FAMILY LEGAL SERVICES REVIEW

Comments on MAG Consultation Paper

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Submitted by: The Ontario Bar Association

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BAR ASSOCIATION
A Branch of the
Canadian Bar Association

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BARREAU DE L'ONTARIO
Une division de l'Association
du Barreau canadien

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Introduction

The Ontario Bar Association ("OBA") appreciates the opportunity to provide comments on the Family Law Services Review Consultation Paper ("the MAG Consultation Paper") issued by the Ministry of the Attorney General (the "Ministry"), which asks whether the delivery of family legal services should be expanded to include people who are not lawyers, such as paralegals, law clerks and law students. The Ministry and the Law Society of Upper Canada (the "Law Society") have appointed the Honourable Justice Annemarie E. Bonkalo to lead the Family Law Services Review.

The OBA

As the largest voluntary legal organization in the province, the OBA represents approximately 16,000 lawyers, judges, law professors and students in Ontario. OBA members are on the frontlines of our justice system in no fewer than 39 different sectors. In addition to providing legal education for its members, the OBA has assisted the Ministry and the Law Society with numerous policy initiatives, both in the interest of the profession and in the interest of the public.

The OBA's mandate includes a responsibility to improve the law, improve the administration of justice, and improve and promote access to justice. These priorities were central considerations in the preparation of this submission, which was formulated by a Working Group of the Family Law Section with the input of section members from across the province. The Working Group also considered numerous reports from jurisdictions in Canada and the United States that have considered, rejected and/or implemented the delivery of legal services to the public by non-lawyers.

Background

The MAG Consultation Paper

As noted in the MAG Consultation Paper, the Ministry of the Attorney General and the Law Society of Upper Canada are exploring whether the delivery of family legal services should be expanded to include people who are not lawyers, such as paralegals, law clerks and law students.

The Honourable Justice Annemarie E. Bonkalo has been appointed to lead a review that will:

1. Identify the legal services at different stages in a family law matter which, if provided by persons in addition to lawyers, could improve the family justice system by better enabling people to resolve their family law disputes.

2. Identify persons other than lawyers (e.g., paralegals, law clerks and/or law students) who may be capable of providing those family legal services with appropriate safeguards put in place (e.g., education, training).

3. Recommend procedures, mechanisms and/or safeguards (such as education, training, insurance, regulation and/or oversight) to ensure the quality of family legal services provided by alternate legal service providers.

The scope of the family law services review does not include child protection matters under the *Child and Family Services Act*.

Prior Review of the Law Society Task Force

Concerns about the delivery of legal services to the public by non-lawyers have existed for over a decade in several provinces in Canada, as well as several states in the United States of America and Commonwealth countries such as England and Australia. The primary concerns raised in these discussions can be broken down to three distinct issues:

1. risk to the public;

2. quality of service; and,

3. erosion of the rule of law.

In March 2000, a Law Society Paralegal Task Force (the "Task Force") recommended the regulation of and jurisdiction in which paralegals could provide services, while specifically delineating specific areas that should remain outside of the paralegal's scope of practice. One of the areas deliberately taken out of the jurisdiction in which paralegals could provide services was the area of family law, given the risk of harm to the public that cannot be managed through regulation. The Task Force specifically considered the risk of harm to the public in the area of family law while keeping in mind access to justice.

The Task Force identified that "incompetent service" can create a risk of a broad range of harm to the consumer and ultimately concluded that a risk-based analysis suggests a need to regulate, even to the point of prohibition. Further, the Task Force highlighted that consideration must be given to the fact that harm is not limited to the client alone, but also upon children, third parties and on society in general.

Paralegals are currently regulated and may practise in the area of:

(a) Small claims court;

(b) Traffic court for charges under the *Provincial Offences Act*;

(c) Minor criminal charges under the *Criminal Code* heard in the Ontario Court of Justice; and

(d) Tribunals, such as the Landlord and Tenant Board or the Workplace Safety and Insurance Board (that allows for appearances by agents).

The Task Force found that there was relatively small risk associated with the first three areas (small claims court, *Highway Traffic Act* and minor criminal offences) and that these areas of law also require a low level of consumer sophistication to assess the risk. With respect to landlord and tenant issues, the Task Force opined that the process was not unduly complex and, again, clients are able to properly and easily assess the risks.

It is relevant for the purposes of these submissions to consider some of the areas of law specifically not included within the paralegal's scope of services and the rationale behind the Task Force's recommendations.

