

University of Windsor

Scholarship at UWindsor

National Self Represented Litigants Project

Faculty of Law

5-15-2017

Family Legal Services Review Submission on Paralegal Practice

Julie Macfarlane

University of Windsor, Faculty of Law

Follow this and additional works at: <https://scholar.uwindsor.ca/lawnsrlppubs>



Part of the [Law Commons](#)

Recommended Citation

Macfarlane, Julie. (2017). Family Legal Services Review Submission on Paralegal Practice.
<https://scholar.uwindsor.ca/lawnsrlppubs/5>

This Report is brought to you for free and open access by the Faculty of Law at Scholarship at UWindsor. It has been accepted for inclusion in National Self Represented Litigants Project by an authorized administrator of Scholarship at UWindsor. For more information, please contact scholarship@uwindsor.ca.

**Family Legal Services Review
Submission on Paralegal Practice
May 15, 2017**

*Dr. Julie Macfarlane
Distinguished University Professor and Professor of Law
on behalf of the National Self-Represented Litigants Project¹*

The [National Self-Represented Litigants Project](#) (NSRLP) fully supports the recommendations made by Justice Bonkalo in her Family Legal Services Review to broaden Access to Justice for family litigants.

This submission will focus on the recommendations regarding the extension of paralegal practice into some family cases, and the licensing of qualified paralegals who can offer these services to family litigants. A second and separate submission, written by our Research Fellow Nikki Gershbain, sets out our arguments (framed in the context of the NSRLP's 2013 Study, [“Identifying and Meeting the Needs of Self-Represented Litigants”](#), and Nikki's stakeholder consultations) for an institutional adoption and promotion of unbundled legal services and legal coaching.

Why We Face an Access to Justice Crisis in Ontario

There can no longer be any doubt that Ontario, like many other jurisdictions around the world², is facing an Access to Justice crisis in family legal services: the majority of the public cannot afford full representation by a lawyer.

¹ I am the Director of the National Self-Represented Litigants Project. I want to acknowledge the research and writing contributions of Dayna Cornwall, NSRLP's Project Coordinator, and Joanna Pawloski, LLB candidate (2019) and Research Assistant, NSRLP, to this submission.

² For studies in other jurisdictions reaching very similar conclusions, see Lord Chancellor's Civil Justice Working Group, "Access to Justice for Litigants in Person" England and Wales, 2011; Bridgette Toy-Cronin "[Keeping Up Appearances: Accessing New Zealand's Civil Courts Without a Lawyer](#)" (PhD thesis) at http://img.scoop.co.nz/media/pdfs/1511/Summary_of_Thesis.pdf; *Cases without Counsel: Research on Experiences of Self-Representation in US Courts*, the Institute for the Advancement of the American Legal System (lead researchers Natalie Knowlton, Corina Gerety and Logan Cornett), 2016

This inability to enter the legal services market is a major factor in the huge increase in the number of self-represented litigants in Ontario's family courts. In some urban centres, self-represented litigants now comprise almost 80% of litigants³. On average, 57% of litigants across Ontario are without counsel – more than half of the province's family litigants. 80,000 Ontarians now come to family court each year without the assistance of legal counsel.

The cost of legal services (which obviously reflect year of call and matter, but are typically around \$350 an hour for a family lawyer⁴) means that most Ontarians cannot afford the assistance of a lawyer for anything beyond a short, time-limited period, if at all. Many contentious family files are neither short, nor time-limited, of course. Many self-represented litigants (SRLs) who formed part of the original sample (n=249) for the [2013 National Self-Represented Litigants Study](#), as well as some of those who have subsequently completed an intake form for NSRLP's continuing data collection⁵, report expenditures on legal services before becoming self-represented that range from \$10,000 - \$200,000.

Slightly more than half of respondents in the 2013 National Study – as well as those reporting in our 2014-15 and 2015-16 Annual Intake Reports – began with a lawyer representing them – but ran out of funds to continue after a

(http://iaals.du.edu/sites/default/files/documents/publications/cases_without_counsel_research_report.pdf)

³ Ontario Ministry of the Attorney-General, combined Ontario Court of Justice and Superior Court figures for 2014/15

⁴ Based on Canadian Lawyer's annual survey "The Going Rate" at <http://www.canadianlawyermag.com/6046/The-going-rate.html>. It is important to acknowledge that a small number of family lawyers offer some fixed fee services or low bono discounts, but those who have become self-represented following a period of representation typically report paying a retainer, plus an hourly rate of \$350 upwards.

