

(The following article was written by Justice Richard Chesterman and was published in the Queensland Bar News. Justice Chesterman consented to having the article put online on my website [www.margaret-marks.com](http://www.margaret-marks.com) – MM)

### **McKENZIE'S TRUE FRIEND**

The claim may appear startling but I believe that the profession is too self-effacing. The public would be shocked to hear that lawyers do not take themselves seriously enough, but that is my assertion. I make it in a medium which is likely to be read only by lawyers, and I limit it to the class of lawyers I know best, the Queensland Bar. Even here there are exceptions, but nevertheless I believe the thesis generally holds good.

It may be tested in a number of ways. One is the performance of barristers on the rare occasions they make an appearance in the mass media. Invariably they appear self-conscious and, when given a speaking part, are usually inaudible. This is odd in a profession which exists by the spoken word.

Another proof is provided by the very small number of barristers who take part in public debate on matters of controversy, even those directly affecting the profession, the courts, or more loosely, the function of law within society. There may be reasons for this particular reticence other than the one I have advanced. An implacably hostile press and the lamentable Queensland characteristic of attacking the man (the turn of women will come) and not debating the idea discourage the public expression of any but the most populous of sentiments. But the real reason, I think, is that deep down most of us suspect that what we say or do has no general importance. We do not see ourselves as players on life's stage. At best, we are members of the audience.

David Williamson expressed the idea in a recent play in which he had one of his characters explain that history is something that happens somewhere else.

It was not always so. Generations ago members of the English Bar were not burdened by any feelings of modesty. They corresponded in congratulatory and, indeed, self promoting terms convinced that their affairs would be of public importance. Their achievements were carefully recorded in letters and diaries kept conspicuous for their biographers to find. If you doubt my assessment look at the effusive biographies of such lawyers as Lord Justice Birkett, Patrick Hastings KC or Marshall Hall KC by the likes of Montgomery Hyde or Edward Marjoribanks. You will see the same phenomenon, though expressed in a mature prose, in the two recent volumes of "*Lives of the Lord Chancellors*" by Professor Heuston. For the most part these well documented barristers were made famous by their appearances in murder trials, but murder is the same whether committed in Brisbane or in Brighton. It excites interest only by reason of the passions and ambitions which, fomenting and clashing, give rise to it. It is true that Norman Birkett was more than just a criminal barrister. He was the reserve judge in the British contingent at the Nuremburg War Trials but the only thing of consequence he wrote from the appointment was a bitter complaint that he was not given the same honours as the run-on judge. The late Dan Casey and our contemporary Bill Cuthbert have each appeared in as many complex, intriguing and emotion charged trials as their English counterparts but there is, sadly, no biographical record of their careers, or the cases which locally caused as much titillation and outrage as anything in the Old Bailey.

I do not ask why we should be different as a justification for immodesty. I do however suggest that we should regard something of what we do as worthy of permanent record. As a faltering first step I offer this reminiscence as a footnote to some future history of the Bar.

The term “McKenzie friend” has become an institution in the law. It comes from the name of the case, *McKenzie v. McKenzie* [1971] P 33; [1970] 3 WLR 472, which established for modern times “that every party has the right to have a friend present in court beside him to assist by prompting, taking notes, and quietly giving advice”. The Court of Appeal found authority for its decision in a judgment given 140 years earlier. There was no occasion in the interim in which the question arose for consideration. In the thirty years since the courts have frequently been called upon to consider the circumstances in which the right to a McKenzie friend will arise and what, if any, limitation should be imposed on the right. The debate has been triggered by the growth in litigation, particularly criminal and administrative, and a corresponding decline in the availability of legal aid.

The suit was a contested one for divorce. The parties were West Indian. The wife was represented but the husband had been denied legal aid on the eve of trial. The facts were complex, the litigants accusing each other of numerous and varied matrimonial faults.

