COMMENTS ON THE FAMILY LEGAL SERVICES REVIEW REPORT

Date: May 15, 2017

Submitted to: Law Society of Upper Canada

Submitted by: Ontario Bar Association

ONTARIO BAR ASSOCIATION
A Branch of the Canadian Bar Association

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Introduction

The Ontario Bar Association ("OBA") appreciates the opportunity to provide this submission in response to the Family Legal Services Review Report prepared by the Honourable Justice Annemarie E. Bonkalo ("**the FLSR Report**"). This is the OBA's second submission relating to the Family Legal Services Review ("**FLSR**") that commenced in February 2016. Our first submission, dated April 2016, provided a detailed response to the original consultation paper released by the Ministry of the Attorney General, and is appended for convenience. This submission builds upon the comments in the first submission, with a focus on the specific recommendations made in the FLSR Report.

The FLSR Report provides 21 general recommendations and encourages the Law Society to further examine the feasibility of implementation. The Law Society has indicated it is preparing an action plan in family law for the fall of 2017. As the regulator of legal services in Ontario, it is critical that the Law Society thoroughly consider the appropriateness of the recommendations in the FLSR Report in any such action plan.

Executive Summary

Background

Family law is fundamentally important to the people of Ontario. Family breakdown affects every demographic in every region of the province. Divorce, separation, custody, access, property division, child protection matters, and domestic violence – amongst others issues – have a fundamental impact on the future wellbeing of spouses and their children. People's lives are quite literally at stake. Lawyers recognize that separation can often be an overwhelming time for parties, even sophisticated clients. Flawed or inappropriate advice in the area of family law can have devastating consequences for clients and their families lasting for many years, if not generations. Some families have significant assets. Some have none. Cost is important to all. The public interest demands that throughout this difficult time, people have meaningful recourse to the complex range of rights and entitlements that have developed through decades of legislative and common law reform.

According to various reports, between 50-70% of participants in the court system do not have a lawyer acting for them throughout the course of their family law proceeding. Whatever the exact figure, it is clear that the number of self-represented/unrepresented litigants in Ontario should be a significant access to justice concern for everyone involved in the system.

The FLSR had a narrow mandate to examine whether permitting specific categories of non-lawyers to provide family law services would improve access to justice, and if so, how that would be accomplished in practice. With respect, that is the wrong question to ask. To truly and meaningfully enhance access to justice, the focus should be on how we can support system-wide changes to

simplify the process for family litigants and to ensure that they are able to obtain the proper legal advice they need from lawyers, as well as a variety of additional supports from appropriate professionals wherever necessary. Indeed, it is recognized that the range of litigants' needs in family law extends well beyond legal issues and into a range of social, emotional, and financial matters, which are most effectively addressed through a collaborative and interdisciplinary service model that includes not only lawyers but also paralegals, law clerks, articling students, financial experts, parenting supports, mental health experts, and other professionals. As we have described in detail below, the narrow mandate of the FLSR serves to obfuscate and frustrate this approach.

The Family Law Context

Virtually every expert review has recognized that family law matters are among the most complex issues in the justice system – factually, legally and emotionally – in dealing with the breakdown of personal relationships in the context of at least 39 statutes, two sets of child support guidelines, two sets of court rules, and many decades of legislative and common law reform. It is unrealistic to assume, for example, that a custody and access proceeding will not involve interrelated legal issues such as mobility and abduction, child protection, property valuation, and domestic violence.

Moreover, family law matters routinely evolve as they proceed. What may be simple and straightforward at the outset may become much more complicated as facts emerge and circumstances change. Categorizing a proceeding at the outset as "simple" provides a point-in-time label that may subsequently become misleading. The concern is even greater if the label channels the proceeding into a distinct service silo where a non-lawyer is responsible for identifying legal complexities that would require referral to a lawyer. As set out below, there is a high risk that emerging legal issues will not be properly identified by a non-lawyer; additionally, where issues are properly identified and duly referred to a lawyer, the client will incur frustration and wasted costs.

It is inherent to the abovementioned complexity that family law matters cannot be safely divided into discrete issues.[1] The ability to identify and ensure meaningful access to litigants' rights and obligations requires an in-depth knowledge of everything from tax law to criminal law, corporate law to health law, and estate law to bankruptcy. In Ontario, the responsibility for safeguarding this service to the public is entrusted to lawyers, who have often successfully completed seven years of post-secondary education, obtained competitive results in coursework and on the standardized admission test for law school, completed 10 months of articling or equivalent, and successfully passed the two comprehensive licensing exams required by the Law Society of Upper Canada.

[1] See, e.g., Ontario Court of Justice, Submission to Justice Bonkalo, p. 4.

What Can be Done to Improve Access to Justice

The Need for Legal Information and Orientation

The FLSR Report and many of the submissions received by Justice Bonkalo note that the most pressing gap identified by family litigants is the inability to access basic legal and court orientation information. This includes non-case specific information about the correct forms to use, filing and service procedures, the court process and the availability of alternative dispute mechanisms, and what is expected of litigants at various stages of the court proceeding.

There are two important issues related to this critical gap in access to justice.

First, to the extent that this type of service is presently available – including from lawyers in Family Law Information Clinics, Mandatory Information Programs, and neutral evaluations and others – it is not nearly sufficient to meet the demand of family litigants. Moreover, the undersupply results in pressures on justice participants who are ill-suited to provide the service, such as court staff, who do not have the training or time to provide this assistance at the counter. While legal information and orientation need not be provided by regulated professionals, those familiar with providing such services to clients recognize that a basic training in the law for those who provide legal information allows that information to be conveyed most effectively to clients and should enhance the regulator's confidence that service providers are not engaging in the unauthorized practice of law.

