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The removal of legal aid from the majority of civil and family matters has led to the emergence of a new entrant to the legal services market. Fee-charging McKenzie Friends are reportedly extending their traditional role of assistance to litigants in person in court proceedings to incorporate legal advice and representation. Concerns about the access to justice implications for litigants in person of introducing a new branch to the legal profession has culminated in a judicial consultation advocating a prohibition on fee recovery. Smith et al's recent report, however, casts doubt on the appropriateness of this recommendation suggesting instead that regulation may be a more proportionate response. This paper considers the debate on the future of McKenzie Friends by analysing the existing empirical evidence as well as the findings of the author's qualitative research on the experiences of litigants in person in the civil and family courts. Whilst McKenzie Friends who are inimical to the access to justice needs of litigants in person exist, evidence from litigants in person suggests that in the absence of legal aid, fee-charging McKenzie Friends can provide a more flexible and affordable alternative to the legal profession. Overall, this paper highlights the importance of listening to the experiences of litigants in person to provide them with a voice before making the important access to justice decision of introducing a fee prohibition. Adopting a litigant in person focussed approach may indicate a system of regulation, education and court supervision.

Introduction

The withdrawal of legal aid from the majority of civil matters by the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO), has led to an increase in the number of litigants who appear in court without representation.[1] These so-called litigants in person

[1] Statistics state that in April to June 2016, neither the applicant nor respondent had legal representation in 34 per cent of private family law cases, representing an increase of 17 percentage points from April to June 2013. MOJ, *Family Court Statistics Quarterly, England and Wales* (April to June 2016), at p 14.

(LIPs), are hardly an unexpected consequence of the removal of public funding, as their growth was predicted by both the Government[2] and the Civil Justice Council.[3] However, what has been less predictable is the phenomenon of LIPs engaging the services of fee-charging McKenzie Friends (McFs), rather than seeking advice and representation from the legal profession. The entitlement to in court assistance has been acknowledged from as early as 1831 when Lord Tenterden CJ declared that, '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'.[4] The term 'McF' was adopted much later when the validity of in court assistance was determined in *McKenzie v McKenzie*.[5] In this case, Mr McKenzie's assistant, an Australian Barrister named Mr Hanger, was denied permission to provide Mr McKenzie with in court assistance, as he was not on record as his legal adviser. The Court of Appeal recognised that LIPs are entitled to receive appropriate support in court. Sachs LJ confirming that it is always 'in the public interest that litigants 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'[6]

Following the judgment in *McKenzie v McKenzie,* the role adopted by McFs has traditionally been one of providing assistance to a LIP which falls short of representation. Yet, in an effort to provide support to LIPs and relieve the pressures faced by the judiciary caused by the influx of LIPs, evidence suggests that judges may be willing to extend the remit of McFs. Recent research by the Ministry of Justice (MOJ) refers to the judiciary reporting regular sightings of professional McFs in local courts where judges grant rights of audience including on rare occasions the cross-examination of vulnerable witnesses.[7] These are functions usually restricted to the legal profession.[8] This has become a particular concern in private family law, as the withdrawal of public funding from most private family matters has led to fee-charging McFs specialising in this area of law.[9] In their recent report, Leanne Smith et al established that the fee-charging McFs they spoke to confirmed that they specialised in

[2] MOJ, *Reform of Legal Aid in England and Wales: the Government Response* (Cm 8072, 2011), at [140].
[3] Civil Justice Council (CJC), *Access to Justice for LIPs (or self-represented litigants) A Report and Series of Recommendations to the Lord Chancellor and to the Lord Chief Justice* (November 2011), at [15].
[4] C*ollier v. Hicks* (1831) 2 B. & A. 663, at 669.
[5] [1970] 3 WLR 472.
[6] Ibid, at [479].
[7] MOJ, *Alleged perpetrators of abuse as LIPs in private family law: The cross-examination of vulnerable and intimidated witnesses* (MOJ Analytical Series 2017), at p 21.
[8] Legal Services Act 2007, S.12 (1), Pt 3.
[9] Legal Services Consumer Panel (LSCP), *Fee-charging McKenzie Friends* (April 2014), at p 13.

family law cases, which tended to focus mainly on child arrangements.[10] Despite recent reports, evidencing the working practices and behaviour of McFs there remains a scarcity of qualitative research investigating the McF/LIP relationship from a LIP perspective.

The emergence of fee-charging McFs arises in part because of the advice lacuna that exists following the removal of legal aid from the majority of civil and family matters. LIPs unable to afford to instruct a legal professional can receive pro bono assistance, but the sheer number of LIPs requiring this help leads to demand outstripping supply. Schemes such as Bar Direct have the prospect of increasing access to justice. The scheme allows litigants to go directly to barristers rather than having to engage the services of a solicitor.[11] This can result in significant savings for LIPs, as they no longer have duplication of resource. Solicitors also charge by the hour, which can lead to greater expense than may be incurred when instructing a barrister directly when charging by the hour is the norm.[12] The Bar Council supports this contention arguing that instructing barristers direct can be an attractive option for LIPs who have the finances to pay for some help especially as a young barrister will often charge a comparable or cheaper hourly rate than a McF.[13] Notwithstanding, in accordance with Liz Trinder et al's findings, few interviewees in the author's study knew of the Bar Direct Scheme.[14]

There is evidence that solicitors too have adjusted their service provision to LIPs by offering legal advice on an unbundled basis.[15] This involves litigants 'selecting from lawyers' services only a portion of the full package and contracting with the lawyer accordingly'.[16] This frees litigants from the burden of having to invest considerable financial resource in order to engage the services of a lawyer. Instead, LIPs can instruct a solicitor to deal with a discrete matter or provide advice on a particular issue without having the expense of retaining the

[10] Leanne Smith et al, '*A study of fee-charging McKenzie Friends and their work in private family law cases'* (June 2017) at p 54.
[11] The Bar Council, http://www.barcouncil.org.uk/using-a-barrister/public-access/ accessed on 11 August 2016.
[12] This was a benefit identified by a number of the interviewees in the author's study.
[13] Bar Council, *Response to the Reforming the courts' approach to McKenzie Friends consultation* paper (June 2016), at [7].
[14] Liz Trinder et al, *Litigants in person in private family cases* (Ministry of Justice 2014); Smith et al, '*A study of fee-charging McKenzie Friends and their work in private family law cases'* (June 2017), at p 117.
[15] The term 'unbundling' was created by Forrest S Mosten in his article entitled 'Unbundling legal services and the family lawyer' (1995) 28 Fam LQ 421.
[16] Ibid, at p 423. Mosten explains that these services usually consist of '(1) gathering facts, (2) advising the client, (3) discovering facts of the opposing party, (4) researching the law, (5) drafting correspondence and documents, (6) negotiating, and (7) representing the client in court'.

lawyer for all other aspects of their case. In this respect, a LIP can keep control over their case whilst retaining the possibility of seeking assistance when needed, depending on the seriousness of the issue and their financial position. Unbundled services received Court of Appeal approval in *Minkin v Landsberg.*[17] Briggs LJ gave a further endorsement in his recent report when recognising that LIPs should be able to receive 'affordable early advice on the merits of the case' without having to commit to the expense of a full retainer. Further, he espoused that solicitors should adapt the provision they offer to respond to this requirement.[18] The Law Society has reacted by issuing a Practice Note advising solicitors about the correct manner in which to provide unbundled services.[19]

Clearly, LIPs need to be aware of the choices they have when instructing the legal profession. This may lead to them shopping around for legal services and thus widening routes to accessing justice. One way to encourage this behaviour is by ensuring that litigants know how to instruct barristers directly. Since 2015 there has been a Direct Access Portal, which is the Bar Council's website listing all Direct Access Barristers together with their specialism.[20] It is imperative that this new service is advertised in a manner that reaches the attention of any potential litigants so that they are aware of their legal service options. It may be that solicitors should also consider changing their charging methods to a fixed fee model for discrete court hearings. This would afford LIPs access to legal assistance that would otherwise be too expensive, due to a lack of sufficient funds or knowledge of the court process to enable them to agree an inherently uncertain hourly rate.

Despite the introduction of Bar Direct and unbundled services, there will still be LIPs for whom the fees of the legal profession remain unaffordable. Whilst support and legal information is available from organisations such as the Personal Support Unit, which is an independent charity whose aim is to 'support people going through the court process without legal representation',[21] its remit does not extend to legal advice or representation.[22] For impecunious LIPs, fee-charging McFs offer a possible route to receiving advice and assistance and thus a possible plug for this access to justice gap.

[17] [2015] EWCA Civ 1152 [76].
[18] Briggs LJ, *Civil Courts Structure Review: Final Report* (Judiciary of England and Wales 2016), at [6.38].
[19] The Law Society, 'Unbundling civil legal services' (4 April 2016), at [2] http://www.lawsociety.org.uk/support-services/advice/practice-notes/unbundling-civil-legal-services/
[20] http://www.directaccessportal.co.uk/
[21] www.thepsu.org/about-us/what-we-do/
[22] Ibid.

Whilst allowing new entrants to the legal services sector may ensure LIPs have advice and representation at an affordable cost, this comes with unquestionable risks for LIPs. McFs do not have to be legally qualified or follow a code of practice. Additionally, there is no mandatory professional regulatory authority for McFs.[23] Thus; LIPs are denied the protection that regulation can afford in the event that inadequate advice leads to financial loss or breaches of confidentiality. In contrast, instructing a solicitor or barrister involves the protection of professional regulation by the Solicitors Regulation Authority (SRA) and the Bar Standard's Board (BSB) respectively.[24] Regulation requires members of both branches of the legal profession to have a practising certificate,[25] adhere to a code of practice[26] and for firms of solicitors and individual barristers to take out professional indemnity insurance.[27] In addition, complaints may be made to the Legal Ombudsman about either branch of the legal profession.[28] In appropriate cases, this can result in financial compensation as well as referral to the relevant regulatory body for disciplinary proceedings.[29]

As will be explained in this paper, there are conflicting reports about the behaviour of fee-charging McFs. Initial evidence suggested that they usually became involved in private family matters because, as fathers, they have had a personal negative involvement with the family courts. This leads to a possible risk that some of them act in an agenda-driven manner favouring the needs of fathers over those of mothers and more importantly the best interests of the child. Consequently, this leads to conflicts of interest between McFs and the LIP mothers they represent or, more usually, oppose.[30] Worse still, it can result in intimidating behaviour, as well as increasing the often emotionally charged atmosphere in cases that involve LIPs on both sides. However, Smith et al's report cast doubt on the prevalence of agenda-driven McFs providing a more favourable examination. They report that many of the

[23] There is a Society of Professional McFs but membership is on a voluntary basis. http://www.mckenziefriends.directory/index.html
[24] Both bodies are Approved Regulators in accordance with the Legal Services Act, s 20.
[25] See the Solicitors Act 1974, s 1(A) and the Legal Services Act 2007, Pt 2, Sch 5 which requires barristers to have a practising certificate issued by the General Council of the Bar.
[26] Solicitors Regulation Authority (SRA), 'Handbook' (Version 16, October 2017) SRA Code of Conduct 2011; The Bar Standards Board (BSB), Handbook (3rd edition, April 2017) Pt 2 The Code of Conduct (9th Edition).
[27] BSB Rules, r 114; SRA Indemnity Insurance Rules, r 1.3.
[28] The Legal Ombudsman was established by the Office for Legal Complaints, under the Legal Services Act 2007, s 114.
[29] Legal Services Act 2007, ss 137 and 141.
[30] LSCP, *Fee-charging McKenzie Friends* (April 2014), at [3.5] [4.17] [4.18].

