With (McKenzie) Friends Like These:

Prohibiting Fee Recovery by McKenzie Friends

In January 2013, Mr Baggaley appeared before Leicester County Court. Acting for a father in family proceedings, he was the sole employee of two companies offering legal advice and services. Over the course of the proceedings, Mr Baggaley – a man with criminal convictions for disorderly conduct and dishonesty, and no legal qualifications – became increasingly aggressive and abusive, threatening the barrister for the other side, swearing at a court usher and calling the chairman of the bench 'pathetic'. Proceedings were adjourned and the court ordered a two-year restraining order, preventing him from issuing, acting in or conducting any claim, application or appeal in any proceedings.[1]

Mr Baggaley was only able to attend court through his status as a McKenize friend, a form of lay assistant for litigants in person. This essay examines the current law in this area and makes the case for much-needed legislative reform. Against the backdrop of substantial cuts to legal aid in 2012, it considers why instances like Mr Baggaley's are becoming increasingly common and how we might address the underlying legal, economic and social factors involved. Ultimately, it argues that although regulation might appear the most intuitive solution, a formal regulatory framework would undermine the roles of McKenzie friends and the legal profession, and in so doing, inhibit access to justice. Instead, this essay proposes a legislative ban on fee recovery. The reform would help to curtail a number of worrying trends observed in the courts, while leaving the fundamental elements of the *McKenzie* principle intact.

[1] *Re Baggaley* [2015] EWHC 1496

The Law on Lay Assistance: Friend, Assistant, Advocate

Though most often associated with *McKenzie v McKenzie*, lay assistance for litigants in person was established some 140 years earlier. *Collier v Hicks* found that "persons not in the legal profession are not allowed to practise as advocates in any of these courts,"[2] but an exception was made for "remote places," where, with judicial discretion, a friend may attend court to offer one party support and assistance. *McKenzie* drew on this precedent, finding that "every party has the right to have a friend present in court beside him to assist by prompting, taking notes, and quietly giving advice."[3]

While McKenzie friends are largely unregulated, legislation provides some formal restrictions. The *Legal Services Act 2007* establishes that rights of audience and the right to conduct litigation are reserved legal activities[4] to be undertaken only by persons authorised by regulatory bodies and with appropriate insurance.[5] A similar provision is included in the *Solicitors Act 1974*.[6] In *Noueii v. Paragon Finance plc,* meanwhile, the Court of Appeal also stressed that a breach of these rules is both contempt of court and a criminal offence.[7]

In practice, however, permission to represent litigants before the court is a point of contention and Moorhead describes this body of law as "confused and contradictory."[8] *O'Toole v Scott* established that courts could permit rights of

[2] *Collier v Hicks* [1831] 2 B & Ad 663, 670
[3] *McKenzie v McKenzie*, [1970] 3 All ER, 36
[4] Legal Services Act 2007, s 12
[5] ibid, s 13
[6] Solicitors Act 1974, s 20(1)
[7] *Noueii v. Paragon Finance plc (No. 2)* [2001] EWCA Civ 1402
[8] Moorhead, 134

audience to McKenzie friends.[9] However, where Lord Woolf found that this discretion was reserved for “exceptional circumstances,”[10] Lord Donaldson found that "it is not a question of seeking the leave of the court [but rather] of the court objecting to and restricting the use of assistance, if it is clearly unreasonable."[11] Similarly, though Practice Guidance requires “a short CV and a statement outlining their experience, lack of interest in the case, understanding of their role and the need for confidentiality,”[12] evidence suggests that these requirements are often overlooked in the judiciary’s “willingness, even keenness to permit McKenzie Friends”[13] and that “some are gaining rights of audience unsolicited.”[14]

Although this practice raises questions about sufficient protections for litigants, McKenzie friends are nonetheless seen as a way to make courts less daunting and help litigants through procedures that “are too often inaccessible or incomprehensible to ordinary people.”[15] Courts have stressed their importance in “protect[ing] the interests of justice by levelling the playing field,”[16] offering assistance where a litigant would otherwise have been left without “equality of arms.”[17] In *Airy v Ireland*, it was argued that under Article 6 of the European Convention of Human Rights, the right to