⁵ "Tracking the Continuing Trends of the Self-Represented Litigant Phenomenon: Data from the National Self-Represented Litigants Project, 2014-2015" at <https://representingyourselfcanada.com/wp-content/uploads/2015/05/nsrlp-intake-report-2015.pdf> and "Tracking the Continuing Trends of the Self-Represented Litigants Phenomenon: Data from the National Self-Represented Litigants Project, 2015-2016" at <https://representingyourselfcanada.com/wp-content/uploads/2017/02/Intake-Report-2015-2016-FINAL1.pdf>

certain point. Once they have reached their financial “limit”, these individuals began to represent themselves. They felt, quite simply, that their only choices were either self-representation, or giving up (perhaps to a claim for support, property division, or access to their child). The following statement, from the 2013 National Study, is typical:

“I was scared out of my mind. But I had a hard choice – either learning to do this for myself, or letting my daughter go, forever. I didn't know that even if I learned how to do this, anyone would believe me.
But I could not give up without trying.”

The following similar comment comes from a signatory to our [petition](#) supporting the licensing of paralegals:

“People do not want to do this. We really do not. We have no choice. Help us have a choice, give us a voice. Please.”

It is also important to understand the role that the explosion in web-based legal information has played in this crisis. Many SRLs describe initially looking on the Internet for help with their legal issue, and seeing a great many resources come up in Google. Consistently, however, they describe disappointment with the depth, scope and reliability of this information (although some excellent new services are now starting to emerge to help them⁶).

Moreover, many SRLs discover that representing themselves with no prior experience of the justice system is extraordinarily complex, difficult, demanding and stressful. Even with good web-based resources, there are innumerable challenges for litigants unfamiliar with the processes and internal culture of the family justice system – and these individuals are of course already experiencing family transition, or even crisis. Our research shows that with few exceptions, the arc of the SRL experience moves from

⁶ For example, Steps to Justice launched in January 2017 by CLEO (see <https://representingyourselfcanada.com/great-new-legal-resource-for-ontarians>)

initial optimism (following a decision to self-represent and/or the realization that they can no longer afford legal services) through confusion and disillusionment, to eventual despair.

It is the intensity and widespread nature of this despair among family SRLs which has motivated the work of the [National Self-Represented Litigants Project](#) (NSRLP) since its establishment following the 2013 National Study.

The Paralegal Question

Unfortunately, many of the institutions and organizations that represent the Ontario Family Bar, as well as influential individuals, have responded negatively to the paralegal practice recommendations made by Justice Bonkalo.

The legal profession's monopoly over the provision of legal services in Ontario is justified in the public interest. In the Law Society Act⁷, the Society is charged with maintaining and advancing the cause of justice and the rule of law, and "to act so as to facilitate access to justice for the people of Ontario". This monopoly over who provides legal services is intended to ensure "standards of learning, professional competence and professional conduct."⁸

But the services of the legal profession are now only affordable to a small fraction of Ontarians⁹. Many members of the Family Bar continue to assert that "only we (lawyers) can possibly *do this right*" (see also below). The assertion of the monopoly to prevent the provision of legal services by other trained and licensed individuals (who would have to meet standards set by the Law Society) really only works if "this" is also accessible and affordable. The Family Bar is asking Ontarians to accept that they should continue to assert their control over legal services by excluding paralegal alternatives, while simultaneously pricing services out of reach of the majority of

⁷ Law Society Act, L.S.O. 1990 s.4.2(1)(2)

⁸ Law Society Act, L.S.O. 1990 s.4.2(5)

⁹ A reality broadly accepted by the legal profession: see former Supreme Court of Canada Justice Tom Cromwell writing here <https://www.thelawyersdaily.ca/articles/2807/let-s-give-the-bonkalo-report-a-chance-thomas-cromwell>

Ontarians. This proposition is paradoxical and it is also, we believe, inconsistent with the duty of the Law Society under the Law Society Act to provide services “in the public interest”¹⁰.

