



The Advocates' Society
La Société des plaideurs



FEDERATION OF ONTARIO
LAW ASSOCIATIONS
FÉDÉRATION DES ASSOCIATIONS
DU BARREAU DE L'ONTARIO



Family Lawyers
Association

Monday, February 14, 2022

JOINT COMMUNIQUÉ

Of The Advocates' Society, the Federation of Ontario Law Associations, the Toronto Lawyers Association and the Family Lawyers Association

Opposing the Proposed Family Legal Services Provider Licence

The current proposal to create a Family Legal Services Provider Licence is not in the public interest and will not serve the critical legal needs of vulnerable members of the community who are involved in family law proceedings. The motion set out in the Report of the LSO's Access to Justice Committee should be rejected.

Our associations, which collectively represent approximately 18,000 Ontario members, oppose the proposal for the following critical reasons, among others:

- Family law matters are unpredictable and complex, and the consequences for the individuals and families involved can be grave. The Report's assertion that there is a "hierarchy" of issues that paralegals could be instructed to address in a consistent sequence is false and demonstrates a fundamental misunderstanding of family law.
- The suggestion that "lower income" cases are more likely to be "simple" is false. There are significant and complicated factual matrices that frequently intersect with family law matters, including domestic violence, coercive control, power imbalance, substance abuse, mental health problems and immigration sponsorship problems. Creating a two-tier system to allow those with less training and expertise to advocate on behalf of families with lower incomes is a fundamentally flawed and troubling approach.

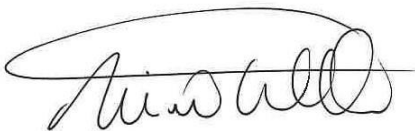
- The proposed motion puts the LSO at risk of failing to meet its statutory obligation to regulate the professions in the public interest and to ensure legal service providers meet the appropriate standards of professional competence. Twenty-eight weeks of training and a brief placement cannot provide the legal expertise necessary to competently protect the interests of clients on the vast range of issues that arise in family law disputes and are contemplated within the scope of the FLSP licence.
- The Report rests on flawed data and flawed conclusions drawn from the data. Our associations, the Ontario Court of Justice, the Superior Court of Justice and the Court of Appeal for Ontario all made submissions to the Committee that opposed the proposed scope of the FLSP licence, for very similar reasons. The Report largely ignores these submissions and the very real concerns raised therein.
- The proposal will not enhance access to justice for Ontario families. Many family lawyers offer services at hourly rates comparable to, or lower than, the rates paralegals currently charge. The majority of family lawyers also offer the same type of "outside-the-box" billing options that the Report suggests paralegals offer, including limited scope, unbundled, legal coaching, flat fee and sliding scale services.



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Background

The key features of the proposed FLSP licence have been opposed in the submissions made to the LSO by our organizations, as well as in the submissions made by the Ontario Court of Justice, the Superior Court of Justice of Ontario, the Court of Appeal for Ontario and the Family Law Rules Committee (which determines Right of Audience).

The FLSP proposal does not demonstrate an appropriate appreciation of the complexity of family law and the gravity of its consequences. Without this crucial understanding, the proposed FLSP licence will fail to meet the three guiding principles of (1) access to justice, (2) public protection and (3) viability, while costing an immense amount in the process— money which would be better spent on effective access to justice initiatives.

Family law is not simple or mechanical.

Family law is a complex area of law that intersects with many other areas, from trusts to tax to bankruptcy to pensions to wills and estates, to name only a few. Family lawyers must understand some 39 federal and provincial statutes and regulations and how many of them intersect. Family lawyers need expertise in common law principles including property law, contract law and equitable claims such as unjust enrichment and constructive and resulting trusts. Issues regularly intertwine, and are often not apparent at the outset. Cases that present as “simple” can be the ones that end up at the Court of Appeal. A lack of knowledge or a failure to issue-spot can have catastrophic impacts on a client, including losing their home, child or financial stability.

It is wrong to assume that only particularly complicated family law cases fall within the complex web of statutes and common law described above, or that most family law cases are “simple”. It is impossible to determine at the outset with any degree of certainty which cases will be more complex. It is also fallacy to suggest that “lower income” cases are more likely to be “simple”. There are significant and complicated factual matrices that frequently intersect with family law matters, including domestic violence, coercive control, power imbalance, substance abuse, mental health problems and immigration sponsorship problems. The Report's assertion that there is a “hierarchy” of issues that paralegals could be instructed to address in a consistent sequence is false and demonstrates a fundamental misunderstanding of family law.

The proposal risks breaching the LSO's statutory duty to protect the public.

The proposal has utterly unrealistic expectations that paralegals could learn broad substantive areas of law and how to draft contracts and conduct trials in a 28-week education program followed by an 8-10 week field placement. It is not possible to learn what is needed to competently practise family law with such limited training. If approved, this proposal puts the LSO at risk of failing to meet its statutory obligation to ensure legal service providers meet the appropriate standards of professional competence.

