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Family Law Committee

Response to "Family Legal Services Review"

Report by Justice Annemarie E. Bonkalo

Submitted to: Access to Justice Committee, Law Society of Upper Canada

Submitted May 23, 2017

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EXECUTIVE SUMMARY

Please accept this submission on behalf of the Family Law Committee of the Federation of Ontario Law Associations, ("FOLA").

FOLA is made up of the members of the 46 local law associations spread across Ontario. In total, we represent approximately 12,000 lawyers who are, by-in-large, practising in private practice in firms of all sizes across Ontario. Many of our members practice in small communities or service neighbourhoods in larger centres where they are pillars of their community. Our members are on the front-lines of the justice system and see its triumphs and shortcomings every day.

FOLA is an advocate, on behalf of practising lawyers, for a better justice system that recognizes the crucial role competent and professional lawyers play in our system of justice. Many of our members are professionals who specialize in family law either exclusively or as part of a broader general practice, but regardless of area of practice, this topic and the potential to expand the scope of practice for non-lawyers is of great interest – and concern – to nearly all our members.

Our Position in Brief

While we applaud the efforts by the Attorney General and the Law Society to examine the challenges of "access to justice" in the family law system, we believe that providing access to competent counsel and justice are very complicated issues. A lack of access is rooted in many causes with many different possible solutions.

As we will lay out in the course of this submission, FOLA and its members do not believe that the conclusions of Justice Bonkalo in her report entitled, "*Family Legal Services Review*" (hereinafter referred to as "the Report") with respect to licensing paralegals and other non-lawyer professionals to work in this space, without lawyer supervision, can be supported by evidence. Many of her recommendations could, in fact, produce irreparable harm to the family law justice system.

The majority of the Report reviewed some of the existing family legal services and then made 21 recommendations. Some of the recommendations are supported by FOLA, (e.g. regarding lawyers providing unbundled services and legal coaching and the Law Society and LawPRO continuing to educate and support same), but it is the Report's recommendations regarding expanding the scope of paralegal practice into family law, without lawyer supervision, that are the most fraught with controversy and most opposed by our membership.

FOLA cannot and will not support a "specialized license for paralegals to provide specified legal services in family law." FOLA cannot and will not support the list of areas of practice or legal advice and representation that the Report recommends paralegals be able to provide. In making these recommendations, the Report has disregarded and/or ignored most the submissions made during the consultation process from the family law Judiciary and from the practicing family law Bar. In

other words, the concerns expressed by those who currently work directly with the families and deal with the challenges facing the family court every day were ignored.

Respectfully, we submit that the Report is seriously flawed and many of the recommendations are dangerous and costly to the public and the justice system. We concur with the submission provided by the Superior Court of Justice, where they stated:

> *"Given the complexity of and the importance of this area of the law, it is not necessarily realistic to expect paralegals to be able to provide competent legal advice in a family case, even with the development of standard educational and training requirements...We already see the challenges for the Court when only one party has representation and judges have to work hard to ensure that self-represented litigant receives procedural fairness. If paralegals can represent parties in a family case, it would cause greater confusion for the judge in terms of what potential assistance to provide to ensure fairness between the parties."*

We submit that family law is complex, emotionally charged and not to be taken on by anyone except the best trained and regulated professionals. Most family lawyers go into this area of practice because they want to help people solve their legal problems and move forward with their lives. They engage in specialized legal and alternative dispute resolution training and participate in ongoing professional development. They are for the most part, emotionally and intellectually predisposed to finding solutions in highly emotional conflicts. We simply do not believe that expanding the scope of paralegals to practice family law will improve "access to justice."

"… THE QUALITY OF JUSTICE IN THE ONTARIO COURT OF JUSTICE WILL SUFFER. WE HAVE A COURT SYSTEM THAT IS PREMISED ON LAWYERS. WE NEED LAWYERS. THIS IS LAW. NOT ONLY IS THIS LAW, IT IS PROFOUNDLY IMPORTANT LAW, AND WE NEED LAWYERS TO REPRESENT THESE PEOPLE." - JUSTICE MARION COHEN

Summary

In this submission, we will provide our opinions on specific recommendations that we agree on and those that we believe are erroneous. We will provide a perspective on where we believe Justice Bonkalo was mislead or misinformed in her conclusions and on what we believe could be unintended consequences of her recommendations.

Our submission today will also repeat and rely on many of the same arguments made in our written submission to Justice Bonkalo in May of 2016. We challenge some of the underlying assumptions that are defining the problem and driving the development of a policy that from the beginning of this process was inevitably going to conclude with a call for an expanded scope of practice for non-lawyers. Second, we make the case that the training, disposition and skills of lawyers make them the best positioned professionals to remain at the centre of family law disputes and litigation.

A large portion of our report, however, will be to reiterate some of the better ideas for reform that we first submitted in May of 2016 to Justice Bonkalo and that we believe should be considered, implemented, allowed to germinate and measured before taking any further radical steps to fundamentally alter the family law justice system. Many of these recommendations fall into the purview of the Attorney General, but there are some that could be tackled by the Law Society in partnership with the practising bar across Ontario. FOLA is prepared to work with the Law Society and Ministry to advance any of these initiatives.

FOLA's Paralegal Committee will offer comment in a separate submission on what it believes the Law Society should do if the recommendation by Justice Bonkalo is accepted to allow for the expanded scope of practice for paralegals. Their committee has been looking at these issues for many years and they are in a much better position to comment on that aspect of what the Access to Justice Committee of the Law Society is presently considering.

We look forward to participating in any further discussions or reviews of this very important subject.

Specific Comments on the Report's Recommendations

Recommendations 1 and 2:

Recommendation 1:

Lawyers should continue to offer unbundled services and should take steps to ensure the public is made aware of their availability. Lawyers should consider innovative opportunities to offer unbundled legal services, including affiliations with other lawyers and online platforms.

Recommendation 2:

The Law Society of Upper Canada and LawPRO should continue to support the expanded use of unbundled services and should offer continuing legal education opportunities and tools to address the liability concerns that lawyers have raised as an impediment to offering these services.

FOLA Position:

Accepted. FOLA agrees with both recommendations 1 & 2 and only recommends that the Law Society also undertake to do the following:

(a) Considering the 2017 Ontario Court of Appeal case of *Meehan vs. Good*, amend the Rules of Professional Conduct to further clarify the responsibilities of a lawyer acting under a limited scope retainer to help minimize the risks to public and the risks of liability for the lawyer.

(b) In addition to educating the lawyers and the public, the Law Society should also educate the Judiciary so that they fully understand unbundled legal services and limited scope retainers. The Judiciary should clearly understand that the Law Society and LawPRO have both repeatedly and strongly advised lawyers who offer these services not to work outside of a clearly defined written limited scope retainer.

Recommendation 3:

The legal profession should support the development of legal coaching and offer continuing legal education opportunities to ensure lawyers are equipped to offer these services. Lawyers should be encouraged to take these training programs, and to offer and advertise coaching services. The Law Society of Upper Canada and LawPRO should consider providing incentives for lawyers to make legal coaching an integral part of their practice.

FOLA Position

FOLA is unable to agree or disagree with the recommendation. We need clarification on what "legal coaching" means. For example, most lawyers view "legal coaching" as a type of mentoring between lawyers, (which FOLA would fully support). However, the Report seems to indicate that "legal coaching" is a service lawyers could provide their clients and that is where the meaning becomes unclear. There are limited scope retainers where a client does not want the lawyer to attend court,

however, they want the lawyer to give them legal advice and direction on representing themselves at court, and possibly remain available to them on the day of court so the client can call and ask questions. If this is the type of legal coaching the Report was talking about, then FOLA can also support this recommendation, but with the amendments to the Rules of Professional conduct and education as set out above.

Recommendations 4, 5 and 6:

Recommendation 4:

The Law Society of Upper Canada should create a specialized licence for paralegals to provide specified legal services in family law.