[9] Philip Thomas, ‘From McKenzie friend to Leicester assistant: the impact of the poll tax’ (1992) Sum PL, 212
[10] *D v. S (Rights of Audience)* [1997] 1 FLR 724
[11] *R v Leicester City Justices, ex p Barrow* [1991] 3 WLR 368
[12] Barry, 69
[13] Liz Trinder, et al, ‘Litigants in person in private family law cases’ (2014) *Ministry of Justice Analytical Series* <justice.gov.uk/publications/researchand-analysis/moj> accessed 22 Sept 2019, 94
[14] Legal Services Consumer Panel, *Fee-Charging McKenzie Friends* (2014) <legalservicesconsumerpanel.org.uk/publications/research_and_reports/documents> accessed 22 Sept 2019, 5.36
[15] Richard Moorhead, ‘Access or aggravation? Litigants in person, McKenzie friends and lay representation’ (2003) 22 CJQ,133
[16] Kerry-Ann Barry, ‘McKenzie Friends and litigants in person: widening access to justice or foes in disguise?’ (2019) 69 CFLQ, 149
[17] Angela Melville, ‘“Giving Hope to Fathers”: Discursive Constructions of Families and Family Law by McKenzie Friends Associated With Fathers' Rights Groups’ (2017) 31 (2) Int J Law Policy Family, 148

a fair trial encompasses a right to lay assistance,[18] a point which has also been made in *Re O*[19] and *R v Leicester City Justices, ex p Barrow.*[20]

In this sense, McKenzie friends are something of balancing act – while they pose a risk to litigants, it is offset by their role in making courts and procedures accessible. In the judicial test for granting permission to McKenzie friends, the courts are required to look not at the merits of the litigant's case or even on their objective need for assistance, but rather whether the litigant wants the friend to be present; the "litigant's own view of their needs and interests."[21] This is consistent with the original *McKenzie* ruling, where the friend was allowed not because of his legal background, but in spite of it; he was permitted precisely because he was "not attempting to take part in the proceedings as an advocate."[22] Here, the courts have made clear that the role is not concerned with *Ersatz*-lawyers, offering heightened risk for cheaper rates, but rather on the practical and personal advice that litigants find useful when bringing their case to court.

The Impact of Legal Aid Cuts: 'Advice Deserts' and Hidden Agendas

The *Legal Aid, Sentencing and Punishment of Offenders Act 2012* saw a radical restructuring of legal aid, effectively stripping public funding from the vast majority of civil, family and immigration cases.[23] Those affected have found themselves in "a climate where legal aid is virtually unobtainable and lawyers are disproportionately expensive."[24] Despite reports of the "under-supply of providers in some areas of the

[18] *Airy v Ireland* [1979] EHRR 305
[19] *Re O (Children) (Hearing in Private: Assistance)* [2005] EWCA Civ 759
[20] *R v Leicester City Justices, ex p Barrow* [1991] 3 WLR 368
[21] Moorhead, 153
[22] *McKenzie v McKenzie*, [1970] 3 All ER, 36
[23] Barry, 69
[24] JUSTICE, 'Response: Consultation on reforming the courts' approach to McKenzie friends' (2016), <justice.org.uk/mckenzie-friends> accessed 22 Sept 2019, 6

country"[25] and a government promise of "robust mechanisms to identify any developing market shortfall,"[26] legal practitioners were left with reduced work and courts saw a significant increase in litigants in person. Two years later, the National Audit Office found that fourteen local authority areas could be classed as 'advice deserts',[27] areas where no applications for civil legal aid funding were granted.

