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## Access to Justice Committee: Family Legal Service Provider Consultation

Submitted to: Law Society of Ontario  
Osgoode Hall, 130 Queen Street West  
Toronto, Ontario M5H 2N6

Submitted on: November 26, 2020

### **Submitted by:**

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Thank you for providing this opportunity to The Federation of Ontario Law Associations (Hereinafter referred to as "FOLA") to provide comments regarding the Family Law Service Providers (Hereinafter "FLSP").

FOLA is an organization that represents the associations and members of the 46 local law associations across Ontario. Together with our associate member, The Toronto Lawyers Association, we represent approximately 12,000 lawyers, most of whom are in private practice in firms across the province. These lawyers are on the front lines of the justice system and see its triumphs and shortcomings every day.

These submissions serve as FOLA's comments regarding the FLSP. FOLA does not fully support the proposal of the Family Law Working Group to establish a new profession of Family Law Service Providers. The said proposal fails to demonstrate and or establish a business case that would provide an alternative to litigants or the ability to increase access to justice.

The issue of access to justice for individuals in family law disputes has received an increased attention in recent years both on a national and international level, specifically to unrepresented individuals involved in family courts proceedings. FOLA continues to be committed to initiatives that provide access to justice, and also to the ongoing reform of Ontario's family law system. Family law has been, and continues to be, a



very complex area of law where families turn to the family courts to assist them in resolving their disputes. These families hope to understand the process and have their time within the system be financially affordable.

In Justice Bonkalo’s report entitled, *“Family Legal Services Review”*<sup>1</sup>, Justice Bonkalo recommended that *Paralegals licensed in family law should be permitted to provide legal services in custody; access; simple child support cases; restraining orders; enforcement; and simple and joint divorces without property*, while the Family Law Working Group expanded on the scope of practice beyond what was proposed without providing a business case to support same.

There should be no dispute that we must address the issues of access to justice in family law and we also must be mindful of the sociocultural shifts which have also occurred. Having said that, one must look at the overall objective rather than a quick Band-Aid solution. Chief Justice Warren K. Winkler’s opening remarks <sup>2</sup> *“I would like to begin with a simple statement; access to a justice system does not necessarily equate with access to justice. I state this, because there is a need to continually examine our systems of justice and scrutinize them to determine whether they are providing adequate access to justice for our citizens.”* Simply put, allowing paralegals to expand their scope of practice to include Family Law without any empirical data, in and of itself does not equate or afford access to justice for Ontarians.

Furthermore, Justice Cohen of the Ontario Court of Justice stated, *“What’s at stake (in these cases) is of great magnitude,”* ..... *“This is the most important work that we do.” The solution, she said, is a “properly funded, properly resourced legal aid system. It’s what the people of Ontario have a right to expect. . . . This is your legal system and you expect to get the same access to your legal system as everybody else gets.”*

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<sup>1</sup> Justice Bonkalo, Family Legal Services Review, (Ontario: Ministry of the Attorney General, 2016) [Bonkalo Report].

<sup>2</sup> Law Society of Ontario, 5th annual family law summit (2011)



Additionally, *R. v. Bilinski*<sup>3</sup>, Justice Bruce Durno of the Superior Court of Justice considered the question whether the paralegal provided deficient service to the extent that the guilty verdict in this case was in doubt. In his decision, Justice Durno stated that *“The appellant has provided no evidence that the LSUC or any other regulatory body has now assured the public that the representation level is the same. Indeed, the record supports a contrary conclusion. The case-specific evidence on this appeal supports that conclusion. The appellant knew he was not retaining a lawyer. He knew the agent had less legal training than a lawyer and he knew the agent would charge less than a lawyer.”*

**Answers to questions posed in the consultation paper.**

1. *Will the proposed scope of permissible activities support increased access to affordable, competent family law legal services? If so, how?*

FOLA is of the view that the proposed scope does not provide and/or increase access to affordable, competent legal services. There is simply no empirical data which would demonstrate this.

In 2016, FOLA retained an established research firm Corbin and Partners to conduct a study relating to the comparable market fee assessment between private practice paralegals.

This study determined that although at the surface level there is a general impression that legal fees charged by paralegals to clients are lower than fees charged by lawyers for similar services, a deeper analysis showed there were doubts and uncertainties on whether there was a significant cost difference at all<sup>4</sup>.

While anecdotal evidence exists to question this comparative pricing, there is a complete lack of empirical evidence on which to gauge this issue. Lawyer’s legal fees continued to be tracked, both provincially and nationally, but similar tracking has not yet been found in the regulated paralegal market.