Recommendation 5:

Paralegals licensed in family law should be permitted to provide legal services in the following areas:

- *custody;*
- *access;*
- *simple child support cases;*
- *restraining orders;*
- *enforcement; and*
- *simple and joint divorces without property.*

They should not be permitted to provide services in cases involving:

- *the Convention on the Civil Aspects of International Child Abduction[124] (i.e. the Hague Convention);*
- *child protection (which is outside the scope of this review);*
- *property;*
- *spousal support;*
- *complex child support in which discretionary determinations are necessary to arrive at an income amount (e.g. self-employment, undue hardship); and*
- *relocation.*

Recommendation 6:

Within the areas of practice set out in Recommendation 5, above, paralegals licensed in family law should be permitted to do the following:

1. *Conduct client interviews to understand the client's objectives and to obtain facts relevant to achieving that objective;*
2. *Perform the following forms-related tasks:*

i.Complete court-approved forms on the client's behalf;

ii.Advise the client on which form to use;

iii.Advise the client on how to complete the form;

iv.Sign, file and complete service of the form on the client's behalf;

v.Obtain, explain and file any necessary supporting documents on the client's behalf;

1. *Select, draft, complete or revise, or assist in the selection, drafting, completion or revision of, a document for use in a proceeding;*
2. *Determine what documents to serve or file in relation to the proceeding, determine on whom to serve or file a document, or determine when, where or how to serve or file a document;*
3. *Advise the client about the anticipated course of proceedings by which the court will resolve the matter;*
4. *Communicate with another party or the party's representative;*
5. *Represent a client in mediated negotiations;*
6. *Prepare a written settlement agreement in conformity with the mediated agreement;*
7. *Represent a client in court, other than at trials; and*
8. *Advise a client about how a court order affects the client's rights and obligations.*

FOLA Position

Not accepted. FOLA cannot and will not support a "specialized license for paralegals to provide specified legal services in family law." FOLA cannot and will not support the list of subject areas of practice for legal services or the types of legal services, advice or representation that the Report recommends paralegals be able to provide.

All three of these recommendations are seriously flawed and, in our view, are dangerous to the public. The Report does not clarify or differentiate between providing "legal services," "legal advice" or "legal representation." The Report uses these terms interchangeably, but precision in their definition is essential to the appropriate development of public policy.

FOLA cannot support paralegals providing any advice or representation unless it is with the supervision of a lawyer for the reasons laid out in the following:

Our first of many critiques of these particular recommendations revolve around the fact the Report dramatically contradicts itself when it says, "there is no doubt that family law is complex and that it has the potential to forever impact vulnerable people in the most important areas of their lives" and then goes on to recommend that, "paralegals be permitted to provide a complete spectrum of services in prescribed areas of family law that are typically (but by no means always) less complex than others." Respectfully, FOLA submits that family law is complex, period. Determining the best interests of a child has never been "less complex." Family law situations that involve domestic violence issues and the potential need for a restraining order has never been "less complex." Even many divorce applications that seem "less complex" in the beginning turn out to be very complicated and can have deep and long-lasting effects on a litigant's rights, (e.g. property and pensions and health benefits). As Justice Cohen said in her article in the Toronto Star on March 14, 2017, paralegals in family courts, "is not the solution." She went on to say that custody and access issues are "complicated endeavours" and pointed out that the Report does not provide any direction for what will happen to litigants whose access or child support case transforms from the so called "simple" to "complex." She aptly pointed out that the Report's recommendations create a "two-tier" system because, "Paralegals can't assist on the question of who gets the Rolex, but they can assist on who gets the kids?"

> FOLA SUBMITS THAT FAMILY LAW IS COMPLEX, PERIOD. DETERMINING THE BEST INTERESTS OF A CHILD HAS NEVER BEEN "LESS COMPLEX." FAMILY LAW SITUATIONS THAT INVOLVE DOMESTIC VIOLENCE ISSUES AND THE POTENTIAL NEED FOR A RESTRAINING ORDER HAS NEVER BEEN "LESS COMPLEX."

A second critique, related to the first, is that the Report misrepresents and minimizes the importance of the so called "court approved forms" and family court documents. These documents are not just "forms." These documents are "pleadings" and "affidavits". Completing family court forms is not just a matter of ticking the right boxes and filling in the blanks. An appreciation and knowledge of what is behind these documents is needed and completing the documents incorrectly without any thought to the long-term consequences could jeopardize a client's claims and credibility in the long run. Many of these claims are outside the purview of "family law" and fall into other areas of law including estates, real estate, tax law, corporate law, etc.

A third critique revolves around the assumptions of affordability. The Report does not differentiate between the needs of the "un-represented" litigant and the "self-represented" litigant. The Report makes the unfounded and unsubstantiated assumption that an "unrepresented" litigant who cannot afford to hire a lawyer will instead hire a paralegal and that this will improve "access to justice." The Report offers no evidence to support this assumption and further provides no evidence to suggest that Paralegals are, in fact, more affordable to this segment of family law litigants or that they will have a positive impact on the issue of "un-reps" in family court.

As we pointed out in our initial submission to Justice Bonkalo, we believe a further distinction needs to be made between unrepresented litigants who cannot afford the legal process and those who

are self-represented because they chose to be. We do not believe accurate statistics are kept on these cases, but enough family law practitioners have noted that they believe a portion of the self-represented population is able to retain counsel but has, at some point in their case, received advice they did not support or like and have chosen to carry on the fight without counsel. When these cases do end up in court, they often drag on unnecessarily and are the high-conflict cases that receive high profile and clog up the courts.

Competent counsel, retained early, often helps litigants avoid these high-conflict situations and steers their clients to lower-cost mediation or settlement that avoids high-cost court appearances.

A fourth critique revolves around the dangerous recommendation that paralegals should be allowed to provide legal representation to "clients in court, other than in trials, as long as the matter on which they are providing representation fall within their prescribed scope." This statement creates potentially serious problems for clients who have complex matters that are both inside and outside the "prescribed scope" of what a paralegal might be able to do. For example, an application is commenced for custody and access and child support, however, there is also a legitimate claim for spousal support. Is the specialized paralegal only to speak to parts of the application?

In the experience of practicing lawyers that we consulted across Ontario, it is extremely rare that any family law case is narrowly focused or that certain areas of family law (and law beyond family law) do not overlap.

A fifth critique revolves around the easily foreseeable situation of one party who retains a lawyer and one party who retains a paralegal. In this situation, if it is a high conflict case, either litigant has the ability to refuse to settle and drag a matter all the way to trial. The paralegal, in this case, cannot continue to represent the litigant at trial possibly leaving one party with no representation, or forcing the situation where a new lawyer will need to pick up a file midstream. In this scenario, even if the client can retain a counsel, it will be very difficult for that lawyer to pick up a matter on the eve of trial when they have not been involved in any of the documents preparation, negotiations or prior court appearances or the development of their strategy.

LAYING THE BLAME ON LAWYERS FOR THE CHALLENGES FACED BY THE FAMILY JUSTICE SYSTEM AND THE NUMBERS OF UNREPRESENTED AND SELF-REPRESENTED LITIGANTS IS SIMPLY WRONG AND UPSETTING TO THOSE FAMILY LAW LAWYERS WHO WORK SO HARD EVERY DAY TO PROVIDE ACCESS TO JUSTICE …

Finally, the Report offers that expanding the scope of paralegal practice was providing "something" to those who cannot afford a lawyer, and "something is better than nothing." However, as Justice Cohen said, "something is not better than nothing." The Report basically disregards all the innovations and options that have been put into place to offer the un-represented and self-represented litigant's family legal services and calls them "nothing." Laying the blame on lawyers for the challenges faced by the family justice system and the numbers of unrepresented and self-represented litigants is simply wrong and upsetting to those family law lawyers who work so hard every day to provide

access to justice. Despite the sometimes-fragile economic model for many family lawyers, they are still doing so many things to help meet the challenges. Lawyers are volunteering and spending days in court free of charge to participate in MIP presentations and DRO services. They take on the low paid work with legal aid certificates, per-diem duty counsel and work in clinics. They are creating innovative affiliations and programs that offer unbundled legal services and "day of court" representation. Many lawyers even offer pro-bono legal services. They are taking training and offering services in mediation, cooperative and collaborative family law. They are continually educating themselves on family law issues and how to deal with high conflict. Is this, as the Report puts it, "nothing"?

