

To: Madam Justice Bonkalo

From: Dr Julie Macfarlane, Distinguished University Professor  
and Professor of Law, University of Windsor and Director,  
National Self-Represented Litigants Project

April 29, 2016

**Re: NSRLP Submission to the Ontario Family Legal Services  
Review**

The NSRLP submission to the Review is framed around two of  
the questions that have been posed.

- \* **Which legal service offerings could improve the family justice system if they were more widely available?**
- \* **If an appropriate framework is put in place, should persons other than lawyers, such as paralegals, be permitted to provide legal services in certain family law matters?**

This submission provides merely a summary of my own and NSRLP views on these questions. I am very happy to provide further detail, research background and of course engage in discussion and answer any further questions that the Review Team might have.

All references below are to the 2013 National Self-Represented Litigants Study<sup>1</sup> unless otherwise stated.

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<sup>1</sup> *Identifying and Meeting the Needs of Self-Represented Litigants: Final Report*  
Macfarlane 2013

**1. Which legal service offerings (e.g. conducting legal research, preparing correspondence, appearing in court, etc.) could improve the family justice system if they were more widely available?**

*Overview*

Self-represented litigants (hereinafter SRLs) describe their challenges primarily in terms of the procedural complexity of the legal process. Relatively few SRLs describe problems with developing substantive legal arguments, although they may underestimate the complexity of these. Nonetheless, their principal needs – and challenges - are being presented as access to legal (primarily procedural) information and general orientation (including a basic understanding of what will be expected of them as a SRL).

Legal information, assistance with procedural “navigation” and general legal system orientation and expectation-setting, are not tasks that need to fall to lawyers alone. Already we see this type of assistance being offered by staff in Family Legal Information Centres across Ontario.

These services offer reinforcement of both the need (they are overwhelmed by persons seeking help, and necessarily have to limit the extent of assistance to each individual) and the effectiveness (reflected in the testimonials of those whom they have been able to help) of these services. However there is a pressing need for more services of this type to meet the volume of those coming to family court unrepresented (slightly more than 50% aggregated across Canada).

*Specific assistance requested by family SRLs*

The types of assistance that family SRLs consistently describe themselves as needing include the following:

- *Assistance with form completion and review of completed forms.*

Many SRLs find the completion of family court forms extremely difficult and often mistakes are made that later hold up, or even undermine future proceedings. The type of assistance SRLs describe needing include (eg) help identifying the correct form to use for their matter, general guidance on what a particular section requires, explanation of legal terms used on forms, identification of omissions or errors, rather than legal advice specific to their case.

- *This difficulty often extends to filing and service procedures.*

Many family SRLs make errors with filing incorrectly, and difficulties with the formalities of service.

- *What to expect at pre-trial hearings*

Including a settlement conference, a case management conference, a mediation, or a motions hearing. Family SRLs often have little or no idea what it means to be asked to attend, for example, at a settlement conference or case management conference. The assistance they say that they need in relation to what to expect includes: when they will be asked to speak, what type of presentation is required, how to organize their response to the other side, how to develop a proposal for settlement; what documentation they should present at a hearing, and how.

We know that SRLs are often poorly prepared for pre-trial hearings, and unclear about the purpose of the hearing. For example: NSRLP research shows that SRLs are often “blind-sided” by an application for summary judgment, and do not understand the procedure sufficiently to enable them to properly respond. We also see that SRLs fare very poorly in motions for summary

judgment brought by represented parties  
(<https://representingyourselfcanada.com/2015/11/26/nsrlps-summary-judgment-research-report>). We are concerned to note these poor outcomes are reflected in other types of pre-trial hearings as well

(<https://representingyourselfcanada.com/2016/04/18/finally-canadian-data-on-case-outcomes-srl-vs-represented-parties/>).

