

# A study of fee-charging McKenzie Friends and their work in private family law cases

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## Executive Summary

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### Context

The term ‘McKenzie Friend’ originates from a 1970 Court of Appeal case in which it was confirmed that litigants in person (LiPs) have a (rebuttable) right to receive lay assistance in the course of representing themselves.<sup>2</sup> The parameters of this lay assistance are now outlined in Practice Guidance, which states that: “McKenzie Friends may: i) provide moral support for litigants; ii) take notes; iii) help with case papers; iv) quietly give advice on any aspect of the conduct of the case”.<sup>3</sup> Although the traditional type of McKenzie Friend is still very much in evidence in our courts,<sup>4</sup> the reach of the title has extended to include the role of a different type of supporter, namely one who provides ‘lay assistance’ on a

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<sup>2</sup> *McKenzie v McKenzie* (1970) 3 WLR 472

<sup>3</sup> Practice Guidance (McKenzie Friends: Civil and Family Courts) [2010] 1 WR 1881.

<sup>4</sup> In a study comprising 150 observations of private family cases conducted prior to the legal aid reforms in April 2013, Trinder et al observed 21 individuals providing informal, unremunerated support in the court room. See L Trinder, R Hunter, E Hitchings, J Miles, R Moorhead, L Smith, M Sefton, V Hinchly, K Bader and J Pearce, *Litigants in person in private family law cases* (Ministry of Justice Analytical Series 2014).

regular basis for a fee, and additionally undertakes a range of ancillary tasks outside of the court but in connection with court proceedings.<sup>5</sup>

It has been reported that the number of fee-charging McKenzie Friends is growing in the wake of the withdrawal of legal aid for a range of legal disputes through the Legal Aid, Sentencing and Punishment of Offenders Act 2012. It appears that a majority of fee-charging McKenzie Friends work in the area of private family law disputes. This is partly because there is extensive unmet need in relation to legal services in this area and the withdrawal of legal aid for such disputes precipitated a steep rise in the number of unrepresented litigants in the family courts. But there is also evidence that prior experience as a litigant in the family courts has served to motivate many fee-charging McKenzie Friends to move into this area of work. This in turn prompts concerns that the work of such individuals might be agenda driven.

There are further suggestions that there has been an increase in the number of fee-charging McKenzie Friends seeking permission to exercise rights of audience (i.e. to address a judge on behalf of a litigant in court). There is currently nothing to prevent any person from offering general legal advice and assistance in most cases in England and Wales. By contrast, rights of audience are a reserved activity under the Legal Services Act 2007, meaning that they should normally only be exercised by 'authorised' individuals. Such individuals (usually lawyers) must be appropriately qualified and insured and are subject to the rules of the relevant professional regulators, which operate under the oversight of the Legal Services Board. Unauthorised individuals, including McKenzie Friends, can be granted permission to exercise rights of audience on a case-by-case basis.

The work of fee-charging McKenzie Friends has prompted much discussion. On the one hand, fee-charging McKenzie Friends might function as an affordable source of support for those unable to afford a lawyer and as such improve access to justice. On the other hand, there are fears that provision of legal services by unqualified and unregulated individuals carries a degree of risk, both for vulnerable litigants and for the efficient administration of justice.

A report published by the Legal Services Consumer Panel in 2014 concluded that the risks presented by fee-charging McKenzie Friends were not great and that they ought to be accepted 'as a legitimate feature of the evolving legal services market'.<sup>6</sup> In spite of this, concerns remain and a recent consultation by the Lord Chief Justice sought views on a proposal that, 'the provision of reasonable assistance in court, the exercise of a right of audience or of a right to conduct litigation should only be permitted where the McKenzie Friend is neither directly or indirectly in receipt of remuneration'.<sup>7</sup>

Thus far, however, fee-charging McKenzie Friends have been the subject of relatively little empirical research. As such there is a thin evidence base on which

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<sup>5</sup> This 'extended role' has been described by the Legal Services Consumer Panel: Fee-Charging McKenzie Friends (April 2014).

