Submission of Shaun O'Connell Bsc PGCE for the Consultation on McKenzie friends

Introduction

The overhaul of the status and use of McKenzie friends is long overdue. The practice guidance of 2010 is and has been a bone of contention ever since it's introduction. Most judges refuse to accept it's limited role as guidance and view it as authoritative statement of law and dare not diverge from it, (even if they wished to).

I am an experienced McKenzie friend having ten years experience of helping people in the family court and other types of proceedings on a voluntary expenses only basis and three years as a professional McKenzie friend, whereby I am paid for my services. I had inhouse training for a number of years with the Environmental Law centre. I have provided various submissions previously on Family court issues, been published in Family law week and attended meeting of the Family Justice Council. Therefore I believe I am sufficiently experienced to give some useful insights into this subject.

I have been granted right of audience on numerous occasions, and never been refused in the Court of appeal where I have attended regularly since 2003. I have been involved in two cases seeking right to conduct litigation, and granted this once. The right to conduct litigation is not a right that is particularly important but right of audience is a very important one. My brief CV is appended.

Right to McKenzie friend/ litigation assistant

I believe that I am well-known to the Family Court, given the full appeal hearing when my own McKenzie friend was not permitted to assist me, leading to the decision of LJ Wall and LJ Thorpe in June 2005 in re O'Connell and others [2005] EWCA Civ 759.

The Court advocate Robin Spon-Smith's submissions led the decision very fairly and the law
seems well settled on the right to a McKenzie friend being a strong one. I then advocated that McKenzie friend should be renamed as litigation-assistant, in order to give it, in the eyes of the Court a more professional role with a name that can be well understood. LJ Wall then stated that the use of the word Mckenzie friend had been around for a longtime and was well understood. I did market research on this point some years ago, and none of the 120 people, (members of the public in the street), questioned on this had ever heard of the word, much less could even guess what one was. These days it is more associated with a marketing clothes label.

With the cuts to legal aid, the advent of the internet, the poor financial state of this country and the growth of litigant's in person, there is a need for the role of Mckenzie friend to be more widely known about, and their use to be anchored to fill a gap in the legal market that is not going to change. I am concerned that some professionals in the legal system view McKenzie friends as a threat, however, there is room in the market and a gap that needs to be covered for those with funds to afford a McKenzie friend but whom cannot afford formal legal representation.

Right of audience

LJ Munby sitting as a High Court Judge in 2009 delivered a judgement N (a child) [2008] EWHC 2042 (Fam) looking at the issue of right of audience for McKenzie friends. The starting point is, of course, the statutory scheme embodied in the Courts and Legal Services Act 1990. The situations where someone has a right of audience are identified in section 27 of the Act. So far as concerns a McKenzie friend the relevant provision is in section 27(2)(c), which provides that:

"A person shall have a right of audience before a court in relation to any proceedings only in the following cases - …

(c) where … he has a right of audience granted by that court in relation to those proceedings".