McFs in their sample displayed a genuine desire to assist LIPs rather than acting for self-serving ends. Their working practices also provided a more flexible and affordable service which favours LIPs' access to justice needs in a manner unparalleled by the legal profession.[31] It is the purpose of this paper to offer further qualitative evidence in relation to the debate about the future of McFs by listening to the voice of the LIP. It is this opinion, which should also inform decisions on whether there should be a ban on McFs charging for their services, as the Judiciary recommend,[32] or whether regulation and minimum qualifications are alternatives that are more appropriate.[33]

This paper begins by explaining the methodology employed by the author for her study on the experiences of LIPs before examining the legal status of McFs as well as the current empirical evidence about their prevalence and working practices. A comparison is then made with the evidence emerging from the author's qualitative inquiry investigating the experiences of LIPs in the civil and family courts post-LASPO. This evidence facilitates the discussion about what the future should hold for McFs who charge for their services. Rather than banning fee-charging McFs, this paper, in accordance with Smith et al's recommendations, argues that regulation and minimum qualifications might be a more proportionate response.[34] This could afford LIPs a further avenue to effective access to the courts, supported by adequate protection and take an initial step towards filling the advice gap that exists in the legal services sector. As this paper is concerned with the phenomenon of fee-charging McFs all references to McFs relate to this type of McF unless otherwise stated.

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[31] Smith et al, '*A study of fee-charging McKenzie Friends and their work in private family law cases'* (June 2017).

[32] Lord Chief Justice of England and Wales, *Reforming the courts' approach to McKenzie Friends: A Consultation* (February 2016) (Consultation).

[33] Bearing in mind the prevalence of McFs in family matters, the discussion that follows focuses on the family courts. This highlights the need for future research not only about the behaviour of McFs in the family courts to determine whether the evidence contained in this paper is prevalent, but also about the experiences of LIPs who engage the services of McFs in civil matters. So far as the latter situation is concerned, this forms part of a wider requirement to investigate the experiences of LIPs in civil matters, as the most recent study was conducted before the LASPO reforms in 2005. See R Moorhead and M Sefton, *Litigants in Person: Unrepresented litigants in first instance proceedings* (Department for Constitutional Affairs 2005).

[34] Strategies for the regulation of McFs are contained in Competition and Markets Authority (CMA), *Legal services market study: Final Report* (15 December 2016), at p 17; LSB, *A vision for legislative reform of the regulatory framework for legal services in England and Wales* (September 2016) [6] and LSCP, *Fee-charging McKenzie Friends* (April 2014), at [6.10] and [6.11].

Methodology

The evidence generated for this paper derives from the author's qualitative research investigating the experiences of LIPs in the civil and family courts. After obtaining ethical approval from the School of Law and Social Justice's Ethics Committee at the University of Liverpool, semi-structured interviews were conducted with 36 LIPs involved in litigation in a civil and family hearing centre in the North West of England. Interviews took place after the LASPO reforms were implemented between July and October 2015. Recruitment of participants was facilitated by the Personal Support Unit,[35] connected to the court building in which the interviewee's cases were listed. The PSU gave leaflets to their customers explaining the purpose of the research. PSU involvement meant that all interviewees had received some form of legal information and assistance before interview although this varied according to how long they had been involved in the court process.

Interviewees, who expressed an interest in participating in the project to the PSU, were introduced to the author usually before they appeared in court that day or after they had received other help from the PSU. The interviews then took place in a court witness room after their court hearing or consultation. This mimics the approach taken by Trinder et al when undertaking their research on LIPs. They explain that in four of the courts the usher introduced members of the research team to possible participants prior to the hearing.[36] In the present study, all interviews were audio-recorded, following the participant's consent, in order to assist in transcription as well as provide verbatim accounts to enrich the subsequent written analysis. The length of time of interviews ranged from between thirty and ninety minutes and the subsequent data was analysed using inductive thematic analysis[37] and coding using the computer software package NVivo 10.

Of the 36 interviewees, 19 were female and 17 were male. The majority of interviewees fell within the younger age ranges of 18 – 30 (10 interviewees) or 31 – 40 (10 interviewees). Only six interviewees were between the ages of 51 – 60 and a mere two were between the

[35] The PSU offers free support for those facing proceedings in the civil and family courts and some tribunals. www.thepsu.org
[36] Trinder et al, *Litigants in person in private family cases* (Ministry of Justice 2014), at p 60.
[37] V Braun and V Clarke, Using thematic analysis in psychology (2006) *Qualitative Research in Psychology* 3 (2) 77.

ages of 61 – 70. Nine interviewees were unemployed and of the 27 who were in employment, seven of these had a professional role. Twenty-two of the interviewees would have fallen within the scope of legal aid before the LASPO reforms because they would have satisfied the merits test and their disposable income fell below the means test threshold of £733 per month. As far as issues of ethnicity are concerned, only two of the interviewees were non-White British being born in Jamaica and Pakistan. The sample, therefore, provides no specific data regarding the experiences of LIPs from ethnic minority backgrounds or for whom English is a second language.

The majority of LIPs were appearing in private family matters. Only two interviewees had civil court issues and the remaining 34 were engaged in private family matters. The evidence contained herein is limited to matters involving s.8,[38] child arrangement orders in private family law matters. Sixteen interviewees were involved in proceedings where neither the applicant nor respondent had legal representation, whilst eighteen interviewees had a represented opponent. One interviewee had a McF advising the other party and one matter was a without notice application. The greater amount of matters involving LIPs on both sides is a likely consequence of the removal of legal aid from the majority of private family matters. This is a trend replicated in the family courts more widely.[39]

A specific theme that emerged from the data was the behaviour of McFs who were acting on behalf of the participants as well as those who were representing the LIP on the other side. Of the 36 interviewees, only two had received assistance from a McF and only one had a McF assisting the other side. The low number of LIPs instructing McFs is also a feature of previous research. Trinder et al's study involved 24 McFs of which only three were fee-charging McFs and Smith et al's report included McFs in only 2% of the cases listed on the days they had a researcher present in court. This represented 14 out of 846 hearings listed. Of these 14, seven were observed. The number of cases involving McFs led to their suggestion that fee-charging McFs affect a very small fraction of private family

[38] Children Act 1989.

[39] 'In January to March 2018, the proportion of disposals where neither the applicant nor respondent had legal representation was 37%, an increase of 20 percentage points since April to June 2013. Correspondingly, the proportion of cases where both parties had legal representation dropped by 16 percentage points to 19% over the same period', Ministry of Justice, *Family Court Statistics Quarterly, England and Wales* (January to March 2018), at p 6.

proceedings.[40] They suggest that there are approximately 100 McFs operating with many operating in the field of private family law. Nevertheless, the potential financial and emotional costs that LIPs may incur because of their assistance warrants enquiry into the McF/LIP relationship and the requirement of legal intervention.[41]

As with any qualitative study, there are limitations in respect of the research methodology's ability to provide a trustworthy and unbiased account of the experiences of its participants. One of the main issues considered by the author was the reliability of the data in respect of the capability of LIPs to give an objective portrayal of their experiences or opinions about the court system. This is particularly important, as LIPs were interviewed shortly after appearing in court. It may be questioned whether this allowed for a sufficient period of reflection, as responses may have revealed initial thoughts but not long-term perspectives. Hence, LIPs' sentiments about their McF experience may have changed once they were no longer emotionally involved in the process.[42] Their emotional involvement also has the ability to colour their assessment of the services provided by McFs. However, this is an inherent feature of qualitative research, which can affect the validity of the data to the extent that it must accurately reflect the phenomena under study as perceived by that study population.[43]

This paper should be read with these limitations in mind and on the proviso that the small-scale nature of the research is such that statistical analysis of a representational nature is impossible. This is confirmed by the fact that the sample was drawn from a single court building, which may produce a less heterogeneous sample. Nevertheless, as Ritchie and Lewis explain, 'A study which cannot support representational generalisation may still generate hypotheses which can inform and be tested in further research. It may yield material about a particular individual case which is of interest in its own right'.[44] Thus, the analysis that follows intends to provide an understanding of the experiences of these particular LIPs in a quest to appreciate further the McF/LIP relationship from the LIP perspective, as well as inspire further research. It does not propose to assert that these experiences are either typical

[40] Smith et al, '*A study of fee-charging McKenzie Friends and their work in private family law cases'* (June 2017), at p 62.
[41] Ibid, at p 85.
[42] Trinder et al, *Litigants in person in private family cases* (Ministry of Justice 2014); Lee and Tkacukova, *A study of litigants in person in Birmingham Civil Justice Centre* (CEPLR Working Paper Series 02/2017), at p. 5.
[43] Jane Lewis and Jane Ritchie, 'Generalising from Qualitative Research' in Jane Ritchie and Jane Lewis (eds) *Qualitative Research Practice: A guide for social science students and researchers* (SAGE 2003).
[44] Ibid, at p 266.

or atypical. Rather, it intends to stimulate a conversation about whether and, if so, how the legal services sector should extend beyond the two branches of the legal profession to include McFs as a means of filling the gap in access to justice provision for LIPs.

