

McKenzie Friend

This Guide applies to Australia and the use of a McKenzie Friend in the Family Courts of Australia

At the loneliest place in the world – the bar table, you can have a friend sit beside you to help you sort through your papers and provide general help.

A McKenzie's Friend does not have to be an expert or even have any particular knowledge of Family Law. They are there to sit beside you, help with you papers and keep an eye on what's going on and keep you on track.

At the other end of the scale you can have 'friend' that really knows how the system works (a sort of default solicitor) that will be taking all sorts of notes and watching the witnesses and even quietly whispering suggested questions in your ear.

History

In the 60's and 70's Australians made their pilgrimage to the UK to see the 'Old Dart' and take advantage of using it as a base to visit Europe. Many also worked to gain experience or a different view of their chosen professions. Such was a young Queensland solicitor named Ian Hanger. Australian solicitors took working holidays in the UK and this gave them the opportunity of seeing the actual functioning of the Law Courts – the origins of most law used in the Commonwealth. They technically could not 'practice' but they could work in law offices and gain general experience and be part of the everyday work of the law firm.

According to the stylised (and much preferred) version of this history the 'firm' where Ian Hanger worked had a client called McKenzie who was going through a contested divorce. Mr McKenzie had a bad habit of leaving everything to the very last moment and literally at the last moment before a hearing he needed representation in Court again. Since no Solicitors or Barristers were available the principal asked Ian Hanger to go and sit in Court with McKenzie. English law from a Lord Tenterden judgment in 1,831 had allowed a 'friend to sit beside you and quietly whisper advice'.

Hanger sat next to McKenzie who by all accounts had no idea what to do and generally made a hash of things. During the proceedings the Judge asked Hanger who he was and on learning that he was not qualified to practice in the UK promptly ordered him from the bar table (In fact Hanger was not advocating or even presenting for McKenzie) Hanger went to the back of the Court which in essence meant he could offer zero help to McKenzie. Hanger went back to the office and there the matter rested or so everyone thought. Some weeks later McKenzie fronted up late on a Friday afternoon and asked them to prepare an appeal because he had lost his case.

Now Ian Hanger was just leaving to go on a touring holiday and was asked to read and make any comments on a possible appeal. After reading the judgment he could not find any real grounds but in a typical display of Australian humour wrote 'The Judge was wrong to exclude me'. Hanger returned from holidays to find an appeal in progress.

There was nothing remarkable about the McKenzie case but the appeal was to introduce the term into Court 'folklore'. In 1970 there were many racial riots and general racial disturbances in Britain. The appeal Judge on learning that McKenzie was a West Indian asked 'Is Hanger black' the reply was 'No, and his Father is the Chief Justice of Queensland'.

The appeal succeeded - probably more on professional courtesy (metaphorically throwing out the Son of a senior Judge) and racial harmony (asking the colour of a persons skin during an appeal) than on any virtue of any incorrect judgment made by the Court.

Quickly the term 'McKenzie Friend' came into common usage (a lot easier to say than a friend to sit next to me etc and Tenterden's decision of 1831 etc)

In Commonwealth countries if no 'decision or appeal' exists in their own Courts they generally first seek an existing judgment or appeal from a Court in the UK. So litigants began to argue for a 'McKenzie Friend'. Australia, New Zealand, Canada recognise the term and it has even spread to the USA. (When we use the term 'McKenzie Friend' you will not see it mentioned in Acts, Rules or Regulations – its an unofficial term that is commonly recognised in the Court system. You will read its use in Judgments where SRL's have used one)

By the middle of the 70's McKenzie Friends were being used in the criminal Courts of Australia and it appears that by early 1980 it was being used in Family Court cases.

With the dramatic rise in Self Representation and better access to information through the Internet and support groups a 'McKenzie Friend' is now part of the landscape of Court proceedings. Statistics do not provide detail on the percentage of cases that use McKenzie Friends, however subject to some minor details all SRL's can use them.

This guide will provide information on how a friend [McKenzie Friend] can assist a SRL in the Family Court of Australia and the Federal Magistrates Court

Important

If you research the use of McKenzie Friends in overseas literature be careful because their use is different in some Countries. Example: in the UK they can be used to advocate at tribunals or to advocate for people with disabilities but now need permission to enter a Court for a Family matter because the UK Family Courts are 'closed hearings'.

Seek Legal Advice

This guide is produced for educational purposes. Users of the guide should not rely on the guide for legal advice or as a substitute for legal advice. Instead, persons with legal problems including those who plan to represent themselves in court should consult a lawyer. Those who cannot afford a lawyer should seek out legal aid.