The largest part of this submission is devoted to addressing the objections to the expansion of paralegal practice that have been raised by the Family Bar since the publication of the Bonkalo recommendation (Part 1 below). We believe that none of these objections credibly undermine the principle proposed by Justice Bonkalo for a careful, thoughtful expansion of paralegal practice.

In Part 2, we highlight the public need for affordable options in family court and the public support for the licensing of paralegals, which we have seen first-hand through the dissemination of our [petition on the issue](#). This petition has, to date, been signed by 720 people, the majority of whom are Ontarians. Many signatories of the petition have also posted comments, which describe eloquently why it is important for paralegals to be permitted to offer some family legal services.

Finally, in Part 3, we address the challenge and the urgency of making real changes to deal with the long-term and systemic consequences of the Access to Justice crisis in Ontario’s family justice system – including failing public faith in the administration of justice, effects on physical and mental health and wellness¹¹, as well as the impact on families, including children, who are managing family transition through divorce and separation.

Part 1: Objections and Answers

Many judges and family lawyers are concerned over the prospect of allowing licensed paralegals to work on some family files. However, we believe their concerns can be reasonably answered. Here we present the most substantial objections that have been raised, as well as our answers to these objections. Please note that the first three describe a specific objection to the expansion of paralegal practice, while the latter six argue that another solution would eliminate the need for the expansion of paralegal practice.

¹⁰ Law Society Act, L.S.O. 1990 s.4.2(3)

¹¹ Semple, N. “The Cost of Seeking Civil Justice in Canada” 93 Canadian Bar Review (2015) 639

1. Objection: Potential clients simply do not accept the necessity of a lawyer's skill in family matters. Self-represented litigants should somehow "find the money" to pay for, or to continue to pay for, a lawyer's expertise.

Answer: Study after study shows that affordability is the major reason for the shocking number of those coming to family court without counsel¹². Most Ontarians now fall into the gap between those who do not qualify for legal aid (a single person must earn less than \$16,000 a year in most cases to be considered for legal aid¹³), and those who can afford full representation by a lawyer. The idea that in saying no to licensed paralegals the Family Bar will funnel all these self-represented litigants back into the arms of lawyers, is, in our view, irrational, and it has no empirical basis.

2. Objection: Paralegals cannot handle family cases because the issues are too complex.

Answer: This blanket rejection of paralegal capacity is difficult to accept, since paralegals currently work in complex practice areas, such as small claims court and immigration. While family cases present unique challenges, the recommendation of the Bonkalo Report proposes an issue-based distinction between cases that paralegals could handle, and those that should continue to fall to lawyers. Bonkalo further recommends that paralegals appear in court on motions and applications, but not at trial where lawyers would continue to have sole rights of appearance.

Drawing such distinctions accepts that not all matters are suitable for paralegal practice. Moreover, the details of the parameters of paralegal practice can still be debated as the proposal proceeds. Similarly, there is plenty of time to debate the appropriate content for paralegal training and the standards set for licensing.

Rejecting the use of paralegals in *any* aspect of family practice is unsupportable. It is already the case that legal assistants (who cannot presently be designated as paralegals) work in family law firms on cases and carry out various tasks under the supervision of a family lawyer.

¹² Supra note 2

¹³ Legal Aid Ontario, <http://www.legalaid.on.ca/en/>

The proposed expansion of paralegal practice should of course be carefully monitored and evaluated, using credible independent research methods. Task-based evaluation (reviewing both competency and client satisfaction with enumerated tasks in family practice) will provide critical and reliable data for future decision-making on “who does what” in family practice.

It is important to recognize that the public does not accept that simply saying “no, it’s too complex” is a credible – rather than a self-interested and protectionist – argument. On our [petition page](#), where almost half of the signatories have left a comment explaining why their support for expanding paralegal practice, we have seen multiple comments that refer to the capability of paralegals to manage some family cases. Some of these comments come from lawyers:

“I am a lawyer who teaches paralegals, and understands the skill level they bring to the matters they handle. Family law needs to change.”

“Paralegals are certainly capable of representing individuals in Family Court. They would of course need additional training. With that they could handle less complex matters. Motions on consent, case conferences, advocacy.”

“Paralegals have shown that when given the opportunity to specialize in an area of law, we have succeeded. Landlord and Tenant Board, Provincial Offences, and the Small Claims Court are proof of this as they are becoming dominated by paralegals.”