The legal status of McKenzie Friends

There is unequivocal legal authority for the proposition that a LIP can 'arm oneself' with 'such assistance as he thinks appropriate, subject to the right of the court to intervene'.[45] This assistance can take many forms,[46] which include the support of a friend or family member in court to provide reassurance and assistance, as long as such help does not hinder the 'proper and efficient administration of justice'.[47] Support can also extend to the provision of legal advice. Although classified as a 'legal activity' under the Legal Services Act 2007,[48] it is not a 'reserved' legal activity.[49] As a result, LIPs can receive legal advice from anyone professing to be sufficiently qualified to provide this service. This leaves LIPs who cannot afford a lawyer in a precarious position, as they may receive well-meaning advice from an unreliable source. Worse still, they may receive advice from an unscrupulous adviser with ulterior reasons for providing the LIP with this type of assistance.

The provision of legal assistance by a non-legally qualified friend should not extend to representation in court or conducting litigation, as both of these services are reserved legal activities.[50] A McF, therefore, would not be permitted to 'act as the litigants' agent in relation to the proceedings; manage litigants' cases outside court, for example, by signing court documents; or address the court, make oral submissions or examine witnesses'.[51] In fact, ignoring these prohibitions amounts to a criminal offence, unless the court is willing to grant these rights on the making of an appropriate application.[52]

Practice Guidance makes it clear that the court should be 'slow'[53] to grant an application for rights of audience,[54] or the conduct of litigation[55] to a McF unless there is 'good reason.'[56]

[45] *R v Leicester City Justices, ex parte Barrow* [1991] 3 All ER 368, at 379 (Lord Donaldson MR).
[46] Ibid, at 376.
[47] Ibid, at 379.
[48] S.12 (3) (b), Pt 3.
[49] S.12 (1), Pt 3.
[50] Ibid.
[51] Practice Guidance: *McKenzie Friends (Civil and Family Courts)* (12 July 2010), at [4].
[52] Legal Services Act 2007, s 14 (1).
[53] Practice Guidance: *McKenzie Friends (Civil and Family Courts)* (12 July 2010), at [19].

There are sound justifications for this reticence, as, unlike lawyers, they are not required to be legally trained, insured or regulated. So far as those who act as McFs on a regular basis and therefore, consider themselves to be acting in a professional capacity, are concerned, the Practice Guidance stipulates that permission from the court to conduct litigation and/or represent LIPs should only be granted in 'exceptional circumstances'.[57]

Irrespective of this judicial guidance, evidence has emerged that the judiciary has displayed a willingness to allow McFs into court as, on 'balance it [is] better to have a McF than not'.[58] This anecdotal evidence is supported by the Legal Services Consumer Panel (LSCP), which reported that eight out of ten of the McFs they interviewed revealed that they had been granted a right of audience to advocate on their client's behalf.[59] Such rights have reportedly been regarded by some McFs as being the norm rather than being granted in 'exceptional circumstances' as required by the Practice Guidance.[60] The recent Consultation on fee-charging McFs supports this assertion. The judiciary remark that grants of the discretionary right to address the court on behalf of a LIP have become 'increasingly common'[61] as have requests by LIPs for McFs to be granted a right of audience on their behalf.[62] However, the reliability of this evidence must be weighed against the fact that quantifiable data regarding the number of McFs seeking advocacy rights is not provided and Smith et al's finding that the majority of McFs they interviewed did not wish to seek advocacy rights.[63]

Irrespective of the lack of reliable data concerning the true extent of McFs seeking rights of audience, the prospect that the judiciary is allowing McFs rights of audience requires further

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[54] The Legal Services Act 2007, s 12 (3) (1), Sch 2 states that, 'A right of audience means the right to appear before and address a court, including the right to call and examine witnesses'.
[55] The Legal Services Act 2007, s 12 (4) (1), Sch 2 states that, the conduct of litigation includes, 'the issuing of proceedings before any court in England and Wales … the commencement, prosecution and defence of such proceedings and … the performance of any ancillary functions in relation to such proceedings'.
[56] Practice Guidance: *McKenzie Friends (Civil and Family Courts)* (12 July 2010), at [20].
[57] Ibid, at [23]. The Legal Services Act 2007, Sch 3 para 1(2) (b), states that a McF who wishes to address the court must receive prior permission.
[58] CJC, *Access to Justice for LIPs (or self-represented litigants) A Report and Series of Recommendations to the Lord Chancellor and to the Lord Chief Justice* (November 2011), at [142]; MOJ, *Alleged perpetrators of abuse as LIPs in private family law: The cross-examination of vulnerable and intimidated witnesses* (MOJ Analytical Series 2017), at p 21.
[59] LSCP, *Fee-charging McKenzie Friends* (April 2014), at [3.14].
[60] Ibid, at [5.36].
[61] Lord Chief Justice of England and Wales, *Reforming the courts' approach to McKenzie Friends: A Consultation* (February 2016), at p 5.
[62] Ibid, at p 8.
[63] Smith et al, '*A study of fee-charging McKenzie Friends and their work in private family law cases'* (June 2017), at p 66.

examination. Whilst extending the rights of McFs can be applauded for bestowing on LIPs greater access to justice through the provision of affordable legal assistance and representation, it is a service that is wholly unregulated and offers LIPs little means of redress if things go wrong. This leaves LIPs exposed to the possibility of incorrect or misleading advice and the consequential financial cost this may involve. Additionally, when dealing with the personal issues that family matters necessarily entail, McFs are not subject to the same regulatory requirement to maintain client confidentiality as their professional counterparts.[64]

The cost implications of instructing unqualified advisers

There is growing evidence that McFs who represent LIPs in court will be protected from personal liability for any costs arising from undue delay or wasted costs. Rather, the LIP incurs this additional financial burden. In *Oyston and Another v Ragozzino*, the defendant made defamatory comments of a sexual nature about the claimants, a situation that had been facilitated by the McF, who had also sent similar correspondence on the LIP's behalf.[65] The LIP was, therefore, not 'at all well-served' by the assistance of his McF who was responsible for 'pouring yet more fuel on the flames rather than assisting Mr Ragozzino to present his defence with suitable moderation'.[66] In spite of this, the fact that he had allowed himself 'to be used as a mouthpiece' by the McF,[67] prevented him from distancing himself from responsibility for the defamatory statements made. Hence, he was responsible for the full extent of the damages awarded.

Similarly in *R (on the application of Laird) v Secretary of State for The Home Department & (1) Belinda McKenzie (2) Sabine McNeil*[68] the two McFs were spared a wasted costs order of £2,000 when they brought an application for judicial review of a deportation order, but failed to attend with their client at the resultant hearing. By conducting litigation without the LIP's authority, they had acted outside their remit as McFs[69] and were pursuing their own interests. Nevertheless, Simler J ruled that they should not be liable for the additional costs involved.

[64] cf solicitors and barristers whose codes of practice govern issues of confidentiality. See BSB Rules, r C15; SRA, 'Handbook' (Version 16, October 2017), at ch 4.
[65] [2015] EWHC 3232 (QB).
[66] Ibid, at [44].
[67] Ibid.
[68] [2016] EWHC (QB) (unreported). See also Chloe Smith, 'Campaigning' McKenzie Friends avoid £2,000 cost order' *Law Society Gazette* (26 February 2016) http://www.lawgazette.co.uk/law/campaigning-mckenzie-friends-avoid-2000-cost-order/5053891.fullarticle.
[69] Practice Guidance, *McKenzie Friends (Civil and Family Courts)* (12 July 2010), at [18].

They had been trying to help the litigant and had not been warned that a costs order might be made against them. The LIP was, therefore, liable for a wasted costs order in the sum of £4,421.

The cases of *Oyston* and *Laird* underline the precarious position of LIPs should they engage a McF who then uses their case as a means of pursuing personal interests. It also emphasises the fact that although McFs may state that they are conversant in law and procedure this may not necessarily be the reality. The McFs in *Laird* should have been aware of their limited remit, in accordance with the Practice Guidance 2010,[70] and that their application was totally without merit. These are matters, which should have been relayed to their client, so that an informed choice about proceeding could be made.

Whilst incurring unnecessary legal costs is a matter of concern for LIPs in civil matters, in family matters there is more at stake than financial loss. If a McF antagonises an already fragile relationship between the parties or is incapable of providing objective advice to a LIP, due to a quest to serve their own agenda, this may hinder the LIP in spending time with their child or protecting them when safeguarding issues exist. This may have adverse consequences not only for the LIP, but also for the child who is the subject of the proceedings.

The quality of assistance provided by a McF is of crucial importance in family proceedings, as the Practice Guidance states that where proceedings relate to a child 'the presumption in favour of permitting a McF to attend such hearings … is a strong one'.[71] In a situation where the LIP may be unable to maintain objectivity due to their emotional involvement, having a self-serving McF, who also feels passionate about the issues can be a toxic combination for courtroom harmony. Whilst assistance in court is to be encouraged as a means of facilitating access to justice for LIPs, this must be subject to the vigilance of the judiciary in identifying behaviour that is contrary to the LIP's interests.

[70] Ibid.
[71] Ibid, at [9].

The agenda-driven McF

There have been three recent reports including evidence about the qualifications and behaviour of McFs.[72] The first of these, solely relating to McFs, was conducted by the LSCP in 2014.[73] The evidence base for this research consisted of a search of 34 websites offering McFs' services for remuneration as well as interviews with 28 McFs.[74] One obvious omission from the LSCP project is the involvement of the LIPs who engaged the services of the McFs taking part in the study. The report, therefore, fails to provide a voice for the people whose access to justice rights are at stake when instructing McFs. The authors recognise this shortcoming but refer to a lack of funding as one of the reasons for the absence of the LIP's voice.[75]

The LSCP report found that few McFs were legally qualified and most offered their services following their own negative experience in court during a divorce or child contact matter.[76] These negative experiences were such that they raised concerns that they may compromise the advisers' ability to act in an objective manner and instead lead to them pushing their 'personal viewpoint onto the client'.[77] As most McFs were male, and fathers themselves, they tended to be assisting other fathers, so that there was the resultant risk of them pursuing a personal agenda to the detriment of the client.[78] Being mainly interested in the plight of fathers, there was also anecdotal evidence of ex-wives and mothers being subjected to intimidating behaviour by the McFs.[79] This behaviour has been identified in a number of private family law cases.[80]

The authors of the LSCP report suggest that such behaviour may not be a large-scale problem due to the small numbers of litigants using McFs' services and the lack of response to the call for case studies.[81] However, Trinder et al challenge this conclusion.[82] Their report included

[72] LSCP, *Fee-charging McKenzie Friends* (April 2014); Trinder et al, *Litigants in person in private family cases* (Ministry of Justice 2014); Smith et al, '*A study of fee-charging McKenzie Friends and their work in private family law cases'* (June 2017).
[73] LSCP, *Fee-charging McKenzie Friends* (April 2014).
[74] Ibid, at [2.9].
[75] Ibid, at [2.10].
[76] Ibid, at [3.5].
[77] Ibid, at [1.11].
[78] Ibid, at [4.17].
[79] Ibid.
[80] *Re H (Children)* [2012] EWCA Civ 1797, at [15]; *Re Baggaley*[2015] EWHC 1496 (Fam).
[81] LSCP, at [4.2].

observations of 24 cases involving McFs, of which three McFs received payment for their services.[83] Whilst one of these advisers made a very positive contribution, the other two were motivated by their own personal history of pursuing litigation in the courts and both made a 'negative contribution' to the proceedings.[84] This led to one case taking double the time it should have done. The other involved a mother who instructed a McF linked to a fathers' rights group, which led to her agreeing to a shared residence order when she was reluctant to allow even unsupervised time with the child.[85] Trinder et al voice concerns that such behaviour is unlikely to be rare due to the evidence supplied during the research from members of the judiciary, Cafcass[86] and lawyers about the behaviour of McFs.[87] The author's own qualitative research, outlined below, provides further evidence of McFs behaving in a manner inimical to the interests of LIPs.

