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Tab 12.1

Access to Justice Committee

Review of the Law Society's Access to Justice Approach: Call for Comment

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Introduction

The Access to Justice Committee (“Committee”) is seeking input from lawyers, paralegals, legal organizations and the public to assist in its ongoing review of the Law Society’s approach to access to justice. Specifically the Committee wants feedback on the access to justice initiatives currently undertaken by the Law Society, to assist in determining if the initiatives are effective and consistent with the Law Society’s statutory functions. The initiatives are described below and a list of guiding questions are found at the conclusion of this paper.

This paper will be published in both English and French for the call for comment.

Background

In the past 15 years, numerous reports have pointed to rising numbers of self-represented litigants and the negative consequences of unmet legal needs.¹ While the need is profound, the Law Society, as a provincial regulator, has finite resources and statutorily defined functions (primarily to ensure that legal professionals meet appropriate standards of competence, conduct and learning). The Law Society’s approach to access to justice should be effective and consistent with our statutory mandate.

To that end, the Committee is reviewing the Law Society’s approach to access to justice. This review will provide guidance to the new bench (who will be elected in April 2019) in developing its strategic plan. The review includes an analysis of the Law Society’s current access to justice initiatives and the Committee is seeking input as part of its analysis.

Historically, the Law Society’s commitment to access to justice was concentrated on facilitating access to *legal services* by lawyers. For example, the Law Society was:

¹ See for example, Justice Annemarie E. Bonkalo, “Family Legal Services Review” Report submitted to Attorney General Yasir Naqvi and Treasurer Paul Schabas, December 31, 2016, Ontario Ministry of the Attorney General online at: www.attorneygeneral.jus.gov.on.ca/english/about/pubs/family_legal_services_review/; “Everyday Legal Problems and the Cost of Justice in Canada: Overview Report” Trevor C.W. Farrow, Ab Currie, Nicole Aylwin, Les Jacobs, David Northrup and Lisa Moore, Canadian Forum on Civil Justice, 2016, online at: www.cfcj-fcjc.org/sites/default/files/Everyday%20Legal%20Problems%20and%20the%20Cost%20of%20Justice%20in%20Canada%20-%20Overview%20Report.pdf; National Action Committee, “Access to Civil & Family Justice, A Roadmap for Change”, October 2013, online at www.cfcj-fcjc.org/sites/default/files/docs/2013/AC_Report_English_Final.pdf; Canadian Bar Association, “Reaching equal justice report: an invitation to envision and act”, Report of the CBA Access to Justice Committee, Nov. 2013, online at: www.cba.org/CBAMediaLibrary/cba_na/images/Equal%20Justice%20-%20Microsite/PDFs/EqualJusticeFinalReport-eng.pdf; Dr. Julie Macfarlane, “The National Self-Represented Litigants Project: Identifying and Meeting the Needs of Self-Represented Litigants, Final Report”, May 2013, online at: <https://representingyourselfcanada.com/wp-content/uploads/2016/09/srlreportfinal.pdf>; “First Nations Representation on Ontario Juries, Report of the Independent Review Conducted by The Honourable Frank Iacobucci, February 2013”, online at: https://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/iacobucci/First_Nations_Representation_Ontario_Juries.html.

- a) An early champion for Ontario's legal aid system and administered the plan from 1951 to 1999. Legal Aid Ontario was then transferred to an independent agency of the provincial government.
- b) A leader in connecting the public to legal services, by creating the Lawyer Referral Service in 1970. This service continues today as the Law Society Referral Service.
- c) A key player in the introduction of contingency fees in 2004, as a means of facilitating access to justice for those who otherwise might not be able to afford legal representation.²

In 2006, the *Access to Justice Act* introduced amendments to the *Law Society Act* which fundamentally shifted the Law Society's regulatory role. Under the new regulatory framework:

- a) The Law Society regulates paralegals as providers of legal services and not just lawyers. In addition, the Law Society has the power to authorize new providers of legal services to address unmet legal needs.³
- b) The Law Society has the power to exempt persons from law society regulation by providing that certain persons are deemed not to be practicing law or providing legal services.⁴
- c) The *Law Society Act* defines what constitutes the provision of legal services. The Law Society is responsible for policing the boundaries between what constitute the provision of legal services and what can be provided by persons who are not subject to Law Society regulation. This dividing line can impact the types of services that are available to those requiring assistance.