As we will outline in more detail later in this response, there are better and more impactful options that will improve access to justice and make family law more affordable.

Recommendation 7, 8 and 9:

Recommendation 7:

Paralegals wishing to specialize in family law should first be required to complete the current requirements for a paralegal licence.

Recommendation 8:

At minimum, the following topics should be included in any education and training of paralegals in family law: gender-based violence, family dynamics, client counselling, forms completion, ethics and professionalism, substantive and procedural family law and indicators that a client requires referral to a lawyer.

Recommendation 9:

A practical, experiential component in family law should be built into the licensing process for paralegals specializing in that area.

FOLA Position

Given FOLA's position as laid out above, our Paralegal Committee will provide some comments on the Reports recommendations regarding the training and experience requirements for a paralegal to become "specialized" in family law. However, we do wish to point out that allowing a paralegal to call themselves "specialized" in family law could create very serious regulation problems and further confuse the public.

Even lawyers who have practiced family law for many years are not permitted by the Law Society to call themselves "specialized" without going through a rigorous (some would say, impossible) application process. If paralegals can or are required to call themselves, "specialized" it may give the impression to the public that they are a better option rather than retaining a lawyer.

There is already a great deal of confusion for the public because of how paralegals have been allowed to market themselves. (A point that FOLA has made in its submissions to the Advertising

and Referral Fee Working Group.) Many new Canadians or citizens that speak English (or French) as a second language – or not at all – already find it difficult to differentiate between a paralegal and a lawyer. This sector of the public is already very vulnerable to abuses in this area of law because they may be alone and without family supports. In addition, there will also inevitably be new immigrants that have spousal support and/or property rights and yet they do not pursue these claims because they went to a paralegal and such matters would be outside their scope of practice. When lawyers do not advise their clients of their rights, they can be held liable. What will happen to the paralegal in this type of situation?

Recommendation 10:

Licensed paralegals with a specialization in family law should be subject to regulation and oversight by the Law Society of Upper Canada, and be required to be insured for their services.

FOLA Position

This matter will be taken up by FOLA's Paralegal Committee report

Recommendation 11 and 12:

Recommendation 11:

The Law Society of Upper Canada should take steps to facilitate collaboration between lawyers and paralegals with family law licences to form formal and informal affiliations, referral networks and interdisciplinary teams.

Recommendation 12:

Legal Aid Ontario should apply its interdisciplinary model to family law, using paralegals licensed in family law wherever possible.

FOLA Position

If the Law Society expands the scope of paralegals to include family law and requires that paralegals be supervised by lawyers, then facilitating collaboration between lawyers and paralegals is appropriate. However, in our view paralegals should not be permitted to offer family law legal advice or representation without the supervision of a lawyer or in a separate practice acting on their own, for the reasons stated above. Additionally, LAO should not be permitted to offer legal aid certificates that encourage or only allow a client to use a paralegal, also for the reasons already stated.

Recommendation 13:

The Ministry of the Attorney General should consider whether opportunities exist to utilize paralegals licensed in family law in the delivery of family justice services, including at the Family Law Information Centre and at the family court counter.

FOLA Position

Accepted, on the condition that paralegals are not providing any legal advice or legal representation without lawyer supervision. Paralegals must be limited to providing only legal information and direction to resources at the family court counter and/or Family Law Information Centre's. An exception might be made for aid to be provided in a triage program, however, someone trained and experienced in social work or psychology would likely be better equipped for that type of position.

Recommendation 14:

The Family Rules Committee should consider how the family court forms could be amended to require service providers who are compensated for preparing, or assisting in the preparation of, forms, to indicate that they have provided such assistance.

FOLA Position

Accepted. No further comment.

Recommendation 15 and 16:

Recommendation 15:

The Law Society of Upper Canada should review the impact paralegals specialized in family law have had on access to justice five years after the first family paralegal licences have been issued. This review should include an analysis of whether paralegals provide an affordable alternative to traditional models, whether the introduction of paralegals in family law has had any impact on self-representation and whether adjustments should be made to their scope of practice.

Recommendation 16:

In order to facilitate a five-year review, there should be a robust evaluation system in place as soon as paralegals are permitted to begin specializing in family law. The evaluation should measure client and paralegal satisfaction, as well as obtain views from the wider family justice community on the impact of paralegal practice in family law.

FOLA Position

In our initial submission to Justice Bonkalo, FOLA made the point that there was no empirical evidence from any jurisdiction in North America that identified an economic case for either clients

or the justice system when paralegals are allowed to move into family law. Granted, there are few jurisdictions where paralegals (or equivalent para-professionals) are allowed to practice in the area of family law, but this too supports our broader point. There is simply not enough strong evidence to justify that expanding scope of practice will result in a positive movement of the statistics surrounding self-represented or un-represented litigants. The recommendations are made on little more than a prima facia assumption that paralegals will charge less and that their representation will be less costly both to the client and the system.

We challenge this assumption on three levels. First, our members report that many paralegals – in particular senior, experienced paralegals - in many parts of Ontario have, over time, raised their rates to be roughly equivalent to that of lawyers in the same community. The same general trend can be expected for specialized family law paralegals over time. In any case, the evidence only exists in anecdote and no empirical study of paralegal and lawyer rates exist. Even the rates cited in Justice Bonkalo's report are samples.

Second, we contend that an examination of cost should be looking at system-wide cost and not just the price to the client. As noted in our first submission, at the simplest of levels, if a lawyer charges $300 per hour to prepare a document or affidavit and is able to do the work in one hour, the cost to the client is $300. A less expensive, but also less experienced professional such as a specialized family law paralegal may charge a lower hourly rate of, for example, $150 per hour, but require 2 hours to do the same document for a total cost of $300.

A similar economic analysis needs to also be done for the justice system as a whole. Many judges and lawyers can cite examples of paralegals in small claims court, for example, who bring reams of superfluous evidence, exhibits or documents to the trial and delay proceedings with unnecessary and complicated motions. While we acknowledge there are some lawyers who might use these tactics, the incidences of lawyers who clog the system are much less frequent. Some of these concerns would be addressed with better training for paralegals, but the point remains that no empirical study has ever been done of the true cost (or true cost savings) of paralegals in the justice system. We simply do not know and without this evidence, solid public policy cannot be made.

Third, we fear that introducing ostensibly less expensive para-professionals into the market might, in fact, drive some lawyers out of the market. Many of our members across Ontario are general practitioners in small communities. They might devote one quarter of their practice to family law and the rest to a variety of practice areas (wills and estates, real estate, criminal, etc.). What happens to the portion of the practice devoted to family when a paraprofessional who charges lower hourly rates enters the market and starts to compete? When faced with price competition, the lawyer has the choice to lower their rates or leave the market altogether. We fear many will simply leave the market and leave a void in communities across Ontario, particularly small towns. How will fewer lawyers providing family law services be an improvement to the access to justice problem?

As such, we recommend that the Law Society should undertake a comprehensive economic impact study looking at rates, cost to clients, system cost and the impact on access to justice <u>before</u>

undertaking such a radical public policy decision. If nothing else, this study will provide a necessary base-line of information to work from for any future steps that might be taken.

That said, if the Law Society does accept the recommendation to expand the scope of practice for paralegals without this work being done, FOLA agrees that there needs to be an ongoing robust evaluation of the impact of paralegals. Lawyers and judges should also be asked to provide feedback on their experiences working with or supervising paralegals and the review should be focused on system cost, cost to clients and the impact on the rates of self-represented litigants in the system. The review should commence much sooner than 5 years as recommended in the Report and, we believe, should be done right away so a base-line of information is collected and the impact of other variables (such as the role out of Unified Family Courts) can be factored.