Both lawyers and paralegals are ideally suited to providing legal information and guidance to the public because, as regulated professionals, they are already aware of the critical distinction between legal advice and information. With minimal further training on family law specific procedure, paralegals could be in a position to deliver legal information and guidance in a cost-effective way.

Second, in the context of "court navigation," it is critical to recognize the unique role that forms play in family law. It is inescapable that drafting, completing, and revising forms and pleadings necessarily involves legal judgment and decision-making, and that errors and omissions can have a significant impact on the rights of litigants in their proceeding. There are currently dozens of forms under the Family Law Rules, with as many as thirteen forms to be filed prior to the first case conference in a standard case dealing with children, support, and property.[2] Unlike other areas of law, almost every issue in family law is advanced by way of forms. As set out above, self-represented litigants have found the system to be complicated and have indicated that it would be of great assistance to have someone navigate the system and provide the forms to be completed at

[2] For the Applicant, these include the Application, the Financial Statement, the Affidavit in Support of Claim for Custody or Access, the Certificate of Financial Disclosure, and the accompanying Affidavit of Service; the Reply and accompanying Affidavit of Service; the Conference Notice, the Case Conference Brief, the Net Family Property Statement, the Confirmation of Case Conference, an updated Financial Statement or Affidavit, and accompanying Affidavit of Service.

each stage. However, where clients pay for assistance from a professional to complete the forms, it is impossible to strip out the expectation that legal advice will be given. This leads clients to believe that the assistance they are receiving to complete their forms will reliably flag all the legal issues involved in their case.

The discussion of forms (and in considering the recommendation for non-lawyers to provide independent legal advice and representation generally) leads to a reasonable question: "If people are currently representing themselves – with potentially no experience or understanding of the law – isn't something (i.e. paralegals independently providing legal advice) better than nothing?"

As discussed in detail below, it is not possible to carve out areas of competence in family law, a fact that leaves the clients' overall interests at risk. Legal service providers are either fully competent or not competent at all – there is no in between. If clients are unable to be assured that they are receiving fully competent service, the regulator has not met its duty. "Buyer beware" in this context is a woefully insufficient protection.

Legal Advice and Representation

With respect to legal advice and representation, it is critical for the Law Society to thoroughly consider Recommendations 4, 5, and 6**,** which propose that the Law Society develop a special licence to allow paralegals to provide certain types of family legal services such, as custody and "simple" divorces, independently from lawyers. This has been addressed in detail later in this submission.

As noted above, the delineation of specific legal services and representation according to "safe and simple" matters cannot be reconciled with the realities of family law and its application. If offered independently from the oversight of a licensed lawyer, such proposals are a fundamental departure from the regulatory protections that are currently in place, and significantly jeopardize the ability of the regulator to ensure competent and transparently delivered legal services to the public.

As concisely stated in the Ontario Court of Justice submission to the FLSR:

> "We believe that there must be a distinction between legal advice and representation and other legal services. Legal advice and representation must be the purview of lawyers."[3]

The OBA's first submission spoke to the importance of the emerging ways in which legal advice can be provided through a lawyer when the client is not fully represented. We have provided additional comments as part of this submission, particularly with respect to targeted ("unbundled") legal services and legal coaching. Whether matters appear simple or complex at the outset, the involvement of a lawyer at critical points is a significant access to justice enhancement and the best alternative safeguard to full representation. The concept of unbundled legal services and legal

[3] Ontario Court of Justice, Submission to Justice Bonkalo, p. 2.

coaching only recently gained momentum with the recent support of the judiciary and LawPRO; to date there has been no evaluation of the impact of these services and, as discussed below, the public is still largely unaware of them.

It is also important to emphasize that this does not mean that a lawyer's legal training and expertise is necessary for every issue and at every stage of service to a client. On the contrary, interdisciplinary collaboration recognizes that many elements of service – apart from legal advice and representation – can be delivered safely and more cost effectively by non-lawyers. Collectively these respond to the full range of client needs throughout a family law proceeding, and help get people through the system quickly and at the lowest possible cost, while ensuring that their legal rights are not sacrificed in the process.

The preceding section on system navigation is an example of how increased interdisciplinary collaboration can build upon the work of the earlier reports and respond to the most pressing access to justice needs. Critically, these steps can be advanced in the short-term, so that their impacts are felt immediately.

Paradoxically, the recommendation to create a new class of practitioner separate from lawyers to provide a limited range of legal services is antithetical to the interdisciplinary collaboration that has proven itself most successful. Creating a separate class of paralegal puts clients into service silos that create an unnecessary and significant impediment to achieving the lowest cost and appropriate service provider as matters progress. Even if cases independently carried by paralegals were to be properly referred to lawyers when the matter evolves outside of the permissible scope of practice, the process is inherently complex, frustrating, and costly for the public.

Moreover, all indications are that implementing the regime would require an enormous investment in terms of development and oversight by the regulator. While the FLSR Report refers to the early development or implementation of models in Washington and Utah, and suggests the adoption of elements of those models, there is a fundamental absence of evidence that they are achieving any meaningful increase in access to justice, notwithstanding the significant associated training, costs, and regulatory undertakings required to develop and launch them.