This data shows that shows that seven of eight Ontario SRLs over the past 52 months (figures based on Can LII) lost an application or a motion when they face a represented party. We believe them to be in part a consequence of procedural mistakes by SRLs and lack of effective preparation that could be addressed if SRLs had better access to legal information services.

### *Information about “next steps”.*

This is a very different type of assistance than that offered in the traditional “summary advice model” offered by lawyers. This focuses on whether the client should bring a suit or not. In contrast, SRLs need assistance with the “next steps” in their ongoing proceeding. This finding is reported in the National SRL Study.<sup>2</sup>

Non-lawyers could offer all the above forms of assistance to family SRLs without giving specific legal advice. However we also know from NSRLP research that legal information staff (in courthouses and other agencies) are often concerned that they might “cross the line” and fall foul of restrictions on the unauthorized practice of law<sup>3</sup>. As a consequence their default is to offer less, not more help.

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<sup>2</sup> Above note 1 *Identifying and Meeting the Needs of Self-Represented Litigants: Final Report* Macfarlane 2013 at pages 86-88

<sup>3</sup> Above note 1 *Identifying and Meeting the Needs of Self-Represented Litigants: Final Report* Macfarlane 2013 at pages 69-73

*It is important for the Review to recognize this dilemma, to consider how to relieve such pressure, and to propose solutions to allow these important services to be delivered more broadly and effectively to family SRLs.*

Solutions include:

- Providing clearer guidelines and training for legal information providers (NSRLP has done some of this work in projects with court services staff in Nova Scotia and New Brunswick<sup>4</sup>).
- For the Law Society of Upper Canada to take steps to formally (and perhaps publicly) recognize that such services can and should be offered by non-lawyers, and to offer support for such services.
- Directing more resources towards the expansion of these important and relevant legal information services for family SRLs to enable more people to be served, more comprehensively.
- For courts to consider offering orientation workshops for those filing in family court without representation.
- For courts to consider appointing a specific court services staff member or members who will exclusively review forms being filed by family STLs to ensure that they are complete and ready to go forward<sup>5</sup>.

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<sup>4</sup> See *How Can I Help You? Clarifying Legal Advice/ Legal Information* (Nova Scotia Department of Justice Court Services, Greacen Associates & the NSRLP, 2014); *Evaluation of the Impact of Training for Court Services Staff on Differentiating Legal Information from Legal Advice* (New Brunswick Department of Justice, Greacen Associates & the National Self-Represented Litigants Project) forthcoming 2016

<sup>5</sup> A similar “Courthouse Navigator” program is presently being piloted in New York State, by administrative order of the Administrative Chief Justice. See <https://www.nycourts.gov/courts/nyc/housing/rap.shtml>. Nova Scotia Legal Information Society is also piloting a similar program using public volunteers; <http://www.legalinfo.org>

**2. If an appropriate framework is put in place, should persons other than lawyers, such as paralegals, be permitted to provide legal services in certain family law matters?**

We know that the primary reason for the current high levels of self-representation in family court is lack of resources to pay for the current models of legal services.<sup>6</sup> Many family SRLs are unable to afford to pay the hourly rate of a family lawyer. Finding alternate sources of effective assistance is therefore critical. NSRLP supports the expansion of family legal services to a number of non-lawyer groups.

*Paralegals*

We believe that trained paralegals could provide some types of legal services in family matters. The more difficult question that is not presently supported by evidence-based data is *what types* of services and in *which cases*.

The only empirically grounded way to answer the question of exactly what types of family work paralegals could successfully undertake and offer family SRLs would be to commission research that analyzed the work of family lawyers. The appropriate methodology would be a task-based analysis centred on a number of practitioner case studies. This would enable an accurate breakdown of the actual tasks involved in (eg) a contentious and a non-contentious matter, as well as in a range of areas of contention.