Recommendation 17:

The Ministry of the Attorney General and LAO should ensure continued funding to enable student programs like Pro Bono Students Canada's Family Law Project and the student legal aid services societies to continue to operate and possibly even expand.

FOLA Position

Accepted. No further comment except that the Pro Bono Students should continue to be supervised by lawyers.

Recommendation 18:

The Family Rules Committee should consider amendments to Rule 4 to ensure its consistent application across courts, particularly with respect to court appearances by students and to clarify when lawyer supervision is required. Where supervision is required, judicial permission should not be necessary.

FOLA Position

Accepted. FOLA supports increased court appearances by law students in family court only where they are supervised by a lawyer.

Recommendation 19:

The Law Society of Upper Canada should take the opportunity during its review of its licensing process for lawyers to consider whether there is a way to connect the experiential learning of law students with unmet legal needs in family law.

FOLA Position

Accepted. FOLA is supportive of any opportunities for the practicing family lawyer and law students to connect and provide experiential learning for law students while at the same time, help meet the legal needs in family law.

Recommendation 20:

The Ministry of the Attorney General should develop a training program for court staff that emphasizes the difference between legal information and legal advice and encourages staff to provide as much assistance as possible within the limits of their role.

FOLA Position

Accepted. This recommendation aligns with one of the key recommendations made in our first submission to Justice Bonkalo.

Recommendation 21:

The Law Society of Upper Canada should ensure that rules relating to the unauthorized practice of law clearly distinguish between legal advice and the legal information provided by court staff to unrepresented litigants.

FOLA Position

Accepted on the condition that paralegals be included as not being authorized to practice family law. FOLA agrees that the Law Society should ensure that there are clear distinctions made between legal advice and legal information. Non-lawyers, (including court staff, law students, law clerks and paralegals) should not be providing legal advice or legal representation in family law without the supervision of a lawyer.

CHALLENGING THE UNDERLYING ASSUMPTIONS

Underlying this consultation are four assumptions which, to varying degrees, we believe need to be challenged and questioned. We acknowledge that each of these assumptions have some degree of truth to them, but we believe further careful empirical study is needed to better quantify the challenges and to fully appreciate the scope of the problem.

The four underlying assumptions are:

- that the growth of self-represented litigants in the court system is a result of high legal costs associated with high lawyer fees;
- that the self-represented litigant problem is suddenly growing to crisis levels;
- that paralegals would be less expensive; and,
- that there are many "simple" cases in the family courts that could be better dealt with by non-lawyers.

We acknowledge that on the surface, there may be some logic in these assumptions, but in our research, that has scanned across North America we can find no empirical evidence that this is the case. Even if there is some grain of truth in these assumptions, we object to the degree and scale of how these assumptions are being represented and used to justify policy decisions that will have a profound impact on the family law system, on family law practitioners and on the litigants, themselves.

Assumption #1: "Self-represented litigants are self-represented because they cannot afford a lawyer"

Our challenge to this assumption is three-fold. First, there are many lawyers in Ontario who offer flexibility in their payment arrangements (such as offering payment terms that might extend over years). Also, early results from flexible arrangement pilot programs such as limited scope retainers and other mechanisms are promising and deserve to be fully explored. (We will touch on this more later in our submission.)

Secondly, in her report, Justice Bonkalo does not differentiate between the "self-represented" and the "un-represented" litigants. "Self-represented" litigants are people who for various reasons CHOOSE to represent themselves in court. The "un-represented" litigants are people who want proper legal representation, however, they do not qualify for legal aid and do not have the financial resources to pay for counsel. This distinction is very important because these two groups have very different needs. The Report assumes that an "un-represented" litigant who cannot afford to hire a lawyer will instead hire a Paralegal, yet it offers no evidence to support this assumption and provides no proof that Paralegals are more affordable to this segment of family law litigants or that they will have a positive impact on the "un-rep" problem.

Third, the cost of family law is the result of many factors including the complexity of relationships, blended families, the higher net-worth of some of the litigants (and therefore higher costs associated with unpacking and dividing assets) and the Family Law Rules that require more appearances than are probably necessary. Family law is also unique in that it allows re-litigation in

cases of material changes of circumstances. Conceivably, a young couple with young children may be facing off in court for nearly 20 + years.

One suggestion for further research into this subject would be to compare the number of self-reps in criminal law to the self-reps in family law. If the financial qualification for a legal aid certificate in criminal law is comparable to family law and if the number of self-reps in criminal law is far less than in family law and if many of the participants in the criminal law area are people of relatively modest means, that would mean that most accused persons who do not qualify for legal aid can "afford" a lawyer. However, as a group, on the surface, they may present as no better off financially than the people in the family law arena. Yet, they seem to "afford" a lawyer, (no doubt because of the importance of what brings them to court). In other words, they are highly motivated to afford a lawyer. Maybe, with all the legal information and legal services that are available to self-reps in family law, the participants are simply not so highly motivated. And, if they are not sufficiently motivated to hire a lawyer, where is the evidence that they would be motivated to hire a paralegal?

Assumption #2: "The self-represented litigant problem is growing to crisis levels"

We have no doubt that there are too many self-represented litigants in our courts. There have always been too many self-represented litigants in our courts. We believe every litigant has the right to counsel and that our system would function more efficiently and effectively if there was counsel available to everyone. Our concern is that action is being undertaken today without having an accurate and complete, current picture.

The report from the Honourable Justice Peter Cory delivered to the Attorney General in May 2000 about regulating paralegal practice in Ontario noted (in Chapter IX) that 50 – 85% of parties appearing before judges of the Provincial Court were unrepresented. If true, the level of unrepresented litigants has not changed in the past 15 years. But it is also true that there has been no study of the root causes of this phenomenon questioning why or what solutions might exist to the problem. We also note that the available research, such as the work done by Professor Julie McFarlane at the University of Windsor School of Law, does not – to our knowledge - ever question whether a litigant might have been represented at some point in the litigation process. Anecdotally, our members report that in many cases a "self-rep" is of that status after having a lawyer for at least one or two other parts of the process. In many cases, the "self-rep" is of that status after having received advice from counsel that they did not like or expect. In other words, in many cases the lawyer has advised one course of action, such as a settlement or mediation, but the emotion that almost inevitably accompanies a family case has gotten in the way of a rational decision. We believe this to be the circumstance in at least some cases, but we believe more work and study needs to be done to quantify how many cases this might represent. Expanding scope of practice for non-lawyers would do nothing to help in this circumstance, except to potentially extend the litigation process and increase court costs.

Assumption #3: "Paralegals are less expensive than lawyers"

The Federation commissioned research on this very question and the conclusions from a survey of available sources across North America show that "surface pricing" of paralegals are indeed less expensive than lawyers. Our research conducted by respected research firm Corbin Partners also sought out any sources or quantitative work that compares the total cost of paralegals versus lawyers to the legal system. No such research could be found.[1]

Our belief, which needs to be tested further to confirm our hypothesis, is that the cost-differential between a paralegal and a lawyer would be reduced if an accurate "system-wide" view of costs could be done. We believe that the extra training provided to lawyers do, in many cases, enable lawyers to conduct interactions with their clients or the legal system more quickly, thus reducing the overall cost. (In our response to Recommendation #16 above, we lay out a simple example that illustrates this point.)

A further and more detailed examination of total system cost would need to look at the relative efficiency of lawyers and paralegals in the courts, for example. Anecdotally and based on conversations with judges, we believe that many interactions in court are dealt with more efficiently and quickly when both sides are represented by lawyer counsel. If one side was represented by a paralegal, instead being self-represented, presumably it would be somewhat better for the system and for the litigant, but the degree to how much better is questionable.

