

# McKenzie friends: there's more of them, but what do they actually do?

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A McKenzie friend is someone who attends court in support of a party that does not have legal representation.

The term originates from the British case *McKenzie v McKenzie* [1970] 3 All ER. This was a divorce proceeding where the husband had been legally aided in earlier stages of litigation, but his legal aid was terminated before the trial started.

At the start of the trial the husband had an Australian barrister, Ian Hanger, sitting beside him who was not able to practise in England. The trial judge ordered Mr Hanger not to participate in proceedings. Later, the Court of Appeal found that the judge should not have prevented Mr Hanger from assisting the husband in the way that he proposed to do, and that justice was not done in those circumstances.

Davies LJ referred to the earlier case *Collier v Hicks* (1831) 2 B & Ad at 669:

"Any person, whether he be a professional man or not, may attend as a friend of either party, may take notes, may quietly make suggestions, and give advice; but no one can demand to take part in the proceedings as an advocate, contrary to the regulations of the court as settled by the discretion of the justices."

McKenzie friends are widely used in the United Kingdom. Organisations such as Court Without a Lawyer have been set up to streamline the process and provide McKenzie friend services in a structured and consistent manner. In 2010 the Master of the Rolls and President of the Family Division issued joint Practice Guidance concerning the proper approach courts should take to the provision of reasonable assistance by non-lawyers to litigants-in-person in respect of McKenzie friends. This clearly sets out the rights of litigants in respect of McKenzie friends.

## Increased use of McKenzie friends here

New Zealand appears to be following the UK path where questions over access to justice, the costs of going to court and the low threshold for legal aid are creating a climate where the self-represented litigant may see a McKenzie friend as a viable alternative to a lawyer. New Zealand Law Society Library research shows a steady increase in McKenzie friend participants in court. Between 1992 and 2012 the number of McKenzie friends appearing in the High Court and Court of Appeal was about one to three per year. Since 2013, however, the number has increased, with a peak of 22 cases in 2015.

Although their participation in court is still relatively low, questions have arisen regarding the role, rights and responsibilities of McKenzie friends in New Zealand.

## New Zealand High Court

In a recent High Court decision, *Craig v Slater* [2017] NZHC 874, Mr Craig applied for permission to be assisted by a McKenzie friend in court. The unusual feature was that the proposed McKenzie friend was a practising barrister. The defendants opposed the application on the basis that the McKenzie friend was a barrister. Justice Toogood allowed the application with the conditions that the McKenzie friend:

- Sit beside Mr Craig in court;
- Take notes;
- Quietly make suggestions to Mr Craig and give advice;
- Propose questions and submissions to Mr Craig who may put the same before the court; and
- In rare circumstances, and only with the further leave of the court, address the court.

In addition, the McKenzie friend was not permitted to ask any witness a question.

Referring to the Court of Appeal decision on McKenzie friends, *R v Hill* [2004] 2 NZLR 145, Toogood J raised several issues that might arise when allowing a lawyer to act as a McKenzie friend:

- Would legal professional privilege apply as between the accused and a lawyer acting as a McKenzie friend?
- What duties would a lawyer acting as a McKenzie friend owe to the court as distinct from any duties that might be owed to the accused?
- What liability might the lawyer have to the accused?
- What control would the court have over a lawyer acting as a McKenzie friend rather than an advocate in the usual case?

Mr Craig wanted cost-effective assistance from a lawyer experienced in defamation and Toogood J commented that the material presented by Mr Craig in relation to interlocutory matters had the stamp of a qualified and knowledgeable lawyer and that the material was helpful.

## Consultation papers

While it is accepted by the New Zealand courts and the Law Commission that self-represented litigants should have the right to a support person in court, this principle has not yet been codified into our legislation.