Expanding the independent scope of practice for paralegals is a fundamental regulatory change that would require significant supporting mechanisms, including education and training, licensing, and insurance. Even the insufficient protections suggested in the FLSR Report would divert considerable time and resources away from steps that can be taken immediately to support access to justice in the short term. It is critical that any effective action plan focus on areas that the various justice stakeholders agree can be implemented effectively and quickly.

Conclusion

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 unsupervised in the area of family law.

The objective of the regulator, and indeed the system as a whole, must be to support options for "access" without compromising the quality of "justice." In other words, justice must be both affordable *and* meaningful for litigants. In striking this balance, it must be recognized that the gaps in access to justice are complex and caused by a myriad of factors, all of which make it difficult for clients to navigate the system themselves. It is unrealistic to think that one solution can sufficiently address this problem.

As noted in our earlier submission, we believe that a number of new initiatives underway will improve access to justice in family law, though they need time to take effect. Accordingly, it is unwarranted to consider the delivery of services by non-lawyers, which presents the significant public risks identified above, without first reviewing outcomes of current initiatives.

There is value in asking how the use of paralegals can help address the identified needs gap for family litigants. However, access to justice and the protection of the public, not the expansion of independent paralegal scope of practice for its own sake, must be the critical focus of any reform going forward.

Comments on FLSR Report Recommendations

The following comments flow from specific recommendations in the FLSR Report, with a focus on the fundamental decision points the Law Society will be required to consider in order to develop an effective action plan for the fall. We will be happy to provide further, more detailed input on the plan that is ultimately put forward by the Law Society as the process moves forward.

Increasing Access to the Expertise of Lawyers

The family law bar has not only recognized the challenges presented by the current system in relation to access to justice, it has been at the forefront in proposing and supporting solutions. These include, among many others, spearheading and operating the Dispute Resolution Officer programs; supporting the early diversion of appropriate family law cases to alternative dispute resolution mechanisms; advocating forcefully for the expansion of Unified Family Courts across the province; and recommending to the Family Law Rules Committee ways in which to truly simplify procedures, which will save time and money for litigants.

Another effective, affordable access to justice tool is the unbundled service model and legal coaching (**Recommendations 1 and 3**). The OBA has encouraged lawyers to offer unbundled services and will continue to do so. We recently participated in a subcommittee, along with other legal associations and the judiciary, related to the Future of Legal Representation in Family Law. This subcommittee identified that more work can be done to enhance the provision of unbundled legal services, particularly in respect of increased education for the public about this model, assisting family lawyers in offering these services, educating the judiciary, and creating a way for members of the public to find lawyers who offer these services. While the Rules of Professional Conduct and the Family Law Rules were only recently amended to contemplate limited scope retainers, since that time lawyers in some jurisdictions have had tremendous success with the model.

The OBA is currently working on expanding its "Find a Lawyer" database to enable members of the public to search for lawyers who provide unbundled services. Similarly, we support the development and implementation of legal coaching, through which lawyers assist clients in moving their own matters forward by providing, among other things, substantive legal advice, hearings coaching, and negotiation and settlement coaching. The OBA is involved in creating a curriculum and best practices for legal coaching and is working in collaboration with the Law Foundation of Ontario Legal Coaching Project.

The OBA also supports **Recommendation 2** in the FLSR Report, to which we would add that all justice stakeholders must do their part to support innovative legal service arrangements. The Law Society, LawPRO, and the judiciary all have a role in communicating the permissibility of unbundled services, uniformly and consistently across jurisdictions, so that lawyers offering the services can do so with confidence that the model is supported.

The Indivisibility of Areas of Practice

The FLSR Report proposes in **Recommendations 4 and 5** that paralegals, practicing under a specialized licence, be permitted to independently provide services in delineated areas of family law. With respect, this proposal misses the fundamental issue raised by expert commentators, which is that any attempt to isolate discrete family law issues, or distinguish between "simple" and "complex" matters, is inherently unworkable in family law. Cases that may appear simple on the surface often diverge and evolve into significantly more complicated situations as the facts and evidence become known.

Any attempt to bifurcate proceedings in this way will result in increased cost and prejudice to clients because of the underlying complexity of what may appear to be a straightforward issue. This is best illustrated by concrete examples from our practice, which describe how clients would be suddenly left without representation part-way through a proceeding. Such a result is clearly contrary to the goal of improving access to justice.

Child Support

Child support matters highlight the underlying complexity of what may appear, on the surface, to be a straightforward issue.

Recommendation 5 would permit paralegals to provide legal services in the area of "simple" child support cases, but not cases involving property, spousal support, "complex" child support where discretionary determinations are necessary to arrive at an income amount, or relocation. We assume that "simple" child support refers to situations where is it anticipated that the table amount from the Child Support Guidelines ("Guidelines") may be applied.

However, a seemingly routine application of the table amount can be more complex than it first appears. Where a parent is an employee, for example, the proof of income may be a tax return and line 150 income with a supporting T4 slip. This may initially present as a "simple" child support case at the outset, because a discretionary determination of income may not be contemplated, but in reality the issue may be more complex. The parent may be under-employed, receiving cash income, or receiving other unreported amounts that would be considered income if the evidence is properly discovered and marshalled (giving rise to an argument of intentional underemployment and/or the necessity to impute income). Determining income is not a fixed issue; these matters are often unsettled and employment situations change not infrequently throughout the course of legal proceedings.

Other arguments requiring discretionary determinations in calculating child support include, but are not limited to, grossing up the personal benefits of self-employment, undue hardship, and "special or extraordinary" expenses of a child. The emergence of any of these issues would cause a "simple" matter to become "complex." Where issues like these arise midway through a proceeding, under recommendation 5, the paralegal would be required to end their representation of the client.