<sup>6</sup> LSCP, above, para 5.7.

<sup>7</sup> Lord Chief Justice of England and Wales, Reforming the courts' approach to McKenzie Friends: a consultation, 2016, pp 19-21.

informed judgements about the relative weight of the threats and opportunities presented by this ‘emerging market’ in legal services might be built.<sup>8</sup> The aim of this study was to extend and deepen knowledge and understanding of the work done by fee-charging McKenzie Friends, with particular emphasis on the support they provide in the courtroom and the experiences of the litigants who use them. The research explores two knowledge gaps that existing research has not addressed: first, the lack of data on the perspectives and experiences of the clients of McKenzie Friends; and secondly the lack of information on how McKenzie Friends approach work inside the court environment.

### The research study

The report is based on a qualitative mixed methods study into the backgrounds and practices of fee-charging McKenzie Friends in private family law cases.<sup>9</sup> It combines data from two sources.

#### 1. Interviews with fee-charging McKenzie Friends and with LiP clients of McKenzie Friends

This part of the research comprised in-depth, semi-structured interviews with 20 fee-charging McKenzie Friends and 20 LiP clients of McKenzie Friends. The sample of McKenzie Friends was purposively selected, based on information available online, to encompass a mix of genders, backgrounds, fees and experience levels. Those selected were contacted by letter or email to invite them to participate in the study. The sample of clients was obtained by advertising the study using social media and information distributed at courts and with the assistance of Personal Support Units and Citizens Advice.

The samples cannot be treated as representative and our study might have captured disproportionately more positive than negative accounts of fee-charging McKenzie Friends’ work. This is firstly because it is likely that our sampling method resulted in us interviewing the more established and willing-to-engage contingent of fee-charging McKenzie Friends working in the area of family law. Our sample captured few of those new to fee-charging McKenzie Friend work, and therefore less experienced in it. Secondly, in relation to the client interviews, the majority who ultimately responded to our advertising were alerted to the study by fee-charging McKenzie Friends. This means that the sample of clients interviewed is likely to have a pro-McKenzie Friend leaning.

#### 2. Observation of hearings in private family cases involving fee-charging McKenzie Friends

The second part of the research involved observation of private family law hearings involving fee-charging McKenzie Friends and linked interviews with as many of those involved in the hearing as possible. The researchers spent a total of 34 days at five designated family courts. Out of 846 private family law cases listed on those court observation days, 14 cases were identified as involving a

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<sup>8</sup> For an overview of the recent research, see discussion in chapter 1 of the full report.

<sup>9</sup> This includes cases on post-divorce financial arrangements and cases concerning disputes about the living and contact arrangements that parents make for their children.

paid McKenzie Friend and permission to observe was granted in seven cases. We were able to obtain 14 linked interviews.

### **About fee-charging McKenzie Friends**

Our in-depth McKenzie Friend interviews provided us with detailed information on the backgrounds and motivations of those interviewed. Based on our analysis of this information, all our interviewees fell into one or more of five categories. These categories were not mutually exclusive – indeed, most of our interviewees could be aligned with at least two of the first four categories.

#### **i. The business opportunist**

Almost all the McKenzie Friends we interviewed made statements suggesting that their movement into this area of work was partly motivated by their recognition of a business opportunity. This included some who had been through the family justice process themselves and some who identified fee-charging McKenzie Friend work as an alternative path to a legal career because they were unable to complete partly undertaken legal training (for example because they could not obtain a pupillage or training contract). For some individuals who had previously worked as qualified lawyers, moving into this line of work provided a better fit with their personal lives and the needs of their family.

#### **ii. The redirected specialist**

Our sample included some highly-experienced former professionals (family law solicitors, a legal executive, and a family mediator) who had moved into unregulated paid McKenzie Friend work. Reasons for the change of professional direction included lack of family law employment opportunities, frustration at levels of unmet need stemming from the unaffordability of traditional legal advice in relation to family law, and disillusionment with the nature of professional legal work.

