

October 19, 2020

Family Legal Services Provider Consultation
Law Society of Ontario
130 Queen St. W.
Toronto, ON
M5H 2N6

Via online submission

RE: FAMILY LEGAL SERVICE PROVIDER LICENSE CONSULTATION PAPER

The Toronto Lawyers Association (“TLA”) wishes to provide the following comments on the recommendations contained in the Family Legal Service Provider License Consultation Paper (“the consultation paper”) authored by the Family Law Working Group of the Law Society of Ontario.

OVERVIEW:

The TLA is the voice of its 3,700 members who practice law in all disciplines across the City of Toronto. Some 11% of our members practice family law. The great majority of family lawyers are sole practitioners or practice in small firms. Family lawyers represent individuals from all walks in life, often at a moment of great vulnerability financially, emotionally, and with respect to their physical safety. For many, a separation or divorce is the first time that they have had any contact with the legal system. Individuals seeking to navigate Ontario’s family law justice system encounter complex laws and procedures. Many are not legally sophisticated and do not have the resource to access their rights.

The TLA is committed to the reform of the family justice system to simplify it and to increase access to justice while protecting the vulnerable individuals caught up in that system. The TLA advocates for reform and in this submission sets out a number of changes that would further these goals.

The TLA does not support the proposal of the Family Law Working Group to establish a new profession of Family Law Service Providers (“FLSP”). This proposal will not be able to advance access to justice, may cause actual harm as currently constituted, and will divert precious resources from other more pressing access to justice issues.

The proposed FLSP model does not present the business case which would support the viability of FLSPs performing legal services for those who cannot afford lawyers. Additionally, there is no consideration of the potentially devastating effect on the practices of those members of the family law bar who currently serve low and middle income Ontarians. It should be noted that because members of the family law bar practice in small firms it has traditionally been a point of entry to the profession for racialized lawyers

and for all women lawyers where systemic discrimination barred access to other legal disciplines. Taking a step that forces many family lawyers out of business will have an immediate and negative impact on diversity in the profession.

The FLSP proposal presents a false dichotomy. The argument is that as this province has an access to justice crisis that anyone who opposes the FLSP proposal is failing to meet that crisis. The Law Society of Ontario (“LSO”) has devoted significant resources over the last few years going down the path of trying to create the FLSP as a new profession without having done the basic work of analyzing or even considering the data as to whether this new profession will solve the access to justice problem. The resources thrown at this venture have been diverted from pursuing reforms that would actually improve access to justice, reforms which are much needed. There is an opportunity now to stop pouring resources into the FLSP and to, instead, look at reforms that may make a difference and are more pressing.

The TLA has identified three broad areas of concern with the FLSP proposal. These are: (a) the failure to protect the public from unqualified practitioners; (b) the lack of a business case that the FLSP will provide services at a reduced cost; (c) the damage to the family law bar and the diversity of lawyer licensees.

PROTECTION OF THE PUBLIC FROM UNQUALIFIED PRACTITIONERS

The consultation paper provides a good review of the many areas of knowledge required to practice family law including advocacy skills, contract drafting skills, negotiation skills, as well as knowledge of substantive areas of law including: family law legislation, rules, and regulations, contract law, real property law, corporate law, restitution, income tax, evidence and so on. While access to justice issues in family law may be more pressing than other areas of law, the FLSP proposal must be balanced against the fact that family law is one of the most complex areas of law. The consultation paper proposes that FLSP practice most areas of family law. That is, that these providers advise clients on their rights, negotiate and draft contracts, argue motions, including motions for summary judgment, and conduct trials. There are narrow restrictions, but these providers are to be licensed to act in parenting disputes, and to deal with valuable assets including private businesses, RRSPs, matrimonial homes, and other property. This goes far beyond what was proposed in the Bonkalo Report,¹ which recommended that paralegals for example be restricted from acting in cases involving property and spousal support, as well as being restricted from representing clients at trials, and restricted from drafting domestic contracts “except where they are the result of mediated negotiations and are drafted in conformity with a mediated agreement.”²

All licensed lawyers in Ontario must learn the basic principles of family law legislation and jurisprudence which is a required part of the curriculum for the bar examination. Practicing family law requires knowledge of other substantive areas of law that form a core part of a law school education including contract law, business organizations, tax law, real property law, bankruptcy law, and criminal law. What may appear to be simple tasks, such as preparing a financial statement for the purposes of determining support and equalization, require a broad legal knowledge. The lawyer needs to identify the assets

¹ Justice Bonkalo, *Family Legal Services Review*, (Ontario: Ministry of the Attorney General, 2016) [Bonkalo Report].