Though no records are kept on the number of McKenzie friends, widespread anecdotal evidence reports of a sharp increase following the cuts in 2012. It is now estimated that McKenzie friends appear in around 5% of civil cases.[28] The Legal Services Consumer Panel attributes this increase solely to legal aid cuts, observing that "for many litigants in person, the real choice is now between using a McKenzie Friend or being entirely unsupported during proceedings."[29] Melville makes a similar observation, but also stresses the vulnerability of many of those affected: "[A McKenzie Friend's] support is especially important in a system that often leaves one party without the 'equality of arms' to face a litigant who has access to legal representation, or has subjected them to a history of violence."[30]

With legal aid all but removed, a new class of 'professional', fee-charging McKenzie friends started to take its place. As Trinder has found, "the role of paid McKenzie Friends tend[s] to be wider than "family/friend informal supporters, [who] generally [provide] quiet emotional support."[31] Instead, this group offer a "solicitor-lite"[32]

[25] Ministry of Justice, *Reform of Legal Aid in England and Wales: the Government Response* (2011) 8072 Cm,140
[26] ibid, 30
[27] ibid, 35
[28] Rosemary Hunter, 'Paid McKenzie friends: the case for regulation' (2017) Fam Law, 13
[29] Legal Services Consumer Panel, 4.5
[30] Melville, 148
[31] Trinder, 96
[32] Judicial Executive Board, *Consultation response: Reforming the courts' approach to McKenzie friends*, (2019), <judiciary.uk/wp-content/uploads/2016/02/MF-Consultation-LCJ-Response-Final-Feb-2019.pdf> accessed 22 Sept 2019, 29

service, preparing documents, managing bundles, negotiating on the litigant's behalf and requesting rights of audience.[33] When such McKenzie Friends advertise their services, they typically emphasize the legal nature of their work, with websites offering "a full range of professional low-cost support services,"[34] or purporting to be "as good, if not better, than any solicitor or barrister."[35]

Yet, without training, regulation and insurance, this change in the nature of their work tips the balance inherent in the McKenzie principle and exposes some of society's most vulnerable to disproportionate risk. Academic research and reported cases show time and again how this risk manifests itself in practice, with "positively disruptive"[36] McKenzie Friends providing advice that is "agenda-driven"[37] or "simply wrong"[38], using their clients as a "puppet"[39] or a "mouthpiece"[40], or even acting as "menace to the proper administration of justice."[41]

In *Oyston & Anor v Ragozzino*, for example, a McKenzie Friend was found to have aided and abetted a client in sending "savage, abusive and obscene"[42] correspondence to the other party. Although the McKenzie friend had "fuelled" the ill-advised letters, the litigant remained liable for the subsequent damages.[43] In *Noueii*, a McKenzie friend repeatedly advised a litigant to appeal, despite the right of appeal having already been exhausted,[44] considerably increasing the litigant's liability for

[33] Trinder, 95
[34] Melville, 156
[35] Max Walters, 'Up front: Fresh call for McKenzie friends ban' (2019) 25 Mar LS Gaz, 1.
[36] Melville, 149
[37] JUSTICE, 2
[38] John Hyde, 'News: McKenzie friends 'preying' on the vulnerable' (2016) 5 Dec LS Gaz, 1
[39] *Re Baggaley* [2015] EWHC 1496 (Fam), [8];
[40] *Oyston and Another v Ragozzino* [2015] EWHC 3232 (QB)
[41] *Mensah v Islington Council*, unreported, cited in Moorhead, 150
[42] Chloe Smith, 'News: McKenzie friend 'fuelled flames' in libel hearing' (2015) 16 Nov LS Gaz, 1
[43] Barry, 69
[44] *Noueii v. Paragon Finance plc (No. 2)* [2001] EWCA Civ 1402

costs.[45] Though case law establishes that McKenzie friends may be found liable for bad practice, this is restricted to cases where they claimed to be offering the services of a qualified lawyer, and did not apply in *Oyston* or *Noueii*. Further still, as *Mensah v. Islington Council* illustrates, even where a cost sanction is awarded, it has little effect where the uninsured McKenzie friend is insolvent or bankrupt.[46]

Family matters appear to be particularly affected, with the LSCP reporting that professional McKenzie friends "mainly advise fathers at the lower end of the income spectrum."[47] *Re Baggaley* was one such case, as was *Re H*, in which the McKenzie friend made a large number of errors in preparing documents and repeatedly intimidated the mother in custody proceedings.[48] A study by Melville has found that McKenzie friends in this area frequently "promote powerful social myths that support gender inequality and violence against women, and deny children's rights."[49] In *Pelling*, for instance, a McKenzie friend was refused permission due to his inability to separate his "role as chairman of a [fathers' rights] pressure group from that as an assistant of LIPs."[50]

Here, it is important that cuts to legal aid have not only seen an increase in McKenzie friends, but also a fundamental change in the way they operate. A new subset of 'professional' McKenzie friends are taking advantage of the lack of regulation, training or insurance required, and engaging in work that is substantively more legal than the traditional, 'quiet advisor' archetype. Beyond the discretion of judges in the courtroom, there is no recourse for bad practice and instances of poor advice and disruptive behaviour often go unreported and without repercussion.