The judgment of Lord Justice Sachs explains how the point arose for decision. “... difficulties fell upon the husband, who was in person and who had the always arduous task of conducting his own litigation, taking such notes as he

could of what was happening, and giving evidence when that was his function. Not having legal aid ... he had, however, the advantage at that moment of having sitting beside him a young man who had been deputed to help him by a firm of solicitors whom he had previously instructed. That young man happened to be someone who was qualified as a member of the Bar in Australia: Obviously the assistance which he could give might well have proved valuable. On the first day of the trial, however, his position beside the husband attracted the attention of the judge, who asked him who he was and who then spoke to him in terms which he, the young man, not unnaturally took to be intimation that he should desist from what he was doing. He went away, first to the back of the court and then out of the court. That young man, however, had done nothing, so far as this court has been able to ascertain, other than sit quietly beside the husband and give him from time to time some quiet advice or prompting”.

What is not widely known is that Mr McKenzie’s friend was our own Ian Hanger QC, and that it was his initiative and sense of duty to a client abandoned by Legal Aid which created this pocket of jurisprudence and has provided undoubted benefit to many litigants in person in the presentation of their causes.

Ian and I travelled to London only a few weeks after our graduation and admission to the Bar in December 1968. That was then something of an adventure. Our qualifications were not recognised in England. I found that an Australian barrister seeking work in a London solicitors’ firm was regarded with an attitude that fell somewhere between curiosity and contempt.

London at the time was beginning to feel the tension of racial conflict. It was the year in which Enoch Powell made his celebrated speech predicting that the streets would run with “rivers of blood” if the number of immigrants from Commonwealth countries was not substantially reduced.

Ian found work with a socially ambitious solicitor who had commenced a practice in Elephant and Castle, a relatively poor and cosmopolitan area in inner south London. The bulk of Geoffrey Gordon & Co’s clientele were legally assisted. His presence on staff presented Mr Gordon with an opportunity to put Ian in charge of a branch office in the adjoining borough of Lavender Hill, where there was in fact a mob. Some of its members were clients. Ian lived near Clapham Common. He travelled to and from work on the Clapham omnibus without ever seeing the reasonable man.

Mr and Mrs McKenzie had had a tempestuous marriage and were engaged in equally turbulent matrimonial litigation. As often happens in the law the cases which break new ground involve litigants who are unmeritorious, if not obnoxious. Mrs McKenzie petitioned for divorce on the ground of persistent and extreme physical cruelty. The allegations had about them an air of verisimilitude.

Mr McKenzie was a client of Geoffrey Gordon & Co but had neglected his affairs. He did not bother to communicate with his solicitors in the months preceding the trial, but on the day before it was due to commence, when legal aid was withdrawn, he implored Mr Gordon to assist him. No doubt rightly

sensing that the predicament could be best handled by counsel Mr Gordon sent his client and the file to Ian who had an evening to prepare for trial.

Ian sat at the bar table next to Mr McKenzie who had not the faintest idea of what to do or say. Frequent prompting was required even to get to the point where the marriage certificate was tendered. The case proceeded slowly and in confusion. After lunch, the judge became irritated and questioned Mr McKenzie about his friend. Mr McKenzie was too inarticulate to give a satisfactory explanation. His Lordship then remarked that “the young man has a lot to say, he can speak for himself”. So called upon, Ian explained why he was present and what he was doing. The judge retorted that he “had had enough.” He directed Ian to move from the bar table to the public gallery, and not to speak to Mr McKenzie except during adjournments. Ian did so but finding he could not provide any useful assistance, did not return after the first day. If the judge had had enough when Ian was present the law reports suggest he had more than enough after Ian left.

The day before he was to come with me on a motoring tour of Scotland, Geoffrey Gordon sent a copy of the judgment to Ian’s office with a request that he advise on prospects of appeal. There did not appear to be any. The reasons for judgment carefully analysed the facts and expressed impeccable conclusions. Eager to go on holidays, vexed with his employer for the lateness of his demand, angered by his expulsion, Ian wrote tersely “The judge was wrong to exclude me”. It was meant facetiously but Geoffrey Gordon was unused to antipodean humour. He took the advice seriously and briefed counsel to appeal on the suggested ground.