This a general guide and cannot contemplate all eventualities dealing with a McKenzie Friend in court. It covers the role in a general way.

The Family Law Act, Regulations, Rules of Court, Court Practices and Court Precedents can change quickly.

Some Basics about use of McKenzie Friends in the Australian Family Courts

1. Do not need permission to sit in the Court. Australian Courts are 'Open Courts' and the public is permitted to observe any proceedings.
2. Will need acceptance (permission) to sit next to you at the bar table
3. Should NOT be a witness in your case
4. Cannot ADVOCATE (speak for you)
5. You should tell the clerk of the Court you wish to use a McKenzie Friend so that they can inform the Judge, Registrar or Federal Magistrate.
6. The Judge, Registrar or Federal Magistrate is likely to ask whether the McKenzie Friend knows their role and to state what they can and cannot do.
7. The Judge, Registrar or Federal Magistrate will ask opposing counsel if they have any objections
8. The 'Court' has the right to remove 'anyone' from the Courtroom that is obstructing the proceedings (this includes 'your friend' if they are causing problems)
9. Has no 'Legal Status' in the Courtroom (or in procedural matters)
10. Cannot attend counselling, mediation sessions, pre-trial meetings with you
11. Can be refused entry by other counsel to 'settlement' discussions during a break in Court proceedings
12. Does not have access to 'Exhibits' (Evidence room for viewing returned subpoenas)

What is a McKenzie Friend?

A McKenzie Friend assists a person who is representing himself or herself in court. The McKenzie Friend:

1. Provides moral support to the self representing person,
2. Sits at the counsel table with the self representing person,
3. Assists with paper work including the taking of notes as the court proceedings go on,
4. 'Quietly' whispers advice to the SRL,
5. Generally assist the self representing person.

The McKenzie Friend cannot speak in court (they cannot advocate) for the SRL except in very special circumstances. Special circumstances may include having a language problem, having a disability or being of old age to name a few. (Usually if this is the case the person becomes 'A Next Friend' - there are official forms for this) The decision to allow this to happen lies in the discretion of the judge hearing the case. Some judges are more accommodating than others. For this reason it is best for the SRL to go ahead alone in case special permission is not given by the judge.

Who can be a McKenzie Friend?

Anyone can be a McKenzie Friend. There are no specific qualifications. The following qualities make a good Mackenzie Friend:

1. Common sense;
2. Well organized;
3. A "big picture" person;
4. A person good at reading and writing English;

It is not necessary for your 'McKenzie Friend' to have all these characteristics.

Persons who are show offs do not make good McKenzie Friends. (they could also be removed from the Court) Also, persons who are confident that they know what the law is but have little or no experience or are just posturing, do not make good McKenzie Friends.

A level handed, reasonably educated person makes an excellent McKenzie Friend. In addition, there is nothing stopping you from having more than one McKenzie Friend. *One who is a good writer could help you with all the paper work. Another could actually accompany you to court. The bottom line is you need someone to help you.

Please note you can have only one McKenzie Friend sit with you during the court hearing. Other friends can sit in the main body of the court room.

*Sometimes the description 'Case Manager' is used. Someone that helps organises and coordinates your case.

INSTRUCTIONS FOR MCKENZIE FRIEND

Just Being There

The most important contribution a McKenzie Friend can make is support. Going to court can be intimidating. The self representing person needs someone by his or her side. Beyond support, here are some ways a McKenzie Friend can help. Remember a McKenzie Friend may not be able to do all of these things.

Attending Legal Aid or at a Lawyers offices

Self representing persons will need legal advice. The McKenzie Friend can attend legal clinics with the self representing person. A second pair of eyes and ears can be useful. Many people are nervous when they see lawyer. Ask the lawyer if a McKenzie Friend can sit in.

Reading Self Help Material

Written material exists to help self representing persons. A McKenzie Friend can read and explain it to a self representing person. Some people have literacy problems. Even those with no literacy problems can benefit from having someone else read over the material. Written self help material can be quite extensive.

Preparing Court Documents

An important element of the court hearing is the preparation of court documents including affidavits. A McKenzie Friend who is a good writer can help, at least, the McKenzie Friend can proofread the material.

Attending Other Court Hearings

Attend court hearings on a day before the case is actually heard. The self representing person can do this along with the McKenzie Friend. This can give you an idea of what to expect. During this time, it might be a good idea to check out parking and eating establishments for the day of the court hearing.

Preparing for the Court Hearing

A McKenzie Friend can help the self representing person prepare for the court hearing. This friend can read over all the court documents and help the self-representing prepare the presentation to the court. Are the important points being covered? Is the presentation clear and simple?

