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FOLA's RESPONSE TO LSO's ACCESS TO JUSTICE COMMITTEE

Submitted to: Law Society's Access to Justice Committee
Access to Justice Consultation
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Thank you for allowing justice stakeholders the opportunity to provide feedback to the Access to Justice Committee (“the Committee”). With the recently announced cuts to Legal Aid Ontario, access to justice, particularly for the vulnerable members of the public, is of crucial importance.

The Federation of Ontario Law Associations (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 who 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.

Introduction

The *Law Society Act* mandates that in carrying out its functions, duties and powers under the Act, the LSO “shall” have regard to a number of principles, including “a duty to act so as to facilitate access to justice for the people of Ontario”.

The words “access to justice” are not defined in the *Law Society Act*. Clearly, access to justice is a very broad term that can include assisting members of the public to find a lawyer but can also include the provision of funding to Ontarians of modest means for the retention of legal service providers.

In facilitating access to justice, the roles played by various justice stakeholders are of importance. For example, as the regulator of the profession, the Law Society should not assume the responsibility of a funder of legal services. Funding for such services is the responsibility of the state, not the regulator. The regulator’s responsibility in facilitating access to justice should be focused on matters such as matching the public’s legal needs to legal service providers. This responsibility can be met in various ways. As recently stated by the Supreme Court of Canada in *Trinity Western University v. Law Society of Upper Canada*,¹

“The Law Society of Upper Canada was also entitled to interpret the public interest as being furthered by promoting a diverse bar. Access to justice is facilitated where clients seeking legal services are able to access a legal profession that is reflective of a diverse population and responsive to its diverse needs. Accordingly, ensuring a diverse legal profession, which is facilitated when there are no inequitable barriers to those seeking to access legal

¹ *Trinity Western University v. Law Society of Upper Canada* [2018], S.C.R. 453



education, furthers access to justice and promotes the public interest.”²

The private bar also has a responsibility to facilitate access to justice, quite apart from the directives issued by its regulator. As stated by the Supreme Court of Canada in *Hryniuk v. Mauldin*³,

“Ensuring access to justice is the greatest challenge to the rule of law in Canada today...Increasingly, there is recognition that a culture shift is required in order to create an environment promoting timely and affordable access to the civil justice system”.

The Court went on to add:

“...counsel must, in accordance with the traditions of their profession, act in a way that facilitates, rather than frustrates, access to justice. Lawyers should consider their clients’ limited means and the nature of their case and fashion proportionate means to achieve a fair and just result”.⁴

While FOLA is pleased to respond to the seven questions posed by the Committee, we feel that it is imperative that the Committee appreciates that the Law Society, as the regulator of the profession, is but one player in a game of many players and, as such, it should recognize the role it can play in the access to justice challenge and should not move into an arena that is better occupied by other players, particularly by the state. With that introduction, FOLA will respond to the questions posed by the Committee.

Question 1: What do you think of the Law Society’s current access to justice initiatives?

The Law Society has undertaken some creative and helpful initiatives to facilitate access to justice. However, we would encourage the Law Society to engage in broader consultation to obtain different perspectives in tackling access to justice issues. Clearly, Ontario is not the only jurisdiction that struggles with access to justice. While it is important that the Law Society consults with other justice stakeholders within the province, it is also important that the Law Society look to jurisdictions outside of Ontario.

² Ibid at para. 23

³ *Hryniuk v. Mauldin* [2014], 1 S.C.R. 87

⁴ Ibid at para. 32



By way of example, we understand that the Law Society is a member of the National Council of Bar Presidents (NCBP) in the United States. A number of other justice stakeholders in Ontario and local law associations in the province are also members of the NCBP. Twice per year, typically in conjunction with the National Association of Bar Executives (NABE), the NCBP meets to discuss issues facing local and state bars throughout the United States.

FOLA makes an effort to attend the NCBP and NABE programs. Some of our local law association members such as the Hamilton Law Association and the Frontenac Law Association also make a point of attending these meetings. However, despite the fact that the Law Society, as we understand it, is a member of the NCBP, we rarely see an attendee from the Law Society. We would recommend that the Law Society attends these meetings, as it is important to get ideas and perspectives from other jurisdictions.

Specifically, with respect to the access to justice issue, an example of a different perspective came from the meeting in Chicago in August, 2018, when John Phelps, the CEO of the State Bar of Arizona, took the participants through that bar’s lawyer referral service initiative. This was the type of presentation that the Law Society may well have found beneficial. As will be discussed ahead, we feel that there are improvements that could be made to the Law Society’s Lawyer Referral Service and it would be helpful if the Law Society consulted with other jurisdictions as a means to find improvements to its own access to justice initiatives or learn of ideas for additional access to justice initiatives.