[45] Moorhead 149
[46] *Mensah v Islington Council*, unreported, cited in Moorhead, 150.
[47] Legal Services Consumer Panel, 15
[48] *Re H (Children)* [2012] EWCA Civ 1797
[49] Melville, 150
[50] *R v Bow County Court ex parte Pelling* [1999] EWCA Civ 2004

Judges and Gatekeepers: The Case for Prohibiting Fee Recovery

These developments have led academic literature, judicial consultations and government papers to acknowledge the need for reform. However, opinions differ as to how this reform might look in practice. Broadly, the suggestions fall into three categories: (1) judicial intervention; (2) regulation; and (3) prohibition of fee-recovery.

For the former, the Civil Justice Review argues that the role of lay representatives can be maintained, with "problems of incompetence can be resolved by registrars and judges."[51] A similar point was made by respondents to the Lord Chief Justice's Consultation on Reforming McKenzie Friends, who argued that "the court has sufficient power to control McKenzie Friends but there is a simple lack of consistency in the use of those powers."[52]

This solution, however, has very limited reach. As set out above, the role of the McKenzie friend – and particularly paid McKenzie friends – has expanded to encompass tasks and responsibilities well beyond the courtroom, where the risk they pose is out of judicial hands.[53] In particular, the worrying trend of McKenzie friends using litigants to exercise political or personal grievances would remain largely unresolved (*Pelling, Re Baggaley, Re H*). It also fails to address the vulnerable position of litigants whose liability for costs rise significantly due to the actions of a McKenzie friend, but have no means of recovery (*Ouyston, Noueii, Mensah*).

Among academics, regulation is the most frequently cited solution and initially appears to be more in keeping with developments on the ground. It seems logical that increasing problems with McKenzie friends should be met with increasing

[51] Moorhead, 136
[52] Judicial Executive Board, 26
[53] Barry, 69

controls. As Hunter argues, regulation could monitor actions both in and out of court, provide accountability and establish a much-needed insurance framework for what is quickly becoming an established professional service.[54]

In this body of literature, comparisons are frequently drawn to the institution of regulation in other fields. However, in some cases, this inadvertently reveals serious issues with the model. Barry, for example, discusses the rise of case management companies following the removal of legal aid from personal injury claims in 1999, a move many saw as "encouraging compensation culture [and] persuading litigants to bring claims irrespective of merit."[55] Regulation, she argues, resulted in the "steady decline in the number of CMCs"[56] and the same might be achieved with McKenzie friends. Here, however, Barry appears to have misjudged the objective. As a key component of a litigant's right to a fair hearing, legislation should not strive to "deter"[57] McKenzie friends at all; the issue is not their existence, but the quality of the service they provide.

Significantly, Barry's solution would affect not only for-profit McKenzie friends, but also the voluntary friends for whom the category was created. As the Legal Services Consumer Panel finds, "the cost and administrative burden of regulation could drive McKenzie Friends from the market,"[58] deterring not only the ineffective and disruptive, but all McKenzie friends. Indeed, the archetypal 'volunteer-friend' is more likely to be intimidated by regulatory standards and insurance requirements than the 'fee-charging professional', who may be able to pass associated costs onto clients.

[54] Hunter, 13
[55] Barry 69
[56] ibid
[57] ibid
[58] ibid

Introducing regulation only for those who receive payment is equally problematic, as it amounts to government-sponsored recognition of McKenzie friends as an acceptable legal service. This would effectively create "a new branch of the legal profession,"[59] albeit without the level of training and expertise traditionally demanded of those in the field. In addition to calling into the question the necessity or value of the standards currently used by the Solicitors Regulation Authority and the Bar Standards Board, this presents a worrying disregard for the protection of consumers and the integrity of the justice system.[60]

Instead, in line with the findings of the Judicial Executive Board's 2016 Consultation, a more practical response is to target those who present the greatest threat to litigants by prohibiting fee recovery.