3. Objection: Paralegals will not end up costing clients any less than lawyers.

Answer: There is absolutely no evidence to support this speculation, which has circulated widely on Twitter and other social media. There is a wide discrepancy between the hourly rate commonly charged by family lawyers - upwards of \$350 an hour – and those charged by paralegals¹⁴. Some members

¹⁴ In our experience, paralegals charge between \$75 and \$200 an hour, depending on the complexity of the matter.

of the Family Bar have claimed that paralegals would take so long and make such a mess of family files, that this four-times difference in hourly rates would be erased. However, it is hard to imagine that properly trained and licensed paralegals would commonly display such a level of incompetence in accomplishing tasks such as drafting documents, and filing court forms. This is particularly difficult to imagine since many legal assistants currently draft documents and file court forms for the family lawyers for whom they work.

The real question here is whether some types of relatively routine and straightforward applications (for example, filing an uncontested divorce, agreeing to child support using the table guidelines) should cost as much as \$350 an hour upwards, and whether the types of training and qualifications that family lawyers bring – as opposed to trained paralegals charging a lower hourly rate - are really necessary for all family matters. We agree with Bonkalo that they are not.

Once paralegals are permitted to take on certain types of family cases, data can be collected that tracks absolute and relative costs. Until then, this is pure speculation with no empirical basis, and it contradicts present experiential knowledge.

4. Objection: The A2J crisis can be solved by the provision of more legal aid, making the expansion of paralegal practice unnecessary.

Answer: Unfortunately, this objection is unrealistic and uninformed. Respected legal economist Gillian Hadfield¹⁵, among others, has demonstrated that fully funding those who cannot afford a lawyer would bankrupt public services. Instead, there is a need for multiple creative solutions, including the licensing of paralegals to handle some family cases.

At the NSRLP we support the expansion of legal aid as well as the use of more creative options for funding assistance (for example, using limited scope retainers in some cases). However, the quantitative data shows clearly that

¹⁵ See for example legal economist Professor Gillian Hadfield's testimony to the New York Task Force to Expand Access to Civil Legal Services at <https://richardzorza.files.wordpress.com/2012/10/hadfield-testimony-october-2012-final-2.pdf> and see <https://news.usc.edu/42081/hadfield-testifies-on-access-to-justice/>

public legal assistance can only play a small part in bridging the gap between those unable to afford legal assistance, and those who are eligible for such assistance.

5. Objection: More triaging and diversion into mediation and settlement processes will help address the A2J crisis.

Answer: We agree. However, this is another example of just one piece of a systemic solution, and not a reason to reject the proposal for paralegal practice. It is also noted that after more than twenty years of promoting such programs, there is still insufficient public uptake – particularly among SRLs, who often have little idea how to use such processes effectively without more assistance¹⁶ – to make a real dent in the access to justice crisis by using mediation and settlement processes.

6. Objection: Promoting information and education programs in Ontario family courts will reverse the rise of self-represented litigants.

Answer: At the NSRLP we support such expansion and have worked with services across Canada providing training. Many SRLs, especially those with higher levels of education, attest to the usefulness of such programs (and the sterling work being done by court information workers). However, although helpful, there are many litigants for whom information and education programs are *insufficient to meet their needs* – they also need legal assistance.

7. Objection: Ontario’s family judicial vacancies should be filled.

Answer: Once again we agree, but do not believe that this would significantly address the need for assistance for SRLs in family court. By the time a SRL reaches a hearing before a judge, he or she has already been struggling without assistance, or with minimal assistance, for some time. This creates enormous challenges for family court judges, who often see family litigants who are not ready or able to participate. Furthermore, judges are often faced with the dilemma of how “actively” they should assist self-represented litigants in their courtrooms¹⁷. Even where this assistance is provided,

¹⁶ 2013 National SRL Study at pages 73-75

¹⁷ This is a contentious issue currently being explored in case law. See *Pintea v Johns*, 2017 SCC 23

guidance by a neutral, impartial decision maker is not an adequate replacement for assistance provided by a legal professional who is dedicated to a litigant's case.