he said in paras 38 – 40:-
In my judgment the law is to be found as set out in *Clarkson v Gilbert* [2000] 2 FLR 839 and, in particular, in the passages from the judgment of Clarke LJ which I have quoted in paragraph [28] above. **The starting point is that a McKenzie friend does not, as such, have a right of audience and, as Clarke LJ put it, that the court can exercise its discretion to grant a McKenzie friend a right of audience in accordance with section 27(2)(c) of the 1990 Act "only ... for good reason" and in the light of and bearing in mind the "general objective" set out in section 17(1) of the Act and the "general principle" set out in section 17(3).** Moreover, as Peter Gibson LJ said in *Mensah v Islington London Borough Council* CAT 2384 of 2000 at para [56], in the passage endorsed by Brooke LJ in *Paragon Finance plc v Noueiri (Practice Note)* [2001] EWCA Civ 1402, [2001] 1 WLR 2357, at para [67], the court should be "very slow" to grant a McKenzie friend a right of audience. But this is not to say that, as a general principle, such an order can be made only in 'exceptional' circumstances. As Clarke LJ pointed out in *Clarkson v Gilbert* [2000] 2 FLR 839 at para [28], that would be, in effect, **to read restrictive words into a statute which confers an unfettered discretion.** Moreover, both Waller LJ (at para [26]) and Clarke LJ (at para [30]) were quite clear that the judge at first instance (Eady J) had misdirected himself in law and applied the "wrong test" in saying that such an order could be made only in exceptional circumstances. As Clarke LJ said (at para [28]), "There is a spectrum of different circumstances which may arise so that it is difficult to lay down precise guidelines. Cases will vary greatly." He added (at para [29]), "All will depend upon the circumstances." At one end of the spectrum there will be the 'professional' McKenzie friend who acts also as an advocate, the person, as Lord Woolf CJ put it (at para [20]), "setting themselves up as an unqualified advocate" or, as Clarke LJ put it (at para [28]), "holding himself out as providing advocacy services, whether for reward or not." There, as a general principle, the court will make an order only in exceptional circumstances. At the other end of the spectrum there will be the McKenzie friend who is the litigant's spouse or
partner, though even there, as Clarke LJ was careful to point out, the circumstances may vary widely. In between - and Mr Holden falls somewhere between the two ends of the spectrum though as it seems to me much nearer the spouse / partner McKenzie friend end of the spectrum than the 'professional' McKenzie friend advocate end of the spectrum - there will be a very wide range of circumstances which it is futile and indeed impossible to classify or categorise. One is, after all, faced with a *spectrum* and not, as some of Mr Bogle's submissions tended to suggest, a set of pigeon holes. **At the end of the day one has to remember that, as Lord Woolf CJ put it (at para [17]), "The overriding objective is that the courts should do justice."** And one also has to bear in mind, as he observed, the reality that legal aid is not available as readily as it was in the past, leading, as the *President's Guidance: McKenzie Friends* [2008] 2 FLR 110 comments, to the growth of litigants in person in all levels of family court. Moreover, as the *Guidance* reminds us, "*the attendance of a McKenzie friend will often be of advantage to the court in ensuring the litigant in person receives a fair hearing.*" Similarly, in my experience, there will be occasions - sometimes; sometimes not - **when the grant of rights of audience to a McKenzie friend will, to adopt the President’s words, be of advantage to the court in ensuring the litigant in person receives a fair hearing.** Sometimes, indeed, it will be essential if justice is to be done and, equally importantly, perceived by the litigant in person as having been done.

An essential part of Article 6.1 of the Human Rights Act within the right to a fair hearing is 'equality of arms. In Buchberger v Austria at para 50 Equality of arms was described as 'The Court recalls further that the principle of equality of arms - one of the elements of the broader concept of fair trial - requires that each party should be afforded a reasonable opportunity to present his or her case under conditions that do not place him or her at a substantial disadvantage vis-à-vis his or her opponent (Dombo Beheer B.V. v. the Netherlands judgment of 27 October 1993, Series A no. 274, p. 19, § 33; Ankerl v. Switzerland judgment of 23 October 1996, Reports 1996-V, pp. 1567-68, § 38). Each party must be given the opportunity to have knowledge of and comment on the observations filed or evidence adduced by the

Family Court cases vary in their complexity from the new and untainted case where two parents disagree with each other over the arrangements for their child, to cases where there have been or are public law alleged child abuse cases with varying degrees of complexity or cases in their aftermath where the system has got it wrong as no system is perfect or infallible. There maybe children in foster care, with one parent not seeing the other, or complex allegations. If parents could agree (and takes two to agree) they would not be in Court! The parent maybe facing the might of the State bodies whether CAFCASS, NYAS or Local Authority. Honesty is not the province of the State, I can show numerous cases where there is prima facie evidence of misconduct by State actors.

Whether a litigant is paying a McKenzie friend for services or is carrying out the role for expenses only or pro-bono, should not affect the issue in law. The law does not make any distinction between types of McKenzie friend, it confers an unfettered discretion.

A close look at other types of proceedings whereby the assistance of a McKenzie friend or lay helper with right of audience being granted without hindrance is needed- In the Criminal Court. Human Rights Act article 6.3 allows legal representation of your own choosing so anyone can represent you in the trial and preliminary hearings and with open Courts. However, lay person cannot attend Police interview, you will need a solicitor or the duty Solicitor. Employment tribunal:- no need for a Mckenzie friend as anyone can represent a party in the Employment tribunal. Open Court hearings and litigant in person can charge £25 per hour for work on their own case. Small claims Court – representation by McKenzie friend permitted. Tribunal hearings generally right to assistance and right to lay representation for example in Child benefit, DHSS and CSA tribunals.