#### **iii. The good Samaritan**

A ‘good Samaritan’ McKenzie Friend appeared substantially motivated by concern for the welfare and well-being of the client. Many of our interviewees made comments that suggested they were altruistically motivated. Ultimately we placed a handful of our interviewees in this category, on the basis that their espoused empathy with the needs and financial constraints of some litigants reportedly manifested itself in charging practices, e.g. if the interviewee did some work for free or set their fees at a very low level in the interests of affordability for low income litigants.

#### **iv. The Family Justice Crusader**

Existing research suggests that many McKenzie Friends take up the role following their ‘own negative experience of courts during divorce or child contact.’<sup>10</sup> Our research supports this finding and we also found evidence that many McKenzie Friends have links with support groups and networks that are primarily aimed at fathers. However, our analysis suggested that not all those

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<sup>10</sup> LSCP, n3 above,, p3 and para 3.5.

with personal experience of the legal system will become a crusader for their particular version of family 'justice'. Some simply capitalise on their experience by converting it into a business opportunity, whereas others provide services at a low fee out of a desire to support others as 'good Samaritans'. In fact, only a small proportion of interviewees made comments that suggested they were even partly agenda-driven. It seems that, while personal experience might well be a common gateway to working as a McKenzie Friend, it does not necessarily characterise the approach to practice.

#### v. The 'Rogue'

We note evidence from outside the remit of the study, which suggests that a minority of fee-charging McKenzie Friends behave inappropriately and/or unscrupulously, on a scale that is likely to damage the interests of litigants or the administration of justice. For example, in the life cycle of this project there was one high-profile conviction of a fee-charging McKenzie Friend for fraudulent conduct in connection with a private family law case.<sup>11</sup> There are also other reported and unreported cases that have highlighted bad McKenzie Friend behaviour.<sup>12</sup>

We saw limited evidence of 'rogue' McKenzie Friends in this study. We did observe one case hearing involving a fee-charging McKenzie Friend whose conduct was wholly inappropriate in the context of family law proceedings, and had impacted negatively on the trajectory of the proceedings. Some of the McKenzie Friends we interviewed presented anecdotal evidence of others who behaved dishonestly, negligently or exploitatively. Poor behaviour on the part of McKenzie Friends is probably a minority concern but we suggest that this area of work is particularly vulnerable to exploitative opportunists, given that there is no regulatory body, no professional code or scrutiny, and potentially no set-up costs.

### **Business practices of fee-charging McKenzie Friends**

#### Qualifications and professional training and development

A number of McKenzie Friends involved in the research held, or were working towards, relevant professional qualifications and relevant training and development opportunities were reportedly sought and pursued by many others. Though this was often restricted to participation in bespoke McKenzie Friend training that is designed and delivered by individual McKenzie Friends, it is clear that many fee-charging McKenzie Friends are keen to further their knowledge and skills and willing to invest time and money in doing so.

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<sup>11</sup> The David Bright case, see <https://www.lawgazette.co.uk/law/mckenzie-friend-jailed-for-deceit-in-family-court/5058352.article>

<sup>12</sup> Re Baggaley [2015] EWHC 1496 (Fam), Oyston v Ragozzino [2015] EWHC 2322 (QB). See also the unreported 2015 case in which a fee-charging McKenzie Friend was imprisoned for three years after pleading guilty to 15 counts of fraud by false representation: <https://www.lawgazette.co.uk/news/mckenzie-friend-jailed-for-5000-fraud-scheme/5050653.article>.

### Fee charging practices

The McKenzie Friends we interviewed utilised a range of fee structures – some charged by the hour, some a flat fee for a case or task, and some a daily rate. Headline rates were extremely variable but reported fee-charging practices are such that the overall cost of services provided to clients appears to be relatively low, even in the case of those whose rates are at the higher end of the spectrum. This impression was supported by evidence provided through our client interviews.