(a) Incorporating businesses and giving legal advice on business matters: The Task Force felt that incorporation requires a sophisticated knowledge of business law, tax law, securities law, family law and estates. The consumer would be at risk if paralegals just used precedents available to them. Each agreement must fit the corporate vehicle to fit the circumstances of the case. Finally they submitted that the consumer is unable to assess the complexity and risk.

(b) Wills and estates: The Task Force found that proper advice requires knowledge of twelve separate statutes and common law concepts and can only be given at the end of a comprehensive client interview. The assessment of capacity, undue influence, etc. makes the potential risk to the consumer greater than some people may recognize. Incompetence may not only harm the testator but also the beneficiaries.

(c) Personal injury claims and statutory accident benefits: The Task Force recognized that non-lawyer insurance brokers perform claims settlement work, but the insurer has the capacity to bear the risk. It was determined that accident benefit law is complex (involving complex statutes and limitation periods) and independent paralegals active in this area would pose a grave risk to the public because ill-informed choices may result in uncorrectable consequences. There was also concern expressed that paralegals are likely to urge their clients to accept poor offers when a cash settlement is imminent. The cost of a licencing scheme would be excessive in relation to the benefits it would bring to the public.

(d) Real estate law: There was concern about allowing paralegals to offer services in real estate law because of the variety of intersecting statutes and because of the vigorous ethical guidelines that must be adhered to in order to protect the public in this area. It was

> submitted that the risk was great because most people consider their home to be their most significant asset.

Many of the considerations for excluding an area of law (set out above) from a paralegal's scope of service would not only apply to family, but are amplified in this area of law, given the complexity and risks to the client and third parties. The Task Force highlighted that lawyers, paralegals, stakeholders and tribunal representatives all agree that there is potential for abuse in family law, especially in immigrant communities. The Task Force further found that:

> "*Family law deals with highly complex areas with a high level of risk to the consumer and to third parties, such as children, spouses and other beneficiaries.*"

The Task Force also expressed concern that it may be that a particular service provider does not desire to cause harm but is incapable of identifying situations where risk is present, and where appropriate, referring the client to a lawyer. There are certainly some areas of law in which the client can assess the risk in a failed defence, such as a speeding charge, an unsuccessful change of name application or a defective income tax return, but the Task Force determined that the ability of most family law clients to properly assess the risk in the provision of legal services by non-lawyers is limited. Ultimately, the Task Force made the recommendation that independent paralegals should be prohibited from practising in the area of family law.

Analysis and Recommendations

Overview

The MAG Consultation Paper focuses the family law review on the narrow question of whether non-lawyers should be permitted to deliver family law services. The first part of this submission, "Key Considerations in Family Law Services", provides an overview of the reasons why we believe that expanding the delivery of family law services to non-lawyers seriously jeopardizes the rights and legal interests of the public – often women and children – at one of the most vulnerable times in their lives.

Everyone involved in the family justice system should be concerned about access to justice and finding ways to assist individuals who would prefer legal representation but do not have it. However, in seeking solutions it is critical to ensure that the various initiatives undertaken do not sacrifice the principle of risk of harm to the public as the paramount consideration. The second part of the submission, "Key Opportunities for Improving Family Law Services", provides a brief overview of some of the initiatives that are in development or underway, in which various family justice system participants are working collaboratively towards improving access to justice in the public interest. It is respectfully submitted that the focus of the Ministry of the Attorney General's Consultation is too limited and narrow in its scope and should not be considered without

understanding the other initiatives and pilot projects underway in family law to improve access to justice.

Key Considerations in Family Law Services

Complexity and Quality of Service

The Law Society and the public have a significant interest in ensuring that legal and law related services are competently delivered. The complexity in an area of law will dictate the level of knowledge required to gain that competency. Family law is an extremely complex area. In addition to extensive knowledge of family law legislation and case law, family lawyers must have knowledge of everything from tax law to criminal law, corporate law to health law and estate law to bankruptcy law. This well rounded knowledge base is best supported by the training and education received by lawyers.