² *Ibid.*

(including contingent assets), understand the nature of ownership of the assets, identify taxes and other contingent liabilities. The lawyer needs to understand how income is calculated for support law purposes for salaried individuals and those who own closely held corporations, which include a large share of small business owners in this province. LawPRO describes family law as “one of the most complex practice areas involving dozens of federal and provincial statutes and voluminous case law.”³ It comes as no surprise then that according to LawPRO, “[f]ailure to know or apply the law is twice as likely to occur in family law than in other areas of practice.”⁴ These are the challenges experienced by licensees with law degrees. How can we expect family law service providers with far less education to practice effectively in this field?

The consultation paper assumes that after a two-year paralegal training program which, as the Bonkalo Report notes, does not provide any curriculum to prepare paralegal candidates to deliver legal services in family law, the areas of knowledge a FLSP will need can be taught in 6 – 8 months, with a field placement of two to three months.⁵

If it were, in fact, correct that it is possible to reach competency in the diverse areas of knowledge FLSPs must learn after a two year college program and 6-8 months of study, then it would not be necessary for lawyers to obtain a three year university degree in law followed by articling or the Law Practice Program to achieve competence on the same material. In reality, it is not possible to learn these areas and to become competent based on the limited education program proposed in the consultation paper. It is possible for some rudimentary principles to be absorbed but not for any understanding sufficient to advise and represent clients. It is not possible for individuals educated in this cursory fashion to understand how to learn and apply the law as it evolves and changes. Law school teaches lawyers how to research and learn the law on an ongoing basis. The FLSP service providers will lack that basic skill, as legal research is not mentioned as part of the proposed curriculum. Where there are restrictions on FLSP service providers it is difficult to understand how they will be monitored. For example, an FLSP service provider will not be educated in restitutionary principles and not permitted to advance an unjust enrichment claim. How will the FLSP provider spot the issue that a client may have an unjust enrichment claim and know that they must be referred to a lawyer if the provider does not have a proper (or any) understanding of restitution in the first place?

Studies have shown that while paralegals can provide effective representation in certain dispute resolution contexts, they have failed to in others, such as immigration law.⁶ No other jurisdiction has licensed paralegals to such a broad scope of family law practice. There are two American jurisdictions that have established paralegals with a more limited scope than the consultation paper proposes for Ontario. They are Washington State and Utah. The Washington State program has failed. It was recently

³ “Family Law Malpractice Claims Fact Sheet” (19 July 2017) online: Practice Pro < <https://www.practicepro.ca/practice-aids/claims-fact-sheets/family-law-claims-fact-sheet/>>.

⁴ *Ibid.*

⁵ *Ibid.*

⁶ Wiseman, David, “Paralegals and Access to Justice for Tenants: A Case Study” in Trevor C.W. Farrow & Lesley A. Jacobs, eds, *The Justice Crisis: The Cost and Value of Accessing Law* (Vancouver: UBC Press, 2020) 173 at 174 [Wiseman].

terminated because of the costs and the small number of individuals who wished to become licensed under the program.⁷

The limited license legal technicians (“LLLT”) family law program in the State of Washington had required an associate’s degree, a three-year program at an accredited school, and 3000 hours of paralegal experience involving substantive legal work in any practice area under the supervision of a lawyer.⁸ This was eventually shortened to 1,500 hours,⁹ but LLLTs, unless specifically permitted, were not allowed to represent a client in legal negotiations, in court, in formal administrative proceedings or in other formal dispute resolution processes.¹⁰

Utah’s Licensed Paralegal Practitioner program includes family law as an area of practice. So far there are only four individuals who have qualified with four more on their way to doing so.¹¹ Licensed paralegal practitioners (“LPPs”) in Utah have only one semester of coursework in addition to their entrance requirements, but prior to being able take their qualifying exam, LPPs must work with a law firm for at least 1,500 hours in the preceding three years.¹² If LPPs are going to practice family law, at least 500 of these hours must be substantive law-related experience in family law.¹³ LPPs can be licensed to practice law in the areas of family law, debt collection and landlord-tenant disputes.¹⁴ They can file court documents, complete settlement negotiations, review court documents, represent clients in mediation, and serve as mediators, but they are prohibited from appearing in court.¹⁵