### Business management and client care processes

Some of what we heard about business practices was concerning and suggested a need for many fee-charging McKenzie Friends to pay closer attention to developing administrative procedures and business standards that are capable of safeguarding their own and their clients' interests. The take-up of professional indemnity insurance and registration with the Information Commissioner's Office, was not widespread among those who were not members of the Society of Professional McKenzie Friends, which requires such insurance and registration. Many did not provide clear terms and conditions of service and few had clear procedures in place for complaints handling. Protection for clients of McKenzie Friends therefore appears to be patchy and limited.

### Flexible working hours and emphasis on client relationships

Many of those we interviewed reported that they did not keep standard office hours and prided themselves on their availability and responsiveness to clients. It was clear from our interviews with clients that the friendliness, informality and accessibility of fee-charging McKenzie Friends was highly valued. However, this departure from typical professional boundaries and relationships can blur expectations for both clients and McKenzie Friends. We heard some accounts of McKenzie Friends finding themselves in difficult, potentially risky situations as a result of client demands or behaviour.

## **The work of fee-charging McKenzie Friends**

### The tip of an iceberg: prevalence of fee-charging McKenzie Friends and significance of out-of-court work

Our data suggest that the size and shape of the services provided by fee-charging McKenzie Friends are rather different to what has been assumed in previous discussion and commentary. To begin with, data from our court observations suggest that fee-charging McKenzie Friends in private family law cases remain a relatively rare occurrence. As such, problems experienced and presented by unsupported litigants at court are likely to be far more prevalent than any problems connected with the work of fee-charging McKenzie Friends. Secondly, whilst much commentary to date has reflected on issues presented by McKenzie Friends providing support in the courtroom, our research suggests that fee-charging McKenzie Friends undertake a wide range of tasks outside of court. For those who took part in the study this appears to constitute the bulk of their work.

### Legal advice, procedural awareness and settlement orientation

Almost all the McKenzie Friends in our study appeared to give legal advice of some sort, though not all of them defined it as such. This study was not designed to measure the quality of the work done by fee-charging McKenzie Friends against any objective criteria. However, it appeared that a majority of the fee-charging McKenzie Friends we spoke to and /or observed at court had gleaned sufficient knowledge and procedural awareness from their experience to enable them to mitigate the difficulties experienced by many unassisted litigants in person. As such, some are likely to be instrumentally useful to the courts and aid the administration of justice. There were exceptions to this general finding. A minority of those we encountered during the research demonstrated misunderstandings of the law or related questionable judgements about the appropriate management and presentation of client cases.

There was evidence of a strong settlement orientation amongst the McKenzie Friends we spoke to and most described activities associated with facilitating negotiation and achieving settlement as a feature of their usual work.

### Rights of audience

In the courtroom, most of those involved in the study restricted themselves to a 'coach' type role, helping the litigant to represent themselves and preferring not to seek rights of audience in the absence of exceptional circumstances. We were told that many McKenzie Friends refer clients to other family justice professionals, particularly direct access barristers, for specialist assistance when it is required and several client interviewees also suggested that this was the case. In the court observation stage of the research we saw some evidence of McKenzie Friends whose active efforts to exercise rights of audience presented difficulties. However, we also heard evidence that it is not uncommon for judges to invite McKenzie Friends to address the court when they think it might be helpful.

### The scope and clarity of reserved activities under the Legal Services Act 2007

The 'conduct of litigation' is a reserved activity under the Legal Services Act 2007, meaning that fee-charging McKenzie Friends are not normally permitted to undertake tasks that would fall under this heading. The interviews and observations conducted for this project revealed that there is potential for confusion around the scope and boundaries of the conduct of litigation and fee-charging McKenzie Friends vary in their perceptions of which tasks fall beyond the boundaries of their proper role. Policy discussions concerning McKenzie Friends are often focused on the desirability of allowing unregulated and unqualified individuals to undertake reserved activities but the discussion tends to focus on another reserved activity: the exercise of rights of audience. Given the amount of work that fee-charging McKenzie Friends report doing outside of the courtroom, the case for clarifying – and perhaps reviewing – the scope of the conduct of litigation seems more pressing than concerns about rights of audience.