Proper advice requires knowledge of common law concepts and at least **39 separate statutes,** including:

1. *Divorce Act;*
2. *Family Law Act;*
3. *Canada Evidence Act;*
4. *Civil Marriage Act;*
5. *Marriage Act;*
6. *Child and Family Services Act;*
7. *Children's Law Reform Act;*
8. *Courts of Justice Act;*
9. *Family Law Rules;*
10. *Family Orders and Agreements Enforcement Assistance Act;*
11. *Family Responsibility and Support Arrears Enforcement Act;*
12. *Reciprocal Enforcement of Support Orders Act;*
13. *Succession Law Reform Act;*
14. *Income Tax Act;*
15. *Pension Act;*
16. *Rules of Civil Procedure;*
17. *Arbitration Act, 1991;*

18. *Pension Benefits Act;*
19. *Change of Name Act;*
20. *Pension Benefits Division Act;*
21. *Business Act;*
22. *Annulment of Marriage Act;*
23. *Bankruptcy and Insolvency Act;*
24. *Criminal Code;*
25. *Vital Statistics Act;*
26. *Partition Act;*
27. *Pension Benefits Standards Act;*
28. *Creditor's Relief Act;*
29. *Evidence Act (Ontario);*
30. *Garnishment Attachment and Pension Division Act;*
31. *Intercountry Adoption Act;*
32. *Charter of Canada;*
33. *Statutory Powers Procedures Act;*
34. *Fraudulent Conveyances Act;*
35. *Interjurisdictional Support Orders Act;*
36. *The Hague Convention on the Civil Aspects of International Child Abduction;*
37. *Limitations Act, 2002;*
38. *Real Property and Limitations Act;* and
39. *Substitute Decisions Act.*

There are also numerous additional regulations, rules and guidelines.

There is nothing "cookie cutter" about family law. Knowledge based judgement must be exercised in relation to most family law matters and re-evaluated throughout the case. Each client presents a unique set of facts, requiring judgement and knowledge on complicated and diverse issues. Each agreement needs to be tailored to each case, governing some of the most sensitive and important areas in a person's life.

Very often, issues being addressed in family law cannot be bifurcated and are often intertwined, including a divorce and limitation periods, a divorce and benefits/insurance, access and child

support, property and support, trust claims and property, property claims of unmarried spouses (such as joint ventures), a religious divorce and settlement of all other issues, tax, property and support, possession of matrimonial home and a divorce, etc. Splitting off specific issues between service providers would undermine the case management system.

Family law has also been affected by the globalization of law. In addition to issues related to child abduction, family law lawyers must be able to give advice to clients on the enforcement or amendment of foreign orders, seizing foreign assets, world-wide Mareva injunctions, absconding debtors, domestic contracts applicable regardless of the jurisdiction in which the parties live, jurisdictions for starting proceedings, conflicting jurisdictions, recognizing foreign divorces or religious marriage and contracts, amongst many other issues. Recently, a large and complicated issue has arisen with respect to service of divorce applications in foreign jurisdiction, causing the judiciary to have to review thousands of cases.

A High Risk

With the exception of name applications, all stakeholders consulted by the initial Task Force classified family law issues as falling within the "high risk" category.[1] Flawed or inappropriate advice given to a client in the area of family law can have devastating consequences for clients and their families lasting for many years if not generations. Simply stated paralegals do not have the education, training or skills to properly represent vulnerable children, parents or spouses as they navigate the family justice system and it would be difficult to properly educate, train and equip paralegals with the necessary skills required to handle complex family law litigation in a cost effective manner.

On the other hand, with their unique skill set, family law lawyers are able to identify and assess the variables, to ask the right questions, and to determine the real ambit of the legal issues involved. Further, the issues that end up needing to be ultimately resolved may diverge significantly from the issues initially identified. Finally, it is incumbent on the legal profession to protect the vulnerable and to ensure that they are able to make informed decisions on all their legal needs.

The range of issues at stake for family law clients is very broad. Essential rights are at stake such as the right to remain in a home, custody of children and the nuances between shared parenting and primary residence, access to children, ownership of property, valuation, division and possible disposition of property, valuation of pensions, child support including contributions to special or extraordinary expenses, support for adult children, shared parenting complexities, spousal support, entitlement to spousal support, compensatory and needs based spousal support, quantum and duration of spousal support, lump sum and periodic spousal support, health benefits and security for support.

[1] Final Report, Paralegal Task Force Report, March 2000, Law Society of Upper Canada at page 130.

Separation can be an overwhelming time for parties, even sophisticated clients. Family law addresses the personal issues that matter most to people: *Where am I going to live? Where are the children going to live? How am I going to be able to afford to live? Am I going to be able to pay my bills? Do I have to sell the house? If my spouse moves, how do I enforce my support entitlement? If my spouse leaves the country with the children, how do I ensure they come back? What happens to my support if my spouse dies? Does getting my divorce affect my rights? Can my spouse withhold the children from me? My spouse swore to never pay me a penny of support – can that happen? How do I keep myself and the children safe? If my spouse built up the business while I stayed home to care for our children, am I entitled to anything? How will I afford to live in my old age? Does my spouse have to share his/her pension? If my spouse refuses to remove religious barriers to remarriage, am I trapped? We had a religious wedding, is that enough?*

In some foreign jurisdictions paralegals are permitted to obtain "simple divorces" for clients. However, a divorce in Ontario has serious ramifications that need to be considered. It has been suggested that paralegals should be allowed to prepare and give advice on "simple" or consent agreements. However, poorly drafted agreements or agreements that fail to address the comprehensive issues arising from a breakdown of a relationship can be very problematic.