The Canadian Research Institute for Law and the Family conducted a 2012 survey with Alberta family law lawyers about experiences with self-represented litigants. In this study, participants were asked about alternative approaches to legal representation, including the delegation of legal services to paralegals. The findings of the study include the following:

> *"Most lawyers expressed concerns about the quality of Paralegal's work, the possibility that their services could increase litigants' expenses or require remedial work to repair (31.6%), and that paralegals lack the necessary training, skills and expertise to provide legal services (21.1%) …"*
>
> *"Among respondents commenting on the suitability of paralegals to provide legal services, judges believed that paralegals should be restricted from giving legal advice and providing advocacy services. A fifth of lawyers expressed concerns about the adequacy of paralegals' training, skills and expertise to provide legal services, and almost a third expressed concerns that paralegals provide poor quality service which may delay the conclusion of a dispute or require additional expense to correct."*

Our own survey of members came to similar conclusions. There is a high degree of skepticism by members of the bar that the quality of work done by paralegals will be such that it will not require remediation and additional cost to other litigants or to the justice system. We acknowledge that

[1] Reference is to Corbin Partners' "Market Reconnaissance Study" examining fees of private practice paralegals and lawyers. Study was commissioned by the Federation of Ontario Law Associations. Text of the study can be provided upon request.

this skepticism is not without its own bias, but it is nevertheless a consideration that we feel the Attorney General and the Law Society should be looking at very closely.

On a related note with respect to the quality of advice and cost to the system, it is notable that currently in a circumstance where one side in a dispute is represented by a lawyer and the other is self-represented, the judiciary are left in the difficult position of attempting to guide the self-represented litigant without actively assisting them and breaching the rules of court. While the judiciary would be spared this difficulty if a paralegal was present for the self-represented, the court would be absolutely bound to accept the submissions of the paralegal. In this circumstance, it is presumed that both sides are represented by competent counsel, but in many cases, there would be an imbalance of competence and experience if one side had a lawyer and another a paralegal, which could lead to other problems and costs to the justice system, especially on appeals.

Assumption #4: The assumption that there are "simple" divorces and family law matters

All throughout the Report, Justice Bonkalo refers to "documents" and "forms" that could be completed by a knowledgeable professional (like an unsupervised paralegal) who simply plugs numbers into a formula or "checks boxes" and follows the proper procedure. We strongly disagree with this description.

The "documents" and "forms" that she is referring to are "PLEADINGS" and "AFFIDAVITS" and "SWORN FINANCIAL STATEMENTS." Every document that is served and filed in a family court matter could be highly prejudicial to a client. A great deal of thought must be put into each document.

FOLA DOES NOT ACCEPT THIS GENERALIZATION THAT THESE AREAS OF LAW ARE "LESS COMPLEX" … WHEN PEOPLE HAVE EXHAUSTED ALTERNATIVE DISPUTE RESOLUTION SERVICES AND THEY GO TO COURT, IT IS VERY RARE THAT THESE MATTERS ARE "LESS COMPLEX." IN FACT, WHEN PARTIES HAVE NOT BEEN ABLE TO REACH A RESOLUTION OUTSIDE OF COURT, IT USUALLY MEANS THAT THEY ARE EXPERIENCING A HIGH LEVEL OF CONFLICT AND/OR COMPLEXITY IN THEIR SEPARATION

Additionally, a major problem in the Report is found in the list of "prescribed areas of family law that are typically, but by no means always less complex than others" that Paralegals should be permitted to practice without the supervision of a lawyer at every step of court except a trial. In addition, many areas of family law are usually intertwined with the same list of services that the Report says Paralegals should not be permitted to provide. The Report provided no clarification or answer on how to deal with this problem.

In the experience of our members, there are rarely circumstances where a divorce is "simple" and can be dispensed with through a formula or simply following the procedure. Putting aside the high-degree of emotion that inevitably comes with a family law matter, there are many dozens of statutes and law that must be dealt with, and there could be even more depending on the

complexity of the case and whether the matter touches business ownership issues, matters of taxation or even criminal law. Moreover, the diversity of issues and laws that must be dealt with is high. Everything from real estate to child protection and custody, immigration law, mental health issues and dozens of other factors contribute to making family law incredibly complex.

It is the experience of most family law practitioners that it is very rarely evident in the first meeting that a divorce or other matter is, in fact, "simple". On the face of it, a divorcing couple with a joint ownership of a primary residence and no children could seem to be a "simple" matter, but often after the initial consultation, other matters such as ownership of a business, immigration status or other factors emerge. In other cases, power relationships and potential abuse are not well understood or identified as risk factors until well after the initial consultation. Would a less well-trained professional pick up on all those factors and understand the rights and responsibilities for each party in the initial consultation? What if that professional gets that initial assessment wrong? Who picks up the pieces then?

Further, the idea of expanding scope of practice so that non-lawyers could do the less complex matters ignores the economic reality of a professional services practice (regardless of whether it is a law practice or any other). The less complex matters in a law office are very often assigned to support staff (law clerks and articling students) to conduct the labour under the supervision of the lawyer such that the client gets the benefit of a proper job under proper advice for the least cost. We fear that "cream skimming" the so-called simpler cases could, in fact, drive more lawyers out of the family law practice (and maybe out of law altogether) by making it economically unviable to practice. How will that help "access to justice"?

Summary/Conclusion

The evidence and the assumptions that are forming the basis for the Report's push to expand the scope of practice for paralegals and other non-lawyers in the name of expanding "access to justice" is simply not clear and what little exists is not compelling.

As one of our Committee noted, when confronted with the argument that hiring a licensed paralegal rather than a lawyer on an hourly basis would be significantly less expensive than hiring a lawyer, he said: *"No basis is given for this statement … (it is made) as a result of Socratic reasoning which prima facia would seem logical but has shown time and again not to be the case in other areas where paralegals compete with lawyers such as Small Claims Court and various tribunals."* In fact, our research across North America has concluded that there is a lack of evidence – one way or another – to prove either hypothesis.

The report of the research commissioned by the Federation concluded:

> *Based on an investigation of existing market intelligence, using a wide variety of sources within Canada, the US and the UK, it leads to the following inferences:*
>
> - *At the surface, there is a general impression given that the legal fees charged to clients by paralegals are lower than fees paid for similar services provided by lawyer.*

- *When delving deeper into an assessment of total case fees for comparable legal matters, we learn that there are doubts and uncertainties expressed in the legal marketplace on whether there is a significant cost difference at all.*

- *However, while anecdotal evidence exists to question comparative pricing, there is a lack of empirical evidence to gauge this issue. Fees for the services of a lawyer continue to be tracked in the Canadian market (nationally and by province). Similar tracking has not been found for the regulated paralegal market.*

Even in the jurisdictions that have moved to expand scope of practice for paralegals and non-lawyers, such as in Washington State, we can find no empirical or published evidence that the move has resulted in the promised improvements in access to justice or even that there are currently studies being done to test this question.

On the question of cost and value of various lawyer and non-lawyer service models; on the question of scope of the problem of self-represented litigants; and on the questions of impact that such a move to expand scope of practice will have, too many questions remain unanswered and too many doubts exist to confidently draw the conclusions that lead to a policy of expanded scope of practice.

THE CASE FOR LAWYERS … AND THE RISKS ASSOCIATED WITH EXPANDING SCOPE OF PRACTICE FOR PARALEGALS

Family law, especially as practiced in Canada, is an extremely complex area of law requiring the combination of proficient technical skills and an adept personal touch. Family lawyers need to be knowledgeable on dozens of statutes and the precedents coming out of the family law courts are constantly evolving the jurisprudence of family law.

It has long been our feeling that only well-trained lawyers can adequately serve family law clients. Only lawyers have the depth of knowledge of the relevant family law statutes, and many other aspects of the law, such as real estate, corporate/commercial law, immigration law, mental health law, criminal law and many others. In some ways, the best family law lawyers are not really specialists, but deeply knowledgeable generalists who apply their expertise to emotionally charged family breakups.

At a system level, the Law Commission of Ontario notes that:

> *"There are several challenges in describing and assessing Ontario's formal family justice system. There are many actors involved and there is a fragmentation of services … The organization of the courts and the multiple forms of non-judicial dispute resolution are another factor. In Ontario the diversity of community organizations linked to the system is another reason for local differences and sometimes a fragmentation of services. …*
>
> *Family law in Ontario is an area of specialists."*[2]

We believe that lawyers are best suited and trained to navigate these complex family law waters. A lawyer's education, temperament, breadth of knowledge, regulatory oversight and insurance requirements make them uniquely qualified to work in the complex, multi-faceted field of family law.