Therefore, while the Law Society has had some commendable initiatives on access to justice, we feel it should consider consulting more broadly to find ways for improvements to its current initiatives and to seek ideas for additional initiatives.

Question 2: Should some of these initiatives be enhanced? If so, which ones and why?

The Committee’s report mentions that the Law Society supports an accessible, fair and effective justice system through advocacy for such things as “robust legal aid”.

Obviously, since the report was released at the end of February, there has been a change in the legal aid landscape. The reduction in legal aid funding means that the Law Society has to take on an even greater advocacy role, particularly on behalf of the economically disadvantaged Ontarians who cannot access legal services.



Lawyer Referral Service

We feel that the Lawyer Referral Service could be enhanced and improved upon, specifically to make it more user friendly.

The current Law Society website has a homepage that contains two primary subject areas that are immediately adjacent to each other: "Find a Lawyer/Paralegal" and "Make a Complaint". FOLA is unaware of any other self-regulated profession that has, on its website homepage, such a predominant feature as to how to make a complaint.

A member of the public may think that the "Find a Lawyer/Paralegal" section is a referral service, when it is not. To get to the Lawyer Referral Service section of the website, a member of the public has to click on the "Public Resources" button, then click on the "Finding a Lawyer or Paralegal" button and then click over to the "Law Society Referral Service". Surely it would be more user friendly for the public to replace the "Make a Complaint" section on the homepage with a "Law Society Referral Service" section, such that the public can more easily access means by which to find a lawyer or paralegal to meet their needs.

If a member of the public does find their way to the Law Society Referral Service page, the site is not useful. FOLA has received anecdotal accounts from members of the public advising that when it comes to the requirement to provide their name, phone number and e-mail address, they leave the site. Comments received by FOLA indicate that some members of the public are very uncomfortable having to give the Law Society of Ontario their personal information.

The Committee's report states that in 2017 it provided over 45,000 referrals to lawyers and paralegals. However, FOLA questions the number of lawyer/client relationships that came from these referrals. Again, anecdotal evidence from some of our members, who have been on the Lawyer Referral Service, suggests that a great many callers are doing little more than tire kicking. We suspect that of the 45,000 referrals to lawyers and paralegals, only a small fraction ultimately resulted in a member of the public retaining a lawyer to provide legal services. We also suspect that a very significant percentage of the public seeks out the LSO's referral service only after they have exhausted their search efforts through Google.

FOLA is therefore of the view that the Lawyer Referral Service can be enhanced by way of making it more easily accessible and user friendly. If the Lawyer Referral Service is going to be effective for the public, the service should be more predominantly displayed on the Law Society's homepage and the only personal information a member of the public ought to be mandated to give is an e-mail address. Providing name and a phone number should be optional.



Access to Justice Across the Province

Our membership has raised access to justice concerns over attrition rates in less urban areas. While the LSO has taken steps to address this issue as a matter of gender, the access to justice concern relates to lack of available legal assistance based on geography. In particular, as the older generation of lawyers ages out of practice in more rural communities, our membership is not seeing new lawyers replacing them.

In the past, the LSO has acknowledged the overall “greying of the Bar”. Further, our membership in the Northwest Region has long identified their concern of there being no resident judge in Fort Frances, which has had the observable effect of attracting fewer lawyers in the area, despite available mentorship and need for service.

FOLA is concerned that although the LSO has acknowledged and tried to address the concerning lack of legal resources outside urban areas within the province, those efforts have waned in more recent years. We believe this to be a significant access to justice issue that requires addressing by the legal regulator.

Question 3: Should some of these initiatives be reduced? If so, which ones and why?

While FOLA appreciates the Law Society’s ongoing commitment to make access to justice a priority consideration in the execution of its mandate, of its current initiatives, the development of the Family Law Service Provider (FLSP) license for paralegals and others within family law begs for reconsideration. This is particularly so in the absence of a comprehensive strategic partnership and plan with other access to justice partners, including the Ministry of the Attorney General (MAG), Legal Aid Ontario (LAO) and family law practitioners.

FOLA views the current initiative as misguided, and to the extent that it is meant to be an access to justice solution aimed at curing the rate of self-represented or unrepresented parties, it carries with it a disproportionate risk to the public and public confidence in both the legal and paralegal professions. We submit that an FLSP license will not enhance access to legal services and it will not promote accurate and clear legal information for the public or support an accessible, fair and *effective* justice system.