The FLSP proposal involves only 550 hours of coursework with a field placement of two to three months. The proposal does mention that there should be a prerequisite of one to three years of full-time practice experience as a licensed paralegal, but none of this experience has any family law requirement. Further, the FLSP proposal involves paralegals have a much larger scope of practice than those in the State of Washington and Utah, despite having much less of an education and experience requirement. Yet paralegals in Ontario are being tasked to do more than those in the State of Washington and Utah.

Furthermore, LLLTs themselves thought that 3,000 hours of prior experience was a correct requirement, and that in addition 500 to 1,000 hours of this requirement should be dedicated to family law.¹⁶ Some LLLTs felt that after their training they lacked enough specific family law experience to be fully

⁷ Stephens, C.J., Supreme Court of the State of Washington, Correspondence to S. Crossland, Chair of the Limited License Legal Technician Board, R.Majumdar, President of the Washington State Bar Association, and T. Nevitt, Interim Executive Director of the Washington State Bar Association, June 5, 2020,

⁸ Bonkalo Report, *supra* note 3.

⁹ “Become a Limited License Legal Technician” (2 September 2020), online: Washington State Bar Association < <https://www.wsba.org/for-legal-professionals/join-the-legal-profession-in-wa/become-a-legal-technician>>.

¹⁰ Bonkalo Report, *supra* note 3.

¹¹ Lyle Moran, “Utah’s Licensed Paralegal Practitioner Program Starts Small” December 12, 2019, *abovethelaw.com*.

¹² “New Utah rule allows practice of law without supervision of lawyer”, online: Utah State Bar < <https://www.utahbar.org/licensed-paralegal-practitioner/lpp-about/>>.

¹³ “Licensed Paralegal Practitioner Program”, online: Utah State Bar < <https://www.utahbar.org/wp-content/uploads/2020/01/LPP-Info.pdf>>.

¹⁴ *Ibid*.

¹⁵ *Supra* note 11.

¹⁶ Clarke, Thomas M. & Sandefur, Rebecca L., “Preliminary Evaluation of the Washington State Limited License Legal Technician Program” (2017) National Center for State Courts at 9 [Thomas].

competent at the start of their practice.¹⁷ The FLSP proposal is dangerously lacking in its education and experience requirements.

This proposal is dangerous to the public as the LSO's listing of these areas of knowledge and assertion that the FLSPs are competent in them will mislead individuals into trusting and retaining these providers to represent them when the providers will not have the ability to do so properly. This will lead to poor results for those who retain them. The most basic duty of the LSO is to protect the public from unqualified practitioners. This proposal fails that duty. The problem is that to qualify family law service providers sufficiently to practice family law as proposed would require an education comparable to that of existing lawyers.

There is an argument that something is better than nothing which was posed in the Bonkalo Report.¹⁸ That is, that it is better for an unrepresented litigant to have the assistance of a service provider even if that provider is not as competent. This argument fails. First, the formerly unrepresented litigant will be worse off because they have paid for a service which will be incompetently performed. That money has been thrown away. Second, the formerly unrepresented litigant will have lost the opportunity to receive special consideration from the court. Our courts have repeatedly confirmed that self – represented litigants are entitled to preferential treatment.¹⁹ This right will be lost to those who hire these providers.

There is no consideration in the consultation paper to the issue of domestic violence, beyond a mention that this would form a 20-hour component of the FLSP curriculum. Many individuals seeking family law help are financially vulnerable. Many are also victimized by physical or verbal abuse. These individuals will be particularly at risk if they are misled by the LSO into retaining unqualified service providers who will not have the knowledge to protect them from coercion or further abuse by their former partners. In particular, women's access to justice is often dependent in part on whether the legal professionals they encounter have a deep understanding of domestic violence and its harms and are alive to the complex interactions between multiple legal systems.²⁰ 20 hours is not sufficient to gain this sort of knowledge.

It would be regrettable for the LSO to fail in its duty to protect the public from unqualified advice in any field of law. To do so in family law where the individuals seeking legal services are often unsophisticated legal consumers would be particularly pernicious.