The Court Hearing

The day of the hearing is where the Mackenzie Friend really helps. Here are some of the ways a McKenzie Friend can help:

1. The McKenzie Friend can ensure you keep to your notes or time schedule during your presentation. The best way to do this is to pass a note or quietly whisper in the persons ear.
2. The judge may ask where certain material is. The (probably flustered) SRL may not be able to find it. The McKenzie Friend should be able to.
3. The McKenzie Friend can monitor the body language of the judge and witnesses. People sometimes show their views of the case by body language. A McKenzie Friend can monitor this better than an SRL. For example, the SRL may be going 'too far' and the judge may become frustrated because the SRL is not moving along to the next point. A McKenzie Friend can draw this to the attention of the self-representing person and sometimes a swift kick under the table can prevent a disaster.
4. A McKenzie Friend can keep notes as the matter proceeds in court.
5. The court hearing for your case may have a break. There are breaks in the morning or afternoon sessions. During the break, the McKenzie Friend can reassure the self representing person. In addition, the McKenzie Friend can go over the presentation so far pointing out matters that have been left out or things that should be clarified.
6. At the end of the SRLs presentation, (submissions, closing address, cross examinations) the SRL should always turn to the McKenzie Friend to see if there is any final comments that should be made.

(The Mackenzie Friend must be careful not to overdo it. A little bit of note passing and whispering in the ear is okay. However, if it becomes persistent, the McKenzie Friend will annoy the judge and go outside of the role of the McKenzie Friend)

McKenzie Friend – some case history

McKenzie Friend (England)

The case of Pelling v Bow County Court [1999] E.W.J. No. 4027 explains what a McKenzie Friend is. Lord Woolf, MR states at paragraphs 5-7, the following:

“5 5. The title ‘McKenzie Friend’ draws its name from the decision of the Court of Appeal in McKenzie v McKenzie [1971] P 33. The role of a McKenzie Friend was first recognised in Collier v Hicks [1831] 2 B & Ad.663. Lord Tenterden CJ in that case said (at p.669):

‘Any person, whether he be of 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 v McKenzie was a contested divorce case. The husband had been legally aided but his legal aid was terminated. At the commencement of the hearing there was sitting beside him an Australian solicitor, who was working for one of the firms of solicitors who had been acting for the husband. According to the report he was there ‘voluntarily in order to assist the husband in conducting his case’. The young man could have been of great value to the husband at the hearing of the case which was complicated and lasted some ten days or so. However the judge at first instance did not allow him to remain after he found out that his firm was no longer on the record. The three members of this court (Davies, Sachs and Karminski LJ) considered that this was a wrong decision. In that case the court was of the opinion that the husband was entitled to the assistance of the McKenzie friend. Sachs LJ in his judgment stated that the error made by the judge did not render the trial a nullity. However he added ‘that where such an error takes place the onus rests on the opposite party to show that it did not cause prejudice’. Sachs LJ also stated:

‘All the assistance a litigant in person gets from a judge and from opposing counsel is not really the same thing as having skilled assistance at his elbow during the whole of a lengthy trial. In those circumstances it has not been shown that there was no prejudice to the husband on the adultery issue through lack of the assistance which he ought to have had. It is moreover always, to my mind, in the public interest that a litigant should be seen to have all available aid on conducting cases in court surroundings, which must of their nature to them seem both difficult and strange.’”

An additional case is Paragon Finance plc. V Noueiri [2001] EWCA Civ 1402. In that case, the court said the following:

Although Mr Alexander did not purport to act as a McKenzie friend, it is worth mentioning some important principles governing McKenzie friends. The development of this jurisprudence is set out in the judgment of Otton LJ in the Divisional Court in R v Bow County Court ex parte Pelling [1999] 1 WLR 1807, 1811B-1813, [page30] in a passage approved by the Court of Appeal at p. 1826B. Three principles are worth noting from the judgments in this case:

- i) A McKenzie friend has no right to act as such: the only right is that of the litigant to have reasonable assistance (see p. 1824G).
- ii) A McKenzie friend is not entitled to address the court (see pp. 1823E, 1824G.) If he does so, he becomes an advocate and requires the grant of a right of audience under s 27. **(s.27 is a ‘practice certificate’ for that day and is only available in UK Courts)**
- iii) Generally, a litigant in person who wishes to have a McKenzie friend should be allowed to do so unless the judge is satisfied that fairness and the interests of justice do not so require (see pp. 1827D and 1823G). However, the court can prevent a McKenzie friend from continuing to act as such where the assistance given is inimical to the efficient administration

of justice, for example where the friend is indirectly running the case or using the litigant as a puppet

In *R v Leicester City Justices ex parte Barrow* [1991] 2 QB 260 Staughton LJ described the court's power to control the activities of a McKenzie friend in these terms:

'An assistant can be ordered to stay away from the litigant or to leave the court if he is disorderly, just as any member of the public can be removed. If he wastes time unnecessarily, as by prompting the litigant to ask irrelevant questions, or causing delay by long consultations, he should be warned; and if this conduct persists his assistance should be terminated. Courts already have, on occasion, the task of controlling professional advocates and litigants and persons who cause unnecessary delay...'