Worse is if the emergence of the complicating issue goes undetected, as the client's interests would be dangerously ill-served.

An argument or order for shared custody of children under section 9 of the Guidelines, an increasingly common arrangement, can also complicate the calculation of child support. An issue of "simple" child support will suddenly become complex if the access arrangements are altered so that one party now has the children more than 40% of the time. The Supreme Court of Canada has found that the amount of payable child support in shared custody arrangements is a discretionary decision of the court, based on the table amount and the contributions being made by each parent.[4] Imagine a situation in which a paralegal is at court on a settlement conference and almost all issues are close to a resolution. Where full resolution includes a new access regime where the child is with one parent 40% of the time, the paralegal would have to remove themselves from the matter in the middle of proceedings. A matter that may have appeared "simple" has quickly become complex as a result of the facts of the case and the application of the law, requiring the client to expend unnecessary time and resources.

Divorce

Divorce proceedings also illustrate the challenge in attempting to isolate specific family law issues, as well as the prejudicial effect a "simple" matter can have for a client who is not properly made aware of their comprehensive rights and obligations.

Recommendation 5 would permit paralegals to provide legal services in "simple and joint divorces without property," but not cases involving property. When a party seeks a "simple" divorce, a qualified lawyer will review all of the corollary issues in order to determine the context in which the party seeks the divorce. A competent lawyer will provide advice regarding parenting; child support; spousal support; property issues (including equitable claims such as joint family ventures, resulting and constructive trusts, and various other equitable claims with limitation periods); oppression remedies; restraining orders and damages, as appropriate; and the advisability of resolving all issues with full financial disclosure and a valid separation agreement, final order, or arbitral award, before proceeding with the divorce.

Counsel must review and advise the party on these substantive issues before proceeding with a divorce. This is essential because in many cases, the client may be understandably unaware of the significant and potentially harmful ramifications of proceeding with a simple divorce in the specific factual and legal context of their case. Meeting with a lawyer to seek a simple divorce is sometimes the first and only time a misinformed party has the opportunity to receive comprehensive advice about his or her relationship breakdown.

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[4] *Contino v. Contino*, [2005] 3 SCR 217.

Without addressing all potential corollary issues, a "simple" divorce could cause substantial prejudice; deny a party matrimonial home rights, pension rights, or health benefits; and accelerate limitation periods, both equitable and statutory, potentially disqualifying the litigant from substantial claims going forward. Under the recommendation, a paralegal will not be qualified to advise on these issues or to competently gauge whether a "simple" divorce is even appropriate in the circumstances.

Enforcement

Recommendation 5 would allow paralegals to provide legal services in the area of "enforcement," which we assume refers to enforcement measures taken by the Family Responsibility Office in relation to the payment of child and spousal support. Enforcement of child support and spousal support falls almost exclusively under the jurisdiction of the Family Responsibility Office. Therefore, if paralegals were to provide legal services in this area, they would be acting for the defaulting payor.

When acting for the defaulting payor, enforcement measures in family law can have severe prejudicial consequences. Defaulting support payors may be jailed for non-payment in Ontario, a sanction so severe that it is unavailable for any other monetary debt in Ontario. They may also lose their driver's licence and passport. Property enforcement measures also have profound consequences and can involve judgment/debtor exams, writs of seizure of sale resulting in the seizure of bank accounts, and the appropriation and sale of real property.

To avoid suspension of a driver's licence, a defaulting payor must immediately seek a refraining order and undertake to forthwith issue a motion to change to attempt to rescind arrears. Accordingly, the matter would be immediately launched outside of "enforcement" and into substantive legal advocacy. The recommendations would not permit a paralegal to continue. His or her role would be immediately terminated or bifurcated, again rendering the procedure costly and fractured for the litigant. At worst, incomplete advice in this area could deprive clients of their liberty, infringing their fundamental rights, while jeopardizing the financial security of their family members.

The High Cost of Competency

Education and Training

Given the impracticality of separating areas of family law into discrete areas, a legal service provider must be competently trained and highly qualified to provide services across the full spectrum of family law areas in order to ensure that the public interest is protected. That being true, the inherent complexity of family law matters and the recognized vulnerability of family litigants requires a hard look at how paralegals are trained and how they operate in practice.

While paralegals are not permitted to deliver legal services in the area of family law, they may practice in small claims court, in traffic court for charges under the *Provincial Offences Act*, in

matters involving minor criminal charges under the *Criminal Code* in the Ontario Court of Justice, and before certain tribunals. In their submissions to Justice Bonkalo, judicial commentators expressed considerable concern about the competency of paralegals to provide legal services under the current training regime. It is not in dispute that expanding paralegals' scope of practice to family law matters would require significant changes to the relevant educational and licensing requirements.

It may be useful to contrast the proposed education and licensing requirements for the Washington State Limited License Legal Technician (LTTT) program and Utah's Limited Paralegal Practitioners (LPP) model, with the training required by both of these models either equal to or exceeding what is currently required in Ontario. It is important to note that both the Washington and Utah models continue to evolve; the Utah program is still in development, with an implementation date of 2018. (The training, mentorship, and management support provided by Legal Aid Ontario in transitioning five paralegals into unsupervised roles in criminal duty counsel offices is discussed further below.)