8. Objection: More and better use of web-based technologies is needed to address the Access to Justice crisis.

Answer: We are delighted to see the emergence of better web-based resources and other uses of technology (for example e-filing, and the launching of an online dispute resolution forum in British Columbia¹⁸). However, the effective deployment of new technologies is once again only one piece of a systemic solution to the A2J crisis. We know from our daily interaction with SRLs that for some litigants, especially older people and those dealing with language barriers, face-to-face access to a legal advisor is critical. This reality is also widely accepted by those working on new technologies.

9. Objection: Paralegal practice is only one part of the A2J problem, we need systemic change.

Answer: We agree. Multi-faceted systemic change is necessary to address the Access to Justice crisis. However, that does not mean that incremental change should not begin. Indeed, it is clear to us at the NSRLP from our daily mailbox that something must also be done right away to respond to the unmet legal needs of the public.

In the view of the NSRLP, none of the objections or alternatives raised by the Ontario legal establishment are sufficient to suggest that the proposal to licence paralegals to work on some family law matters should be scrapped. This is one eminently practical solution to addressing the access to justice crisis – one among many, certainly, but one of the most practical.

Part 2: Need and Public Support

Of the over 700 ordinary Ontarians who in the last few weeks have signed our [petition](#) supporting Justice Bonkalo's recommendation for the expansion of

¹⁸ See British Columbia. Civil Resolution Tribunal, at <https://civilresolutionbc.ca/>

paralegal practice, hundreds offer concrete and intelligent evidence for why they wish to see paralegals able to offer assistance to family litigants.

By the date of this submission (Monday, May 15th) this petition has been signed by 720 people, the large majority of whom reside in Ontario. We are certain that this is just a small fraction of the support for the expansion of paralegal practice among those who have been directly affected, or who have had family or friends affected, by the Access to Justice crisis.

Many commenters naturally speak of the financial burden of legal services, endorsing paralegals as a reasonable and affordable option:

“I have been faced with self-representation, and know first-hand the need for more affordable legal assistance in family law.”

“I have to represent myself in family court. Had to decide feeding my children is more important than paying a lawyer \$400 per hour.”

“Family issues are arising daily and far too many people are struggling with representation due to affordability. I've personally heard stories from mothers and fathers struggling in family courts having to uncomfortably represent themselves for issues that a paralegal would be capable of helping with. Our legal system is supposed to ensure justice is accessible to all.”

“Access to justice includes being able to be fairly represented in court-- families should not go unrepresented or struggle because they cannot afford a lawyer's services.”

The public is painfully aware that financial considerations are the most significant factor in limiting Access to Justice.

However, just as important is the issue of health. Litigants forced to represent themselves have described over and over again the negative consequences to their health and well-being that so often follow when they try to navigate the court system without a skilled and qualified advocate. Many of those leaving comments on our petition have referenced mental health and wellness as a primary consideration in supporting the licencing of paralegals:

“I have seen the pain and suffering my daughter and granddaughter have gone through as a result of this legal system. It has been devastating...”

“I am a freelance Graphic Designer who was forced to defend myself against an unscrupulous client who chose not to pay for work done. [...] Ultimately, I defended myself in court and won, but suffered from a lengthy depression afterward due to the emotional stress the case caused me. If I had had access to a paralegal to help me, I might not have had to endure the manipulations of [opposing counsel] on my own and fared better.”

“I am a Family Court Support Worker (MAG) and I see some of my clients having to represent themselves before the judge and their [...] abusive [...] partners. These women deserved to be supported and represented in Family Court. It is already very stressful, traumatic and emotionally draining for them to leave an abusive partner, deal with police, criminal charges, financial hardship, feelings of guilt for different reasons (ex in jail, children and family judgment, shelter, etc.) without having to represent themselves on top of that.”

“Family court is hard and a long tough battle. Court is stressful enough. Help us ease our burdens.”

Commenters furthermore realize that paralegals can be very capable of providing good legal help and representation, if they are effectively trained and licenced:

“Education is a continuous requirement for the paralegal and lawyer profession. If paralegals were to be able to expand their scope of practice into family law, there is no doubt that they will continue their education in order to properly represent those needing adequate but affordable representation.”

“Access to justice must include access to legal services and legal service providers. Paralegals were regulated by the Ontario government and LSUC to increase access to justice for the people of Ontario. A judicial system that cannot be accessed by those who need it is of little use or value. There is a role for paralegals in family law matters.”