In reviewing the LSO’s historical position on this issue, we adopt the same concerns of the LSO as set out in its An Analysis of a Framework for Regulating Paralegal Practice in Ontario.⁵

⁵ Law Society of Upper Canada, July 24, 2000



At the point in time when the Law Society reviewed paralegal regulation, the courts were already dealing with an increasing number of self-represented and unrepresented litigants, primarily in family law matters. Understanding that to be the case, the Law Society rejected the notion that regulation and licensing of paralegals (and others) was a matter of access to justice, despite Justice Cory’s recommendations set out in his report dated May 31st, 2000. Specifically, the LSO set out three primary objections:

“First, the available evidence (anecdotal, not empirical, evidence) concerning access to justice provides no clear sense as to why certain sectors of the population are being denied access to justice, and without such, **it is not clear that permitting paralegals to practice in a particular area will in any way resolve the problems of lack of access to justice.**

Second, the results of research conducted for the Society confirm that the question of whether paralegals play a role in facilitating access to justice is not one that comes with an easy “yes/no” answer. Contrary to what might be expected if paralegals were facilitating access to justice for people who could not afford to use lawyers, **the research shows that there is a pattern of use of paralegals that seems to ignore the issue of costs; that only a minority of individuals who end up using a paralegal instead of a lawyer (after having considered using a lawyer) do so as a result of the cost of using a lawyer; and that, all other things being equal, in most cases, a greater proportion of individuals (including those who use paralegals) will prefer to use lawyers over paralegals.**

Third, resolving any problems of lack of access to justice by permitting paralegals to practice in certain areas (example, family law, wills and estates) will, at worst, exclude persons relying on paralegals from access to justice and, at best, establish a two tier justice system. No amount of education and training short of that undertaken by individuals who later qualify to become lawyers can permit a paralegal to bring to a client’s problem the knowledge, skills and abilities of a lawyer. **A paralegal, practising in certain areas (example family law, wills and estates) stands to mire the administration of justice leading his or her clients without any access to justice at all or with a level of access to justice far short of that obtained by a**



lawyer for his or her clients. It is not serving the public well to answer their call for access to justice, their need and wishes for the services of a lawyer, by saying that the public can have access to the services of a licenced paralegal.” (Emphasis added)

The LSO went on to consider that addressing the issue of access to justice through paralegal regulation, “conveniently delays a comprehensive study and a complete resolution of the problems of lack of access to justice”, urging the Province to address this issue.⁶

It is interesting to note, that at the time of these LSO comments, paralegals were not yet regulated and were practicing family law. Despite this, there was no significant public uptake of the service, despite the assumed cost issue.

Further, after five years of regulation, in its *Report to the Attorney General of Ontario Pursuant to Section 63.1 of the Law Society Act*, the Law Society concluded that “ In spite of extensive communications work by the Law Society, public awareness has not kept pace with changes in the legal services market, particularly with respect to awareness of the distinction between services provided by lawyers and services provided by paralegals.”

In February, 2016, the Ministry of the Attorney General and the LSO appointed Justice Bonkalo to explore delivery of legal services by paralegals and others. Justice Bonkalo delivered her report on December 31st, 2016, which report included recommendations that the LSO develop a licence for paralegals and others, with a limited scope.

There was no apparent additional research by the LSO or others to contraindicate its earlier findings that the licencing of non-lawyers in family law matters was not a clear access to justice issue (cost). The LSO reversed its earlier position and committed to the creation of this licence on December 1st, 2017, with no further or greater understanding than when it made its earlier submissions in 2000.

It is FOLA’s view that the creation of a new licence will not support the LSO’s objective of providing an accessible, fair and effective justice system for the following reasons:

First, the driving assumption behind both the need for an access to justice solution, and that paralegals and others are that solution, is that of reduced cost. This is an unsupported assumption that cost is the decisive factor for clients (which was not the LSO’s finding in its submissions in 2000), and that paralegals and others are less expensive. These

⁶ Ibid at page 3



assumptions have not been supported by any anecdotal or empirical evidence, and it is the belief of our membership that there will actually be increased costs.

To the extent that there may be some truth to the belief that non-lawyer licensees currently charge less in fees, it is inevitable that such fees will increase with what will be the necessary costs incurred for further education, ongoing CPD requirements, licensing fees and insurance. The closer to the scope of practice of lawyers, and their necessary competence, the more similar the fees. There is simply no compelling evidence to support the notion that the creation of a new license will overcome the financial accessibility hurdle of Ontarians of modest means.