In the absence of such research (and in the hopes that it will follow shortly), we offer the following suggestions for a paralegal role in

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<sup>6</sup> See forthcoming Final Report of *Case Without Counsel*, Institute for the Advancement of the American Legal System (iaals.org); Dewar et al *Litigants in Person in the Family Court of Australia* (2000); *Access to Justice for Litigants in Person* Lord Chancellor's Civil Justice Review (2011).

providing family legal services in Ontario. They are based on our present knowledge of both the substantive and procedural law and on the needs consistently articulated by family SRLs.

Addressing the Review's specific questions:

- *Which types of legal services (e.g. interviewing a client, preparing certain documents)?*

A trained paralegal could conduct an intake interview with a family client, noting where a (specified) complex issue may need to be referred to a family lawyer.

A trained paralegal could complete the application for divorce, the response to an application, and prepare and finalize an affidavit.

- *In which types of family law matters (e.g. divorce, custody and access)?*

Potentially all of the above. Rather than exclude certain areas of family practice, it is more effective and better client service to train paralegals to recognize complex legal areas (for example, cross-jurisdictional issues, custody re-location cases) where they may feel more comfortable referring their client to a lawyer.

Levels of acrimony are not the same as complexity, and well-trained paralegals could deal equally as well with this aspect of family litigation work as a lawyer.

- *With what safeguards (e.g. education, training, insurance, regulation and/or oversight)?*

There is already a certification program for paralegals in Ontario, and this should be expanded to include certain types of family work. This should include training on both family law procedures and substantive family law issues.

Paralegal training should also be expanded to include training on conflict management to better prepare to enable paralegals to manage the acrimony and conflict sometimes present in family cases. This might include, for example, a basic understanding of family mediation, how to prepare a client for negotiation with the other side, referral sources for local services).

Additional possibilities include mentoring/ supervision by an experienced family lawyer for the first years of practice, and paralegal specialist certification as a family law specialist upon taking further educational programs.

Finally, it will be important to collect data to monitor what we hope will be the expansion of a number of aspects of family legal services to paralegals in Ontario. This could include data collected systematically from both paralegals themselves and their clients. Tracking via evaluation would enable a responsible monitoring of any problems that might emerge at an early stage. It would also enable the public to directly contribute their opinions to the development of more accessible and affordable family legal services.

### *McKenzie Friends and courtroom companions*

McKenzie Friends are courtroom companions who cannot address the court, but can sit beside a SRL at the front of the court, take notes for them, pass them documents and debrief the proceedings after.

SRLs find appearing in court very stressful. Accompaniment by a friend or relative, or even a paid McKenzie Friend, has the potential to reduce their stress and enable them to focus on what they need to present to the court.



NSRLP is promoting the more extended use of courtroom companions for family SRLs, and has recently produced a new Guide on this topic (“Choosing and Presenting a Courtroom Companion” available at <https://representingyourselfcanada.files.wordpress.com/2016/03/mckenzie-friend-final.pdf>)

*Other types of family litigant “coaches”*

There is a role for other types of expert assistance for family SRLs. These include speaking and presentation coaches, professional editors who can help to review and revise documentation, conflict coaches who can assist a SRL in thinking through the possible elements of a settlement proposal, perhaps in advance of a mediation or settlement conference. Such coaches would have very specific roles in preparing and supporting SRLs through the court process, reflecting their particular expertise.

There is also a role for experts who can offer public legal education seminars on aspects of the justice system to help SRLs make more effective presentations and avoid procedural mistakes.

Finally, we believe that the Law Society and the Ministry of the Attorney-General could play an important role in enhancing public access to courtroom companions and other types of family litigant “coaches”. This might include:

- Publicly stated support for such forms of assistance.
- The provision of information to family SRLs (for example via the network of FLIC’s) of local support services including courtroom companions and other coaches.
- Encouraging family practitioners to provide referral to trusted local sources of such assistance.

As stated at the outset, I am very happy to answer any questions, provide further information that you may find useful, or engage on

any ongoing way with the important work of the Review.

Julie Macfarlane  
April 2016