A more favourable typology

Witness testimony from members of the judiciary casts doubt on the negative aspects of McFs being involved in their own previous personal disputes and members of father's rights groups. Rather than impeding the McFs' ability to remain neutral, the suggestion is made that this enhances their ability to remain non-confrontational in the courtroom.[88] Smith et al also offer a more encouraging analysis of the behaviour and working practices of McFs. Their study involved semi-structured face-to-face interviews with 20 fee-charging McFs and telephone interviews with 20 LIPs who had instructed fee-charging McFs. Additionally, there were observations of seven cases involving McFs.[89] Whilst the report provides, for the first time, evidence from both McFs and LIPs who have used their services, the 'vast majority' of the LIP sample was generated from sources that would be expected to have a

[82] Trinder et al, *Litigants in person in private family cases* (Ministry of Justice 2014).
[83] Ibid, at p 94.
[84] Ibid, at pp 96 – 97.
[85] Ibid, at p 97.
[86] Cafcass is the acronym used for the Children and Family Court Advisory and Support Service. They represent children in family court cases and are tasked with ensuring that 'children's voices are heard and decisions are taken in their best interests'. They are independent of the courts, social services, education and health authorities and all similar agencies. See www.cafcass.gov.uk/about-cafcass.aspx
[87] Trinder et al, *Litigants in person in private family cases* (Ministry of Justice 2014), at p 111.
[88] MOJ, *Alleged perpetrators of abuse as LIPs in private family law: The cross-examination of vulnerable and intimidated witnesses* (MOJ Analytical Series 2017), at p 21.
[89] Smith et al, '*A study of fee-charging McKenzie Friends and their work in private family law cases'* (June 2017), at p 10.

pro-fee-charging McF leaning'.[90] As the authors acknowledge, this has the potential to skew the results 'towards those with broadly positive experiences of fee-charging McFs.[91] However, the inclusion of in court observation of McFs provides independent evidence of the impact of McFs in the courtroom. The study provides an invaluable insight into what some LIPs like about McFs and why they used them instead of lawyers. It also evidences the type of work carried out by McFs on behalf of LIPs. The author's study builds on this research by documenting the experiences of two LIPs who instructed fee-charging McFs, unaffiliated to fathers' rights groups, to act on their behalf.

Smith et al found that there were four main types of McF. The 'business opportunists' become McFs because they realise there is a gap in the legal services market. They are attracted to the role either because they have been in a family matter themselves, see it as a first step to becoming a lawyer or, being already a lawyer, as a more flexible way to practice.[92] The 'redirected specialist' has years of experience as a family lawyer and makes the decision to practice as a McF because there is more work available.[93] The 'good Samaritan' McF is motivated by a desire to assist LIPs who are in dire need of help.[94] Contrastingly, the 'family justice crusader' is motivated by previous negative court experiences.[95] However, these McFs represented only a small number of the sample and not all of those with a negative experience became crusaders; some became 'good Samaritans' or 'business opportunists'.[96] The 'rogue' McF was the least common type of McF but their inappropriate conduct was at the 'extreme end of the spectrum' involving sexual offences and fraud convictions.[97] As there were only a small number of 'family justice crusaders' and 'rogue' McFs the study provides evidence that there are McFs who have a genuine desire to assist LIPs rather than being motivated solely by self-serving interests.[98]

Furthermore, the report reveals that there are a number of reasons why LIPs would favour the services of a McF over those of a lawyer beyond costs saving. The flexible manner in which

[90] Ibid.
[91] Ibid, at p 11.
[92] Ibid, at p 17.
[93] Ibid, at p 18.
[94] Ibid, at p 19.
[95] Ibid, at p 20.
[96] Ibid.
[97] Ibid, at p 21.
[98] Ibid, at p 16.

McFs conducted their business was particularly favourable. Most worked from home and were willing to meet with LIPs outside normal office hours and respond to texts and emails late at night and at weekends. They were also willing to meet clients at mutually convenient locations and spoke to them in an informal friendly manner.[99] This meant they shared an 'identity or affinity', which was far more appealing than the formality adopted by lawyers.[100]

Smith et al also provide evidence of the range of work undertaken by McFs, the bulk of which occurs outside the courtroom. There was evidence of McFs conducting litigation on behalf of LIPs, despite this being a reserved legal activity[101] and engaging in an extensive range of tasks. This included assistance with paperwork, giving legal advice and information, managing expectations and facilitating settlements.[102] Hence, representing LIPs in courts is only the 'tip of the iceberg' when it comes to the activities of McFs.[103] In fact, Smith et al found that most McFs do not want to represent LIPs in court. They reported that McFs three approaches to rights of audience. The majority acted as a 'coach' and took on the traditional role of supporting the LIP rather than speaking in court.[104] Others would only participate in the court proceedings if the LIP were struggling and needed the McF to play a more active role. These 'understudy' McFs, therefore, did not actively seek rights of audience.[105] The only McFs who did want to represent LIPs and play a greater role in court were 'frustrated actors'. These McFs were more likely to be disruptive.[106]

The value of Smith et al's report resides in the evidence that not all McFs stereotypically become involved in their role due to previous negative court experiences or act unscrupulously. Indeed, their analysis found overall that LIPs 'probably do better' when assisted by a McF than they would do if they had to proceed alone.[107] These findings have important access to justice implications in respect of the proposal to ban McFs from charging for their services and supports the contention, discussed further in this paper, that regulation, qualification and court supervision may be a more appropriate response.

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[99] Ibid, at p 32
[100] Ibid, at p 39.
[101] Practice Guidance (n. 103), at [18].
[102] Smith et al, *A study of fee-charging McKenzie Friends and their work in private family law cases* (June 2017), at p 43.
[103] Ibid, at p 59.
[104] Ibid, at p 67.
[105] Ibid, at p 68.
[106] Ibid, at p 70.
[107] Ibid, at p 57.

Analysis of interviews

Although Smith et al reported that agenda-driven McFs represented only a small proportion of their sample[108] it was a feature that emerged from the interviews conducted by the author. The following analysis, therefore, provides an insight into the types of negative behaviour that can occur from, what Smith et al may term as 'family justice crusaders' or 'rogue' McFs and the impact it may have on LIP clients. As will be explored, it appears that despite the potential accompanying risks of instructing McFs, it is a service that LIPs may remain willing to employ. To provide a richer insight into the interviewee perspective, statements are woven into the following analysis. The interviewees are given pseudonyms to retain their anonymity.

McKenzie Friends as a cost-effective access to justice alternative

Janice, who approached a McF on the recommendation of a previous client, provides a stark account of the negative behaviour of a McF. Her main motivation for instructing a McF was her financial inability to instruct a lawyer. Although she engaged the McF's services on a number of occasions, Janice eventually decided to forego his assistance due to the perceived detrimental impact his advice was having on her mental health and wellbeing. As with the evidence in previous research, '*it was clear that he was a father that was denied access, going to the High Court with his own case*'. Despite being concerned by the McF's confession that he was both a '*woman hater'* and '*very bitter about the system'*, Janice still decided to '*reluctantly'* accept his services due to the belief that she had no other avenue for advice. The main reason for maintaining the McFs assistance was that she could afford his charges. '*He is a far, far more reasonable rate than any solicitor you can imagine'.* The charging rate was '*roughly around the £40 per hour mark, and I think he said £150 for a day'*.

This evidence concurs with that provided by the LSCP, who found that McFs charged an hourly rate of £15 to £89 or a daily rate of between £100 to £400, and typically £150 to £200.[109] David's testimony echoes this evidence, remarking that his McF charged £140 per

[108] Ibid, at p 20.
[109] LSCP, *Fee-charging McKenzie Friends* (April 2014), at [3.18].

day. This corresponds with the evidence provided by Peter, who explained that the main reason for forgoing assistance from the legal profession was the potential cost. *'I didn't have the funds, £250 for half a day (laughs)*'. It is perhaps unsurprising; therefore, that LIPs perceive McFs as a valuable means of gaining access to justice, which would otherwise be unobtainable. As explained earlier, the PSU is available for support and guidance but its remit does not extend to the provision of advice and it only operates from eighteen locations throughout England and Wales.[110] Hence, as the LSCP explains, 'for many LIPs, the real choice is actually between using a McF or being entirely unsupported during proceedings.'[111]

McKenzie Friends and their assumed knowledge

The need for protection from 'family justice crusaders' and 'rogue' type McFs is highlighted by the fact that Janice maintained the McF's services despite being aware of his hostility to women and the obvious conflict of interest this may cause. Janice explains that her McF seemed '*to be very, very knowledgeable in terms of the legal arena, so much so that he was very persuasive and I thought well I need him'.* This assumption appears to have been founded purely on the fact that the McF was providing advice rather than evidence of his ability. Despite Janie being involved in a case in which she was concerned about allegations of sexual abuse made by her young son against his father, the McF did not provide her with advice on how to ensure that the safeguarding issues and evidence came before the court. This is perturbing because when interviewed Janice brought with her two files of documentation that she had accumulated over the two-year period of the proceedings. She remarked that the McF did not explain the importance of providing the court with supporting documentation in relation to the allegation of sexual assault and the abuse she had suffered. Additionally, Janice did not receive information about her potential eligibility for legal aid.[112] Entitlement to legal aid arose from the fact that she met the criteria for public funding. The allegation of sexual assault against the child of the family and domestic violence was, at the time of seeing the McF, within two years of the child arrangements application by the child's

[110] www.thepsu.org/our_network/
[111] LSCP, *Fee-charging McKenzie Friends* (April 2014), at [4.5].
[112] LASPO, Sch 1, Pt 1, para 12, states that civil legal aid is available where (a) there has been or is a risk of, domestic violence between the A and B and (b) A was, or is at risk of being, the victim of that domestic violence.

father.[113] The failure to provide this information had a major impact on the interviewee. This left her with considerable procedural and adversarial barriers to overcome. She would now have to prepare paperwork for a fact-finding hearing[114] and cross-examination by the McF representing the applicant without legal advice or assistance. Additionally, the child of the family was exposed to potential danger should Janice fail to file the evidence she had generated in support of her objection to the father's application. Denied this vital information, the court may have decided that any allegations were unfounded due to the lack of supporting evidence.