Part of this reduced paralegal cost assumption is that meaningful cost savings cannot be found within current family law practice. This is simply incorrect. Many lawyers already offer reduced or sliding scale rates. Organizations such as JusticeNet, workplace benefits and private insurers also partner with lawyers to offer reduced fees to clients. Paralegals and others already assist in family law matters at reduced rates, albeit under the supervision and responsibility of a lawyer. This cost savings is already in practice, but will be lost with an independent license and the increased related practice costs.

In addition, many lawyers offer unbundled services, which help to keep costs down, without sacrificing overall competency and knowledge. We take notice that despite the recommendation of Justice Bonkalo, and the commitment of the LSO to promote unbundled legal services and coaching, no action has been taken on these commitments by the LSO to either promote them amongst lawyers or the public. Work on amending the Rules of Professional Conduct to aid in unbundling services would be a useful exercise for the regulator.

FOLA submits that the LSO can better address the assumed “cost” issue through a comprehensive strategic plan and advocacy with our access to justice partners, as will be set out below, without creating public confusion, unwarranted liability issues and sacrificing on overall knowledge and competence of the service provider.

Secondly, accurate and clear legal information regarding family law matters is already available to the public from a variety of resources at no cost, including Family Law Information Centres, Duty Counsel, free half hour lawyer consultations offered either voluntarily or by participation in the Lawyer Referral Service, as well as online resources including Steps to Justice and CLEO.

One of FOLA’s concerns, and that of Justice Bonkalo in her report, was distinguishing legal information from legal advice, which was one of the commitments made by the LSO on December 1st, 2017. By creating what will be, by definition, a limited scope or unbundled FLSP licence, the lines between whether legal information or legal advice is being provided will become blurred. The risk of unauthorized practice, by accident or



otherwise, is simply too great a risk to the public, who is relying upon the profession to be qualified to provide legal advice.

The LSO is already grappling with unauthorized practice issues in a relatively well-defined scope. Advertisements targeting racialized populations rarely distinguish between lawyers and paralegals, the result being that clients think they are hiring a lawyer, but in fact are not. Until the LSO can manage this issue better, it should not be considering muddying the waters even further.

Again, this was a concern of the LSO, when it stated,

“The result will be little if any improvement on the status quo: a variety of persons, with different levels of competence, offering the same legal services to the public for a range of fees; public confusion as to what qualifies a person to provide legal services...”.⁷

Thirdly, the FLSP licence will not contribute to an effective justice system. It will create confusion for the parties and the court, and likely duplication of services and cost. While the scope of the FLSP licence has yet to be defined, short of completing the same training as a lawyer, it is reasonable to assume that the scope of practice must be limited. That is, only certain issues will be within the scope of the FLSP and their training, by its nature, will be an “unbundled” service with all of its attendant increase potential for liability.

This sort of limited and focused education and training does not lend itself well to family law matters. Family matters invariably intersect with other areas of law, including business, estates, criminal and bankruptcy, to name but a few. Family matters are also fluid with issues evolving and emerging over time. It is essential that a professional qualified to practice in all aspects of family law (and related law) be involved at initial stages to determine the scope of potential issues before a FLSP becomes involved. To involve the FLSP at initial stages exposes the client to serious risk of missed/misidentified claims, defences and duplication of services and/or change in service provider if and when the true scope of issues is revealed. Rather than create efficiencies, it will create confusion, multiple retainer/representation and duplication, or no representation at all. FOLA therefore urges the LSO to reconsider and withdraw from this initiative.

⁷ Ibid at page 6



Question 4: Should the Law Society launch new access to justice initiatives? If so, which ones and why?

The Law Society in a Leadership Role

As referenced earlier, it must be recognized that the Law Society is but one of a number of players when it comes to facilitating access to justice. Other players include government, the courts, licensees (whether lawyers or paralegals) and the various stakeholders in the justice system. The Law Society cannot take on all roles and particularly cannot take on the role of a funder for legal services. Funding for legal services to those of modest means is a function of the state, not of the regulator.

However, FOLA believes that the Law Society can take on a strong leadership role in addressing the access to justice issues that face this province. It is universally recognized that access to justice is a fundamental problem that goes to the very heart of Ontario's justice system. Someone has to step up to the plate and take a leadership position and there is no reason why the Law Society cannot be that leader.