Concerns about the role and scope of McKenzie friends have been revisited in the UK and in New Zealand. A consultation paper issued by the New Zealand Law Commission *Review of the Judicature Act 1908: Towards a New Courts Act* (NZLC R126, 2012) addressed the subject of McKenzie friends. Questions asked by the New Zealand Law Commission included:

- Whether submitters had experienced any problems with the use of McKenzie friends;
- Whether McKenzie friends should continue to be permitted; and if so,
- Whether there is a need for legislation, regulation or guidelines outlining their roles in New Zealand courts;
- Whether a person should be permitted to have a lawyer as a McKenzie friend.

In response, there was widespread support for McKenzie friends – provided they are unpaid and confined to their current role in court. The Commission's view was that self-represented litigants should be able to have a support person with them in court unless that person obstructs the administration of justice. The Commission also considered that there is merit that such a provision be included in new courts legislation.

## Lawyers as McKenzie friends?

The Law Society and the New Zealand Bar Association did not support lawyers being McKenzie friends (although the Law Society would allow it in exceptional circumstances)

and instead suggested that, if practising lawyers wish to support a person who cannot afford legal representation, the better approach would be for the lawyer to act in a pro bono capacity. The Law Commission agreed with this. Concerns identified are that lawyers are subject to ethical obligations to their clients and have duties to the court and that combining the two would blur the roles and lead to confusion.

## Thoughts from the Bar

What do lawyers involved in litigation think about McKenzie friends? Members of the New Zealand Bar Association were asked for their views. The respondents preferred to remain anonymous.

One barrister had encountered McKenzie friends in court and did not support them as, "...they are often do-gooders who are emotive and don't help, or alternatively charlatans who think they are de facto lawyers and are, in reality, shysters who are ripping off their 'clients'."

This practitioner felt McKenzie friends often hampered the court process and that their role should remain limited so that they can only address the court at the discretion of the presiding judge. McKenzie friends should not be entitled to payment. The practitioner added that lawyers and/or enrolled barristers and solicitors should not be allowed to act as McKenzie friends, and that they should represent their clients as officers of the court and therefore be subject to the same rules and sanctions that exist for all lawyers before the court.

Another practitioner thought that people use a McKenzie friend for a number of reasons, and not just cost. He said many people see lawyers as difficult to deal with, or have difficulty finding a lawyer they can relate to. Some, feeling that lawyers are unapproachable, instead resort to using a well-meaning acquaintance who may know the court system.

In this practitioner's opinion "...the legal system makes bringing or defending certain claims time-consuming and complex and may encourage people bringing or facing claims to resort to McKenzie friends. For example, the Disputes Tribunal jurisdiction is capped at \$15,000 or, if the parties agree, \$20,000. What about a claim for, say, \$21,000? A claimant may limit their claim to \$15,000 or hope the other party will agree to the Disputes Tribunal having jurisdiction, but even then the Disputes Tribunal will be limited to \$20,000. Why should a claimant have to compromise that way before they even begin? In those circumstances the temptation would be strong to have a McKenzie friend instead of a lawyer."

This lawyer also raised potential concerns, such as what training or vetting, if any, the McKenzie friend had had, and that it would be difficult to ascertain whether the McKenzie friend was a 'fit and proper' person for the case. He added that lawyers owe their first duty to the court but to whom does a McKenzie friend owe their allegiance?

## Thoughts from a McKenzie friend

Former lawyer Vinay Deobhakta has started a business based on a similar model as the UK organisation Court Without a Lawyer. His organisation, McKenzie Friend Professionals Ltd (MFPL), provides training for self-represented litigants as well as training for those who might wish to become a McKenzie friend. Mr Deobhakta was struck off the roll of barristers and solicitors in 2014 and is now based in Australia.

Tuhi Ruawai trained as a McKenzie friend with MFPL and was asked about the role of a

McKenzie friend.

## What is your background and what prompted you to train as a McKenzie friend?

*Tuhi Ruawai*

“I was invited to attend a presentation that Vinay was holding in Taneatua (near Whakatane) on the topic of McKenzie friends some years ago. So I listened and asked questions of Vinay. What came of the discussion resonated really well with me, I could see possibilities here for us lay people. So I decided to begin training as a McKenzie friend.