The admission requirements for lawyers entering law school examine intellect, temperament and reward the social and rhetorical skills that good advocates need to be successful. Law school, when at its best, is less an exercise in technical skills development than it is a forum for the development of skills in "how to think" and solve complex problems. The licensing and regulatory regime for lawyers encourages professionalism and the development of systems to efficiently manage complex files. The continuing professional development requirements for lawyers are rigorous and ensure that lawyers stay up-to-date on all aspects of the law that they need to know. For the circumstances where lawyers lack specific knowledge, they are trained in specialized research skills and have access to a network of law libraries across Ontario that allows them to remain current. The insurance regime for lawyers is comprehensive and risks are well known and tested.

In each of the above areas, paralegals and other non-lawyer professionals do not have the depth of experience or skill as lawyers. The insurance regime for family law practitioners will need to be

[2] http://www.lco-cdo.org/en/family-law-reform-interim-report-sectionIII

reconsidered and, if the risks do not balance, could cause the entire insurance regime to be thrown out of balance, raising the costs for everyone and this cost is inevitably passed along to clients.

In our view, even if there was a specialized education and skills development regime set up to raise the skill-level of paralegals to allow them to practice family law, we do not fathom how it could become rigorous enough to overcome these challenges. Our view of the possibility of paralegals in family law has not changed substantially from the views expressed by Justice Cory in his report on the topic in 2000.

In that report, the Honourable Peter Cory delivered to the Attorney General of Ontario a possible framework for regulating paralegal practice in Ontario. Chapter IX of that report deals with "area of permissible practice – Family Law…" Cory states: "*It must be remembered that Family Law is fraught with complexities and replete with legal pitfalls.*" After referring to members of the bar who had made submissions to the effect that there was no such thing as a simple divorce and that paralegals should not be permitted to proceed even with an uncontested divorce The Honourable Mr. Cory stated:

> *"I see no reason why licensed paralegals should not be authorized to undertake uncontested divorce proceedings in any of three circumstances: first where the parties have no children and no significant assets or the assets are jointly held; and if there is no need for, or no issue outstanding, as to spousal support; second where the proceedings are commenced within one year of the execution of a Separation Agreement which resolves all collateral concerns; third, where there was a Court Order resolving all of the ancillary issues granted within one year of the commencement of the divorce action. In any of these circumstances, licensed paralegals should be entitled to undertake uncontested divorce proceedings."*

While Mr. Cory might be correct, we simply do not believe that there are very many of these types of cases to be found in the system. So, should these recommendations be followed, not much of substance would change to address the challenge of self-represented litigants. A typical self-represented litigant is not dealing with an uncontested divorce.

On the issue of "is there other work in this field, for example drafting Separation Agreements, that can be undertaken by paralegals?" Cory said that he would be opposed to any licensed paralegal drafting a Separation Agreement. *"This requires a sound knowledge of the law, property and contract law as well as family law. Quite simply, it is too complex an area for licensed paralegals…"* As Cory notes, the complexity of the law, beyond the most straightforward of cases, are best handled by licensed lawyers who have the specialized training.

In connection with the suggestion that paralegals should give advice in connection with custody and access, division of family property and support and maintenance Cory stated:

> *I worry about a paralegal giving advice of this sort. It is the custody and access cases that determine, not only the best interest of the children involved, but also to some extent the future of our country. The best interest of the child will always be paramount. A consideration of children's best interests must include custody and access*

> *entitlements…questions of child custody, access and support are of fundamental importance. Yet they raise legal issues of great complexity, very often involving the use and division of property both real and personal. The more complex the situation the more likely a mistake will be made in giving advice. Only a lawyer should give advice in this area.*

So, Justice Cory's review opens the door for paralegals in family law, but the restrictions that he feels are prudent – and to which we concur for all the reasons noted – are so restrictive that one is left to wonder whether they would have any impact on the self-represented litigant issue at all. Would sufficient system resources be freed up if uncontested divorces could be done by paralegals or other non-lawyer professionals? We have our doubts.

BETTER OPTIONS TO CONSIDER

A significant challenge that the practicing family law bar cannot deny is the fact that we have a financial stake in the outcome of this debate, making it very easy for the proponents of paralegal access into family law to paint lawyers as being solely financial motivated and fearful of competition in their opposition to what is being proposed. However, FOLA is not arguing against expanding the scope of paralegal practice from its own economic self-interest. FOLA does not dispute the fact that the family justice system faces some significant challenges and that changes are needed to help overcome those challenges.

In this next section, we offer some comments on what, we feel, are better and more impactful options the Review should consider on the question of how best to make our family courts more accessible to more people. There is a cost consideration to some of these ideas, but many are low-cost, practical ideas that could be done with existing resources or modest (and necessary and long overdue) investments.

We appreciate that the field of family law is complex and reforming the family law system will require many inter-related reforms and changes. That is why this menu of choices is being offered.

Unified Family Courts

In Ontario family law matters are heard in the Ontario Court of Justice, the Superior Court of Justice, or the Family Court branch of the Superior Court of Justice, depending on the issue in dispute and where you are in the province. There are presently seventeen unified Family Courts of the Superior Court of Justice located across Ontario in Barrie, Bracebridge, Brockville, Cobourg, Cornwall, Hamilton, Kingston, L'Orignal, Lindsay, London, Napanee, Newmarket, Oshawa/Whitby, Ottawa, Perth, Peterborough, and St. Catharines.

Where the unified Family Court branch exists, the court hears all family law matters, including divorce, division of property, child and spousal support, custody and access, adoption, and child protection applications. In all other sites across the province, family law matters are divided between the Ontario Court of Justice and the Superior Court of Justice, and this inefficiency –

especially in the largest population centres of Toronto, Peel, Halton, etc. – is contributing to the challenge. Inefficiency and inconsistency across the province in the way the courts handle family cases contribute to the cost that has been borne by all clients.

We feel that investing in the expansion of the Unified Family Court across Ontario will result in substantial efficiency gains and make the entire system more accessible for everyone. We are encouraged by the recent announcements of the Federal and Provincial government and would encourage that these investments be made sooner than later so that the benefits to the system can be realized sooner than later.

Making Case Management More Accessible and More Effective

The Case Management system under the Family Law Rules was developed because many family law lawyers, judges and social scientists believe that an effective and accessible family justice system requires pre-trial and post-trial case management by a single judge, an approach to family justice reflected in the slogan: *"One judge for one family."* Judges should have the necessary knowledge, skills, and training needed to resolve family disputes and to help effect changes in parental behaviours and attitudes, as well as the willingness to collaborate effectively with non-legal professionals.

"One judge for one family" is what true Case Management is supposed to be, i.e. "a single judge who deals with conferences and motions and both procedural and substantive issues" and that judge has "the necessary knowledge, skills and training needed to resolve family disputes and help effect changes in parental behaviors and attitudes." Under a "one judge for one family" model, our experience is that the family justice system is much more effective and accessible.

The nature of family law disputes requires that the litigants receive consistent messages, directions and orders from judges that have the education, training and experience in dealing with family cases to ensure that the cases are being effectively dealt with in an efficient manner. This is especially important to self-represented family law litigants who do not have lawyers to help manage their behaviors or understand their rights and obligations which can help to minimize the conflict. If one judge is familiar with the litigants and the facts of their case, this can ease the frustration of the parties and lower the level of conflict. It can also ensure that there will be less inconsistency in the approaches and more effective enforcement of orders.

Presently, Case Management is only available in cases in the Family Court of the Superior Court of Justice which jurisdiction is limited to those municipalities listed in Family Law Rule 1 (3). In some of those communities, the Case Management system is well established and runs smoothly. However, this is not the case in some communities where the judicial and court resources are strained and there may not be enough judges to provide true Case Management.