NO BUSINESS CASE THAT FLSP WILL PROVIDE SERVICES AT REDUCED COSTS

The consultation paper starts from the assumption that non-lawyer service providers will provide family law services at reduced costs. There is no evidence of any form provided to support this contention. There is, however, research to show that the assumption that paralegals are more user friendly or lower the cost of justice is not a reasonable one.²¹ Given this research, the FLSP proposal should not proceed until the LSO can substantiate whether the assumption that non-lawyer service providers will provide

¹⁷ *Ibid.*

¹⁸ Bonkalo Report, *supra* note 3.

¹⁹ *Girao v. Cunningham* 2020 ONCA 260.

²⁰ Koshan, Jennifer, Mosher, Janet, and Wiegers, Wanda, "The Costs of Justice in Domestic Violence Cases: Mapping Canadian Law and Policy" in Trevor C.W. Farrow & Lesley A. Jacobs, eds, *The Justice Crisis: The Cost and Value of Accessing Law* (Vancouver: UBC Press, 2020) 149 at 164.

²¹ Wiseman, *supra* note 6 at 174.

family law services at reduced costs can be supported by evidence. The LSO has advised that since the circulation of the consultation paper an effort is being made to research the business case but will not commit to sharing this information with the TLA. This approach puts the cart before the horse. Researchers have noted that the LSO has not examined whether paralegal services are in fact more affordable since taking on its role as regulator of paralegals.²² This must be investigated before the FLSP proposal proceeds.

The avowed purpose of the FLSP program is to provide legal services for Ontarians with incomes between \$30,000 - \$75,000 per year who are otherwise not served by family lawyers whom they cannot afford. The LSO has not investigated the financial viability of these proposed practices. LLLTs in the State of Washington LLLT program charge \$125 US per hour.²³ LLLTs were found to charge higher fees than paralegals.²⁴ Their education and certification costs were US\$14,440.²⁵ This program has failed and no more LLLTs will be licensed. The problem is that competence aside, a non-lawyer service provider will have the same overhead costs as a family lawyer. That is, office rent, insurance, licensing fees, professional development, IT costs, specialized family law software, marketing, and all the other expenses of running a business. These costs will not be less than those faced by family lawyers. Insurance costs may be higher as these providers will be potentially dealing with high value property and support matters (the average home in Toronto is worth \$1 million) but have low education levels making negligence more likely. Notably, we were told that no effort was made by the Family Law Working Group to canvas the insurance market to determine if insurers are even willing to take on the risk of providing mandatory insurance to FLSPs. The upshot of all of this is that it will not be commercially viable for FLSPs to practice while charging much less than lawyers in a way that access to justice will be increased, much like LLLTs struggled to develop viable business models.²⁶

A new lawyer in Canada charges \$195 on average.²⁷ A new call family lawyer in Canada charges on average \$204.55/hour,²⁸ little more than the State of Washington LLLTs charge. The question of whether once licensed FLSPs will provide lower cost services than family lawyers is not considered in the consultation paper. Nothing restricts FLSP service providers to represent Ontarians with incomes in the range of \$30,000 - \$75,000. The proposed license will permit the FLSPs to represent clients who own homes, have RRSPs, businesses, and other investments. It seems likely that most FLSPs will gravitate to work for those clients who have the means to pay fees high enough for the FLSPs to cover their business costs and generate an income for themselves. This is supported by the fact that paralegals' fees can be substantial,²⁹ and the example of what happened in Ontario when paralegals were introduced to landlord-tenant disputes. Rather than increase access to justice for tenants, paralegals represent less

²² *Ibid.*

²³ "FAQS", online: Laura Genoves, LT PLLC < <https://www.wafamilylawtech.com/faqs> >.

²⁴ Thomas, *Supra* note 14 at 13.

²⁵ *Ibid* at 10.

²⁶ *Ibid* at 11.

²⁷ Moore, Lisa and Perlmutter, Mitchell, "Public Spending on Access to Justice: Where Do We Go from Here?" in Trevor C.W. Farrow & Lesley A. Jacobs, eds, *The Justice Crisis: The Cost and Value of Accessing Law* (Vancouver: UBC Press, 2020) 69 at 76 [Moore].