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<sup>3</sup> 2013 ONSC 2824 (CanLII).

<sup>4</sup> Reference is to Corbin Partners’ “Market Reconnaissance Study” examining fees of private practice paralegals and lawyers. This Study was commissioned by FOLA, a copy of the study can be made available upon request.



A cursory Google search found the following:

Precision Paralegal, Michelle Haigh – President of Precision Paralegal \$295.00 an Hour, Senior Paralegals \$175.00 – \$195.00 an Hour, and Junior / Intermediate Paralegals \$125.00 – 150.00 an Hour<sup>5</sup>.

It therefore appears that the hourly rate for paralegals is comparable to that of a new family lawyer<sup>6</sup>.

It appears that it has already been decided that less expensive paralegals are the answer to ongoing access to justice issues without determining whether they are in fact less expensive and will provide the access to justice being sought. It seems paralegals are the deemed answer without the necessary study to determine what the actual cause of the problem is in the first place: the cause of the problem cannot be that lawyers charge too much. That is far too simplistic for such an overarching and systemic problem.

A number of new initiatives are being implemented to assist individuals seeking counsel in family law matters. This was recognized by LSO treasurer Teresa Donnelly<sup>7</sup>. She stated that “So much good work is happening on the ground to change how family law clients can get help, both publicly and privately, along the spectrum from public legal education and initial consultations on one end, all the way up to full representation,” Donnelly said in introducing the 90-minute Zoom event. “I wish to recognize the family law bar for taking on these projects in direct response to challenges that have been identified in terms of access to affordable legal representation.”

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<sup>5</sup> <https://www.precisionparalegal.ca/our-rates/ontario-hourly-rates/#:~:text=Hourly%20rate%3A%20%24175.00%20%E2%80%93%20%24195.00%20%2F,a%20wide%20variety%20of%20matters>

<sup>6</sup> Bruineman, Marg., “Steady optimism – 2019 Legal Fees Survey”, *Canadian Lawyer* (8 April 2019) online: *Canadian Lawyer* < <https://www.canadianlawyermag.com/surveys-reports/legal-fees/steady-optimism-2019-legal-fees-survey/276027> >

<sup>7</sup> [https://www.thelawyersdaily.ca/family/articles/22015/ontario-family-law-event-details-recent-innovations-in-service-delivery?nl\\_pk=9b8917ae-e321-4893-aeb2-2008377284a4&utm\\_source=newsletter&utm\\_medium=email&utm\\_campaign=family](https://www.thelawyersdaily.ca/family/articles/22015/ontario-family-law-event-details-recent-innovations-in-service-delivery?nl_pk=9b8917ae-e321-4893-aeb2-2008377284a4&utm_source=newsletter&utm_medium=email&utm_campaign=family)



Some of the initiatives across the province are Lukes Place virtual legal clinic, sliding fee scales for modest income earners, the Family Law Limited Scope Services Project, private duty counsel offered through the Advise Settlement Counsel of Toronto (a similar model is being considered in other parts of the province), the Barrie Advise Counsel project, and the initiative of the Family Justice Centre by pro bono Students Canada. Our members have indicated anecdotally that the unbundling of legal services has also been utilized by many clients as a means of reducing cost.

Furthermore, FOLA along with The Advocate Society and the Toronto Lawyers' Association has conducted a survey with family law lawyers across the province, yielding 428 responses with the following results as of November 18, 2020:

- a. 60% offered unbundled services;
- b. 66% offered limited scope retainers;
- c. 42% offered flat fee retainers;
- d. 20% offered sliding scale retainers;
- e. 72% offered limited scope retainers;
- f. 40% offered pro bono work that comprised of the following hours.
  - i. 15.5% offered between 1-19 hours;
  - ii. 15.5% offered between 20-39 hours;
  - iii. 10.5 % offered between 40-59 hours;
  - iv. 5% offered between 60-99 hours; and
  - v. 5% offered more than 100 hours.
- g. 74% offered services below their standard hour rates;
- h. 42% offered lower hourly rates between \$100-\$199; and
- i. 22% offered lower hourly rates between \$200-299.

As is clear from the data gathered, lawyers across the province have recognized that many litigants could simply not afford their hourly rates. Lawyers have therefore adjusted their rates accordingly by offering many alternative options, which include discounted rates. The data gathered above supports FOLA's recommendations made within this report. It is FOLA's position that our recommendations should be seriously considered and implemented



as opposed to moving forward with the FLSP programme as proposed. A "lesser cost" option already exists through family lawyers and therefore the FLSP programme for cost purposes becomes redundant and unnecessary.