It is not enough to ignore the strong fact, that there is no shouting from the rooftops of how the extension of rights in other forms of proceedings, allowing lay persons to advocate on
behalf of litigants is causing disruption, or mass scale injustice. It is strong evidence that lay people can be of use in assisting the administration of justice. Yes there are rogue McKenzie friends, and yes emotions can be highly charged in proceedings concerning your own children, but the wider acceptance of McKenzie friends being granted right of audience is urgently needed. There are several good reasons for this.

1. Many people now fall in the category where they cannot get legal aid but do have sufficient funds to pay for a professional McKenzie friend in order to equip themselves better in the Court procedure, and Court hearing. They should not be blocked access to equality of arms an intrinsic right when the outcome of any hearing can have long-term repercussions for them and their children, and in the absence of capital punishment the strongest decisions affecting a person is that concerning their own children.

2. Family proceedings involve more stress and emotion than any other type of hearing. This is not a dispute about money, possessions or your lost job, but a life determining decision regarding your own children. Whilst other forms of dispute do involve emotions and stress, and can stir up deep seated feelings of injustice, a decision for example of no contact forces a parent into a living bereavement, a nightmare solitude against which all help and assistance as can be garnished must be made available to the litigant for fairness and justice to prevail, as much for the child as for the parent. It is the right of the child to have the material properly tested too.

3. There is a great deal of information now available on the internet, some excellent quality and some exceedingly dubious. A litigant needs help to sift the information. Some individuals embittered perhaps by their own experience make very strong and emotive assertions, litigants in the family court need a balanced view and an experienced McKenzie friend can provide that assistance.

4. Few McKenzie friends are in the position of being able to carry out the work on a voluntary basis for very long, they will whither and disappear. Experienced McKenzie
friends are needed to assist the administration of justice. We all have bills to pay, rent or mortgages are facts of life, never mind associated costs with the litigation, and the freetime to be able to carry out research, preparation, keep up to date with the law and in many cases act as Counsellor, secretary, and moral guide. We should be seen as the only alternative for many litigants given the legal aid strictures and the reality of the cost of representation.

5. Judges often use their own view of the litigant when representing themselves in order to inform their decision, which is unfair if one side is represented, and unfair in any event, as a litigant will want to come across as they believe a professional would represent their case. In other cases their emotions and nerves affect how they act. It cannot be good for justice in the case, if such a snapshot is used to justify the outcome. The Appeal Court is reluctant to challenge a judges view of the witness, and this makes the decision even more important.

6. We live in modern times. There has been much widespread criticism of Family law with hearings behind closed doors and even now the opening up of the Family Court system has been slow. Few of the many thousands of Court decisions are published. Rules still prevent open debate on theories and methodologies used, actions of the actors involved remain without open public scrutiny, and the world of Family law is a long way away from the reality of everyday family life. Lay people like myself who first met the Family Court through their own experience, need to be heard and understood.

7. For the litigant, the Court is still something in which justice is expected, wrongs to be put right, and for the truth to prevail. The cynic would say that the Court is not about justice, but about a decision made on the day you attend at Court, where telling the truth under oath has little meaning for some and made by someone under pressure of getting through their alloted list of cases and whos knowledge of you and your life, your children is guided by some snapshot view of a professional whose own view and analysis is also limited. It is only by assisting a litigant through the Court process and explaining the way that the law is, that they can comprehend the limitiations of it's
function and guide them to get the best outcome they can hope for in the circumstances. The limited time available in the Court system due to Parliament refusing to fund Court time is a serious issue and one the general public is unaware of.

8. For this is truly the role of the McKenzie friend under whichever title it is given. Right of audience for McKenzie friends, especially professional McKenzie friends must be opened up to give equality of arms and a fairer hearing. It is of far more use for the Court to have a professional McKenzie friend advocating than a husband or wife whose knowledge of the legal system is normally limited as any other member of the public and the constraints imposed by the practice guidance be removed, as the law grants an unfettered discretion on grant of right of audience.