Introducing a paralegal or other non-lawyer professional into the process has the potential to confuse and mitigate any of the benefits that come about from unified case management because one could foresee a circumstance where a party will be represented by multiple professionals, depending on the scope of practice being considered.

On a related note, the Family Law Rules currently force parties to attend a First Appearance, Case Conference and Settlement Conference and then even a Trial Management Conference where the judge has no power to make a decision, unless reached on consent, or for purely procedural matters. This process can become very expensive and creates opportunities for delay and costs. Families in conflict and separation need options that assist them in finding quicker resolutions and a simpler process to get some results. Some changes need to be made to the Rules to provide for proportionality and help simplify and stream-line the process and the documents.

More Effective use of Mediation

Many costs and delays are a result of parties who commence a court action when it was not necessary. Many family law matters could (and should) have remained out of court in the first place. In our experience, if one or both parties had retained a lawyer, they may have been redirected to alternative dispute resolution services like mediation, collaborative or cooperative processes to negotiate a resolution out-side court. Despite the many common-sense solutions available outside of court, many self-represented and unrepresented parties are simply unaware of or are suspicious and ill-informed about alternative dispute resolution and so they forgo any attempts to settle their issues amicably choosing instead to go straight into court.

Most Comprehensive Family Law Mediators operate under three strong principles. These principles are: "Voluntariness; Fairness & Autonomy; and Do No Harm." These principles help family law mediators to use their skills (active listening, reframing, emotional intelligence, trust building exercises and an understanding of the role of anger) to build a safe process that recognizes and addresses power imbalances and helps parties to find an alternative resolution to their conflict.

We are aware that family mediation services are now available at every family court location (albeit with variable hours), but we are particularly bullish on the model being employed in The County of Simcoe. In Barrie, "The Mediation Centre" is a group of social workers and lawyers who greatly assist in many cases in either narrowing the issues or resolving some cases in their entirety (many times before the parties have ever entered a courtroom). This service is geared to income, so the parties pay very modest fees. They also have "on-site" services wherein parties receive up to one (1) hour of mediation services free of charge. The Federation recommends the replication and support of this model and ones like it across the province. The cost to expand such a service would be minimal and we anticipate could be found from savings associated with fewer court appearances.

Family Law Information Centres

Much of the social science done in the field recommends providing greater access to information to litigants early in the process. With more information, litigants can make better decisions and know where to find the right support. The Family Law Information Centres have proven to be a helpful resource in filling this need.

We recommend continued support for FLICs and an expansion of their hours of operation to include evenings and weekends, where practical. Right now, some FLICs have very limited service hours that do not even cover court sitting hours. Expanding hours, particularly at non-unified family court SCJ locations will have a profound impact. A further improvement could be made with the addition of an Advice Lawyer located at every FLIC and adding more hours for that service where it exists now.

Steps should also be made to improve access to information on where the FLICs are located. Presently, when searching for FLICs on the Ministry of the Attorney General web-site, for example, the search directs you to a page of all courthouses, regardless of whether there is a FLIC on-site. This is confusing to a trained practitioner knowledgeable in Ontario's court system. It is practically opaque to an untrained person.

We also believe that a small investment in making more of the information available at FLICs available on-line and through a toll-free information line would be a wise and worthwhile investment.

We commend the Ministry for providing the brochure *"What you should know about Family Law in Ontario"* in nine languages, but we would strongly recommend that many more languages be added. According to the Statistics Canada Linguistic survey of 2011, there were more than 200 languages commonly spoken in Canada. Consideration should be given to making the brochure more accessible by changing from a text-dense 42-page document to something interactive that utilizes graphics, pictures and (in an on-line version) video to make it more user-friendly. Consideration might also be given to tailoring the brochure to different populations such as mothers with young children, fathers, couples without children, etc. so that the information is presented in a more tailored fashion, rather than in such a general brochure, and steers the individual in the right directions for other resources, including help from a lawyer.

Another suggestion is to have each of the FLIC offices equipped with computers, software and printers to assist in Family Form completion. Some FLICs have access to such equipment, but most do not. This would be a very simple and relatively straightforward initiative that could help many people.

By making information more accessible earlier in the process, we anticipate that many family law cases can be dealt with earlier, before the confrontational litigation process starts and feelings are hardened even more.

Improvements to the Mandatory Information Program

Presently every litigant (applicant and respondent, moving party or responding party) must attend a 1.5-hour presentation where a lawyer reads a set script about the family court and the alternative dispute resolution options that are available. No one can ask any questions in this "Mandatory Information Program" (MIP). They must have a certificate of attendance signed. The lawyer conducting the session is volunteering their time for this. Many of the lawyers who provided input to this submission do not feel the MIP is achieving what it set out to do. Most litigants need this

type of information prior to the court action being commenced, not after. If hours at the FLIC were expanded and Advice Lawyer and Mediation services were also expanded and offered equally around the province, we feel that would go a lot further to educate parties on options that are available to them and discourage unnecessary litigation.

Some of the information in the MIP would be very helpful to newly separated parties before they commence an Application in court.

Collaborative Practice, Cooperative Practice, Early Neutral Consultations, Limited Scope Retainers, Unbundled Legal Services, Day-of-court Counsel and other innovations:

Many of the lawyers that are attracted to the practice of family law do so out of a genuine wish to help families. By offering Collaborative Practice, Cooperative Practice, Early Neutral Consultations, Limited Scope Retainers and unbundled legal services, lawyers can provide some relief to the self-represented and unrepresented litigant and divert their clients from the family court. These services offer lawyers an opportunity to become problem solvers and peacemakers and show the public and the judiciary how lawyers care about their clients, about family law and access to justice.

Collaborative Practice is a process focused on settlement such that the lawyers enter into a participation agreement signed by all parties and counsel that they will not bring the matter to litigation. They often form a "team" including the lawyers, a family therapeutic professional and a financial professional. The primary objective is to assist the parties in achieving a reasonable and thorough settlement that is in both the clients and the children's best interests.

Cooperative Practice is a process where the lawyers create and provide a constructive and efficient negotiation process for the parties. The parties and lawyers do not enter a contract where they agree they will not go to court; however, they work collegially and cooperatively together to help minimize or lower the conflict and manage their client's expectations. They also practice with a good sense of proportionality to the legal and financial resources available to them and their clients.

Early Neutral Consultations provide legal information and neutral consultations to separating couples. They are family law facilitators that provide legal information and contacts to parties so they can choose the direction of their separation or divorce. They try to assist the parties in putting their families and children first by working as a family unit in making decisions. They provide a safe environment for separating couples and their families and assist the families in saving family resources.

Limited Scope Retainers and Unbundled Legal Services are "the provision of legal services by a lawyer for part, but not all, of a client's legal matter by agreement between the lawyer and the client." These services generally include: consultation and legal advice; document preparation; and limited representation in Court. Consultation includes a lawyer providing advice and direction in "typically a short meeting or phone call" about the legal and/or procedural issues in the matter. The lawyer could also provide the litigant with an evaluation of their case. Document preparation "typically involves getting a lawyer's assistance as to the form and content of a contract, court pleading or other legal document." It could also include, "reviewing or preparing correspondence

or documents, factual investigations, legal research." Limited representation in court could take place "in court, an administrative hearing, at a mediation, etc.: Typically, where a lawyer provides assistance with a single appearance in court or at a hearing, or for work and appearances for a particular stage of a matter." Representation may even include, "examinations for discovery, planning negotiations, planning for a court appearance, providing support during a trial or assisting with an appeal."

On February 3, 2015, The Action Group on Access to Justice hosted a unique program to "explore limited scope retainer and access to justice." Additionally, on October 26th, 2015, the Law Society aired a webcast presentation on the topic of Limited Scope Retainers for Family Law Lawyers. These programs had speakers "with extensive experience using limited scope retainers" and who promoted the "development of new ideas about how they may be implemented in a variety of practice settings." With the increase in the numbers of self-represented and unrepresented litigants in family court, encouraging limited scope retainers and unbundled legal services is a simple way that lawyers can be part of the solution and could greatly assist the courts, the litigants and the community. Promotion and expansion of this idea could help the courts and the province without it costing any public monies.