Whilst having McFs advising in private family matters when they do not have adequate skills is a cause for concern, Janice's McF also displayed behaviour that was deliberately contrary to best interests of the child. Janice was encouraged to lie in court by stating that she had mental health problems and post-natal depression but when this was challenged she received the aggressive response of *'Do you want to win this case or not?'* Preparation for the fact-finding hearing was also hindered. When assisting with the writing of her supporting statement, she explains how it was '*very much kind of like, I don't want to create a slanging match, but I will get this dig in and that dig in'*. This provides an example of the type of emotionally involved behaviour that the LSCP warned may arise when McFs choose to assist LIPs after their own negative court experiences. In this case, Janice recognised that this was not conducive to her case remarking that she '*wanted it to be factual and to be, look I have got this evidence here, I have got a lever arch full of stuff*'. In this manner, it seems that, in the words of Bellamy J, Janice was a 'puppet in [the] hand' of the McF to the detriment of her case.[115] Despite these facts, Janice described her adviser as '*a self-confessed legal whizz. He knows the procedures left, right and centre*'.

Assuming that the McF was conversant with the law and procedure also featured in the testimony of David, who described his McF as '*very good*'. However, he received advice to obtain a host of unimportant material including '*witness statements from people that have seen you with your son or daughter, as many people as humanly possible'.* This feature of

[113] The two-year requirement was extended initially to 60 months, but is now removed. See The Civil Legal Aid (Procedure) Regulations 2012, SI 2012/3098, Reg 33 as amended by the Civil Legal Aid (Procedure) (Amendment) Regulations 2016, SI 2016/516.
[114] A hearing to determine the disputed facts between the parties. They usually involve allegations of domestic or sexual abuse; PD 12J Pt 2.
[115] *Re Baggaley* [2015] EWHC 1496 (Fam), at [8]; Practice Guidance, *McKenzie Friends (Civil and Family Courts)* (12 July 2010), at [13].

advice in family matters has attracted the attention of the judiciary. Sir Nicholas Wall (P) has remarked:

> People in the Appellant father's position frequently take the view that "character" witnesses are of particular importance in Children Act cases. In fact, often the reverse is the case. A witness who knows one of the parties, even if he or she has seen the party in question with the children, is rarely any help to a judge deciding what is in the best interests of the child or children concerned in the particular facts of the case.[116]

This demonstrates the vulnerability of LIPs who assume that those who charge for their services are inevitably legally proficient. It also corresponds with the findings of Trinder et al, who noted that, in the cases of the two McFs who were not particularly competent, their clients appeared satisfied with their assistance.[117] This is a cause for concern because, as explained above, there is no legal restriction to prevent anyone from using the term 'lawyer' or charging for the advice provided. It is not a protected legal title. The evidence of these LIPs indicates that LIPs may assume that McFs are knowledgeable and beneficial to their case simply because of the legal nature of the advice and the likely comparison to members of the legal profession. LIPs may perceive McFs as a cheaper version of solicitors and barristers but their unregulated nature means that LIPs cannot assume that the advice and assistance they receive will automatically be useful or indeed legitimate.

McKenzie Friends and vulnerable witnesses

The need for legal advice and support is paramount when domestic violence is alleged. Although legal aid remains within scope for private family matters involving allegations of physical or sexual abuse the stringent evidence criteria has led to many victims being denied legal aid and the representation it affords.[118] If legal aid is unavailable, the vulnerable witness (the mother in the author's research) must then not only appear in court without

[116] *Re H (Children)* [2012] EWCA Civ 1797, at [10].
[117] Trinder et al, *Litigants in person in private family cases* (Ministry of Justice 2014), at p 112.
[118] Rights of Women (ROW), *Evidencing domestic violence nearly 3 years on* (December 2015) 6. The evidence criteria has now been widened by virtue of The Civil Legal Aid (Procedure) (Amendment) (No. 2) Regulations 2017, Reg 33(2).

assistance but has the challenge of being cross-examined by her abuser. Contrastingly, if the victim does qualify for legal aid, the alleged abuser (the father in the author's research) has to defend allegations determining his future relationship with his child against a legally skilled opponent. Either of these circumstances may engage the parents' Article 6 right to a fair hearing and Article 8 right to respect for one's family life.

LIPs struggle with the requirements of fact-finding hearings in child arrangement matters. The author's research found that the majority of interviewees did not know the purpose of this hearing referring simply to the fact that it would be many hours long. As Michael and Paula explain respectively, '*All I know is that I am in on the 30th September at half past 10 for a three-hour session'. 'I am still a bit unclear in terms of the finding of fact. I feel like that wasn't addressed and I feel like I should have possibly said that today and I didn't.*

The only interviewees who had some knowledge that a fact-finding hearing was to determine safeguarding issues were those who had been in family proceedings previously. Nevertheless, they still relayed an inability to prepare adequately, as they were unable to comprehend the requirements of the Scott Schedule or bundle of documents. Mostly, they expressed their fear of being cross-examined by their ex-partner or, in some cases, a skilled lawyer. '*You do not know what the right thing to say is and, of course, I am cross-examining my ex, so trying to speak to him that is scary'.*[119] *The solicitor is like sort of confusing me, but that is what they do. They know how to do that, don't they? I don't have that skill*'.[120] This evidence suggests that it is more likely that parents who have to attend a fact-finding hearing will seek legal advice from whatever sources they can access. This makes the services of McFs more attractive in circumstances where the knowledge and procedural expertise of the adviser are invaluable to both the vulnerable instructing parent and the safeguarding needs of the child.

Janice's testimony that her McF was '*very intimidating*' emphasises the additional stress that 'family justice crusader' or 'rogue' type McFs may cause for vulnerable witnesses. She

[119] Interviewee renamed Emma.
[120] Interviewee renamed Steve.

describes how her McF presented himself in a '*very much testosterone*' driven and '*aggressive*' manner. He was talking incessantly about how he was better than the McF on the other side and how he had '*been up against him*' and had '*won that battle'*. Such behaviour led Janice to feel that the McF was treating the matter '*like theatre; it is like a drama qualification not the serious matter of my son being sexually assaulted*'. When terminating her relationship with the McF, Janice was disturbed by his aggressive response of, '*I know from your personality that you will lose it in court and that will just play into the opposition's hands. He is good, I know him and he will eat you alive'.* He then warned Janice that the *'judge wants it over with quickly and so the judge will automatically side with him because his McF is so qualified'.* Following this exchange, Janice left the McF's home '*in tears, and I thought I have got to get it out of my head that he is my only choice out there'.*

This vividly demonstrates how important it is to ensure that there are safeguards to ensure that McFs behave in a professional manner especially when assisting a vulnerable parent. *'He was saying, 'I'm telling you now he will get access. And I was so disheartened, I thought, what is the point of going through the whole process then? I might as well just set up 8 visits to a contact centre and do away with all of this stress.'* The disconcerting nature of this evidence resides in the fact that those subjected to domestic violence are more likely to have low self-confidence. As Helen explains, '*At the beginning, I came into court expecting to be told off because he [Father] expects me to be told off and to say what a bad mother I am, but the court hasn't done that'.* The vulnerability of these LIPs leads to susceptibility to oppressive or intimidating behaviour designed to persuade unwilling compromise or withdrawal of safeguarding issues.

Janice's description of her relationship with the McF who was representing her child's father in his application for contact provides evidence of this type of behaviour. She became concerned by the McF's attitude when '*he came in and said "here is my CV. It is best if we can be amicable seeing as we have got the next 11 years of [Child]'s life to try to sort out".* On being passed the CV by Janice, the author was surprised by the inclusion of a long list of private family cases in which the McF claimed to have had successful outcomes. There appears to be no reason for handing a CV to the LIP on the other side and to refer to the proficiency of one's advocacy skills other than to intimidate the opponent as a means of gaining a tactical advantage. Janice explained that after seeing the CV she was worried that

she would be unable to '*compete*' with the McF's expertise in the courtroom, which would lead to an unsuccessful attempt at safeguarding her child. In this respect, the McF's behaviour had the effect of increasing the power imbalance that was already likely to exist. It is, therefore, essential that LIPs, especially those who have vulnerabilities, receive advice and representation from trustworthy sources.