²⁸ Bruineman, Marg., "Steady optimism – 2019 Legal Fees Survey", *Canadian Lawyer* (8 April 2019) online: *Canadian Lawyer* < <https://www.canadianlawyermag.com/surveys-reports/legal-fees/steady-optimism-2019-legal-fees-survey/276027> >

²⁹ Moore, *Supra* note 26.

than 1% of tenants and close to 30% of landlords.³⁰ Paralegals benefited corporate landlords the most, and were not affordable or user-friendly for tenants.³¹ This was actually detrimental for tenants, meant they more often faced landlords with legal representation, and exacerbated the power imbalance between landlords and tenants.³² It is easy to see how the same outcome could apply with FLSPs. FLSPs are going to graduate towards persons who have the funds to pay them, leaving the most vulnerable and least well-off unrepresented parties who are supposed to benefit from FLSPs unserved.

The consultation paper fails to investigate or consider the operating business costs of family lawyers practicing in Ontario today. To conduct such an investigation would be helpful in determining how best to meet the needs of Ontarians whose income is in the range of \$30,000-\$75,000/year. These individuals self-evidently do not have much, if any, money available to pay for legal services. It is unlikely that any service provider, qualified or not, can advise, negotiate, draft contracts, argue motions or take trials for individuals in this income bracket and charge enough to support themselves. The answer for this group of Ontarians is not to create new licensees with substandard skills, but rather to find ways to make self-representation easier, to provide free mediation, to expand legal aid, to increase pro bono assistance, and otherwise fund family law services that these individuals cannot afford.

IMPACT ON THE FAMILY LAW BAR

The TLA understands that the LSO may be wary of giving any weight to the concern that family lawyers may be forced out of business. We understand that this is perceived to be special pleading. However, the loss of livelihoods for existing family lawyers will not just have an impact on them but also on access to lawyers for many Ontarians who currently are being served by family lawyers. This impact on the family law bar will also undermine efforts to enhance diversity in the legal profession.

There is no doubt that the introduction of this program will undermine the practices of existing family lawyers. FLSP providers will have the benefit that since 2017 the LSO has repeatedly communicated to Ontarians that non-lawyer family law service providers will be cheaper than family lawyers. The LSO will continue to promote this position because that is the basis for the entire program, albeit completely unsupported by any facts or research. The LSO has also promoted the notion that family lawyers only charge by the hour, only charge high hourly rates, do not offer fixed fees, and do not offer unbundling or coaching services. The consultation paper itself repeats some of these fallacies, with no supporting evidence. Although this is not true, it will be a tremendous marketing advantage to the FLSPs. Clients who are concerned about costs will retain FLSP service providers over family lawyers because the LSO is taking the position that they are just as competent as family lawyers and cheaper.

It is likely that more sophisticated legal consumers and wealthier legal consumers will continue to retain family lawyers. Those family lawyers who currently serve the middle-class market are the most likely to be supplanted by FLSPs. Once they have been supplanted, they will not be replaced. The result will be the de-professionalization of family law.

³⁰ Wiseman, *Supra* note 6 at 182.

³¹ *Ibid* at 185.

³² *Ibid*.

Family Law has traditionally been an entry point into practice for racialized lawyers and for women lawyers of all backgrounds. This is because family lawyers can hang out their shingle as sole practitioners or practice in small groups. Many work from their homes. The barriers to entry are lower. If family lawyers are driven out of practice, the diversity of the bar as a whole will suffer.

These concerns are all the more heightened by the COVID-19 pandemic, which has had a substantial impact on family law lawyers.³³

THE TLA's PROPOSALS FOR REFORM

The TLA is proposing changes which unlike the FLSP initiative would enhance access to justice for Ontarians:

1. Increase digitalization and remote hearings: The COVID-19 crisis has accelerated the adoption of digitalization and remote hearings. These changes should be maintained and expanded. A legal system which has no electronic filing and no remote hearings is a high cost system to the public.³⁴ Fixing the technological limitations of the justice system enhances access to justice as: (a) electronic filing and document management is easier to access for most self – represented parties; (b) remote hearings prevent wasted time (and legal fees) for lawyers forced to attend at a physical court site. For self-represented parties remote hearings reduce time taken off work. Virtual commissioning of affidavits and other documents also reduce costs and time taken away from work. There are some self-represented parties who do not have access to devices (ipads/phones/laptops) and internet access needed to handle electronic documents and remote hearings. For those people it is essential that the courts invest in laptops on site and in community hubs to ensure equal access. Online dispute resolution programs that offer alternatives to the traditional family law system have also proven to be effective in increasing access to justice.³⁵
2. Expansion of the Unified Family Court across Ontario. Unified Family Courts have specialized judges who are best able to ensure that self – represented parties receive fair hearings. Unified Family Courts are an institution capable of efficiently delivering enhanced access to free or reduced cost mediation services and family law information services to all litigants, including self – represented parties. An obstacle to the expansion of the Unified Family Courts has been construction or re-purposing of physical infrastructure. With remote hearings and electronic filing, in the interim pending the construction of new court houses, virtual Unified Family Courts should be considered.
3. Pro Bono Students Canada are launching a Family Justice Centre Ontario with volunteer private lawyers and students. This initiative should be expanded.

³³ "COVID-19 Impact Report" (2020), online: LexisNexis Canada < <https://go.lexisnexis.ca/COVIDSurveyResults>>.

³⁴ Moore, *Supra* note 26 at 74.

³⁵ Sossin, Lorne and Kapoor, Devon, "Social Enterprise, Social Innovation, and Access to Justice" in Trevor C.W. Farrow & Lesley A. Jacobs, eds, *The Justice Crisis: The Cost and Value of Accessing Law* (Vancouver: UBC Press, 2020) 226 at 234.

4. Legal Aid Ontario services for family law should be expanded, with a restoration of the level of services in place until the early 1990s at a time at which, perhaps not coincidentally, there were far fewer self-represented litigants in the family law justice system.³⁶ While Justice Bonkalo thought it unlikely that Legal Aid Ontario would see any additional funding,³⁷ research has shown that public support for legal aid programs actually increases when such programs are expanded to apply beyond just lower income individuals.³⁸ Further, research has shown that better use of community resources beyond just increased funding may be available for legal aid to expand services.³⁹
5. The LSO should impose a levy on all lawyer licensees, not just family lawyers, to fund family law services for those whose incomes disqualify them from Legal Aid but who cannot otherwise afford counsel. This levy should be geared to income.
6. If the LSO concludes that there needs to be an expansion of individuals practicing family law to try to drive down the market, then the LSO should expand the licensing of foreign trained lawyers rather than creating a new category of lesser trained family law service providers. Unlike FLSP, these individuals are trained lawyers and can easily be educated as needed to meet Ontario requirements. The LSO could fast track the licensing of foreign trained lawyers who commit to practice family law for at least five years after their call to the bar.
7. The LSO should continue to support efforts to expand legal coaching and unbundling of legal services by family lawyers. There is scope for low cost delivery of these services in internet based law firms, using Artificial Intelligence. This innovation is already underway amongst Ontario family lawyers.
8. The Mandatory Information Program delivered in the family law courts to all litigants should be improved to provide more direct information and guidance.⁴⁰
9. Efforts should be made to make the legal process for family law less adversarial, as an adversarial process means the legal system is complex, competitive and labour intensive, which creates barriers to justice and makes the process complicated, expensive and slow.⁴¹ Part of this

³⁶ "Submission on expanding legal services options for Ontario families" (19 October 2019) online: Legal Aid Ontario <Submission on expanding legal services options for Ontario families>.

³⁷ Bonkalo Report, *supra* note 3.

³⁸ Currie, Ab, "The Monetary Costs of Everyday Legal Problems and Expanding Access to Justice" in Trevor C.W. Farrow & Lesley A. Jacobs, eds, *The Justice Crisis: The Cost and Value of Accessing Law* (Vancouver: UBC Press, 2020) 93 at 103.

³⁹ *Ibid* at 105.

⁴⁰ Jacobs, Lesley A. & Carter, Carolyn, "Court-Ordered Family Legal Information Sessions in Ontario: A Path to Justice Approach" in Trevor C.W. Farrow & Lesley A. Jacobs, eds, *The Justice Crisis: The Cost and Value of Accessing Law* (Vancouver: UBC Press, 2020) 192 at 203.