Moreover, this model creates an impossible situation for members of the family law bar who would be expected to provide field placements to train paralegals: it is simply not possible to train someone to practise family law during such a brief field placement.

This proposal will not enhance access to justice for Ontario families.

Many family lawyers offer services at hourly rates comparable to or lower than the rates paralegals currently charge. According to a survey of 448 family lawyers across Ontario in December 2020 by The Advocates' Society, the Federation of Ontario Law Associations and the Toronto Lawyers' Association (the "Survey")¹ (a survey the Report mentions in a footnote but does not discuss), 45% of family lawyers reported that they charge below \$200 per hour as their lowest hourly rate. In addition, the majority of family lawyers offers the same type of "outside-the-box" billing options that the Report suggests paralegals offer, including limited scope, unbundled, legal coaching, flat fee and sliding scale services.

The proposal compares the billing rates of family lawyers to those of paralegals practising in areas *other* than family law, ignoring the increased overhead costs for the delivery of family law services (e.g. specialized software) and assuming that specific paralegal fee structures – such as block fees – will remain in place if providing family law services.

The proposal inadequately addresses the potential high cost of insurance for paralegals and the impact that may have on their fees. Paralegals are not insured through LawPRO and so must obtain private insurance. We understand that current paralegal insurance premiums are priced based on expected payouts in or about the \$25,000 range. The potential payouts if paralegals are handling potentially multi-million dollar cases concerning matrimonial homes, financial assets, and ongoing or lump-sum support claims are much higher. There is no evidence that the private insurance market will insure paralegals to practise family law nor is there a plan to achieve that in this proposal.

The Report is conclusory and ignores key data and submissions.

All of our Associations and all of the Courts made submissions to the Committee that opposed the proposed scope of the FLSP licence — and for very similar reasons. The Report largely ignores these submissions and the very real concerns raised therein.

The Report relies on flawed data and flawed conclusions drawn from that data. For example, the survey sent to family lawyers on billing matters did not allow the selection of multiple answers, thereby failing to gather accurate information on the wide range of family lawyer rates and billing practices. The Report then concludes, wrongly, that paralegals offer more flexible billing models, ignoring the myriad ways family lawyers offer services, including limited service retainers, unbundled services, legal coaching, flat fee services and sliding scale rates. The Report relies extensively on a survey of only 21 self-represented litigants (SRLs) and then draws inaccurate conclusions from the already scant data. For example, the Report concludes that there are three categories of work for which SRLs would choose a paralegal over a lawyer, but the data shows the SRLs would choose a paralegal over a lawyer only 14%, 23%, and 62% of the time, respectively — meaning most of the time the SRL would choose a lawyer to represent their interests.

¹ For the full survey results, please see:

<https://lawsocietyontario.azureedge.net/media/iso/media/about/initiatives/flsp-letter-to-iso-from-tas-re-family-legal-services-survey-redacted.pdf>.

The proposal is a misplaced use of resources.

The proposal will cost \$550,000 to \$800,000, at a minimum, and likely over a \$1 million to initiate. The proposal acknowledges that ongoing full-time LSO staff may have to be added, and that it may be necessary for all licensees to subsidize family law paralegals on an ongoing basis. These funds are better applied to initiatives that will actually provide effective access to justice for Ontario families.

Paralegals do not have right of audience before Ontario courts on family matters.

The Report largely ignores that paralegals do not have right of audience before Ontario courts on family matters — and it is not within the LSO's purview to change this. The *Family Law Rules* provide that a party may act in person, be represented by a lawyer, or be represented by a person who is not a lawyer, but only if the court gives permission in advance. Justice Benotto, Chair of the Family Law Rules Committee, wrote a submission opposing the proposed expansion of the FLSP licence and supporting a more limited role and scope for paralegals, and she did this with the full support of the Chief Justice of Ontario, Chief Justice Strathy.

The proposal is not "something" that is better than "nothing".

There is an access to justice problem in our entire system — not just family law. But it is wrong to suggest there is nothing available to address the need in family law. Family lawyers are working hard to provide access to justice, including through relatively new initiatives like the Family Justice Centre, Advice and Settlement Counsel (ASC) Toronto, and the Family Law Limited Scope Services Project. All of these initiatives offer any combination of pro bono, "low bono" and navigational services. The public is largely unaware of these options and initiatives. They are underfunded, under-promoted and under-utilized. The LSO can and should help with this.

Further, the public is largely unaware that many family lawyers offer various low cost options, including services at Legal Aid rates (under \$150), per hour unbundled or flat fee retainers, and delegating to junior lawyers and/or supervised students. Again, the LSO can and should support an information campaign.

The non-legal family law services model has been considered and rejected, or has been tried and failed, in multiple North American jurisdictions (e.g., British Columbia and Washington). To date, no other jurisdiction has licensed paralegals to practise such a broad scope of family law — for good reason. Ontarians will be better served by the LSO devoting time, attention and resources to developing and expanding existing access to justice initiatives and connecting clients to the right counsel, than spending enormous amounts of time, resources and money on a proposal that does not actually meet Ontarians' access to justice needs.