As to the specific questions asked for the Consultation:-

Question 1

The term McKenzie friend should be replaced with a plain English term that is readily understood. As I have already stated the term 'McKenzie friend' has no meaning to the public who have not met the term through involvement in the legal system. The words solicitor and barrister are widely used in everyday life, in advertising, in films, TV programmes and a fact of life. However, McKenzie friend is not. The public need to be aware of the term before they need help in the Court system. Not only should the term be used but there should be some marketing and media awareness of the availability of alternative assistance in Court disputes so that the Public can make an informed choice.

Question 2

The term 'Court supporter' should not replace the term McKenzie friend. It reminds me of football supporter and implies blind support. I believe as advocated before LJ Wall and Thorpe, the term should be litigation assistant, giving the role some formal meaning, is easily understood and accessible to those who hear the word. It does not imply blind acceptance of supporting one side, but a meaningful role especially in the family Court where life changing decisions related to ones own children are to be made. Litigation Assistant also reminds the Judge of the formality of the role and implies a greater acceptance of the role in Court. (Some judges do not take McKenzie friends seriously which does a dis-service to the children involved and the litigant). Also it implies that equality of arms if being fulfilled.

Question 3

The guidance was wrongly set out. The law confers an unfettered discretion. The Court has the power to remind, rebuke or remove any litigation assistant overstepping their role,
misbehaving or being unruly. Appendix two sets out the role of an advocate and this should be respected by the Court whether the litigant or the litigation assistant is addressing the Court.

Question 4

Appendix two sets out the role of advocate. Good advocacy requires practice and experience. However, it is much easier for the Judge hearing the case being presented without the overlay of nerves and emotion of the litigant in Family Proceedings. Civil proceedings may also engender great feelings of injustice, and emotion too.

The rules should be the same as both types of Court need the opening up of alternative legal representation. Professional or highly experienced Mckenzie friends are needed to cover the gap in affordable legal help and assistance.

Rules of Court should be formed and be clear that the decision should be weighted in favour of right of audience, although as now seems common practice in the Court of Appeal Judges are happily hearing from the litigation assistant and the litigant as the litigant desires. This makes the litigant feel that they are being fully heard and the hearing has been fair.

As far as the test is concerned it should be very simple. Has an application been made for right of audience by the litigant, has a CV been provided, does the other side have any serious objection to the right, and does the litigant wish for the individual to speak on their behalf and would they like a dual role whereby either can address the Court as required.

Good reason is that the litigant has asked for someone to speak on their behalf and proceedings are a stressful event for the litigant.

Question 5 and 6

Standard form notice is welcomed. Litigation Assistant's brief CV should also be required to be attached to the form. The notice should contain a Code of conduct. It is everyone's interest and in the administration of justice that the litigation assistant should inform the Court through their CV of their experience and any informal training they have had, their past experience and if they have any financial interest in the outcome. I am aware of some charging bonus fees and payment by outcome especially in Civil Courts.

Question 7 and 8

The Scottish Courts are way behind the English and Welsh Courts on the issue of McKenzie friends. In 2008 there was no such thing, but three Lord Justices in the Court of Session permitted me to sit behind the litigant and act as lay advisor. 09 09 08 [2008] CSIH 52 XA 28/07 Lord Eassie, Patton and Mackay of Drumadoon. This was after over 100 legal firms had refused to take the case on even though the litigant had a legal aid certificate.

The English and Welsh Courts have different legislation, procedure and rules. A plain English guide should be made available to assist Litigants understand the role, limitations and
possibilities of Litigation Assistance from a source that has input from those experienced in assisting litigant's of limited means, from varied backgrounds and who may have been wrongly informed about the Court system, and it's role and limitations via the media of various forms. Sifting through information is a task in itself for someone facing the Court system.

All involved agencies who meet future or ongoing Court users, need to have a database of outside assistance that maybe of help without recommeding or giving any credence to the Litigation Assistant's reliability. The guide should have tips and hints on selecting a Litigation Assistant and what to look for in their CV, background and experience. It should be made very clear that using a litigation assistant gives no guarantee that they have a good case, being given reliable advice and that they need to be satisfied as a consumer of the decision they are making. At the end of the day, as with any industry, they should have a choice and array of services to meet their needs, and financial arrangements are between them and the Litigation Assistant and should have it all made very clear in writing in advance of any charges they are responsible for.