The issue of competency will be addressed further below in response to question 3.

2. *Will the proposed scope of permissible activities enable the FLSP to develop a business model that is viable? If so, why? If not, why not?*

It is beyond scope of FOLA and its members to ascertain the viability of a business model for which no studies have been commenced. We cannot accurately determine whether a FLSP would or would not have a viable business. There are too many variables, potentialities, and contingencies for us to be able to speculate and foresee the outcome of the FLSP as proposed. It is our position, however, that the proposed scope of permissible activities is overbroad and must be narrowed substantially. This will be addressed in response to the question below.

3. *Will the proposed competencies ensure the appropriate level of competence to deliver family law legal services in the proposed scope? Are there other competencies that should be considered?*

It is our view that the Law Society is being asked to yield to pressure from the judiciary to “do something” about the ballooning number of self-represented litigants before the courts. As indicated above, it appears as though the FLSP has been seized upon as being the solution to this complex, systemic and multifaceted problem. FOLA believes an undergraduate degree, three years of law school, articling/law practice program, and ongoing CPD requirements cannot be compared to a high school diploma, a two year diploma at a community college and less than a year of “training”. For all intents and purposes, a FLSP is a *de facto* family lawyer with about a quarter of the education and training.

To ensure the appropriate level of competence to deliver family law services within the proposed scope, one must be a lawyer.

4. *In your view, what scope of activities would best support access to affordable and competent family law services?*



We must reiterate that we do not believe that the FLSP would be any more affordable than a lawyer, and our position is that the FLSP should not be implemented at all. However, in the event the FLSP is implemented, we have significant concerns about the scope of the permissible activities. They are essentially all areas of family law with very few areas being excluded.

Simple/Joint Divorces: FOLA takes no issue with the proposed scope.

Custody/Access: FOLA takes no issue with the proposed scope.

Child support: FOLA believes the only issue a FLSP should be permitted to address is employed payors where Guideline support is applicable. Self-employed income always has an income determination issue, as it would be erroneous to take the self-employed income at face value. Many factors go into forwarding an appropriate quantum to the court for its consideration when dealing with self-employed payors, and this is analogous to imputation of income as well. Self-employed recipients are also an issue when determining proportionality for section 7 expenses. Furthermore section 7 expenses in and of themselves can be a difficult issue, insofar as just because an expense occurs does not mean it is necessarily “special” or “extraordinary”.

Family law lawyers would advise that undue hardship is one of the most difficult claims to successfully assert. The factors are complex, the case law is nuanced and frankly it’s just plain difficult. It should not be within the permissible scope.

Support issues that are within the Family Responsibility Office matters can involve the default payor suffering serious consequences, such as jail term for each missed payment. It is our position that FLSP’s should not be representing clients who have custody as a possible outcome.

Spousal Support: FOLA takes the position that spousal support should be outside the permissible scope for a FLSP. There is a misconception that since the implementation of the SSAG that spousal support is now markedly straightforward. It is not. Eligibility and duration remain complicated issues with volumes of case law on both sides of every



issue. Additionally, spousal support quantum and termination dates are often encapsulated within negotiations for increased or decreased equalization payment.

**Property/Matrimonial Home:** FOLA takes the position that all property issues should be outside the permissible scope for a FLSP. Our concerns are not just that property issues are complicated, but that the issues are often not self-evident at the outset. How would a FLSP be able to assess whether or not there will be a joint family venture or the extent of issues relating to a matrimonial home, such as the severance of a joint tenancy? Even experienced family lawyers cannot necessarily determine whether such issues will be in play at the outset of a matter.

Additionally, there are complex evidentiary issues which could easily turn a “within” scope to an “outside” scope issue. For example, a family loan may be adequately documented to appear to be a straightforward debt but still may require discounting, thereby requiring a third-party valuator.

The consequences of not identifying, and not having the ability to identify, certain claims relating to property can be catastrophic to litigants.

**Contempt:** FOLA takes the position that FLSP’s should not be representing clients where jail is a possible outcome, as it is in every contempt matter. Contempt hearings are quasi criminal proceedings and the possible outcome if found guilty is a period of custody.

**Setting Aside:** FOLA takes no particular issue with FLSP’s being permitted to apply to setting aside Orders for lack of effective service as contemplated. However, Minutes of Settlement and Domestic Contracts are by their very nature signed by the parties and are not served. These needs to be removed from proposed Area 8.