In Washington, potential LLLTs must complete an associate's degree at an ABA-approved paralegal program (2 years, 45 credits), an additional 15 credits in family law through a curriculum developed by an ABA-approved law school, 3,000 hours working under the supervision of a lawyer, and three exams.[5] In Utah, it has been recommended that an LPP candidate first obtain either a Doctor of Jurisprudence degree from an ABA school (a law degree) or an associate's degree with a paralegal or legal assistant certificate from an ABA program. If the candidate does not have a Doctor of Jurisprudence degree, he or she must complete a national exam, complete an additional course of instruction for the approved practice area, and obtain experience working as a paralegal under lawyer supervision.

Proper training of paralegals is critical not only to ensure the competent delivery of legal services but also to ensure that paralegals are able to accurately identify those areas that fall outside his or her scope of practice. Under the model proposed in the FLSR Report, the burden will be on paralegals to use their discretion and legal judgment in deciding which matters they may competently work on, when their retainer must end, and when the matter must be referred to a lawyer. It is recognized, however, that allowing non-lawyers to handle specific issues cannot be done without a full appreciation and understanding of the other issues in the case.

Accepting this to be true, the argument that "some assistance is better than no assistance" is fundamentally unsound. Clients are entitled to know that the services they engage are fully reliable and trustworthy, and that all of the relevant issues in their case will be recognized and identified.

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[5] Public Welfare Foundation, "Preliminary Evaluation of Washington State Limited License Legal Technician Program," March 2017, p. 6. The LLLT program also provides a grandfathered (or "waivered") option for paralegals with at least ten years' substantive experience working under the supervision of an attorney. These candidates are permitted to proceed directly to the practice-area education and requisite exams (p. 7).

Legal assistance is either competent or incompetent; there is no in between. The question is therefore whether *unreliable* assistance is better than none at all, to which the answer is clearly no. Lawyers, as qualified practitioners in all areas of law, are competently positioned to provide legal advice either through full representation or targeted legal services.

Program Sustainability

Even if paralegals could be provided with sufficient education and training to properly equip them for legal practice as identified in the FLSR Report, our earlier submission noted the paradox presented by this scenario, which is that added training, oversight, licensing, and insurance costs would undermine the affordability of the model. Early evidence bears this out, indicating that these costs will impose a tremendous burden on the candidates and the regulator, raising serious questions about the overall feasibility of the model.

The experience of the Washington LLLT program, launched in 2014, is instructive in identifying the kinds of educational and regulatory costs associated with this kind of program. The Washington State Bar Association (WSBA) regulates LLLTs under delegated authority from the Washington Supreme Court. It also staffs and funds the LLLT Board, which in turn establishes the training, licensing, and examination requirements for LLLT candidates.[6]

The LLLT program generates revenue by charging for the processing of applications for waivers, exams, and licensing. In a 2016 report on the first three years of the LLLT program, the WSBA reported that the total program expenses had reached $473,405, while the total fees collected in 2015 were $11,187.[7] The WSBA is therefore providing a large subsidy to operate the program. The low fees total may be explained by the fact that the LLLT program has seen a small number of successful candidates to date; to date, there are 20 LLLTs in the state.[8]

Some of the regulatory costs incurred by the WSBA may be one-time start-up costs, although the WSBA does not separate start-up costs from ongoing operating costs in its analysis. According to the WSBA, it is difficult to predict when the program will be able to completely cover its own costs, although it projects that it may break even and be self-sustaining within five to seven years.[9]

According to a preliminary evaluation of the LLLT program released in February 2017, the experience of licensed LLLTs to date has not been especially encouraging in terms of viable

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[6] Public Welfare Foundation, p. 5.
[7] Washington State Bar Association, "Report of the Limited License Legal Technician Board to the Washington Supreme Court: The First Three Years," February 2016, p. 26.
[8] Washington State Bar Association, "Limited License Legal Technician Directory."
[9] Washington State Bar Association, "Report of the Limited License Legal Technician Board to the Washington Supreme Court," p. 26.

business models when operating as a pure full-time LLLT practice.[10] The preliminary evaluation found that most LLLTs were not practicing full time; instead, they adopted a variety of operating models, including a combination of part-time LLLT practice and traditional paralegal practice. Some LLLTs also formed relationships with existing law firms, which minimizes revenue concerns and supports referrals, where appropriate.[11] Many LLLTs cited revenue uncertainties as their motivation for selecting business models that establish relationships with existing law firms.[12] The WSBA indicate that the typical total cost of all the education required to become a certified LLLT was $14,440 and early evidence points to the LLLTs' challenges in making an operational profit after incurring this cost.

The preliminary evaluation concludes:

> "Both the regulatory oversight and the law school training use unsustainable business models right now. With increased volumes of LLLTs both could potentially become sustainable, but the likelihood of sufficient volumes is an open question. Similarly, only a couple of the currently licensed LLLTs appear to be making a living solely as LLLTs. The rest are using mixed business models and working significant amounts as traditional paralegals for law firms to ensure sufficient incomes."[13]

It is important to note that the LLLT program is still in its infancy and actively continues to evolve. However, the early experience in Washington raises a genuine question about whether the costs incurred by the regulator and the licensee would be able to sustain a program that would train enough paralegals appropriately while permitting them to operate successful businesses that offer clients a more cost-effective alternative to lawyers.

Legal Aid Ontario also appears to have expended considerable resources, both in time and resources, on its pilot project to expand paralegals' scope of practice in criminal duty counsel offices. In order to transition into unsupervised roles through the project, the five candidates were all required to be licensed paralegals with at least two years' prior criminal experience working as Legal Aid Workers. In addition, the candidates were provided with training, mentorship, and management supports, and also operated under a variety of "quality assurance tools." These tools included monthly peer mentorship meetings, ongoing substantive legal training, monthly managerial quality review observations, and daily reporting of activities into an online portal.