In addition, the *Access to Justice Act* articulated the Law Society's duty with respect to access to justice as follows:

In carrying out its functions, duties and powers under this Act, the Society shall have regard to the following principles. . . [including that the] Society has a duty to act so as to facilitate access to justice for the people of Ontario.⁵

² See for example the Law Society's 1987 Special Committee on Contingency Fees. The Law Society also participated in the 1999 Joint Committee on Contingency Fees established by the Attorney General.

³ *Law Society Act*, s. 27(1).

⁴ Part V of By-Law 4 sets out who may provide legal services without a license. It includes in-house legal service providers who only provide services to the employer, non-licensee and non-law student legal clinic employees, individuals employed by certain government-funded not-for-profit organizations who provide legal services through the organization to the community that the organization serves, and certain other prescribed persons.

⁵ *Law Society Act*, s.4.2(2)

Access to Justice Achievements

After the amendments came into force, the Law Society adopted an access to justice role in the context of its new mandate. It has taken on a more expansive vision of access to justice and its initiatives generally relate to the areas set out below.

1) Facilitating access to legal services

As the legal services regulator for Ontario, the Law Society has naturally focused its access to justice initiatives on facilitating access to legal services.

In the past decade, the Law Society has been a regulatory leader in expanding the range of licensed professionals available to assist the public. In addition to regulating both lawyers and paralegals, the Law Society is currently developing a new family law legal services license to provide further competent services in an area of acute legal need.

Each year, the Law Society also connects tens of thousands of Ontarians to legal professionals through the Law Society Referral Service. In 2017, it provided over 45,000 referrals to lawyers and paralegals. This service has helped Ontarians to understand their legal options, and in many cases those individuals are then able to obtain legal services to assist with their matters.

The Law Society has also used its regulatory powers to facilitate the delivery of legal services in innovative ways, including by:

- a) Amending the professional conduct rules to facilitate unbundled legal services
- b) Amending the professional conduct rules to facilitate pro bono legal services
- c) Permitting the delivery of legal services in multidisciplinary settings, thereby enabling lawyers and paralegals to work with other professionals towards holistic solutions of client problems.

Recognizing that access to justice is facilitated when clients can turn to a diverse legal community, the Law Society is encouraging the legal professions to become more inclusive and reflective of Ontario's diverse population. It is implementing the recommendations of the Challenges Faced by Racialized Licensees Working Group⁶, the Review Panel on Regulatory and Hearing Processes

⁶ Working Together for Change: Strategies to Address Issues of Systemic Racism in the Legal Professions, Challenges Faced by Racialized Licensees Working Group Final Report, December 2016, online at <https://lawsocietyontario.azureedge.net/media/iso/media/legacy/pdf/w/working-together-for-change-strategies-to-address-issues-of-systemic-racism-in-the-legal-professions-final-report.pdf>. For more information on the Law Society's Equality, Diversity and Inclusion initiatives, see <https://iso.ca/about-iso/initiatives/edi>.

Affecting Indigenous Peoples⁷ and the principles of the Indigenous Framework.⁸

2) Promoting accurate and clear legal information for the public

The Law Society is also taking a more active role in ensuring that a continuum of services are available to Ontarians, including accurate, accessible legal information.

The Law Society's new website, www.iso.ca was launched in 2018. It includes a robust 'Public Resources' / 'Services au public' section. Among other things, this section provides guides for handling everyday legal problems, a French language Know Your Rights guide, and a link to Steps to Justice and its French version, Justice pas-à-pas. Steps to Justice is a website providing clear, accurate step-by-step information about legal problems, which was developed through a collaborative effort, involving several organizations, including the Law Society.

In addition, the Law Society Referral Service plays an important role in connecting the public to lawyers and paralegals who provide consultations to help people determine their legal rights and options.

3) Supporting an accessible, fair and effective justice system

The Law Society leverages its partnerships within the justice sector and commits resources to support justice system reforms.

A model for this endeavour can be found in The Action Group on Access to Justice ("TAG"). Through TAG the Law Society facilitates collaboration with the judiciary, legal organizations, academics and others. TAG works to raise awareness of access to justice issues, reduce duplication of efforts, and address unmet legal needs through innovative projects such as Steps to Justice / Justice pas-à-pas.

Further, the Law Society's report, *An Abiding Interest*, details the ways in which the Law Society can support the work of Legal Aid Ontario ("LAO") and its relationships with its stakeholders. The report recommendations, which are currently being implemented, include:

- a) Working with LAO to develop a structured and ongoing process for dialogue with the LAO board and senior management
- b) Playing a role with legal stakeholders and LAO to build stronger relationships and more open dialogue

⁷ Review Panel on Regulatory and Hearing Processes Affecting Indigenous Peoples, Report to Convocation May 24, 2018, online at: <https://lawsocietyontario.azureedge.net/media/iso/media/about/convocation/convocation-law-society-review-panel-report.pdf>.