**Domestic Contracts:** Given FOLA’s views on property as outlined above, it is our position that FLSP’s be permitted to draft Custody/Access/Child support Agreements, subject to our proposed caveats above with respect to Child support. We do not believe FLSP’s should be permitted to address property issues for the reasons outlined above.

**Change of Name under the Change of Name Act:** FOLA takes no issue with this being within the proposed scope.





5. *Is the proposed training program of sufficient duration and rigour to enable candidates to achieve the proposed competencies?*

The proposed training only involves 550 hours of coursework with a short field placement. There is no feasible way, despite careful construction of coursework, that a FLSP could achieve competencies in even the limited scope FOLA would support, let alone the complete proposed scope of activities. As indicated above, the FLSP as proposed essentially creates a family lawyer, and therefore the education and training needs to be analogous to that of a lawyer.

LSO should be mindful of the initiatives that were put forth by the state of Washington which in 2015 had begun a limited license legal technician program. These individuals are licensed to provide legal advice and assistance to clients in certain areas of law, including family law, without the supervision of a lawyer. On June 4, 2020, the Washington Supreme Court decided to sunset the LLLT program because it was, for all intents and purposes, not functioning as it had been projected.

6. *What type of prerequisite experience in legal services provision, if any, should be required for the FLSP?*

FOLA suggests that a minimum five years working as a licensed paralegal should be required before a paralegal should be permitted to apply for the limited scope FLSP. This would at least ensure that the individual has the ability to perform adequately as a paralegal before adding much more professional difficulty to their work.

7. *What length and form of experiential training should be incorporated into the licensing process for the FLSP to support the competencies? If a field placement is required, who will provide the placements?*

This is, practically speaking, a very difficult question to answer. There is certainly no reason a FLSP should not have to have the same requirements for articling/practice as a lawyer. A straw poll of our members show not a single lawyer was willing to supervise such an endeavour for a FLSP. Until some version of the FLSP program is functioning, there



will not be any FLSP’s to supervise future FLSP’s during their field placement. This problem needs to be solved in advance of any continuation of the development of the proposed FLSP program.

8. *Is a CPD requirement focussed on family law appropriate for the FLSP?*

FOLA believes that an enhanced CPD requirement, requiring more hours and more in depth content, would be necessary for the FLSP so as to in some way compensate for their lack of legal education.

9. *Should law clerks be eligible for the FLSP license? Are there other groups of professionals who should be considered?*

FOLA does not support the inclusion of law clerks in the FLSP license, and the reasons for this position mirror those as applied to the proposed paralegal model. Despite this, their inclusion would at least ensure consistent supervision by a licensed lawyer, which is unlike the paralegal model which is being proposed.

10. *What characteristics of the FLSP would make this provider appealing to self-represented litigants? (billing practices, cost structure, accessibility, practicality, other?)*

There is no empirical evidence that any of the “appealing” aspects of the FLSP actually exist. This entire exercise is predicated on the assumption that FLSP’s will be less expensive than a lawyer but there is no evidence to support this. There is a great leap in logic between “we need access to justice” to “FLSP’s will be the answer”.

Additionally, we need to understand that there is an important distinction between individuals who wish to be self-represented and those who are unrepresented. Those who wish to be self-represented will not utilize any provider of a legal service and will continue to appear before the courts without counsel, regardless of cost.

11. *Given the recent enhancements to accessing family law (i.e. court modernization, Steps to Justice, etc), is the FLSP design appropriate?*



The recent move towards the increased use of remote courts via Zoom and other electronic means will be shown to have substantially reduced legal costs and increased efficiencies.

12. *Are any aspects of the proposed licensing framework unfeasible?*

This has been addressed fully in the answers to the previous questions.

13. *Is there additional information or are there other factors that should be considered?*

For better or worse, there is a public perception that lawyers who accept Legal Aid are not as skilled, and those who only accept private retainers are more highly skilled. With the proposed FLSP, there will be a *defacto* third tier, wherein private counsel are on the top, FLSP will likely end up in the middle and Legal Aid counsel will be at the bottom. The only thing creating this hierarchy is the amount of money the public believes each is receiving an hour for assisting their client.

Additionally, even lawyers who have practiced family law for decades are not permitted to call themselves “specialized” without going through a rigorous application process through the LSO. The FLSP in and of itself is a form of specialization which could easily confuse the public into thinking the FLSP is inherently more qualified than a family lawyer.