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[10] It is important to note that the small number of LLLTs did not permit a rigorous statistical evaluation of the program; rather, the researchers relied on structured interviews with thirteen LLLTs, four clients, "several colleagues," and representatives from the Washington State Bar Association, community colleges, and the University of Washington School of Law (Public Welfare Foundation, p. 6).
[11] Public Welfare Foundation, p. 10 and 12.
[12] Public Welfare Foundation, pp. 11-12.
[13] Public Welfare Foundation, p. 12.

Over the course of a year, each paralegal took on new work in accordance with their skills, work availability, and local staff support until they were fully placed. The second phase of the LAO project will involve developing an additional five paralegals. This is a significant investment of financial resources and time, both by candidates and management, to ensure that the paralegals were qualified and competent to work unsupervised.

If it moves forward with an expanded paralegal scope of practice, the Law Society must clearly delineate between the operating costs and revenues for lawyer and paralegal licensing to ensure that lawyers are not responsible for subsidizing the operating or licensing costs for paralegals, which could be significant.

Client Confusion

Even if paralegals could be properly trained at an acceptable regulatory and financial cost, there will still be a very real risk that the model proposed by Recommendation 6 will cause misunderstandings for clients. While early results from the Washington LLLT program found that clients reported a reduction in stress and fear, clients were also confused about what tasks LLLTs may do and which they may not do:

> "Because the line between allowable and forbidden types of assistance followed the complexity of legal tasks and not the typical tasks of family law actions, clients were sometimes forced to do things by themselves that they wanted LLLTs to do or were required to contact lawyers for unbundled assistance when it was available. These distinctions made no sense to them as lay persons."[14]

The Washington study found that this confusion persisted regardless of the fact that the LLLTs walked clients through the engagement agreement and explained their scope of practice in detail. Clients often did not understand the legal nuances of what tasks a LLLT could perform, even though LLLTs provided correct and detailed explanations.

Here again it is clear that some assistance is not better than no assistance at all. The premise simply cannot be true where the assistance on offer causes clients to misunderstand what kind of advice they can receive and from whom, and where they are forced to expend unnecessary resources on not one but two different sets of legal service providers.

The Significance of Competent Legal Advice

The early evidence indicates that expanding the scope of practice for paralegals would not provide clients with a safe, sustainable, and affordable alternative to legal services. In addressing the challenges of self-represented family law litigants, judicial experts and justice system stakeholders all emphasize the importance of legal advice in the process, in light of the significant risks involved

[14] Public Welfare Foundation, p. 9.

in these cases. It cannot be reasonably expected that non-lawyers can provide this kind of advice without significant investments in training, education, licensing, and insurance.

To that end, the tasks indicated in **Recommendation 6** that constitute legal representation or advice have real potential to put client interests at risk. Some will note that family law is not a mandatory course in law school. At the same time, however, qualified lawyers have successfully completed a lengthy academic career, obtained competitive results in coursework and on the standardized admission test for law school, completed a ten month articling position or equivalent, and successfully passed the two comprehensive licensing exams required by the Law Society (including in the area of family law). Lawyers have also been trained to research and understand legislation and case law. We further understand that the Law Society has recently undertaken to review its own licensing program.

We recognize that there is room for improvement in the training of law students. We therefore agree wholeheartedly with efforts to maximize experiential learning opportunities for law students and to connect those opportunities to unmet legal needs in family law, as suggested in **Recommendations 17, 18, and 19**. However, permitting non-lawyers to provide legal services without the required level of education, training, and competency assessment will only make the situation worse.

For these reasons, those services identified in recommendation 6 that entail the provision of legal advice and representation cannot be included in the scope of practice for paralegals. The line must be clearly drawn when an individual's rights and obligations are engaged, or when a person is receiving representation (or appears to be receiving representation) from another individual.

Recommendation 6

(c): Assist the client to select a document for use in the proceeding

On the whole, the OBA is supportive of this recommendation; however, we caution that determining which documents to use in a proceeding necessarily implies the use of legal judgment. In a custody matter, for example, supporting documents can include child welfare records, mental health records, and police records. Locating and accessing this documentation, particularly third party records, often requires additional legal steps to be taken (such as a motion for disclosure). Furthermore, determining which records should be used in the proceeding is an exercise in legal judgment.

(f): Communicating with another party or the party's representative

(g): Representing a client in mediated negotiations

(i): Representing a client in court, other than at trial

Each of these tasks necessarily involves the representation and advocacy of a client's interests. The representation of a client's interests by a non-lawyer, whether in correspondence, mediations or negotiations, or in court, would be inherently problematic for the range of reasons set out above. Lawyers carry distinct skills and unique obligations in their legal representation of clients, not only to the people they represent but also to the court, opposing parties, opposing counsel, and the rule of law.

In addition to these factors, the FLSR Report fails to recognize the false distinction between trials and other court proceedings in family law, particularly motions. Certain motions are final and can have significant, lasting impact on families, including motions to change an order or agreement (which, although technically motions, are usually conducted as trials) and summary judgement motions.

Furthermore, interim motions in family law often establish the status quo with respect to parenting time and arrangements that can permanently affect the final resolution of the case. Motions may be the crux of a case, given that many files settle after the initial motions are decided. In the event that a case proceeds to trial, it would be difficult and costly to a client for counsel to pick up the file at that stage. Moreover, it would be likely impossible to fix any prejudicial mistakes that had been made to that point.