Consider just a few items at risk in proceeding with a "simple" divorce or a "simple" agreement:

1. the loss of possessory rights to a matrimonial home;
2. forced sale or loss of home;
3. unintended loss or limitation of custodial rights;
4. loss of insurable benefits (such as medical, dental, etc.) since many plans do not include "former spouses";
5. loss of survivor pension coverage;
6. loss of statutory right to compel the removal of religious barriers to remarriage (leaving a spouse unable to remarry and perpetuating abuse);
7. abridgement of limitation periods dealing with equalization of net family property;
8. waiver of or release of beneficial or trust interests, including constructive and resulting trust claims and claims arising from joint family ventures;
9. unenforceable or unclear provisions such as property provisions that do not address the equalization of net family property scheme under the *Family Law Act*, speaking only to ownership, thus giving rise to further claims;

10. failure to obtain divorce given barriers under section 11 of the *Divorce Act* where insufficient evidence has been provided to evidence the adequate support of children;
11. unexpected and unforeseen tax liability arising from capital transfers, rollover provisions, attribution rules and the taxable nature of periodic spousal support;
12. unintended tax treatment of support payments;
13. waiver or release of pension benefit rights, life insurance, savings plans etc.;
14. waiver or release of support, or failure to obtain a waiver or release of support;
15. failure to adequately consider the children's best interests in determining parenting arrangements and the legal ramifications of custody provisions;
16. unworkable allocation or parental time with children;
17. decision-making for children;
18. absence of mobility and travel considerations;
19. absence of provisions restraining name change;
20. absence of direction on possible outcomes and cost consequences of offers to settle; and,
21. potential liability for costs.

When a client consults a family law lawyer seeking an "uncontested divorce", a lawyer will have the requisite expertise to make appropriate and nuanced inquiries in order to understand the family circumstances as a whole and to provide fulsome legal advice and direction.

A client intending to seek a divorce only, once he or she understands the importance of resolving corollary issues, will often move forward to comprehensively resolve all issues arising from a relationship breakdown in a timely fashion, before the expiry of limitation periods and other prejudice arises.

A client may attend believing he or she is bound by an unenforceable agreement or an unenforceable arbitration award. It is incumbent on the legal advisor to confirm the client's legal rights and affirm the right to set aside invalid agreements or awards and to seek appropriate relief.

A client must understand the ramifications of any step in family law. Dissolving a marriage has serious legal ramifications, which must be reviewed in detail. Lawyers also have the obligation under section 9 of the *Divorce Act* to canvass the possibility of reconciliation with the party, before proceeding.

Family law is a highly complex and emotionally charged area of law, with high risks and high stakes for clients, their children and extended families. It is incumbent on a family lawyer to identify and proactively advise clients in their best interests. Even if paralegals with enhanced training were subject to a standard of care and insurance were available to address claims of negligence, such after the fact remedies would not function as an acceptable substitute to proper legal advice in the first place. As a result it is our view that expanding the paralegal scope of practice would instead aggravate the already existing issue of access to justice, fail to bring down the cost of obtaining legal services in the area of family law and lead to substantially more errors that could have potentially devastating consequences for already vulnerable participants trying to navigate an extremely complex family law justice system.

An Even Higher Risk

Family law affects some of the most vulnerable people in society. The importance of understanding the family dynamics and its import on people's lives and safety cannot be overemphasized. Domestic violence is a broad concept that encompasses a wide range of behaviours from isolated events to a pattern of emotional, physical, and sexual abuse that controls the victim. Failure to properly screen for domestic violence and failure to review a safety plan with a vulnerable client could lead to fatal results for parties or children.

A family law lawyer brings an understanding of the emotional dimensions of family challenges, and their connection to service delivery in family law. Understanding such dynamics is an important element in preventing harm and reaching resolution. Screening for domestic violence is an essential tool for family law lawyers and anyone participating in the family justice system.

Having the services of a paralegal in these circumstances may end up costing the client more, by having to start fresh with a lawyer, and/or having a lawyer come in and not be able to correct the mistakes already made. Further, failing to provide a proper evidentiary basis for an urgent restraining order could in certain circumstances prove fatal for a family law litigant.