In setting a price for their services, professional McKenzie friends have fundamentally altered the nature of their relationship to the litigant and "exacerbated concerns relating to the use of McKenzie Friends more generally."[61] With the introduction of a fee comes a range of expectations regarding expertise, quality and value that are at odds with the McKenzie friend's traditional role. In essence, the fee changes McKenzie friends from supportive advisors to service providers, complete with the responsibilities that role entails. With these heightened expectations, however, comes increased risk. Where the McKenzie friend fails to provide the expertise, quality or value expected, the lack of accountability inherent in their role leaves the litigants entirely exposed. In barring fees, legislation would reduce the risk posed by McKenzie friends and restore something of the balance that had traditionally been achieved before the courts.

[59] Judicial Executive Board, 26
[60] Ibid
[61] JUSTICE, 8

Further, the ability of McKenzie friends to charge for their services introduces an incentive that is not in keeping with the traditional scope of their role and provides some with the economic means to pursue personal agendas before the courts. As JUSTICE argues, "fee-charging [has the potential to result in] escalating bills, [….] incentivising providers to 'drag out' their work."[62] Similarly, given the correlation between cuts to legal aid and the emergence of 'professional' McKenzie friends[63] - and in turn, between 'professional' McKenzie friends" and reports of disruptive behaviour[64] - banning fee recovery seems a proportionate, economic response to an issue largely driven by the creation of new economic opportunities. Melville argues that in the fathers' rights groups she observed, the fathers' "value position" provided the motivation behind their involvement and that "the barring of fees is unlikely to prevent the presence of McKenzie Friends associated with fathers' rights groups."[65] However, while banning remuneration may not impact every instance of bad practice, removing the economic incentive is likely to make repeated courtroom activism unsustainable and, significantly, would keep individuals from acquiring the perceived authority that comes with charging for a service.

In response, those in favour of regulation frequently argue that prohibiting fee recovery does little to resolve the broader issues around legal aid and access to justice. In a scathing report on the JEB Consultation, Zuckerman writes that the JEB was "more interested in preserving the monopoly of the legal profession and protecting it from competition than in redressing the justice."[66] While legal aid remains a valid concern, this criticism conflates two related, but ultimately separate

[62] JUSTICE, 8
[63] Legal Services Consumer Panel, 1.15
[64] Trinder, 95
[65] Melville, 168
[66] Adrian Zuckerman, 'The court's approach to McKenzie friends - a consultation, February 2016 - no improvement in assistance to unrepresented litigants' (2016) 35 (4) CJQ, 278

issues: (1) how to curtail the increasing number of disruptive McKenzie friends; and (2) how to address the shortfall in legal services. The solution to both is not going to be achieved by a single action, whether it be regulation or the prohibition of fee recovery. Rather, the two issues must be seen separately and taken in turn.

Solutions to the current legal aid crisis are beyond the scope of this essay, but a range of options exist, including clinical legal education initiatives, mandatory pro bono requirements, support for third-sector intervention or the expansion of duty solicitors, among others. But on the narrower question of McKenzie friends, banning fee recovery is, conversely, the only option which does more to support access to justice, rather than less. It is central to the role of a McKenzie friend that they are unregulated; it is their informality that makes them valuable to litigants and, ultimately, to the courts. It is their candid, friendly advice that includes them in the right to a fair hearing. While recent years have seen a shift away from the volunteer-friend archetype, it is this function that we should be looking to preserve. Regulation would all but remove this type of McKenzie friend from the justice system, creating instead a second tier of the legal profession. Banning fee recovery, however, would help to protect the role while providing a practical means of discouraging those who are currently abusing the position. Indeed, rather than scrambling for a ‘quick fix’ to the justice deficit by endorsing inadequate support through regulation, it is more worthwhile protecting the institutional tools that remain, and turning to other avenues when considering more wide-reaching change.

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