to a court is left to the State. The level of support that a litigant requires must be

determined on the basis of the particular facts and circumstances of each case and will depend, amongst other things, upon the importance of what is at stake for the applicant in the proceedings, the complexity of the relevant law and procedure and the applicant's capacity to represent him or herself effectively.

The European Court of Human Rights has considered the issue of the right to representation, in the context of a case in which the applicant was assisted by a McKenzie Friend. In that case it found:

*“There is no automatic right under the Convention for legal aid or legal representation to be available for an applicant who is involved in proceedings which determine his or her civil rights. Nonetheless Article 6 may be engaged under two inter-related aspects.*

*Firstly, Article 6 § 1 of the Convention embodies the right of access to a court for the determination of civil rights and obligations. Failure to provide an applicant with the assistance of a lawyer may breach this provision, where such assistance is indispensable for effective access to court...by reason of the complexity of the procedure or the type of case. Factors identified as relevant in the Airey case<sup>1</sup> in determining whether the applicant would be able to present her case properly and satisfactorily without the assistance of a lawyer included the complexity of the procedure, the necessity to address complicated points of law or to establish facts, involving expert evidence and the examination of witnesses, and the fact that the subject-matter of the marital dispute entailed an emotional involvement that was scarcely compatible with the degree of objectivity required by advocacy in court. In such circumstances, the Court found it unrealistic to suppose that the applicant could effectively conduct her own case, despite the assistance afforded by the judge to parties acting in person.*

*It may be noted that the right of access to court is not absolute and may be subject to legitimate restrictions. Where an individual's*

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<sup>1</sup> see *Airey v. Ireland* judgment of 9 October 1979, Series A no. 32, pp. 15-16, §§ 26-28, where the applicant was unable to obtain the assistance of a lawyer in judicial separation proceedings

*access is limited either by operation of law or in fact, the restriction will not be incompatible with Article 6 where the limitation did not impair the very essence of the right and where it pursued a legitimate aim, and there was a reasonable relationship of proportionality between the means employed and the aim sought to be achieved. Thus, though the pursuit of proceedings as a litigant in person may on occasion not be an easy matter, the limited public funds available for civil actions renders a procedure of selection a necessary feature of the system of administration of justice, and the manner in which it functions in particular cases may be shown not to have been arbitrary or disproportionate, or to have impinged on the essence of the right of access to court. It may be the case that other factors concerning the administration of justice (e.g. the necessity for expedition or the rights of other individuals) could also play a limiting role as regards the provision of assistance in a particular case, though such restriction would also have to satisfy the tests set out above.*

*Secondly, the key principle governing the application of Article 6 is fairness. In cases where an applicant appears in court notwithstanding lack of assistance of a lawyer and manages to conduct his or her case in the teeth of all the difficulties, the question may nonetheless arise as to whether this procedure was fair. There is the importance of ensuring the appearance of the fair administration of justice and a party in civil proceedings must be able to participate effectively, inter alia, by being able to put forward the matters in support of his or her claims. Here, as in other aspects of Article 6, the seriousness of what is at stake for the applicant will be of relevance to assessing the adequacy and fairness of the procedures.”<sup>2</sup>*

The Court in this case made no comment on the role of the “McKenzie friend” which is neither prescribed nor proscribed by the ECHR. It clearly did not, however, consider this to be sufficient to provide the applicant with the required level of legal representation in the case given its complexity, the importance of what was at stake, and its highly emotive subject matter, finding ultimately that, in the instant case, “the principles of

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<sup>2</sup> the case of *P, C and S v the United Kingdom* (Application 56547/00, 2002), paras 88-91 (citations omitted).

effective access to court and fairness required that [the applicant] receive the assistance of a lawyer.”<sup>3</sup>

The role of a McKenzie friend is to give assistance by making notes, helping with case papers or quietly giving advice on the conduct of the case, as well as providing moral support in court. They are not a substitute for legal representation. It is important that practical and effective access to justice is continued to be supported by the provision on legal aid and the availability of legal representation, particularly in the situations outlined by the European Court of Human Rights, where effective access to the courts would otherwise be denied due to the complexity of the procedure and areas of law to be addressed, the importance of the issues at stake for the applicant and the emotional involvement of the applicant. However, in cases where someone is unable to secure legal representation the court must ensure that their rights are protected. This may be through allowing additional time or flexibility in relation to procedures, or allowing someone to assist.

Discretion already exists to allow for a friend of the party to sit and assist and not take part in proceedings. This is something that happens regularly in tribunals such as Children’s Hearings where a relevant person may not require a legal representative, but may bring along a friend or other supporter. It is also provided for in the Scottish Land Courts.

The Civil Court Review recommends that there may also be exceptional circumstances where this should be extended and it would be appropriate to permit a McKenzie friend to assist a party litigant and, with the court’s permission, to address the court. The Civil Court Review sets out that the law at present is unclear and it would be desirable to clarify this for the small number of cases where such representation would help to the court.

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<sup>3</sup> Ibid, para 95.