A quasi judicial and lay body should be set up to discuss requirements of any such guide with an agreed remit for the document. There should be several versions capable of being read by those of varying reading ability. When seeking assistance people are often blinded by emotion and may have been misguided by reading all sorts on the internet. It should be a guide designed to dispel bad notions and give reliable advice and guidance.

Question 9

There should not be a prohibiton on fee recovery. Providing that services have been genuinely explained, agreements made in writing (for example I had some clients paying bit by bit in order to cover agreed costs of work) but usually sought payment in advance with what was covered agreed in writing, then there should be no issue about the agreement and payments due.

Obviously if the proceedings end then the client could refuse to pay. That is a risk taken in the conduct of the work but if all agreements and payments were properly considered and the arrangement made clear, agreed in writing and carried out to the best of the Litigation Assistant's ability then that should be respected.

The risk as with many issues in life is with the consumer. The whole point of Litigation Assistant is covering an area where outside assistance is limited and maybe outside of their cost range, the Litigation Assistant is exactly that, but needs to be fully aware of the risks inherent.

Disbursements are for the Litigant. The litigation Assistant should be able to charge reasonable rates for the drafting of documents, for analysising the case, giving lay legal advice on related matters, for time spent with client whether over the phone or face to face and for attending Court with or without right of audience including travel expenses, Court time etc.

In the absence of being able to charge fees considerably cheaper than law firms their will be a
gap in the provision of legal services that is not being covered.

Question 10

There are a number of issues I raised at the beginning of the document. If the system is really about our future generation, our children then I for one am serious on improving this. I am aware of groups and organisation as well as individuals who are using the law for their own ends to obtain pre-determined outcomes and sharing tactics. I deplore any such behaviour. I am more than willing to give any help that I can to setting up a fairer system and open to engagement.

The law is for Justice and better outcomes for children, not a game to win an outcome.
Appendix One CV of SHAUN PAUL O'CONNELL BSc, PGCE

PERSONAL PROFILE

Experienced in law, administrative tasks, focusing on detail as well as able to multi-task in concert with team or individually. Able to work on own initiative and with a likeable personality. Greatly experienced in teaching in mainstream (challenging, urban and often failing) schools, special needs, anger management, pupil referral units and special schools as well as at secondary and primary levels. Reliable and conscientious.

Experience of provision of services through community and voluntary sector on ad-hoc basis via Southampton under 14 children network, Merseyside CVS and meetings of Family Justice based organisations. Published in family law week. Currently self employed via Southern Family Aid assisting parents in private and public law proceedings as lay legal advisor. Confidentiality of proceedings and information obtained is well-understood.

Sample Legal achievements

E (children) B1/2004/2385 and B4/2004/2019 LJ Thorpe; ‘He has presented me with an erudite argument which demonstrates that whoever composed it has a very profound understanding of the statutory foundation for public law care proceedings, the relevant decisions of the courts on the construction of those provisions, and particularly the inter-relevance of articles of the human rights Act 1998 and fortified by decisions of the Human Rights Court.’ Further, it was also stated that “It may well be that a review of the proceedings in their totality by the Court of human rights would result in some criticisms at some stage either of the Local Authority in their management of the case, or of the justice system in its determination of the case.’

28 04 05 Re O (Children) Circuit Judge removed by Court of Appeal.

22 06 05 O'Connell and others precedent on right to McKenzie friend. [2005] EWCA Civ 759. [2005] 2 FLR 967

03 10 07 Precedent that 'Judges must obey the procedural rules.' LJ Thorpe and Dyson. Re Z B4/2007/1781

05 03 08 Davies V CSA High Court declaration of irrational decision. Judicial review. CO/4782/2007 and CO/7363/2006

23 07 08 Lord Justice Ward: 'with the admirable help of his McKenzie friend, Mr. O'Connell who has helped me on many occasions’... Mr O'Connell, please, it's not a fight worth fighting. Not this one. You've got many other worthy causes; I support many of them....McKenzie friend in Davies V CSA C1/2008/0701.

09 09 08 [2008] CSIH 52 XA 28/07 Lord Eassie, Patton and Mackay of Drumadoon. Permitted to act as lay advisor as no McKenzie friend right exists in Scottish law.