In addition to a high degree of expertise required in the law and rules, to provide proper legal advice, the service provider must also have good and careful judgement and the highest level of ethical standards and must be prepared to continuously re-evaluate at each stage of the case. Family law cases are always evolving and the needs and requirements may change several times throughout the case. There must be an understanding and appreciation about the nature of collaborative values and the availability of CDR procedures in the family justice system.

As set out in detail above, there is significant concern that allowing paralegals to practise in this area of law may compound the problem and create greater vulnerability for clients who are already in a compromised position.

Key Opportunities for Improving Family Law Services

The OBA is committed to finding ways to improve access to legal services and to respond to concerns about the number of self-represented litigants, including efforts to foster a properly resourced case management system, triage system, effective use of technology in the court system and simplified Family Law Rules. The OBA has supported a number of ongoing initiatives, some of which have only recently launched or commenced pilot projects that are intended to assist self-represented litigants in family court and the need for improved access to justice.

Targeted/Unbundled Legal Services

Provincial and Federal governments have been struggling to come up with effective means to address the issue of access to justice in family law. Recently, new initiatives have been introduced into the system. By way of example, in 2011, the Law Society approved limited scope retainers, to provide unbundled services. The concept of unbundled legal services in family law was further endorsed and encouraged in the *Cromwell Report*.[2] Unbundled services have started to gain traction in family law, with many firms, lawyers and clinics now offering unbundled services. It is too soon to tell the effect that this will have on access to justice but many have recognized that this approach appropriately targets an area of great need for litigants who are not represented. Facilitating the ability for unrepresented litigants to obtain proper legal advice from a lawyer, as needed, through unbundled services avoids many of the problems described in the preceding section.

Child Support Recalculation Services

In April 2016, the government introduced recalculation services for child support. This too will alleviate a lot of the child support cases from the judicial system, as an independent third party can vary an order through an administrative process in certain instances. Again, the purpose behind this project is an access to justice issue.

Effective Triage

There is a recognized desire to try to keep family law cases out of court, if appropriate. In June 2015, the Attorney General hosted a Justice Roundtable and convened a working group (the Family Justice Table) to consider, among other things, triage in family law. Through the Family Justice Table, co-chaired by Justice Czutrin, Justice Paulseth and Assistant Deputy Attorney General Irwin Glassberg, the Ministry obtained input from numerous stakeholders. Triage was described as "a method of determining the processes and services required to effectively and efficiently resolve the

[2] ACCESS TO CIVIL&FAMILY JUSTICE, **A Roadmap for Change,** October 2013, Action Committee on Access to Justice in Civil and Family Matters, page 14.

issues arising from family breakdown" and would include "a consideration of legal advice, social services the family may require, dispute resolution options, single source information services and disclosure".

The OBA Family Law Section is enthusiastic about the possibility of having proper triaging for family law cases, to expedite those cases that need to move to trial or a decision on a more urgent basis, while referring other files to alternate dispute resolution, such as mediation, in cases that should be resolved in alternate methods.

The OBA Family Law Section supports a triage system and has advocated for advancing this process. While some cases certainly need to go through the court system, others can be diverted from the court system into other alternate dispute resolution mechanisms, or other services required by the family, if dealt with on a timely basis, before the parties become too polarized by court proceedings. In Ottawa, Masters case manage files and triage family law cases. The Master can refer the matter to a judge, if needed, or move a matter straight to trial, under Rule 2 of the *Family Law Rules*, if appropriate.

While several courts now offer assistance with document preparation and court process, greater use could be made of the Information and Resource Centers and Family Law Information Services, which recently reported that they are being underutilized.

Simplification of Process and Substantive Law

It has been said that the family justice system is too complex, too slow and too expensive, and often incapable of producing just outcomes that are proportional to the problems brought to it or reflective of the needs of the people it is meant to serve.[3] Unfortunately, in spite of recent efforts, the family justice system is still too complicated.[4] Permitting paralegals to practise in the area of family law will do nothing to alleviate the problems created by our complicated laws and complicated processes.

The *Family Law Rules* were designed to simplify the approach to the resolution of these complex areas of the law but, in many ways, they add to the confusion and have become more complex and cumbersome over the years. The current system is a complicated, documents heavy, paper producing set of rules. However, allowing paralegals to offer services in family law does not in any way address the current systemic problems in family law. As set out above, the Ministry recently created a family Justice Roundtable. In addition to reviewing the use of technology and triage in the

[3] ACCESS TO CIVIL&FAMILY JUSTICE, **A Roadmap for Change,** October 2013, Action Committee on Access to Justice in Civil and Family Matters.
[4] ACCESS TO CIVIL&FAMILY JUSTICE, **A Roadmap for Change,** October 2013, Action Committee on Access to Justice in Civil and Family Matters, section 2.

family court system, stakeholders have been asked to provide input on how to simplify both the forms and process in family law.