The risk posed by fee-charging McKenzie Friends

When discussing her experience Janice remarked that the McF she instructed '*does have a lot of clients that are paying him to do this'*. It is, therefore, not only the number of McFs who provide assistance, which requires consideration, but also their potential client base. Smith et al also address this issue. They question the true number of McFs as the sample of LIPs selected for their research and the LSCP's study only involved McFs who advertised online. Those that offer their services online have a visibility that may afford some measure of assurance that the best interests of the child rather than a particular parent will be promoted. For example, the Families Need Fathers' website, which as its name suggests, could be regarded as supporting the gender-biased nature of McFs, requires McFs listed on their website to commit to their Charter. This requires McFs to promote shared parenting in matters involving no risk to the child. McFs are required to refuse to assist any parent who opposes the principles laid out in their Charter.[121] The worrying aspect of Smith et al's research, however, is their warning that, despite the online presence of McFs, there may be new service providers who do not at present use the internet to generate clientele.[122] As they explain, the lack of a system-wide mechanism for identifying whether a LIP received assistance from a McF and the extent of such assistance makes it difficult to estimate the true number of fee-charging McFs.[123]

Support for the hypothesis that there may be more McFs than those who advertise online, is provided by Janice who explains the unsettling manner in which her McF operated. His name did not appear on any McFs' websites so that he operated '*very much below the radar'*. She saw him at his house where he was very secretive and informed her that '*you don't tell*

[121] Families Need Fathers https://fnf.org.uk/law-information-2/courts/mckenzie-friends/mckenzie-friend-listings
[122] Smith et al, *A study of fee-charging McKenzie Friends and their work in private family law cases* (June 2017), at p 82.
[123] Ibid, at p 59.

anybody that you have been here and stuff like that.' Disconcertingly, this mode of operating may be quite common, as Smith et al report that the majority of the McFs they interviewed also worked from home.[124]

Whilst it may be that flexibility is what LIPs find appealing,[125] this mode of operating increases the need for regulation and education of LIPs about the risks of engaging the services of McFs.[126] By affording this protection, LIPs can assess whether cheaper advice corresponds with their access to justice needs. This is particularly important as the Legal Services Board's (LSB) report on unregulated online divorce providers found that 'in general, a significant proportion of clients are unaware of the regulatory status of their provider, even though it affects the level of consumer protection they receive'.[127] In addition, they found that clients were ignorant about what 'being regulated' meant in respect of the quality of the legal advice they should expect to receive. Clients also had no concept of the extent of support or redress available should the advice be inept.[128] It appears unlikely that LIPs instructing McFs in family matters would be any more knowledgeable vis-à-vis regulation.

What should the future hold for fee-charging McKenzie Friends?

One of the main debates to have arisen is whether McFs should be permitted to charge for their services, subject to accompanying protection for LIPs in the form of regulation or whether seeking remuneration should be an unauthorised mode of practice. It is clear that McFs cannot continue to offer their services without regulation. Not only are there the possible problems of inappropriate behaviour and the lack of awareness by litigants of the unregulated nature of the services provided by McFs, as outlined above, but there is evidence

[124] Ibid.
[125] Smith et al, *A study of fee-charging McKenzie Friends and their work in private family law cases* (June 2017), at p 37.
[126] Ibid.
[127] Economic Insight Limited, *Unregulated legal service providers: Understanding supply-side characteristics, A report for the Legal Services Board* (April 2016), at p 6. Ipsos MORI's survey also found that only for 48% of issues did respondents check if their main advisor was regulated. Of those who did not make checks about regulation, some 52% reported that they assumed the adviser would be regulated. Ipsos MORI, *Online survey of individual's handling of legal issues in England and Wales 2015* (May 2016), at p 89.
[128] Economic Insight Limited, *Unregulated legal service providers: Understanding supply-side characteristics, A report for the Legal Services Board* (April 2016), at [6.1].

that the unregulated legal services market engages in misleading advertising.[129] This includes omitting information about the LIP's possible costs exposure should the McF act in an unprofessional manner.[130] As highlighted in the case of *Laird*, [131] discussed earlier, this can involve a considerable amount of money for a litigant, who probably instructed the McF rather than a solicitor for financial reasons.

That some McFs would be less than honest about their services is perhaps to be expected, as parallels can be drawn with the problems that occurred when unregulated claims management companies (CMCs) entered the legal services market. The Access to Justice Act 1999[132] led to the withdrawal of legal aid from personal injury cases as well as a renewed emphasis on using conditional fee agreements (CFAs), otherwise known as 'no win no fee', as an alternative means of funding litigation.[133] A consequence of the growth of CFAs was the emergence of CMCs. CMCs developed the role of acting as intermediaries between litigants and solicitors by soliciting personal injury cases through advertising and direct marketing techniques. These were then passed on to solicitors for a referral fee.[134]

Despite the legal nature of the work conducted by CMCs, they were allowed to operate totally unhindered by regulation until the introduction of the Compensation Act 2006.[135] During the six years in which they were unregulated, their advertising and selling techniques were so pressurised and misleading that they were implicated in encouraging a compensation culture by persuading litigants to 'have a go',[136] and bring claims, irrespective of merit, against insured defendants. This led to insurers often settling the claim rather than risking the excessive court fees that could ensue, which were usually greater than the damages sought.[137] Those employing these practices were rebuked for introducing a climate of fear[138] and

[129] LSCP, *Fee-charging McKenzie Friends* (April 2014), at [1.11]; Smith et al, *A study of fee-charging McKenzie Friends and their work in private family law cases* (June 2017), at p 83 found evidence of 'inflammatory and potentially misleading' advertising by McFs.
[130] LSCP, *Fee-charging McKenzie Friends* (April 2014), at [4.36].
[131] *R (on the application of Laird) v Secretary of State for The Home Department & (1) Belinda McKenzie (2) Sabine McNeil* [2016] EWHC (QB) (unreported).
[132] Sch 2 para 1 (a).
[133] Between 2000 and 2004 there had been over one million claims brought using CFA. See Citizen's Advice Bureau, *No win, no fee, no chance* (December 2004), at [2.12].
[134] Payment of a referral fee by CMCs and the legal profession is now prohibited by virtue of LASPO 2012, s 56.
[135] S 4.
[136] Better Regulation Task Force, *Better Routes to Redress* (May 2004), at p 3.
[137] Lord Jackson, *Review of civil litigation costs: Final Report* (December 2009), at p 111, [4.15].
[138] Lord Young, *Common Sense Common Safety* (Cabinet Office 2010), at p 7.

bringing the legal profession into disrepute.[139] This provides a salutary warning for a legal services market that has once again had public funding removed and is witnessing the consequential emergence of non-legally qualified and unregulated personnel. As with CMCs, McFs cannot continue to be permitted to charge for their services without adequate protection being provided for their unwitting clients.

What is also troubling is the negative manner in which the legal services market is adapting. There is anecdotal evidence of solicitors acting as McFs, as a means of offering their services at a more favourable rate by avoiding the expense of regulation.[140] An example of such behaviour is provided by the SRA's disciplinary proceedings against Abdul Barri. Mr Barri breached the SRA framework rules and Code of Conduct by acting for his clients outside the solicitors' practice for which he worked. Although this was done to provide cheaper legal assistance for his clients, who could not afford the firm's fees, he was not authorised to act as a sole practitioner. The clients would also be unentitled to the protection afforded by indemnity insurance.[141] Whilst such behaviour may be a rare occurrence,[142] it highlights the urgency with which reform should be introduced as a means of ensuring that the law keeps abreast of the changing nature of legal services provision post LASPO.[143]

The judiciary's solution

As a means of addressing the issue of 'Fee-charging' McFs, the recent Judicial Consultation regarding their future proposes a fee recovery prohibition.[144] So far as the judiciary is concerned, it appears that the protection of litigants outweighs any access to justice benefits that could be derived from allowing unregulated and uninsured assistants to provide their

[139] House of Commons (HC) Constitutional Affair Committee, *Compensation Culture* (Third Report) (2005-06 HC), at [81].
[140] Chloe Smith, 'Warning as lawyers offer McKenzie Friend 'unbundled' service' *Law Society Gazette* (2 May 2016) www.lawgazette.co.uk/news/warning-as-lawyers-offer-mckenzie-friend-unbundled-service/5055097.fullarticle
[141] https://www.sra.org.uk/consumers/solicitor-check/197000.article?Decision-1
[142] Chloe Smith, 'Warning as lawyers offer McKenzie Friend 'unbundled' service' *Law Society Gazette* (2 May 2016) www.lawgazette.co.uk/news/warning-as-lawyers-offer-mckenzie-friend-unbundled-service/5055097.fullarticle
[143] See also *Ballard v SRA* [2017] EWHC 164 (Admin) where the solicitor appellant's claim that he was acting in the capacity of McF was rejected by Beatson LJ.
[144] Lord Chief Justice of England and Wales, *Reforming the courts' approach to McKenzie Friends: A Consultation* (February 2016).

services for a fee.[145] It is suggested by the judiciary that any extension of the rights of McFs to charge fees would be a matter for Parliament as it would implicitly 'acknowledge the creation of a new branch of the legal profession, albeit one that was not subject to effective regulation on a par with that provided by existing frontline regulators'.[146]

Whilst the protection of LIPs is no doubt important, the withdrawal of the right of McFs to charge fees may have a profound effect. It is doubtful whether McFs would remain in the legal services market, as they are unlikely to be able to afford to provide their services on a pro bono basis. However, altruism was an aspect of the 'Good Samaritan' McFs identified by Smith et al, there might be some McFs who would be willing to assist LIPs free of charge. Beyond this type of McF, the withdrawal of a right to charge fees would leave those LIPs who cannot afford to engage the services of the legal profession, with limited alternative sources of advice and representation beyond the pro bono services offered by some lawyers and voluntary organisations.

Unsurprisingly, both branches of the legal profession support prohibition.[147] However, the SRA takes a different approach to both the Law Society and the Bar Council by supporting the imposition of fees by McFs, subject to the court controlling their ability to represent clients in court and to conduct litigation.[148] Whilst retaining the right to charge fees is important to widen access to justice for LIPs, the courts' inability to deal consistently with requests for rights of audience has led to problems. Despite the Practice Guidance requiring a short CV and a statement outlining the McF's experience; lack of interest in the case, understanding of their role and the need for confidentiality,[149] there is evidence that the judiciary is inconsistent in its approach to requesting this vital information.[150] Therefore,

[145] Zuckerman's stance is more cynical, arguing that rather than protection of LIPs, prohibition was more concerned with protecting the legal profession's monopoly. Adrian Zuckerman, 'The court's approach to McKenzie Friends - a consultation, February 2016 – no improvement in assistance to unrepresented litigants' (2016) 35(4) CJQ 268.
[146] Lord Chief Justice of England and Wales, *Reforming the courts' approach to McKenzie Friends: A Consultation* (February 2016), at [4.25].
[147] Bar Council, *Response to the Reforming the courts' approach to McKenzie Friends consultation* paper (June 2016); The Law Society, '*Consultation on McKenzie Friends—Law Society response*' (10 June 2016).
[148] SRA, '*SRA Response: Consultation by Lord Chief Justice of England and Wales on reforming the courts' approach to McKenzie Friends*' (20 May 2016), at [14] – [18].
[149] Practice Guidance, *McKenzie Friends (Civil and Family Courts)* (12 July 2010), at [6].
[150] LSCP, *Fee-charging McKenzie Friends* (April 2014), at [5.39]; Smith et al, *A study of fee-charging McKenzie Friends and their work in private family law cases* (June 2017), at p 60.