FOLA would recommend that very significant efforts be made by the Law Society to get the access to justice players together by way of something like a strategic planning session, to address head on what can be done to facilitate access to justice. We envision the participants to include government, the chief justices from the Court of Appeal, the Superior Court of Justice, the Ontario Court of Justice and Unified Family Court, the academic community and the major stakeholders including FOLA, the OBA, the Advocates Society, the Association of Community Legal Clinics of Ontario (ACLCO), Criminal Lawyers Association, the Family Lawyers Association, Legal Aid Ontario, the Round Table of Diversity Associations and the Toronto Lawyers Association.

We envision a strategic planning type session, perhaps with a skilled facilitator, to get these fundamental stakeholders working together as a team, trying to address common problems, rather than each player in the justice system working individually, and at times at cross purposes, to solve a common problem.

By way of example of how things can go awry when stakeholders are not on the same page, one of the recommendations from the Bonkalo report, which was accepted by the LSO, was the training of court staff to distinguish between legal advice and legal information. Since then, MAG has implemented "cross-training", such that court staff are capable of performing various roles. However, the end result has not been the increased efficiency or accuracy of information to the public, nor has there been any discernable benefit to the public. This "jack of all trades, master of none" approach has resulted in inconsistencies at the court counter.

While MAG sought the development of a new family law licence for paralegals and others, on the assumption that such services would be at a lower cost, MAG has increased



the cost of services to Ontarians and has significantly cut its funding to LAO. The LSO and MAG seem to be working in an uncoordinated and piecemeal fashion at best and at cross-purposes at worst.

The effort required to put together a stakeholder meeting would be significant and would have to accommodate many schedules. However, since access to justice is the most difficult challenge facing Ontario's justice system, both criminal and civil, and it is an effort worth making.

In Family Law

As already alluded to, the LSO has made commitments to several access to justice initiatives that remain outstanding. FOLA supports the LSO's commitment to use and expand unbundled legal services as well as support and use legal coaching. While the LSO has taken steps to update its rules and by-laws to permit such practices, it has not gone far enough by actually promoting such practice to the public or the profession.

At this time, the private bar has taken a leadership role regarding this recommendation through the creation of the Family Law Limited Scope Services Project (FLLSSP). While the project included participation from LawPro and offers resources to both clients and practitioners, there is still some lingering hesitation on the part of licensees and concerns about liability. As our regulator, the LSO can, and should, take steps to address this concern with licensees.

FOLA submits that the LSO can still act on its commitment by:

- (1) Supporting that the FLLSSP and citing it as a resource for both the public and practitioners on its website.
- (2) Endorsing the precedent retainer forms.
- (3) Providing for its own directory of practitioners offering unbundled services through its Lawyer Referral Program.

FOLA supports the LSO's commitment to explore how law students may satisfy unmet legal needs in family law. FOLA sees the participation of law students under the supervision of a family law practitioner to meet the LSO's first three criteria, if not all of them:

- (1) Student's fees are significantly less than a practitioner's, and therefore address the assumed cost as a barrier to access to justice.
- (2) Students are already assisting in family matters under the supervision of a lawyer, with the exception of court advocacy.



- (3) Students are educated in various areas of the law and can identify related issues and red flags for litigation and substantive rights issues.
- (4) There is no confusion as to the scope of practice and therefore no potential liability for unauthorized practice.
- (5) There is no duplication of effort or change in representation necessary, as issues evolve since the student is working with a practitioner who is supervising and providing the actual legal advice.

Question 5: What do you or your organization do to facilitate access to justice? Could the Law Society collaborate with you on your initiatives? If so, how?

FOLA's initiatives around facilitating access to justice revolve around its advocacy, particularly on Legal Aid. We have a specific Legal Aid Chair, who is currently Terry Brandon. Additionally, FOLA is a member, along with the Law Society, of the Alliance for Sustainable Legal Aid (ASLA).

Since the cuts to legal aid were announced, FOLA has been active, together with its other ASLA members, in taking proactive steps to try and meet with members in government to discuss the impacts the legal aid cuts are going to have in access to justice for vulnerable members of Ontario's public.

FOLA is always open to collaborate with the Law Society on any access to justice initiative.

Question 6: Should the Law Society institute a levy on lawyers and paralegals to support additional access to justice initiatives?

FOLA would not support such a levy. The Law Society is not, and should not be, a funder of legal services. The Law Society's statutory mandate to act so as to facilitate access to justice does not extend into taking on the role of a funding provider. As mentioned earlier in these submissions, the Law Society should recognize that there are many players when it comes to challenges with access to justice. Funding of legal services to people of modest means is a role for the state, not for the regulator.

FOLA does thank the Law Society for requesting this call for comment and we always welcome any opportunity to work with the Law Society on a collaborative basis to improve Ontario's justice system.