Finally, FOLA takes the view that any roll out of the FLSP should be done slowly and incrementally: scopes of services can be added if appropriate, but if scopes of services have to be reined back in there would have a negative impact on the public’s perception of the LSO.

## **Recommendations**

### **Family Law Rules**

FOLA believes that part of the underlying issue is The Ontario Family Law Rules in and of themselves. Family law practitioners across the province have raised concerns relating to the Rules, and they are viewed as placing a hurdle on the issue of access to justice and require significant reform.

There can be no doubt the Rules have caused legal costs for litigants to skyrocket and any consideration with respect to changes to the Rules should also focus on enhancing timely access to justice and reducing legal costs.



For example, Rules 17 deals with Conferences, including the case, settlement and trial management conferences. While the Rules do allow for the combination of the three conferences into one or two, the practice across the province is unpredictable and inconsistent. These three possible conferences will not necessarily provide a resolution to the matter, and the attendance at these conferences will inevitably result in a higher cost for litigants. They can also result in significant delay in the matter proceeding in a timely fashion. Regardless of whether litigants are represented by counsel or a FLSP, this problem still exists.

Additionally, Financial Forms have been added but the request for irrelevant information and requirements for obsolete forms has not been taken away. For example some of these financial forms made sense before the introduction of the Child Support Guidelines and Spousal Support advisory Guidelines but now why does it matter how much a litigant spends on magazines or pet food? The forms which are currently standard should only be required when the Court orders them and in limited circumstances,

**Legal Aid**

For many years Legal Aid has been viewed as the pillar in providing access to justice through both certificates for the private bar and of duty-counsel to the service of lower-income Ontarians. In recent years we have seen the various governments decrease funding towards Legal Aid, which ultimately increases the presence of self-represented individuals in court. FOLA supports the increase of funding and expansion of Legal Aid Ontario. Furthermore, FOLA’s position the financial eligibility requirements must be revisited and amended to capture those who could not afford a lawyer. For example the current test is as follow:

**CERTIFICATE ELIGIBILITY THRESHOLDS <sup>8</sup>**

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<b>Number of family members</b>	<b>The amount of money your family earns in a year</b>	<b>For domestic abuse cases</b>
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<sup>8</sup> <https://www.legalaid.on.ca/news/details-on-legal-aid-ontarios-financial-eligibility-increase-for-2019/>



1	\$17,731	\$22,720
2	\$31,917	\$32,131
3	\$37,194	\$39,352
4	\$42,726	\$45,440
5+	\$48,173	\$50,803
Single boarder	\$11,632	

Based on the above, it is unreasonable to expect that it would be possible for an individual to earn slightly more than the level of income in the chart above and also have the ability to afford a lawyer or FLSP. The financial eligibility tests for Legal Aid must be changed to encapsulate more than just the very poorest of Ontario's residents.

### **Technology**

There is no doubt that some would consider the COVID-19 pandemic has had an unforeseen but positive impact on access to justice as a result of the enhancement and implementation of the digitalization/ remote hearings. FOLA is of the view that the LSO should work in conjunction with the Attorney General in expanding and continuing to improve this system to allow all Ontarians an easy access to justice.

There are many benefits that can be afforded to all litigants from the increase in digitalization and remote hearings, such as online filings, instant remote hearing without the necessity for counsel and client to travel, and remote hearings are scheduled for a set time with counsel not needing to be in court the majority of the day thereby resulting in a substantial decrease in costs for clients.

In light of the above, FOLA is also of the view that almost everyone has, or can use, a telephone. Many people have smartphones, but some self-represented litigants do not have access to a telephone, electronic device, or a computer. So while technology is the new landscape in remote hearings, LSO and the AG's office must consider making investments in communities to ensure fairness. Furthermore, LSO and the AG's office can consider a



Self-Help center that may offer information and assistance regarding places where self-represented litigants can use computer equipment to participate in remote court proceedings.

**Other Initiatives**

The LSO and the AG's office should consider supporting and providing some assistance in the implementation of Pro Bono Students Canada and the launching a Family Justice Centre Ontario.

It is FOLA's view that the LSO, stakeholders, and the family bar expand legal coaching and the unbundling of legal services by family lawyers.

FOLA believes that Alternative Dispute Resolution should be at the forefront of an initiative driven by LSO to promote same amongst the family law bar.

FOLA is grateful for the opportunity to provide its submissions and welcome any opportunity to work with the Law Society of Ontario as it continues its commitment to address and improve Ontario's justice system.

Yours very truly,

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