McFs are gaining rights of audience in an unsolicited manner.[151] As current practice does not reflect the requirements of the Practice Guidance, it is questionable whether, as the SRA asserts, the safeguards within the civil justice system[152] are sufficient to protect LIPs from the threat presented by unprincipled McFs.

The court has power under CPR 3.11[153] to restrain LIPs from bringing claims totally without merit to court.[154] However, this jurisdiction does not extend to McFs, as they are not "a party to proceedings" for the purposes of the litigation in which they are assisting.[155] In order to impose a civil restraint order on McFs, the High Court must use its inherent jurisdiction to restrain those who 'repeatedly act in ways that undermine the efficient administration of justice'.[156] It is not only this inherent jurisdiction that offers safeguards for LIPs, as the Consultation recommends a renewed focus on ensuring that courts request CVs and statements from McFs before allowing rights of audience.[157] Additionally, McFs should be required to adhere to a Code of Conduct[158] and the Practice Guidance be replaced with rules of court.[159] However, as Smith et al found that the majority of McFs' work occurred outside the courtroom and interviewees in the author's study received assistance prior to their court appearances, judicial supervision alone is unlikely to provide adequate protection.

The Legal Services Consumer Panel's proposal

An alternative recommendation promoted by the LSCP suggests that ''Fee-Charging' McFs should be 'recognised as a legitimate feature of the evolving legal services market.'[160] In order to achieve this, they suggest rejection of external regulation in favour of self-regulation through the formation of a trade association.[161] The LSCP argue that external regulation would, of necessity, drive up costs for McFs, thus causing their more affordable prices to rise

[151] LSCP, *Fee-charging McKenzie Friends* (April 2014), at [5.36].
[152] SRA, '*SRA Response: Consultation by Lord Chief Justice of England and Wales on reforming the courts' approach to McKenzie Friends*' (20 May 2016), at [14] – [16].
[153] For family matters the corresponding provision is 4B PD 4.8 para 1.1.
[154] See also 3C PD 3.1.
[155] *Re Baggaley*, [2015] EWHC 1496 (Fam), at [24] (Sir James Munby P).
[156] Practice Guidance, *McKenzie Friends (Civil and Family Courts)* (12 July 2010), at [17]; Ibid.
[157] Consultation, Lord Chief Justice of England and Wales, *Reforming the courts' approach to McKenzie Friends: A Consultation* (February 2016), at Recommendation 12
[158] Ibid, at Recommendation 6.
[159] Ibid, at p 16.
[160] LSCP, *Fee-charging McKenzie Friends* (April 2014), at [5.7].
[161] Ibid, at [6.10] and [6.11].

in accordance with those charged by the legal profession or lead to them withdrawing from the market.[162]

Whilst there is no doubt that this is a legitimate concern, it does not warrant leaving LIPs vulnerable to the possible unscrupulous practices of McFs. There is also no empirical evidence to support the contention that McFs would regulate their own practices in a manner rigorous enough to provide LIPs with ample protection. Nor is there any evidential basis for the contention that non-professionals offering legal services to LIPs should self-regulate in a manner that is regarded as inappropriate for members of the legal professions.[163]

There is now a Society of Professional McFs which states on its website that its members have professional indemnity insurance and that they must adhere to a code of conduct.[164] This code appears to be merely a reference to the Practice Guidance and a reassurance that complaints will be investigated.[165] One may question the level of protection that can be afforded to litigants by a limited company set up by two McFs, who became involved in the provision of legal advice following their own acrimonious family court proceedings.[166] Their objectivity may be further hindered by the fact that one of these founders has been politically active, which has involved organising publicity stunts for Fathers 4 Justice.[167] That this may compromise a McF's neutrality is supported by Lord Woolf's reasoning in *R. v Bow County Court Ex p. Pelling (No.1)* where the McF was refused permission to assist a LIP due to his 'difficulty in divorcing his campaigning role as chairman of the pressure group to which he belongs from that as an assistant of LIPs'.[168] Similarly, self-regulation by two directors of a limited company with such clear political interests, who may favour the rights of one parent over the other, is unlikely to adequately safeguard LIPs.

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[162] Ibid, at [6.9].
[163] A parallel could be made with the work of paralegals. The Institute of Paralegals encourages those working in the paralegals sector to become members, but its remit is to 'set professional standards and provide recognition' for those working in the sector rather than regulate their activities. They do, however, have a code of practice which its member should conform to; http://www.theiop.org/regulation/the-paralegal-code-of-conduct-2.html. As most paralegals work in legal practices their work is overseen by regulated professionals and so the risk of abuse is reduced.
[164] http://www.mckenziefriends.directory/index.html.
[165] Ibid.
[166] http://courtwithoutalawyer.co.uk/ray-barry.html, http://courtwithoutalawyer.co.uk/john-ison.html.
[167] http://courtwithoutalawyer.co.uk/ray-barry.html.
[168] [1999] 1 W.L.R. 1807, at 1825.

Providing a voice for the litigant in person

Any decision to remove the ability of McFs to charge for their services should not be made without hearing from LIPs who have had the experience of instructing McFs. With this in mind, the author's research provides evidence of the viewpoint of a LIP who has engaged the services of a McF about the future of McFs. As the voice of the LIP has so far only appeared in Smith et al's report, her testimony affords an insight into how LIPs may assess the access to justice benefits of instructing McFs and what reforms they may advocate. It also emphasises the important nature of independent qualitative evidence from the LIP perspective and the need for further research to be conducted. So far as Janice is concerned, despite her troubling experience with the McF she instructed, this did not deter her from wanting to engage a McF in the future. From her point of view, they could offer a valuable service provided there were three main changes:

Firstly, there needs to be more choice, as '*there seems to be a big call for this, but yet there is only one real agency or a few of them that seems to be doing it. If you Google McFs it comes up that they are all in London and the Midlands; there is absolutely none at all for the North West'*. This view is supported by Smith et al who found that a substantial majority of McFs were based in London or the South East.[169] If McFs are to remain a feature of the legal services sector then the need for nationwide provision will have to be addressed. Access to justice should not be determined according to a LIP's postcode.

Secondly, Janice observed the need for regulation:

> *I think McFs are a good idea if they could be regulated in a way where somebody never speaks to you in a way that that man spoke to me. No-one should ever say you don't stand a hope in hell's chance and he will win just because his McF is more qualified. That needs to be regulated. Equally, for me that can't afford a solicitor, there should, perhaps, be more McFs.*

[169] Smith et al, *A study of fee-charging McKenzie Friends and their work in private family law cases* (June 2017), at p 15.

This testimony provides clear support for the contention that McFs can provide a gap-filling role in order to afford LIPs access to justice provided safeguards are introduced.

Lastly, Janice pointed to the gender bias of McFs as *'it seems to me that they are all guys and it has got that feel as though it is fathers only kind of feeling. What about mums that are struggling as well?*' The lack of assistance for female LIPs appears to be a more widespread problem as Smith et al reported that the majority of McFs they interviewed confirmed that they helped more men than women.[170] It is also supported by the empirical evidence discussed earlier in this article which depicted the agenda-driven hostile father representing the needs of other males. Additionally, Smith et al reported that their LIP participants identified organisations supporting fathers as the main mechanism for choosing a McF.[171]

The evidence that LIPs may struggle to find a McF to assist them underlines the importance of the recommendation by the Consultation that a plain language guide should be prepared for LIPs.[172] Such guidance could explain the role of McFs as well as list individuals and companies offering this service. If there are more women or men, who offer their services, independent of politically motivated organisations, they need to advertise their skills more widely so that they reach the attention of LIPs seeking their assistance. Equally, if there is a lack of female McFs this requires investigation to determine whether and to what extent the role is gender biased and the possible reasons for this consequence.

Whilst the author acknowledges that the view of one LIP cannot be taken to represent the views of LIPs more widely, it casts doubt on whether LIPs would consider a fee prohibition a proportionate safeguarding measure when seeking legal advice. Most importantly, it identifies the need for further research to investigate the McF/LIP relationship from a LIP perspective and their knowledge regarding protection from exploitation.

Moorhead argues that there are three identifiable competing values when analysing case law on McFs. These are the courts' desire for administrative convenience, the interests of

[170] Ibid, at p 34.
[171] Ibid, at p 30.
[172] Lord Chief Justice of England and Wales, *Reforming the courts' approach to McKenzie Friends: A Consultation* (February 2016), at [4.15] – [4.19].

regulated legal services providers and the litigant's rights to effective access to justice.[173] Removing the right to charge fees from McFs, after receiving the views of the judiciary and lawyers, gives weight to the first two but failing to give those most affected a voice would not only be disingenuous but may ultimately inhibit effective access justice.

It is hoped that the announcement by the Judicial Executive Board that a further judicial working group will be established 'to review the original proposals in the consultation paper' will provide an opportunity for the voice of the LIP to be heard and afforded appropriate weight.[174]

Is regulation a realistic option?

If further investigation reveals that LIPs oppose a prohibition on fee-charging then the question of how to protect the rights of LIPs has to be addressed. There is growing support for a regulatory alternative to a ban. Smith et al propose that regulation may be a more proportionate response due to their evidence that McFs offer valuable assistance to LIPs outside the courtroom,[175] particularly in respect of negotiating settlements.[176] Additionally, a recent report recorded judicial comments that McFs play a positive role in court,[177] thus providing further support for the proposition that a fee prohibition should not be introduced without further evidence. There will always be those who abuse their position when dealing with uninformed members of society. This risk is why both branches of the legal profession are subject to regulation. The fact that there are examples of both solicitors[178] and barristers[179] who behave reproachfully and put their interests before those of their clients, does not lead to calls for members of the legal profession to be prohibited from charging for

[173] Richard Moorhead, Access or aggravation? Litigants in person, McKenzie friends and lay representation (2003) 22 (Mar) CJQ 133.
[174] https://www.judiciary.gov.uk/publications/consultation-reforming-the-courts-approach-to-mckenzie-friends/
[175] Smith et al, *A study of fee-charging McKenzie Friends and their work in private family law cases* (June 2017), at p 74.
[176] Ibid, at p 46.
[177] MOJ, *Alleged perpetrators of abuse as LIPs in private family law: The cross-examination of vulnerable and intimidated witnesses* (MOJ Analytical Series 2017), at p 21.
[178] Recent examples of solicitors being struck off include Jimoh Adun who submitted 443 improper claims to the Legal Aid Agency and Andrew John Puddicombe who personally charged clients whilst working for a law centre. https://www.sra.org.uk/consumers/solicitor-check/465472.article
https://www.sra.org.uk/consumers/solicitor-check/159099.article
[179] Recent examples include Anisah Ahmed who was disbarred for making untrue assertions about qualifications on her CV and Forz Kahn who was suspended for 7 months for breaching client confidentiality.
https://www.tbtas.org.uk/hearings/findings-and-sentences-of-past-hearings/

their services. In the same manner, what may turn out to be a few 'bad apples' amongst McFs should not prevent LIPs from having an alternative source of legal advice and assistance.