“I had been helping in my community for a while as a support person offering my thoughts and just helping with the written language, punctuation and so on. I wanted to learn more and get better results. There was a lot about the court system I didn’t understand and I had witnessed my kaumatua helping people through the court system. It appeared to me that their work was not effective and it needed people like me to upskill and help them through the Family Court, so I thought I would enrol to upskill and make an effort to do it properly.”

## Can you outline the training you have had and has it been helpful in your role? Do you have accreditation/registration?

“The training company MFPL has a tailored training accreditation programme which, on average, takes 12 months of workshops to gain the company’s accreditation certificate. MFPL’s standard is very high and some who apply for training are declined. The accreditation standard is the company’s personal standard and not an NZQA certification. Until recently, Vinay Deobhakta, who is the founder, was the main trainer but other accredited McKenzie friends like me are slowly doing more training, imparting our knowledge to the trainees coming through.

“The training has been fantastic. It gives a really good insight into the justice system, the courts and how they work. We also get a heavy dose of litigation skills training and on procedures in court. This gives us confidence in court. The self-represented litigants we are helping also get a huge boost because we have the training to really help them instead of just merely being emotional support for the day.”

## Has there been an increase in requests for McKenzie friends? If so why do you think this has been the case?

“Over the last 20 years I personally have witnessed an increase in requests. I think legal fees are getting too high but also people prefer to be with someone they know like whānau who can support them. Especially so for Māori. Most of our Family Court cases aren’t about legal issues like who should get the matrimonial chattels where lawyers are needed, but rather domestic violence, custody issues and access where the lawyers are mostly confirming instructions from their clients rather than debating legal issues over mostly money.”

## What kind of cases are you generally asked to provide support for?

“Mainly Family Court disputes/issues. Due to my business background I’m frequently asked about issues in the employment and disputes tribunal.”

## How are you treated by the other court staff/lawyers/judges, etc?

“Since I did the training I have been treated really well by everyone and can say I’ve had no problems at all and neither have my clients. I have had three cases as a McKenzie friend since accreditation and all three have been successful. One was in the Disputes Tribunal and the other two in the Family Court.

“Previously my experience had been different. I never felt I was truly being respected by the other court users and sometimes even my own clients. The training puts you on a totally different level. We even have a system where we file our CV with the self-litigant’s notice that they are bringing a McKenzie friend. This way the judges know well before what is happening and who we are and our background with proof we’ve had MFPL’s training. I’ve immediately noticed the difference in treatment from everyone and I’m humbled because I understand the huge responsibility that goes with being a McKenzie friend.”

## Do you feel limited by your role and would you like to see it extended in any way?

“I love my role however I too, find it stressful because of the responsibility. We are taught about general physical and mental health issues. This includes for ourselves and not taking on too much work. I do not do it to make money. I don’t think any of our accredited McKenzie friends do. We are there to continue helping our communities, but professionally.

“I personally don’t feel limited in the role. We are taught to be effective support people for self-litigants and not take over the role of advocating. However, we are taught litigation skills and there is an advocacy module too. We are taught how a self-litigant can make a proper application to the judges if they want their McKenzie friend to speak for some reason, however it must be exceptional circumstances.”

## Do you get feedback from your clients? Are they happy with the service you provide?

“My clients are my hapū so I’m constantly getting feedback and I’m glad to say they love the McKenzie friend services.

“I’d like to stress that we are all taught that not all cases are suitable for a McKenzie friend. We do not give legal advice. We are not lawyers and we have lawyers who we recommend if the cases are such where the client clearly needs legal advice and doesn’t have the ability to understand the law themselves. In the family court that is mainly for relationship property matters. I enjoy keeping my role as a McKenzie friend as strictly this, and I see myself as someone who is helping my client express his or herself to a court in an organised and professional manner, so they are actually listened to and their views considered.”