McKenzie Friend (Australia)

Watson v Watson [2001] FamCA 1470 (20 December 2001) paragraph 18 contains:

"18. The first point which I think it important to make is that the application here is for the appointment of a 'next friend', not for the leave of the Court to employ the services of an assistant of the kind which has become known, throughout the Common Law world, as a 'McKenzie friend', following the decision of the English Court of Appeal in *McKenzie v McKenzie* [1970] 3 All E.R. 1034. That decision was to the effect that a litigant who appears before a Court in person is ordinarily entitled, if he or she so wishes, to have the assistance, in the court, of a friend or assistant who may sit beside the litigant at the bar table for the purpose of taking notes, handling or cataloguing documents or exhibits, making quiet suggestions to the litigant as to how best to conduct the case, and generally being of assistance to the litigant in presenting his or her case to the Court, provided that that person does not disrupt the proper conduct of the proceedings. However, an important limitation upon the role and functions of a 'McKenzie friend' is that he or she may not (except, perhaps, in the most exceptional cases, and with the express leave of the Court) act as an advocate for the litigant in the proceedings. That limitation has been recognized at least since a statement was made to that effect by Lord Tenterden CJ in *Collier v Hicks* [1831] 2 B & Ad. 663, 109 E.R. 1290 at 1292, and has recently been reaffirmed by the Full Court of this Court (Kay J, with whom Holden and Mullane JJ agreed) in *KT v KJ & TH* (2000) FLC 93-032 at 87,509."

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Asking for a Friend (McKenzie Friend) to sit next to you in court

Your 'friend' is not a 'next friend' – this refers to a term used for people that support someone who cannot speak properly or has some physical or emotional impairment.

The Family Court uses the term 'Support Person' for 12A Less Adversarial style hearings, you may need to use the McKenzie Friend argument in other types of FCoA cases. Whilst the activities of a McKenzie friend have been defined over the years – the Court has not published guidelines on what a 'support' person can and cannot do and this is left to the discretion of the judicial officer.

If possible ask the Court clerk and say I will be asking for a Friend/McKenzie Friend

Get your friend to sit behind you

Do NOT get your friend plopped down beside you at the bar table –absolute NO NO – wait for permission from the Judge or Federal Magistrate

Now 99.9999% of Judges and Magistrates know exactly what a McKenzie Friend is. But remember that the term does NOT appear in Court literature.

You may get hard time because:

- a) The hearing is short
- b) The Judge or FM has had some bad experiences with McKenzie Friends
- c) You are being tested – in other words are you a time waster just quoting something? without actually knowing what you are asking for? Or what the role of a McKenzie Friend really is?

Now you need to practice this **in words that you are personally comfortable with** – and READ the body language of the Judge or Federal Magistrate as you go. You may only need part of the argument or all of it

- Your honour I seek your permission to have a friend sit next to me in the role commonly described as a McKenzie Friend and also described as a support person in the Family Court
- Your honour I understand the role of this person is not to speak but to quietly assist me, keep me on track and help me to avoid wasting the Courts time
- Your honour this would greatly assist me as I am somewhat nervous and may fumble along the way

CASE LAW ARGUMENT (This is in the McKenzie Friend document)

- You honour the term a friend to assist refers to Lord Tenterden's decision in 1831....."every man"..... And the term McKenzie Friend to the famous English case of 1970.....
- Your honour the Australian Courts *quote Australian case law*
- Your honour the then Chief Justice Alistair Nicolson when referring to SRLs and McKenzie Friends also referred for the need to create a level playing field in the precedent.....

You may still get a no. If you are determined – then restate your argument.

If you get a yes – the other side may object

Restate the 'level playing field' argument and how you have not had years of legal training to prepare you for today

Most Judges and Federal Magistrates will NOT allow the use of a McKenzie Friend if the hearing is very short – ie procedural or a mention HOWEVER if you have asked and been refused a McKenzie Friend and need to give the Court **an answer to a difficult question** – then ask the Court if you can consult with your friend

"Your honour perhaps I need a clearer head before responding - may I consult with my Friend before replying"