Although the Rules do contemplate managing cases on a case-by-case basis, through the case management system, this seldom occurs. Where there is effective case management, judges do try their best to simplify processes but in many areas, due to a lack of resources including the availability of judges, even timelines and deadlines cannot be met by the court system. Obtaining a conference date can be many months away from the parties' separation date and, in many jurisdictions, parties can be assigned a different judge at each conference, contrary to the entire philosophy behind case management. The "management" of cases is usually lost due to the complex and cumbersome process requirements of the current Rules and the under resourced system, leaving judges, lawyers and clients frustrated. The lack of resources for the support systems in court, such as on-site mediation, mental health practitioners, full time and specially trained duty counsel, etc., all contribute to the breakdown in the system.

There is also increasing frustration from litigants, staff, lawyers and the judiciary that there is no uniformity across the province with respect to court processes and procedures (such as the procedures to set court dates, the timelines to file documents, the documents required to set dates or trials, etc.), increasing costs and unnecessarily further complicating litigation.

The Rules are applied to all cases regardless of complexity and regardless of the financial circumstances of the clients. The emphasis on conferencing is well intentioned, but has increased the cost of litigation. In the vast majority of cases, at least three conferences are held in each case regardless of what is at stake in the case – a Case Conference, a Settlement Conference and a Trial Management Conference. In jurisdictions outside Toronto, there is also an "Exit Pretrial" imposed just prior to any court sittings – that is, a fourth conference before a Judge to try and settle the case at the court room door. While these conferences are well intentioned, they add significant cost to the client as the judges insist on compliance with the rules of these conferences.

The Rules, for example, require the parties to update their financial statement if any financial statement is more than 30 days old at the time of any conference. As of May 2015, a rule now requires a Certificate of Financial Disclosure to be updated and filed before each conference. A written brief is required at each conference. The content of the brief is set out in the Rules and must be followed. Each brief is slightly different in form but often repeats many of the facts contained in the previous briefs. The parties are required to file confirmation forms, updated indexes, comparison net family property statements and other documentation, before each conference. In other words, the steps required by the current Rules add significant cost to every case. Lawyers often utilise the services of law clerks, students or junior associates, working under the lawyer's supervision, to complete much of the paper work required to be filed in the court in order to save the client costs but this does not address the systemic problem.

In addition to procedural complexity, in family law, unlike most other areas of law, a lot of family law is judge-made law, which has a way of changing as societal expectations evolve with the passage of time. The issue of the complexity of family law is discussed in great detail above, in the section entitled "Complexity and Quality of Service ".

The Ministry of the Attorney General Family Justice Roundtable has reviewed the use of technology in family law. Litigants cannot file documents electronically and can only serve electronically through a complicated system. Parties or third parties must be personally present at every court date as there is no ability to attend by video, and every document must still be photocopied numerous times because there is no ability to use computers in the courtroom.

The significant deficit in our courts with respect to the effective and efficient use of technology greatly increases costs for family law litigants, whether they have a lawyer or not. It is worth noting that the Ministry has recently announced an increase of 36% to all court fees in family law, and included new fees at both the Ontario Courts of Justice and the Superior Courts of Justice for cases involving custody and access (although there is some mechanism in place to waive these fees on request). Higher fees present an additional barrier at a time when the Ministry is seeking to improve access to justice through this consultation. If the new fees are implemented, they should be used to support necessary improvements in technology for the courts.

Early "front end" services in the family justice services system should be expanded. Specifically, this means allocating resources so as to make front-end services highly visible, easy to access and user-friendly; coordinating and integrating the delivery of all services for families in the midst of a separation; and making triage services including assessment, information and referral, available for all people with family law problems.[5]

Mediation centres are now available in all of the court houses and are becoming increasingly popular, with positive results. Legal Aid has expanded its certificates in family law. A step-by-step guide for the family court has only recently been developed for the Superior Court of Justice website and was only posted this month on their website, but producing hard copies continues to be a struggle in the courts. Hard copies are beginning to trickle out and have been enthusiastically received and passed out by judges, law clinics, lawyers and litigants. New Family Law Procedure flow charts were created by Community Legal Education Ontario (CLEO) and posted starting last month.