We note that these practical problems were not canvassed by Justice Bonkalo with the family law bar during the consultation period. As stated in the FLSR Report, Justice Bonkalo did not initially contemplate her recommendations including the representation of clients in court, and so the practical challenges of her recommendations were never examined when she met with these stakeholders.

(h) Preparing a written settlement agreement in conformity with the mediated agreement

As noted in our earlier submission, the dissolution of a relationship can have serious legal ramifications on a wide range of financial and property rights, pension and insurance benefits, custodial rights, and parental time and decision-making for children, among many others. A poorly drafted separation agreement that fails to address the comprehensive issues arising from a breakdown of a relationship can significantly impact a client's legal rights and obligations. A lawyer will have the expertise to review with the client the comprehensive impact of a separation agreement in order to ensure that no prejudice arises.

Very often, mediations result in a memorandum of understanding that must be converted into a separation agreement. These most often do not contain standard terms on issues including releases, insurance, details as to the mechanisms by which the terms will be fulfilled, and so on. Legal judgment and advice are therefore essential in drafting these agreements.

(j) Advising a client about how a court order affects the client's rights and obligations

Finally, the act of interpreting a court order and advising clients with respect to their rights and obligations is clearly legal advice. Any discussion of what a particular client is obligated to do (or not do), and any conversation that involves questions about a specific legal situation, will necessarily include legal advice to some degree.

The Great Need for Legal Information

The legal community, including the OBA, has long recognized that more can be done to address the challenges in the family justice system to make it accessible to more individuals. As lawyers practicing in the family law system every day, we are committed to finding ways to connect individuals with the kind of assistance they need.

In responding to this challenge, the first step is to clearly understand what litigants identify as their most significant needs when engaging the family court system. We know that litigants primarily describe their challenges in terms of the procedural complexity of the legal process. Their unfamiliarity with the rules, language, and participants in the court system is a source of anxiety and, from the court's perspective, often the cause of delay and cost. Comparatively few unrepresented litigants indicate that they want substantive direction with respect to their matter; mostly, they are really looking for information and guidance.

Litigants frequently turn to counter staff and court clerks for this kind of assistance. As noted by Justice Bonkalo, court staff are not appropriately trained to offer this assistance and are often unclear about how much help they can provide. Still, they find themselves spending a significant amount of time with litigants at the outset of the case in an environment with little privacy, which takes them away from the essential functions of their role at the counter.

There is clearly a large gap between the kind of procedural help litigants need and the way in which it is delivered (if it is delivered at all). Providing litigants reliable access to legal and procedural information could dramatically improve the operation of the family justice system, not only for the litigants themselves but also for opposing parties, opposing counsel, court staff, and judges. This kind of assistance can be provided without giving specific legal advice.

Properly trained paralegals could fill this gap by providing litigants with general, factual information about the court process. Allowing paralegals to provide legal information would give court staff the time to focus on the core functions of their position. It would give recourse to the significant proportion of unrepresented individuals who cannot afford to obtain this assistance from a lawyer and who do not qualify for legal aid services.

To this end, some of the tasks in Recommendation 6 could be properly and safely provided by paralegals, with some amendments as described below. A paralegal would be able to assist with these matters to the extent that the individual has decided on a course of action, but is uncertain

about the process for achieving their goal. We feel there is considerable room for a paralegal in this process to help litigants prepare themselves for court.

Recommendation 6

(a): Conducting interviews

A paralegal should be able to conduct interviews with individuals for the purpose of obtaining the relevant facts about the proceeding. This is a necessary step to fulfilling the other procedure-related functions set out below. However, discussion of the client's objectives and the ways to achieve those objectives would go beyond providing legal information and into the realm of advice.

(d): Service and filing

We know that litigants struggle with service and filing procedures and requirements. The terms and formalities of filing and service are not always clear, and the requirements vary depending on what kind of document or form is being served.

A paralegal, properly trained in the procedural requirements of the Family Law Rules, could explain the procedural rules for which documents need to be served or filed, on whom the documents should be served or filed, and when, where or how to serve or file a document.

(e): General legal system orientation

Individuals also need general legal system orientation, including help understanding how the court process works and what is expected of them as litigants. There is a wealth of factual information that could assist them in navigating the stages the process so that they better understand the overall lifespan of a court proceeding and what the anticipated next steps will be.

In particular, properly trained paralegals could assist individuals by

- explaining the availability of alternatives to court (including mediation and arbitration services);
- explaining the purpose of each stage of the court proceeding, including the settlement conference, case management conference, mediation, or motions hearing;
- describing what to expect at each stage, including what is expected of the individual, when the individual will be asked to speak, what type of presentation is required, how to organize their response to the other side, and what documentation they should bring with them; and
- explaining about potential "next steps" in the process.

All of this assistance could be offered by a paralegal without giving specific legal advice. While it would be exceptionally useful at the counter, we also see a role for paralegals in delivering legal information at FLICs, as alluded to in **Recommendation 13**, as well as at Mandatory Information Programs.

The Importance of Forms and Pleadings

Many litigants find the completion of family court forms challenging and stressful. From the litigant's perspective, it is not always clear what form should be used for their case, how many forms should be used, where to find them, and what the forms are asking for. This is not surprising given that there are dozens of forms designated for use under the Family Law Rules and as noted above, thirteen forms may require filing prior to the first case conference in a standard case dealing with children, support, and property. In some cases, a relatively minor error on a form could mean that materials are not accepted by the court, with prejudicial results including adjournments, costs, or dismissal of the claim, causing unnecessary delay, wasted court time, and frustration for the parties and counsel.