⁸ Law Society of Ontario Indigenous Framework, revised June 5, 2017; Equity and Indigenous Affairs Committee Report to Convocation June 29, 2017 at page 279-289, online at: <https://lawsocietyontario.azureedge.net/media/iso/media/legacy/pdf/c/convocation-june2017-equity-indigenous-affairs-committee-report.pdf>.

- c) Convening public symposia on legal aid policy issues
- d) Championing the need for robust legal aid, and sharing the Law Society's insights and concerns regarding legal aid with the federal and provincial levels of government
- e) Continuing to support the work of the Alliance for Sustainable Legal Aid
- f) Ensuring that the Law Society's appointments to the LAO board include nominees who are experienced in the legal aid system, including the clinic system and the private legal aid bar.⁹

4) Providing assistance to external organizations

The Law Society provides some limited financial and other supports to organizations that are working to enhance access to justice for the people of Ontario, including:

- a) Innocence Canada (formerly Association In Defence of the Wrongfully Convicted) – identifies and advocates for the wrongfully convicted
- b) Pro Bono Ontario - assists volunteer lawyers to provide legal advice and assistance to low-income Ontarians
- c) Ontario Justice Education Network – educates young people about the justice system
- d) Law Commission of Ontario – promotes access to justice through legal research and policy advice
- e) CLEO (Community Legal Education Ontario) – provides accurate and practical legal information to Ontarians, to help them exercise their rights.

Conclusion

Unmet legal needs have a profound negative impact on individuals and society in Ontario. To address these needs with finite resources and a defined regulatory mandate, the Law Society should ensure its access to justice initiatives are effective and consistent with its statutory functions. To that end, the Committee is analyzing the initiatives, which generally fall into four categories:

- 1) Facilitating access to legal services
- 2) Promoting accurate and clear legal information for the public
- 3) Supporting an accessible, fair and effective justice system
- 4) Providing assistance to external organizations

As part of its analysis the Committee is asking for responses to the questions set out below.

⁹ *Report of the Legal Aid Working Group: An Abiding Interest*, January 25, 2018, online at: <http://www.lawsocietygazette.ca/wp-content/uploads/2018/02/2018-LAWG-Report.pdf> at pages 7-8.



Access to Justice Call for Comment

Questions

The Committee seeks input on the following questions by **Friday, May 31, 2019**.

1. What do you think of the Law Society's current access to justice initiatives?
2. Should some of these initiatives be enhanced? If so, which ones and why?
3. Should some of these initiatives be reduced? If so, which ones and why?
4. Should the Law Society launch new access to justice initiatives? If so, which ones and why?
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?
6. Should the Law Society institute a levy on lawyers and paralegals to support additional access to justice initiatives?
7. Do you have additional comments on the Law Society's approach to access to justice?



Law Society
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Tab 12.2

Access to Justice Committee

Family Law Working Group Update: Report to Convocation

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Issue

Convocation is requested to receive, for information, a progress update from the Family Law Working Group, a benchers subcommittee, regarding the development of a family legal services licence, pursuant to the Family Law Action Plan that Convocation approved on December 1, 2017.

Background

(1) Bonkalo Report

On February 9, 2016, Justice Annemarie E. Bonkalo was appointed by then Attorney General Madeleine Meilleur and then Law Society Treasurer Janet Minor to lead the Family Legal Services Review. Justice Bonkalo was asked to explore whether the family justice system could be improved by expanding the delivery of legal services to legal service providers other than lawyers, such as paralegals, law clerks and law students.

Delivered on December 31, 2016, Justice Bonkalo's report contained 21 recommendations, 14 of them addressed to the Law Society. Six of those recommendations related to the creation of "a specialized licence for paralegals to provide specified legal services in family law."¹

(2) Family Law Action Plan

From early March to mid-May 2017, the Law Society and the Ministry of the Attorney General ("Ministry") invited public feedback on the Bonkalo Report to inform their development of the Joint Action Plan for Improving Access to Family Legal Services in Ontario ("Joint Action Plan").² Over 160 submissions from individuals and organizations were received. The submissions indicated general support for the recommendations applicable to the Law Society, except for the recommendations related to the creation of a specialized licence, where stakeholder comments were divided.