A triage system could also have available to it a set of "different prescribed rules" depending on the complexity of the case. For example, in a case where there was little at stake or only isolated issues to be resolved, the triage professional would have authority to direct them to more of a "small

[5] ACCESS TO CIVIL&FAMILY JUSTICE, **A Roadmap for Change,** October 2013, Action Committee on Access to Justice in Civil and Family Matters, page 17.

claims court" type of resolution process with simplified rules and many fewer steps to get to resolution. A simpler set of rules to follow would enable parties to either represent themselves or obtain assistance from a family law lawyer through unbundled services discussed above. Examples of this can be drawn from the mediation/arbitration process which many couples are now utilizing to resolve their disputes in the private field. In that process, parties attend a one day or two day mediation whereby all of the issues are thoroughly canvassed by an experienced family law lawyer. If no agreement is reached, the parties then turn to arbitration. The arbitrator has the authority to set out a simplified process for resolution of the dispute. In other words, there is one conference and then one trial. The concept of triage was recommended and endorsed in the *Cromwell Report*.[6]

The current *Family Law Rules* could be restricted for the complex cases or, alternatively, the court could be empowered to create simplified processes and rules for a particular case depending upon the judge's view of the case. The judge could be empowered to set up a procedure that is proportionate to the resolution of the issues in dispute. Judges are beginning to recognize this with the expanded use of motions for summary judgment but there are other ways of simplifying the process as well.

If access to justice is to be truly obtained, it is essential that a family law client receive the appropriate information they require in order to resolve the issues created by the breakdown of their relationship. In our view simply creating a substandard or inferior level of information will not assist (and will likely cause harm to) a family law client or increase access to justice. Simply put access to justice will not be served by creating a two tier system.

In summary, the focus should be on systemic reforms including remedying legislation that is uncertain and unpredictable and, equally importantly, creating processes designed to address the specific case. The proper implementation of a triage system should be a priority in that respect. Early neutral evaluation of the case with authority to direct the case to the appropriate process resources would provide more access to justice to the client than simply expanding the scope of practice for paralegals.

Unified Family Court

The OBA believes it is important for the province and the Law Society to work closely with the Federal Government to consider an expanded unified family court ("UFC"), which would help address some of the significant concerns expressed with respect to access to justice in family law.

Included in the recommendations for UFCs is a requirement for simplified procedures and front end services such as on-site mediation and on-site mental health professionals. Family law litigants would benefit from an interdisciplinary approach from legal, medical and social work personnel. It

[6] ACCESS TO CIVIL&FAMILY JUSTICE, **A Roadmap for Change,** October 2013, Action Committee on Access to Justice in Civil and Family Matters, page 12.

would ensure that families could resolve all of the legal issues they face in one location. The process and rules could be simplified if all family related issues took place in one court. Resources would be saved by the significant reduction in duplication of services and staff.

UFCs also support specialized family judges, who are properly trained and able to triage effectively. A UFC would house all resources, such as Family Law Information Centers, Mandatory Information Programs, and free or low cost mediation. Families would benefit from the centralization of resources and UFCs would make optimal use of judicial time and resources.

The benefits include:

1. elimination of conflicts of jurisdiction;
2. simplified procedure;
3. elimination of multiplicity of litigation;
4. more economical for families;
5. saving lawyer time and effort;
6. saving the court time and effort;
7. common repository for family records;
8. encouraging social agency and ADR cooperation;
9. developing more effective staff work;
10. resources will be saved and duplications limited; and,
11. adding consistency and certainty to the system.

The concept of UFCs was further endorsed and recommended by the *Cromwell Report*.

A unified family court should retain the benefits of provincial family courts, including their distinctive and simplified procedures, and should have its own simplified rules, forms and dispute resolution processes that are attuned to the distinctive needs and limited means of family law participants. The judges presiding over proceedings in the court should be specialized. They should have or be willing to acquire substantive and procedural expertise in family law; the ability to bring strong dispute resolution skills to bear on family cases; training in and sensitivity to the psychological and social dimensions of family law cases (in particular, domestic violence and the impact of separation and divorce on children); and an awareness of the range of family justice services available to the families appearing before them.[7]

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[7] ACCESS TO CIVIL&FAMILY JUSTICE, **A Roadmap for Change,** October 2013, Action Committee on Access to Justice in Civil and Family Matters, page 19.

Additional Roles in Family Law Services

As noted above, we believe the MAG Consultation Paper focuses the family law review too narrowly on the question of whether non-lawyers should be permitted to deliver family law services. In this section, we provide additional comments on different approaches to the provision of such services.