### The client perspective

The clients we interviewed were, on the whole, extremely positive about their experiences of using a McKenzie Friend. They often felt that fee-charging McKenzie Friends provide support that is distinct from what solicitors or barristers do in several key respects. Most notably, they valued the accessibility and informality of their McKenzie Friends and the sense of having a 'friend' or 'ally' in the process. They reported very high levels of trust in their McKenzie Friends and, where the McKenzie Friend had personal experience of the family justice system, this often seemed connected to a sense of affiliation that was engendered by shared experience. Many of the clients we interviewed gave accounts that suggested the services they had purchased were far cheaper than services they had previously purchased from solicitors (almost all had used solicitors prior to contacting a McKenzie Friend).

### Thoughts for the future

This research suggests that we should be neither completely sanguine nor extremely concerned about the work of fee-charging McKenzie Friends in the area of private family law. The authors do not consider that the findings support placing heavy restrictions on individuals' ability to conduct this type of work or to charge for doing so. However, there is enough that is concerning in relation to fee-charging McKenzie Friends to merit efforts to tackle the worst of the sector and a more detailed evaluation of their services than this study afforded would also be welcome. Steps could usefully be taken to provide greater protection to the litigants who use fee-charging McKenzie Friends. Broader reflection on and clarification of the tasks McKenzie Friends are and are not permitted to do within the current framework of legal services regulation would also be worthwhile. Any interventions should heed the following caveats: first, they should be cognizant of and proportionate to the apparently very limited scale on which McKenzie Friends operate; secondly they should account for the fact that, for many litigants, the choice is between being unsupported or using a fee-charging McKenzie Friend - free support is limited and paying for lawyers throughout a case is beyond their means.

## Key findings

- The McKenzie Friends in our sample fall into one or more of the following categories, with the first category demonstrated most commonly: i) The business opportunist; ii) The redirected specialist; iii) The good Samaritan; iv) The family justice crusader; v) the 'rogue' We saw limited evidence of McKenzie Friends belonging to the fifth category, though further evidence from outside the study supports its existence.
- The business practices of those McKenzie Friends we interviewed were mixed. Professional indemnity insurance, registration with the Information Commissioner's Office, and use of written terms and conditions were not widespread and few had clear and robust complaints handling processes in place. However, many appear to be keen to invest in relevant professional training and development.
- Fee rates of McKenzie Friends are variable but fee-charging practices appear commonly to result in relatively low overall costs for the clients who use them.
- The LiPs we spoke to chose fee-charging McKenzie Friends to support them for reasons of affordability, flexibility, shared experience and having a committed 'ally' assisting them in their case. Most gave very positive accounts of their experience of using a McKenzie Friend.
- McKenzie Friends undertake a range of tasks outside of court. This appears to constitute the bulk of their work, though individuals vary in terms of which tasks they perform and the extent of support provided. There are some ambiguities around the limits of the conduct of litigation as a reserved activity and this impacts on the out-of-court work some McKenzie Friends do.
- Most McKenzie friends we interviewed and/or observed at court appeared to possess basic procedural and substantive knowledge, and it seems likely that this would enable them to improve the ability of the average unrepresented litigant to manage their case. A minority of the McKenzie Friends encountered did show evidence of questionable judgements or demonstrate misunderstandings related to law or procedure.
- Cases involving paid McKenzie Friends in private family law proceedings appear to constitute a relatively small proportion of the total number of hearings involving unrepresented litigants.
- We found a range of practices and inconsistencies between courts in the identification and registration of attendance of fee-charging McKenzie Friends.
- Most McKenzie Friends appear to support settlement and take steps to achieve it, both at court and outside of court.
- Most McKenzie Friends we interviewed said they prefer not to seek rights of audience in the absence of exceptional circumstances but some report being invited by judges to address the court. It is reportedly not uncommon for paid McKenzie Friends to refer clients to other family justice professionals, particularly direct access barristers, for specialist assistance.