The Law Society has amended the Rules of Professional Conduct to allow for Limited Scope Retainers and provide some guidance to lawyers of their additional obligations regarding this type of work. LawPRO has also contributed immensely to developing practice resources for "Best Practices" which can be found on their website.

In Simcoe County, a panel of lawyers that call themselves the "PLUS Panel" (Private Legal Unbundled Service Panel) has formed. The lawyers provide specific limited retainer legal services at reduced rates or on a block fee system. Initial proposals that have circulated are to have a financial eligibility test and practice guidelines, however, at this time, the private bar is setting their own rates and entering these retainers privately with their clients. Most importantly, we have met with the lawyers and judiciary to educate them on this service and provided retainer precedents and discuss challenges. There is some movement now to expand to create a "private duty counsel" panel, (as described below) that could make lawyers available for one-day appearances at Settlement Conferences, Trial Management Conferences and Exit Pre-Trials. The PLUS panel initiative has the support of the local judiciary and mediation centre.

Another innovation that we strongly endorse for further study is the idea presented by Stacy MacCormac, a practitioner in Cobourg, Ontario, who has proposed an *"Onsite – On Demand - Day of Court - Limited Scope Retainer Private Counsel"* model that holds promise for helping many family law litigants, at a low cost. Her model maintains the role of lawyers at the centre of the family law transaction. A full description of Ms. MacCormac's proposal is provided as Appendix A to our original submission, which is available on our FOLA website: http://www.fola.ca/family-law-reforms.html (see page 19)

These innovations in the provision of legal services need to be encouraged and promoted by the Law Society and Attorney General. If there are regulatory or practice-guideline barriers to the greater adoption of these practices, they need to be looked at and ameliorated. If there are

professional liability insurance considerations that are barriers to adoption of these practices, those should be dealt with as more practitioners utilize these models and the insurers become more familiar with the risks. If there are education barriers, the Law Society and every advocate for reform should be hosting even more continuing professional development. If not enough lawyers know about these options, greater promotion should be done of the benefits of these practice innovations.

In our view, an expansion of the scope of practice for paralegals and other non-lawyer professionals may make the economics for these alternative retainer arrangements, and especially limited scope retainers, even more untenable and unattractive to lawyers. If a paralegal can offer "to be by your side every step of the way" (though with less expertise and experience) for the same price as a limited scope retainer provided by a lawyer, the client may well believe they are better served by a paralegal, when in fact the evidence suggests they might not be. . If the competition for limited scope retainers grows in this way, we predict a perverse economic impact and fewer lawyers will offer the service and many others will leave the profession. Since limited scope retainers and these alternatives are relatively new to the market, we strongly recommend that they be given time to gain traction before threatening their existence with new competition.

QUANTITY OF SERVICE DOES NOT EQUATE TO QUALITY OF COUNSEL

Strong and Continued Support for Duty Counsel and Legal Aid Certificate Programs across the Province

No discussion of access to justice can be offered without a word about Legal Aid and a reiteration of the important role of both certificates for the private bar and of duty-counsel to the service of lower-income Ontarians. The Federation applauds the Attorney General and Ontario government for the recent infusion of new money, including the money that has helped to raise eligibility and expand certificate eligible services. This money is welcomed and it is making a difference. There is clearly a demand for this service as attested by the higher than forecast subscription which has resulted in the deficit and subsequent pull back of certificates. As a result, Legal Aid also remains inadequate. The demand for legal services by lower and middle-income Ontarians remains high and continues to grow in the family law space.

We encourage the Attorney General to continue to make the case to his Cabinet colleagues that further investments in legal aid continue to pay strong dividends. We will continue to stand shoulder-to-shoulder with the Attorney General, the judiciary, the Law Society and many others in making that case.

We also reiterate our long-held position, borne out by the facts and experience, that the private-bar certificate and per diem duty counsel system remains the most efficient way to deliver legal services to the legal aid eligible population.

CONCLUSIONS

After careful consideration of all the questions, review of the research that we have commissioned and the research cited by Justice Bonkalo in her report, a survey of our own members across Ontario and many hours of debate and deliberation, we have come to a few conclusions and offer a few final observations which we hope will be considered as by the Benchers of the Law Society.

First, we recommend that much more study and challenge of the assumptions that are underpinning this proposed shift in policy needs to be undertaken. No jurisdiction – that we can find – that has expanded scope of practice for non-lawyers has done the longitudinal study or analysis to determine whether costs have come down or if more litigants are, in fact, being served. And even if more litigants are getting some counsel, questions of quality and the additional cost of repair or mitigation have never been examined. These are questions too important to be left to supposition, especially considering the stakes at hand.

Second, we believe that there are many innovations in the provision of family law, such as those laid out in this paper, that deserve to be given a greater chance to grow and succeed. These innovations need to be promoted, encouraged, funded and made universally available across Ontario. Many of these innovations, such as limited scope retainers and "day of court counsel," have been phenomena for less than two years and are just starting to gain traction. Adding competition from non-lawyer professionals now might make the economic case for many of these innovations unsustainable.

Third, there are reforms and investments that should be undertaken in the administration of our own courts that can help the situation dramatically. Making a unified family court available across Ontario would be a great place to start. An examination of the rules in family court, with a view to removing cost and streamlining process, will also bear fruit.

Fourth, the behaviour and actions of the Ministry of the Attorney General and the courts administrators must stop sending contradictory messages when it comes to access to justice in family law. For example, last year the Attorney General gave notice of a fee hike[3] on certain SCJ cases and, for the first time, on OCJ family matters. These new charges came into effect July 1, 2016. On the one hand, the mandate to Justice Bonkalo lamented that lawyer fees are too costly for many litigants, and on the other hand, at the same time, the Ministry raised fees and costs directly borne by those same litigants. This contradictory message is very disappointing to many family law practitioners and to our clients.

Fifth, and perhaps most importantly, lawyers arguing for the maintenance of their rightful place in the family law justice system may seem to be entirely self-serving, but we firmly believe that every one of the arguments being presented are crafted with the public interest in mind. There is no doubt that should these recommendations be turned into policy and a program is set up to allow an expanded scope of practice for specialized paralegals that there will be an economic impact to lawyers. But for us, this economic consideration is a secondary one. The result will likely be fewer family law lawyers practising in Ontario – a real impact to the practising bar, to be sure – but more

[3] http://www.ontariocanada.com/registry/view.do?postingId=21402&language=en

importantly for the public, they will have fewer family law lawyers to choose from. Similarly, the recommendations offered to reform other aspects of the family law system (Unified Family Court, limited scope retainers, etc.) are all reforms that will have positive and lasting long-term benefits for family law litigants. Many of the reforms we are suggesting could have disruptive and even negative consequence to the business of family law lawyers, but we make the recommendations because they will benefit the public.

… WE WISH TO REITERATE THAT THE RECOMMENDATIONS AND ADVICE BEING OFFERED IN THIS DOCUMENT IS BEING OFFERED WITH THE CONSIDERATION OF THE PUBLIC INTEREST TOP-OF-MIND.

Should the Law Society choose to take the advice of Justice Bonkalo and expand scope of practice, we strongly urge that actions be taken in a slow and measured manner. There is simply too much at risk and the economics of family law are already precarious enough that any action taken to dramatically shift the practice will drive many practitioners out of this field. Losing this expertise and years of experience will be difficult to replace. In short, replacing quality with quantity will simply not yield the results we all desire.

We all genuinely desire to see a better and more efficient family law system in Ontario that serves the needs of every family law litigant that enters the system. It is in this spirit of genuine desire to make the system better that we have offered this submission and look forward to continued dialogue with the Law Society, Attorney General and any other stakeholder that is charged with making our family courts operate better.

Submitted on behalf of the Federation of Ontario Law Associations.

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