The rest is history, and although it happened there, not here, it only happened because of one of us.

The appeal did not pass without incident. It was not obvious from the course of argument that Ian's expulsion would result in a re-trial. At one stage Sachs LJ asked testily "Is this man Hanger black?" He was urbanely reassured "No, my Lord, Mr Hanger's father is the Lord Chief Justice of Queensland." Geoffrey Gordon & Co employed a very superior articled clerk who liked to hint of an immaculate English pedigree. He remarked icily to me that Lord Justice Sachs "was the last person to ask whether someone was foreign."

The worth of a McKenzie friend to an unrepresented litigant, and therefore to the court, was quickly recognised. When addressing the Australian Legal Convention in Adelaide in 1979 Sir Robert Megarry remarked:

"Litigants in person pose their own special problems for the judge. ... even better is the presence of a McKenzie adviser. He is someone who has no right to address the court, but who is permitted to sit beside the litigant in order to prompt him, make suggestions to him and advise him, and make notes. Such an adviser can do much to see that the litigant's real case is put before the court and that time is not wasted ... the essence of such an adviser's value is that anyone whom the litigant in person feels to be on his side can do much to make the trial more effective, if he is any good."

The English, you observe, were quick to claim credit for the innovation. Although addressing an Australian audience it was only belatedly, and in a footnote, that Sir Robert acknowledged that the original McKenzie friend was "a young Australian lawyer". See 1980 54 ALJ 64.

The limitation that the McKenzie friend may not address the court was insisted upon by Lord Denning in a case reported in *The Times* June 4 1974, *Mercy v. Person Unknown* in a judgment which shows an uncharacteristic conservatism.

So well entrenched in the law is the position of the McKenzie friend that Aronson & Dyer in their work "*Judicial Review of Administrative Action*" assert that in some circumstances it will be a breach of procedural fairness to deny "another person to accompany and assist the person entitled to be heard". (See P 562).

The right to a McKenzie friend continues to generate controversy. In a recent decision, *R. v. Bow County Court ex parte Pelling*, *The Times* 8 March 1999 the Court of Appeal forbade McKenzie friends from appearing on applications in chambers.

The decision drew a severely critical editorial from the *New Law Journal*, March 12 1999, which asked "What harm is there in a plaintiff or defendant who is unable to obtain legal aid, afford professional assistance and has been unable to attract the attentions of a *pro bono* group having assistance in the case?" and went on to implore judges to ignore the decision and "in the interest of fairness" exercise the discretion to allow a McKenzie friend "in all but the most exceptional cases".

Alas, the most noble concept is open to corruption. The "McKenzie friend procedure" was described by Moffitt P (*Re B* 1981 2 NSWLR 372 at 385-6) as:

"... a device which was adapted from a decision in England in a civil case considered to be exceptional ... and applied here as a technique in criminal cases usually on the trial of



hardened criminals where the accused would appear to defend himself with the advantages of that course, but have a person with legal experience, who may or may not be admitted to practice ... employed by some group ... to “appear” and conduct the case ... the McKenzie friend, being behind the scenes, would bear no responsibility for any impropriety in the conduct of the case and his ... part would not be apparent and subject to control or criticism. This procedure was initially permitted by some judges, but came to be seen as what it appears to be, ... an abuse of the court’s procedures ...”.

See also *R v. E J Smith* 1982 2 NSWLR 608 per Street CJ (at 613). However balance was restored by the High Court when *Smith* applied for special leave to appeal. Gibbs CJ said (159 CLR at 534):

“... it would be far too absolute to say that an application to have a McKenzie friend should always be refused”.

I did not set out to write a treatise on the law relating to McKenzie friends. Rather my purpose is to note the contribution made by one of our members to the advancement of the law and to suggest that as a corollary we should sometimes see in our work a significance and importance wider than the outcome of particular litigation to the parties involved in it, although that of course must remain our prime focus. We should be alive to the possibility that what we are doing may have a lasting consequence. So approached, we should look on our work and each other with new respect. We may be handling the raw materials of history.