A paralegal, properly trained in the procedural requirements of the Family Law Rules and the relevant Practice Directions, could help litigants with factual, information-driven form questions. In particular, a paralegal could

- help an individual to locate court-approved forms;
- help an individual to identify which form(s) to use for their matter;
- provide general guidance on what a particular section of a form requires;
- identifying if the form is incomplete;
- provide explanations of the legal terms used on forms; and
- commission or witness, file, and complete service of a form.[15]

All of this assistance could be provided without delivering legal advice. While some of this information can currently be sought from counter staff and FLIC offices, there is obviously more demand than what these services are capable of meeting.

At the same time, it is critical that a clear line is drawn between legal information and advice. With respect to forms, this line is drawn as soon as the paralegal begins to draft, complete, or revise a form or pleading. It is inescapable that filling out forms and pleadings in the family law context involves decisions requiring legal judgment and advice. Consider the following examples:

The Divorce Application

Individuals are required to choose a "date of separation" (also known as the "valuation date") in order to complete an application for divorce. On the surface, the separation date may seem like a straightforward concept but in reality, the legislation is vague about what this phrase means and it continues to be litigated in the courts. In addition, the date selected as the date of separation may have substantial implications for issues relating to custody, property, child support, spousal support, tax credits, post-separation accounting, and payment of expenses. Interpretation of this term in the context of an individual's particular circumstances will require the exercise of legal

[15] We distinguish between commissioning or witnessing a form from "signing" a form, as the latter may necessarily imply an act of legal advice (e.g., signing a divorce certificate).

judgment, and it is imperative that individuals properly understand the significance of this date before the forms are completed.

Family law and divorce applications also require individuals to consider and identify corollary issues. The very act of completing the form involves a determination of the issues in dispute and the claims being made, including but not limited to child and spousal support, custody and access, restraining orders, exclusive possession of the matrimonial home, and property issues. Incomplete or inaccurate completion of the application forms could cause substantial and irreversible prejudice in the case.

The divorce application also requires individuals to choose the date the couple started living together (the cohabitation date). The cohabitation date likewise has substantive ramifications for issues including, but not limited to, spousal support rights and unequal division claims under s. 5(6) of the *Family Law Act*. Again, in order to determine this date, which may not be clear, an individual must fully understand the legal significance and implications of their determination.

The Financial Statement

A Financial Statement must be completed when individuals make a claim for child or spousal support, and for property or exclusive possession of the matrimonial home and its contents. Completion of the Financial Statement for married spouses requires that individuals choose a valuation date, with all the attendant difficulties described above.

Large sections of these forms are devoted to identifying a client's assets and liabilities. Assisting a client to properly identity and disclose their assets and liabilities can be a complex and legally significant issue. The forms do not provide comprehensive guidance about what kinds of assets must be disclosed. In our experience, clients often need legal assistance and guidance to ensure that all kinds of assets are included, such as contingent, discretionary interests in trusts; pensions; fractional interests in family businesses or cottages; offshore assets; pending bonuses or tax refunds; outstanding lawsuits; and unusual property such as horses or works of art. Deductions must also be carefully reviewed and included, including date of marriage assets, contingent and future tax costs of disposition, and personal loans. Tracing excluded assets such as gifts or inheritance can also be complicated, and requires a careful understanding of the facts and the law. A lawyer's role in assisting the completion of a Financial Statement is often crucial to the outcome of the case and the client's credibility.

These are only a few examples of the complexities presented by the completion of family law forms and their significance on the rights of litigants. It is inescapable that drafting, completing, and revising forms and pleadings necessarily involves legal judgment and decision-making, and that errors and omissions can have a significant impact on the rights of litigants in their proceeding. This is a matter of public importance and it would be negligent to pretend otherwise.

It is difficult to contemplate paralegals competently providing this legal advice without the training and insurance afforded to lawyers, the costs for which would need to be borne by paralegals. Again, this highlights the paradox that additional costs in training, oversight, licensing, and insurance – all required to ensure competent delivery of legal services – would undermine the affordability of the model.

Encouraging Cooperative Practice

This is not to say that there should be no role for paralegals in the completion of forms, or potentially in other areas, provided their services are provided under lawyer supervision. On the contrary, this model has many advantages, including that it would minimize the training, licensing, and insurance costs for paralegals and the regulator. To this end, **Recommendation 11**, which encourages the Law Society to facilitate collaboration between lawyers and paralegals, holds promise in allowing paralegals to provide cost-effective legal services under the supervision of a lawyer. As noted above, early evidence from the Washington LLLT program suggests that the collaborative model appears to be working well for the public and LLLTs themselves.

Unfortunately, the model proposed in the FLSR Report does not support this collaborative approach. On the contrary, it will create hard silos around paralegals' scope of practice, which will be difficult for clients to see and make it more expensive for them when one retainer abruptly ends and another begins.

Beyond lawyers and paralegals, true interdisciplinary cooperative practice holds unique potential in family law matters due to the range of legal, social, and economic issues that are typically involved. The opportunities for collaboration could include a range of third party services such as mental health experts, parenting coordinators, and financial experts. We encourage further development of this kind of comprehensive collaboration so that clients can access the kind of help they need when they need it, at a price they can afford.

Conclusion

Once again, the OBA appreciates the opportunity to provide comments on the Report as part of the Family Legal Services Review. The OBA looks forward to contributing further comments as the Law Society considers the critical decision points for the action plan to be released by the fall of 2017.