02 10 08 Z (Children) granted right of audience as appropriate person. Lord Justice Thorpe, Wilson
and Collins Quote; 'If I may say so Mr. O'Connell assumed that mantle very well and very much in the interests of the father,' and 'Mr. O'Connell has been quote eloquent in challenging that particular criticism made by the Judge.'

01 07 09 Granted right of audience. Very strong criticisms of procedure in Portsmouth Combined Courts and concern for the state of law regarding cross-examination of children. Described by the Court as 'conducted his case well and in relation to whom I have no criticism'..."the appellant and his McKenzie friend have unearthed from the criminal proceedings and the Local Authority records a mass of material which, no doubt would have provided a rich mine for the cross examination of ISW by a lawyer.' [2009] EWCA Civ 644 SW and KW, Portsmouth City Council and ISW, AJW and EDW by their Guardian.

14 10 09 D (Children) granted right of audience by the Court of Appeal (LJ Wall) – I have heard Mr. O'Connell who presented the case concisely....Mr. D is however, a litigant in person albeit with excellent assistance.[2009] EWCA Civ 1265.

22 03 10 LJ Wall granted right of audience B4/2009 2728 and A 23 03 10. In Judgment dated 20 05 10 LJ Wall stated 'As the applicant is astute to point out, however, the leading case on the question of reopening issues is children's case is in the field of issue estoppel and remains that of Re B (Children Act Proceedings) (Issue Estoppel) [1997]' and further 'This is a highly worrying case with, as this court found, several unsatisfactory features.'

Davies v Welch Queens Bench Division November 5th 2010 attempted committal of Solicitor. Contempt proven.

20th and 29th June 2011 right of audience in the High Court Mr. Justice Baker PO11Z00067.

13th August 2014 PTA granted LJ Macfarlane for proportionality of contact reduction decision, length of hearing and imposition of s.91.14 order. Hearing date awaited. Quote 'She is assisted, as she was before the judge, by a McKenzie friend, Mr O'Connell. I am grateful to him, as no doubt the mother is, for the way in which he has marshalled matters in his skeleton argument and, for my part, more particularly for the way in which he has addressed me today.'

Appendix two – Role of the advocate

The role of the Advocate is well described in Lord Reid in Rondel v Worsley 1969 1 AC 191 stated that “Every Counsel has a duty to his client fearlessly to raise every issue, advance every argument, and ask every question, however distasteful, which he thinks will advance his client’s case.”

A litigant-in-person may have an idiot as his client but the same applies. Clearly the Litigation Assistant has the same duty if advocating to the Court.

In Medcalf -v- Weatherill [2002] UKHL 27, [2002] 3 WLR 172 Lord Hobhouse said:

- The duty of an advocate was a duty "with proper competence to represent his lay client and promote and protect fearlessly and by all proper and lawful means his lay client’s best interests."[51]
- The role of the advocate in performing that duty benefited not only the client but also the public interest. It was essential to achieving the just and efficient resolution of disputes in a system which sought to recognise and enforce rights, obligations and liabilities in accordance with law. [51]
- “It follows that the willingness of professional advocates to represent litigants should not be undermined either by creating conflicts of interest or by exposing the advocates to pressures which will tend to deter them from representing certain clients or from doing so effectively. … Unpopular and seemingly unmeritorious litigants must be capable of being represented without the advocate being penalised or harassed whether by the Executive, the Judiciary, or by anyone else. Similarly, situations must be avoided where the advocate’s conduct of a case is influenced not by his duty to his client but by concerns about his own self-interest” [52]
- "At times the proper discharge by the advocate of his duties to his client will be liable to bring him into conflict with the court. This does not alter the duty of the advocate. It may require more courage to represent a client in the face of a hostile court, but the advocate must still be prepared to act fearlessly. It is part of the duty of an advocate, where necessary, appropriately to protect his client from the court as well as from the opposing party." [53]
- "The professional advocate ...owes certain duties to the court and is bound by certain standards of professional conduct in accordance with the code of conduct of his profession. ... The advocate must respect and uphold the authority of the court. He must not be a knowing party to an abuse of process or a deceit of the court. He must conduct himself with reasonable competence. He must take reasonable and practicable steps to avoid unnecessary expense or waste of the court’s time ..." [54]