“I am a paralegal and ... I see a tremendous need of help in family law matters. I see and hear often people who can't afford to pay for a lawyer, how confused and afraid they are; they don't know what to do or what avenue to choose in their situation. Not only [that], but completing the forms and the language used in the forms and in court is totally unknown to most of these people. I think allowing paralegals to represent in Family Court would be a great help to many.”

“I am a law clerk having specialized in family law for over 15 years. I have had many friends/family that have been faced with the need for legal representation but could not afford it, unfortunately. They and many others would have benefitted immensely from a more affordable and accessible option. Please consider that a service such as this is not only about representing these litigants in court, but also to give them direction, help them with completing family law forms, with procedural issues, and help them to access supporting legislation and case law to assist them. This would pose as an extremely useful resource for self-represented litigants and could tremendously benefit the judicial system as a whole. Please consider the breadth of assistance this could provide for so many.”

Above all, commenters see the inherent value in implementing a recommendation that would provide access to justice in a very practical way where the need is greatest:

“Family law litigants are mostly SRLs and it is ridiculous to send them into legal battles blind rather than with someone who has had at least some legal training, especially in an area of law where the stakes are so high (people's children are at stake! they should be able to use all the help they can get!)”

“The justice system for our most vulnerable people is impossible to navigate in any real way. Broadening the abilities of paralegals while keeping costs low are two reasons I support this petition. One does not realize how stacked the system is in favour of existing power structures until it happens to you.”

We have provided here just a small sampling of the hundreds of comments our petition has received; we recommend that readers of this submission browse the [many more heartfelt comments on our petition website, as they grow daily.](#)

Part 3: Facing the Need for Change

It is very clear to all of us at the NSRLP that many Ontarians need and want to see paralegals licenced to work on family law matters. This is supported by our research over the past five years, by our daily interactions with SRLs, and by the outpouring of support our petition has received over the last few weeks.

We urge the Ministry of the Attorney General to reject the ungrounded objections of the Family Bar and refuse to allow them to sink a proposal that is so eminently reasonable, and so desperately needed.

The public needs to see that the legal establishment – represented by the Ministry of the Attorney-General and the Law Society of Upper Canada – recognizes the need for, and is committed to, real change.

We cannot stress this point strongly enough. The Access to Justice crisis that is forcing so many Ontarians to come to family court alone, combined with the sense many hold that lawyers, judges and other justice system insiders (with court information service workers being notable exceptions) are determined to maintain their vested interests in a system that is for “them”, rather than for the public, is producing a serious backlash of public opinion.

It is often said that the public does not care about Access to Justice. That is not our experience. It is true that few people anticipate that they will need the services of a lawyer, or go to family court for a divorce – until they do. But as one petition signer put it, it is really just a matter of time before many Ontarians will either experience this crisis themselves or will know someone else who has done so. “Do your future self a favour – please read this petition and share if you agree”, urges one commenter.

It is also important to recognize that the public is weary of being told of a new task force or committee that will decide on changes to improve Access to Justice. Help is needed now. Expanding paralegal practice will not bring

immediate help – there needs to be thorough debate on the form of training and standards for licensing, as well as the development of an evaluation framework – but adopting this critical principle will provide the public with a sense of moving forward to a concrete reform, with a reasonable timeframe, which can be a significant part of the solution.

We shall be leaving the petition up for the next few weeks, and can send further updates if these would be helpful. We shall ultimately present the petition, along with the full names of the signatories, to the Attorney-General, the Honorable Yasir Naqvi, and the Treasurer of the Law Society, Paul Schabas.

We close with the following comment from the petition, which we feel crystallizes many of the issues.

“The costs of separation and divorce are not just financial. The added concerns of having to be a single parent and learn how to navigate the courts in order to secure the children's wellbeing and put closure on uncertainty, is no easy task. There are many simple family law matters that paralegals could assist on such as uncontested divorce, registering a separation agreement, mediation to finalize a separation agreement, being an advisor on child support tables, spousal support guideline tables etc. If a law clerk can draft papers and communicate regarding family law matters, under the supervision of a lawyer then surely a paralegal with legal training, should be able to. The monopoly enjoyed by lawyers should not be allowed to continue as it is the families who suffer and the children, the most.”