In this respect, there is merit in the Competition and Markets Authority's belief that a blanket ban may be a disproportionate response to the rise of fee-charging McFs.[180] A more proportionate answer may be to ensure that McFs are regulated and LIPs are educated about the regulatory requirements of all those who offer legal services. In this manner, LIPs can make an informed choice about where they seek legal advice and assistance.[181] Using the analogy of CMCs once again, a solution may be to allow McFs to charge fees but regulate them externally. Following the problems caused by a failure to control CMCs, they are now regulated by the Claims Management Regulator. This is a unit of the MOJ, which is responsible for licensing firms that provide claims management services; carrying out investigations and taking action against both regulated and unregulated CMCs and providing guidance to consumers.[182] This affords an example of how new members of the legal services market can be introduced and regulated as a means of providing access to legal advice and assistance.[183]

An alternative means of regulating McFs could involve adopting the proposals made by the LSB, which promotes a new activity-based approach to regulation. Rather than regulating specific professionals who offer legal services, they put forward the proposition that the activities undertaken by such providers should be regulated according to the degree of risk the activity poses to consumers. This advocates a more targeted and proportionate approach that is no longer based on the professional title of the service provider.[184] In addition, the suggestion is made that regulation should be through a single regulator covering the whole legal services sector.[185] By making these changes the LSB declares that:

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[180] Competition and Markets Authority (CMA), *Legal services market study: Final Report* (15 December 2016), at p 175.
[181] Ibid, at p 17. The CMA proposes that the inclusion of 'unauthorised providers' of legal services within the regulatory framework may be a possible consumer protection solution.
[182] https://www.gov.uk/government/groups/claims-management-regulator.
[183] See also Immigration and Asylum Act 1999, s 84, which requires any person who offers immigration and asylum advice to be registered with the Office for the Immigration Services Commissioner.
[184] LSB, *A vision for legislative reform of the regulatory framework for legal services in England and Wales* (September 2016) [6]. CMA, *Legal services market study: Final Report* (15 December 2016), at p 17.
[185] LSB, *A vision for legislative reform of the regulatory framework for legal services in England and Wales* (September 2016), at [100].

> [They] would contribute to lower costs for providers and consumers, more freedom for providers to grow, innovate and deliver better services for consumers, and greater confidence in regulation and legal services – and the important benefits they deliver for society – more broadly.[186]

If this approach was adopted it could no doubt encompass the activities of McFs, irrespective of the fact that they are not members of the legal profession, and remove the need for separate regulation of their services. If the LSB is correct in its assertion that the cost of regulation would be cheaper it may be that the legal profession could pass on these savings by reducing its fees. This could potentially widen access to justice for LIPs who are at present unable to afford to instruct members of the legal profession.[187]

Along with regulation, a further means of ensuring the quality of advice provided by McFs could be to require a minimum legal qualification. For family matters, this could involve gaining units under the Institute of Legal Executive's Level 3 Certificate and Professional Diploma in Law. The relevant units would be Unit 7, 'Family Law' and Unit 12, 'The Practice of Family Law'.[188] Set at A-Level standard, such assessments would provide some assurance of the quality of advice being given to LIPs. Having a minimum qualification may also encourage some McFs to qualify in these units at level 6.[189] Insisting on entry requirements and regulation may also act as a deterrent to those who wish to become McFs for unscrupulous or self-serving reasons. Support for this contention is provided by the reduced number of CMCs that now operate. Since 2011, there has been a steady decline in the number of CMCs as a consequence of the introduction of regulation and the evolving nature of the CMC market. In 2011 there were 3,213 CMCs which had fallen to 1,610 CMCs by 2016.[190] Further, there appears to be an appetite for such a qualification requirement

[186] Ibid, at [7].
[187] For further discussion on the regulation of non-professional legal advisers see Richard Moorhead et al, 'Contesting Professionalism: Legal Aid and Non-lawyers in England and Wales' (2003) 37 (4) *Law & Society Review* 765; Lisa Webley, 'Legal professional de(re)regulation, equality, and inclusion, and the contested space of professionalism within the legal market in England and Wales'(2015) 83 *Fordham Law Review* 2349.
[188] http://www.cilex.org.uk/study/lawyer_qualifications/level_3_qualifications/level_3_units
[189] http://www.cilex.org.uk/study/lawyer_qualifications/level_6_qualifications/level_6_units
[190] MOJ, *Claims management regulation: Annual report 2015/16*, at p 14.

amongst McFs. Smith et al found that the McFs they interviewed had a positive attitude towards education, proactively seeking training opportunities.[191]

Implementing the courts' supervisory powers

In addition to regulation, the courts can also safeguard LIPs through its gatekeeping role when deciding whether McFs should be granted rights of audience. The recent case of *Ravenscroft v Canal and River Trust*[192] provides clear guidance on how this role can be exercised. In this case, Chief Master Marsh set out the balancing exercise to be undertaken when considering such requests. The starting point was to consider whether the defendant 'reasonably needs' the McF's assistance, if so, the scope of the assistance which the court should allow. Such factors required the court to consider not only the defendant's personal position but also the context in which the application arises, the guidance in the Practice Note and the principles set out in the overriding objective.[193] Bearing these matters in mind, there were three crucial issues to consider. Firstly, the defendant was nearly illiterate and suffered from dyslexia which involved difficulty in understanding written material. Secondly, the claim involved quite technically complex areas of law, which would add to the difficulty in understanding the material. Thirdly, the fact that the outcome of the case was of public importance and, therefore, would be dealt with in the High Court against Queens Counsel meant that there was inequality of arms if the defendant had to represent himself.[194] Despite the McF adding to delay, due to the lengthy particulars of claim he prepared, which had to be amended, the fact that he was 'highly intelligent and articulate' as well as being conversant with the legal issues[195] meant that the defendant should not be denied his assistance. However, this would be subject to the court's power to remove him should he prove to abuse the permission granted.[196]

The court's insistence on receipt of a statement and a CV as well as the detailed balancing exercise that *Ravenscroft* advocates when determining whether a McF should be allowed permission to advocate is a welcome approach. Following the example in this case, courts

[191] Smith et al, *A study of fee-charging McKenzie Friends and their work in private family law cases* (June 2017), at p 31.
[192] [2016] EWHC 2282 (Ch).
[193] Ibid, at [22].
[194] Ibid, at [22 (i – iii)].
[195] Ibid, at [25].
[196] Ibid, at [27].

should rigorously apply the Practice Guidance when determining whether a McF should be allowed to represent a LIP. This strategy, together with regulation, can ensure greater protection for LIPs from those McFs who might abuse the powers granted to them. By allowing McFs to charge for their services LIPs will retain a valuable means of accessing justice and regulation will provide them with the accompanying protection needed.[197]

The Consultation's proposal to prevent McFs from charging fees is to be applauded for generating discussion about how LIPs might be protected from unscrupulous or unprofessional McFs. However, if this is to be achieved at the cost of potentially narrowing access to justice and without allowing those LIPs, who will be profoundly affected, an opportunity to have their voices heard, it is surely a retrograde step.

Conclusion

The growth of LIPs has reportedly led to a willingness by the judiciary to grant McFs rights of audience as well as permission to conduct litigation in order to facilitate assistance to LIPs in the courtroom. However, the lack of regulation and the unscrupulous behaviour of an unknown but possibly small number, of McFs has led to the recommendation that fee-charging for services should be prohibited. This paper has sought to provide an insight into the views of two LIPs, who provide an initial voice for those who have so far had little input into the debate concerning the future working practices of fee-charging McFs.

The call by the judiciary to prohibit McFs from seeking remuneration for their services may not accord with the wishes of LIPs who may perceive them as an affordable means of widening access to justice. A regulated system of McFs who are able to charge fees, but are only allowed representational rights and the right to conduct litigation at the discretion of the court on the production of a CV and statement of experience and qualifications, could provide LIPs with an invaluable source of advice and support. The additional requirement of compliance with a code of practice embodied in Rules of Court and the court's willingness to exercise its inherent jurisdiction to prevent disruptive McFs from appearing before the court would no doubt provide additional protection for LIPs. This should also include a level of

[197]MOJ, *Alleged perpetrators of abuse as LIPs in private family law: The cross-examination of vulnerable and intimidated witnesses* (MOJ Analytical Series 2017), at p 23.

compensation commensurate with that available from the Legal Ombudsman when complaints are upheld against the legal profession.

Requiring McFs to have minimum qualifications, such as the Institute of Legal Executive's Level 3 Certificate and Professional Diploma in Law, as well as requiring them to hold certificates of indemnity insurance will go some way to providing a measure of protection that currently only exists when instructing members of the legal profession.

LIPs must also be educated about their access to justice options so that they can receive advice in a manner and at a cost that they can afford whilst also offering sufficient protection. This can be facilitated by having a plain language guide explaining the services of all types of legal advisers, including McFs, how they are regulated and where to seek redress if things go wrong. This should then be made available to LIPs at court counters, voluntary organisations, such as the PSU, at solicitors' offices and on McF's websites. By adjusting their service provision to include Bar Direct and unbundled legal assistance, the legal profession can also widen access to justice for LIPs so that reliance on McFs no longer remains for some LIPs the only affordable route to receiving advice and representation.

Irrespective of these proposals, the dearth of empirical evidence addressing the views of LIPs, means that it is far too early to come to the conclusion that fee-charging McFs should be assigned to history. Smith et al's research and the author's investigation provide the first steps in listening to and providing more than lip service to the opinions of LIPs. However, such is the small nature of the sample in both studies, 20 LIPs in Smith et al's and two in the author's research, that more empirical research, involving interviews with LIPs, is required to analyse the McF/LIP relationship in both family and civil matters from the LIP perspective. The announcement of a further judicial working group to consider the proposals in the Consultation provides an opportunity for this to occur. It is only by obtaining such evidence that the voices of LIPs will be heard and their views accorded sufficient input when making what will be for them a crucial access to justice decision.