On December 1, 2017 Convocation approved, in principle, the Family Law Action Plan, which was the Law Society's contribution to the Joint Action Plan. The Family Law Action Plan was developed in partnership with the Ministry and comprised of six commitments in response to Justice

¹ Justice Annemarie E. Bonkalo, "Family Legal Services Review. Report Submitted to Attorney General Yasir Naqvi and Treasurer Paul Schabas" (December 31, 2016), online:

https://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/family_legal_services_review/ [Bonkalo Report].

² Law Society of Ontario, "Improving Access to Justice for Families" (March 6, 2017), online: <https://lso.ca/news-events/news/2017/improving-access-to-justice-for-families>

Bonkalo's report.³ In particular, Convocation approved a licensing process to improve access to justice in family law, as follows:

- “Develop a licence for licensed paralegals and others with appropriate training to offer some family law legal services, following resource-related discussions with government. Recognising the urgency of the need, this licence will support training in process navigation, form completion, investigating forms such as financial, motions to change, and uncontested divorces, and possibly other areas outside the courtroom context.”⁴
- “At the same time, assess what additional family legal services by providers other than lawyers, and including advocacy, are in the public interest, and consider how to develop a further expanded licence, following resource-related discussions with government.”⁵

Before the creation of the Family Law Working Group, the Access to Justice Committee was tasked with overseeing implementation of the Family Law Action Plan. On August 9, 2018, Convocation passed a resolution establishing and making appointments to the Family Law Working Group, a joint working group of the Access to Justice Committee and the Paralegal Standing Committee.

(3) Funding

The Law Society has estimated its licence development costs at \$718,000. Under the Joint Action Plan, the Ministry provided the Law Society with a grant of \$150,000 toward these development costs, with the remaining \$570,000 to be funded by the Law Society.

The Law Society's 2019 budget includes licence development costs for 2019 in the amount of \$570,000—a one-time cost to be funded from the accumulated fund balance. This allocation is based on anticipated costs to be incurred in 2019 in relation to item writing activities,⁶ development of education protocols, creation of candidate study supports, and examination activities.

Progress Update

(1) Work Performed to Date

³ Report to Convocation from the Access to Justice Committee (December 1, 2017) at paras 21-22, online: <https://lawsocietyontario.azureedge.net/media/iso/media/legacy/pdf/2/2017-dec-convocation-access-to-justice-committee-report-final.pdf>

⁴ *Ibid.* at para. 22, subpara. 1.

⁵ *Ibid.* at para. 22, subpara. 2.

⁶ Practitioners representing the relevant practice area develop Licensing Examination questions (referred to as “items”) under the guidance of psychometricians with expertise in professional licensing, test development, and validation. Items are derived from information in the study materials prepared by the Law Society for that licensing year, and are reflective of the established competencies for the given Licensing Examination. All new items are subjected to validation activities, including pilot testing. Once operationalized, an item's effectiveness at assessing competencies is monitored and tracked throughout its lifecycle.

Since the approval of the Family Law Action Plan on December 1, 2017, the Law Society has carried out a significant amount of work to develop a licence to permit paralegals and others to provide some legal services in family law, with appropriate training. A focus of the Law Society's work to date has been to determine a scope of permissible activities for the licence. The scope of permissible activities will determine the competencies required of a licence holder, which will in turn form the foundation of the training program and the Law Society's assessment and education regime.

To that end, over the past year the Law Society has had ongoing discussions with the family law bar and other family justice sector participants as it develops the family legal services licence. Key activities since Convocation's approval of the Family Law Action Plan include:

- Meetings with approximately 100 family law practitioners, family law clerks, paralegals, and intermediaries (such as court house staff, parenting coordinators, mediators and others) to build awareness for the concept of the licence and gain insights into the opportunity areas for the provision of legal services in family law:
 - These in-depth, one-on-one discussions have continued to provide a mechanism for determining the areas of greatest need for self-represented litigants and for building buy-in from the professions
 - Participants have been asked a series of standardized questions related to the potential scope of permissible activities, critical competency development, and training requirements
 - Participants have been representative of a variety of practice contexts (including large firms, sole practices, and legal clinics), geographic regions, and as many diverse backgrounds as possible
- A formal, structured licence development process to map the family law activities to be included in the scope of permissible activities; this ongoing process is comprised of the following elements:
 - Experienced family law lawyers were retained to provide separate preliminary mappings of family law activities to form the bases of a draft framework for the licence. These mappings were combined into one working document, from which a neutral, draft listing of activities was derived
 - To ensure defensibility and validity, and in accordance with best practices for licensure development, the draft listing of activities was presented to working groups of subject-matter experts ("development working groups") for discussion and consideration:

- The development working groups were composed of family law practitioners, paralegals, and law clerks with experience in family law, as well as representatives from government and Legal Aid Ontario in order to provide balanced perspectives on the provision of legal services
- The development working groups reflected a cross-section of practice contexts, firm sizes, and geographic locations
- Structured meetings of the development working groups took place in the fall of 2018
- The development working groups were led by psychometricians, who are experts in the science of education and learning with extensive involvement in the Law Society's lawyer and paralegal systems of licensure over the past 15 years
- The development working groups had access to relevant background information, including:
 - Backgrounders on various family law initiatives, such as unbundling and the Family Law Limited Scope Project, and various family reforms, such as Bill C-78 and the expansion of the Unified Family Court, with a consideration of the potential impact that these initiatives and reforms may have on the direction of the licence
 - Environmental scans of other jurisdictions where individuals other than lawyers are permitted to provide legal services in family law and other areas of law, including document preparation, to inform the development of the licence
- The development working groups discussed opportunity areas, reflected on implications, identified perceived issues, and clarified limitations regarding a potential scope of permissible activities
- Following several rounds of review and debate, the development working groups were able to arrive at an initial draft scope of permissible activities for the Family Law Working Group's review and comment
- Additional work remains to be done in order to continue to validate the initial draft scope and ensure that all potential items for inclusion are fully reviewed and considered before finalizing a scope and implementing it. This validation work will be performed by a subcommittee of subject-matter experts established by the Family Law Working Group and described below

Once finalized, the scope of permissible activities will form the basis of the competencies required for this area of legal services provision. Competencies are the cornerstone of a defensible and rigorous licensing process where only those individuals who have demonstrated the requisite knowledge, skills, and abilities for safe and effective practice are authorized to provide legal services to the public. These competencies will in turn form the foundation of the training program and the Law Society's assessment and education regime.

(2) Family Law Working Group's Oversight of the Licence Development Process and Guiding Principles

An initial draft scope of permissible activities was provided to the Family Law Working Group for review and comment. As part of the formal, structured licence development process set out above, the Family Law Working Group has struck a subcommittee that will be comprised of representatives from the development working groups and subject-matter experts from the Family Law Working Group. This subcommittee will continue to validate the draft scope in structured meetings to be facilitated by the same psychometricians involved in the previous round of deliberations. Approved by the Family Law Working Group, the following guiding principles will be applied in the validation stage of the process:

(a) Access to Justice

- i. Is the scope of permissible activities reflective of the areas of unmet need in family law?
 - Will the licence assist with filling the gap in the family legal services market?
 - Does the licence encompass an appropriate range of legal services in those areas of family law where self-represented litigants have the greatest need?
- ii. Are the dividing lines or hand-over points⁷ between family legal services providers and lawyers defensible and in the best interests of clients?

(b) Public Protection

- iii. Are the activities in the scope such that the family legal services provider can be expected to perform them competently with appropriate education, training, licensing, and regulation?

⁷ A "hand-over point" is the point in a family law matter where a licence holder would no longer be able to act under the scope of permissible activities, and would need to hand the matter over to a lawyer.

(c) Viability

- iv. Is the scope of permissible activities sufficiently discrete to allow for specialized education and training (as opposed to education and training comparable to a lawyer's)?
 - How can the scope of permissible activities best harness the existing skills and competencies of paralegals and others who may be interested in becoming family legal services providers?
- v. Will the requirements for obtaining a family legal services licence be feasible?
- vi. Will a family legal services provider be in a position to provide family legal services that:
 - a) Satisfy unmet needs in family law, and
 - b) Are sufficiently affordable “for the large segment of the population that earns too much to qualify for legal aid and too little to feel they can afford a lawyer”⁸?

Next Steps

- Law Society to:
 - finalize a scope of permissible activities
 - use the finalized scope of permissible activities as the basis for defining competencies for the licence
 - use the competencies as the basis for developing the training program and licensing examination
 - develop appropriate candidate study supports as well as candidate administration and education protocols
 - develop a system for evaluating the licence
- Family Law Working Group to continue to provide policy oversight and direction regarding the licence development process
- Family Law Working Group and Access to Justice Committee to provide updates as appropriate

⁸ *Bonkalo Report, supra* note 1.