Services Provided under the Responsibility of a Lawyer

The OBA is of the view that there may be additional appropriate opportunities for non-lawyers to work under the supervision of a family law lawyer, who remains ultimately responsible for the file.

We note that a few years ago, the University of British Columbia directed the Law Students' Legal Advice Program to stop having law students provide legal assistance on family matters. This was contrary to the previous practice allowing 2nd or 3rd year law students through the program to provide assistance in issues involving family violence, property matters, custody, etc. We understand this was based on a concern that law students could not offer competent or adequate representation in this area of law.

Although the current Rules allow law students to appear in court with leave of court, it is the experience of the family law bar that most OCJ judges will not grant students leave to appear in their courts. Given the reluctance of judges for students (under supervision of lawyers) to appear in court, one can only assume that judges will have serious concerns with the attendance of unsupervised paralegals.

Presently, under the supervision of a family law lawyer, law clerks often help to provide efficient and effective services. While law clerks do not appear in court, and do not represent clients independently from a lawyer, law clerks have a widespread and important role in family law to assist and to keep costs down for clients. Law clerks help with organizing and assembling disclosure and the initial preparation of materials, for the lawyer's review. Their important role increases cost effectiveness for the public. At the same time, the public remains protected as the lawyer continues to supervise, retain responsibility and execute ongoing judgment and direction on each matter. While law clerks can assist, they cannot replace counsel. Paralegals cannot be permitted to take over both roles. This would create a dangerous mix and the public must be protected, for all the reasons set out above.

In our view, the above model provides reason to consider additional roles for articling students. Anecdotally, there has been an increase in the family law firms that hire students, as it has been recognized as one of the best forms of training for new family law lawyers. Given that articling students in family law always operate under the supervision of a family law lawyer, who has ultimate responsibility for the file, it is recommended that articling students be given standing to appear in family law courts for some matters, such as consents, adjournments, settlement of orders,

first appearances and other non-complicated issues. However, in this model, again, a family law lawyer remains ultimately responsible. The family law lawyer is able to judge when and how an articling student or law clerk can or should be involved in a case.

Services Provided Independently

We are aware that some jurisdictions have considered expanding opportunities for non-lawyers to assist parties who are not represented. The danger with such assistance is that it could lead to the provision of inadequate or inappropriate legal advice giving rise to the concerns raised earlier in this submission.

Depending on the specific scope of services that might be permitted, a non-lawyer provider would still require substantial training, substantive law experience under the supervision of a lawyer, malpractice insurance, and a responsibility to fulfill professional obligations such as abiding by an ethical code of conduct, attending CLE courses in the area of family law and being subject to disciplinary measures. A paradox results: such onerous training and requirements are required to provide essential protections to the public that a lawyer remains best suited for the tasks. The more lawyer-like the paralegal becomes, the higher the inherent costs. At the same time, even if a paralegal is trained, that training remains narrow, leaving the public open to the concerns set out above.

While litigants who are not represented may be assisted by non-lawyers to some degree, the public will continue to be exposed to a risk of harm. The significant training and oversight required would undermine the cost effectiveness believed to be associated with this model. Access to justice is a laudable goal but incompetent advice and inadequate assistance does nothing to further that goal and leads to dangerous outcomes for vulnerable people and children.

Summary of Recommendations

The OBA believes that there are very significant risks identified in the provision of family law services by non-lawyers, which would be accompanied by little or no benefit to the public in terms of cost or access to justice. It is the recommendation of the OBA that the scope of practice should not be changed with respect to independent paralegals, and that such licensees should continue to be prohibited from practising in the area of family law.

We also believe that other new initiatives need time to take effect. A number of the initiatives underway will improve access to justice in family law. Accordingly, it is unwarranted to consider the delivery of services by non-lawyers that presents the significant public risks identified above without first reviewing outcomes of current initiatives.

Within the narrow scope of the MAG Consultation Paper, we believe there are opportunities to permit articling law students to appear in OCJ, family law courts, under the supervision of a lawyer.

As advocated in the past, the OBA also continues to believe that the Provincial and Federal Governments would best serve the public and address the issue of access to justice in family law by establishing Unified Family Courts throughout Ontario.

Conclusion

Once again, the OBA appreciates the opportunity to provide comments on the MAG Consultation Paper as part of the Family Law Services Review. We understand that the review, led by the Honourable Justice Annemarie E. Bonkalo, intends to hold focused discussions with key stakeholders to inform recommendations to the Ontario government and the Law Society. The OBA looks forward to an opportunity to participate in further stages of this review as it goes forward.