⁴¹ McHale, Jerry M, "Legal Culture as the Key to Affordable Access" in Trevor C.W. Farrow & Lesley A. Jacobs, eds, *The Justice Crisis: The Cost and Value of Accessing Law* (Vancouver: UBC Press, 2020) 247 at 248.

effort should involve more of a focus on consensual dispute resolution, alternative dispute resolution, and other non-adversarial approaches.⁴²

10. Efforts should be made to reduce legal complexity in family law, as legal complexity drives legal costs and increases the time spent on legal issues.⁴³ Justice Bonkalo's Report specifically mentioned that "the family justice system is hampered by systemic issues that require significant further attention. Deep-rooted systemic issues continue to thwart simplicity, proportionality, peaceful resolution and affordability. While a simplification of processes and procedures does not fall within the mandate of this review, it has become clear to me that the complexity of the current system is a fundamental problem that needs to be rectified." The FLSP proposal does not get to the root of the access to justice problem, and so is not a solution to this most pressing access to justice issue in family law.

ANSWERS TO QUESTIONS POSED IN THE CONSULTATION PAPER

1. *Will the proposed scope of permissible activities support increased access to affordable, competent family law legal services, if so how?*

There is no evidence that the proposed scope of permissible activities will support increased access to affordable and competent family law legal services. As the example of paralegals in landlord-tenant disputes shows, it cannot simply be assumed that introducing paralegals will increase access to justice for lower-income individuals.⁴⁴ Paralegals, like lawyers, gravitate to clients who can afford to pay for their services. The LSO has paid no direction attention to whether the assumption as to the affordability of paralegal services has been realized in practice,⁴⁵ and until this is looked at it cannot be said that the proposed scope of activities will support access to affordable legal services. Further, the scope of permissible activities cannot be performed competently without a lawyer's education. The scope proposed is far beyond that in the failed State of Washington LLLT or the fledgling Utah LPP programs, as well as beyond what Justice Bonkalo suggested. Far too much is being proposed to expect any possibility of competent services.

2. *Will the proposed scope of permissible activities enable the FLSP to develop a business model that is viable? If so, why? If not, why not?*

As the LLLT example in the State of Washington demonstrates, it is very difficult for paralegals to establish a viable business model in family law.⁴⁶ Given the strain of COVID-19 on business across the board, and especially the legal profession,⁴⁷ it is extremely difficult to imagine FLSPs succeeding in the current legal business environment. The research has not been done by the LSO on the business case for this proposed program. However, it seems unlikely that the

⁴² *Ibid* at 257.

⁴³ *Ibid* at 249.

⁴⁴ Wiseman, *supra* note 6 at 174.

⁴⁵ *Ibid*.

⁴⁶ Thomas, *supra* note 14 at 11.

⁴⁷ COVID-19 Impact Report, *supra* note 34.

business overhead costs for paralegals will be different or lesser than those for lawyers. Given that fact, as well as the very modest sums available for legal fees amongst Ontarians with incomes in the \$30,000 - \$75,000 range, there will not be a viable business model servicing that cohort. The only viable business model for the FLSP will be to displace family lawyers in serving the middle income market which will not advance access to justice, but simply de-professionalize and lower the quality of family law services in this province.

3. *Will the proposed competencies ensure the appropriate level of competence to deliver family legal services as outlined in the proposed scope? Are there other competencies that should be considered?*

If mastery of all the proposed competencies is achieved then this might allow some level of competence, but mastery of all the proposed competencies seems extremely unlikely under the current education and experience requirements for FLSPs. With limited exceptions, the proposal is to have law practiced by those without law degrees. We believe that a three year law degree coupled with articling or completion of the Law Practice Program is necessary to advise and represent individuals competently in the area of family law.

4. *In your view, what scope of activities would best support increased access to affordable, competent, family law services?*

These submissions have outlined ten different proposals to increase access to affordable and competent family law services.

5. *Is the proposed training program of sufficient duration and rigour to enable candidates to achieve the proposed competencies?*

The proposed training program is not of sufficient duration and rigour to enable candidates to achieve the proposed competencies. The FLSP proposal involves only 550 hours of coursework with a field placement of two to three months. No other family law experience is required. This is far below what will be required to establish competency in the wide scope of practice being allotted to FLSPs. Some State of Washington LLLTs, who had a 3,000 hour experience requirement as well as a three-year program of study, felt that after their training they lacked enough specific family law experience to be fully competent at the start of their practice.⁴⁸ There is no way FLSPs will be competent in a much greater scope of practice with much less educational and experience requirements. What is needed for the scope of practice proposed is a three year law degree coupled with articling or completion of the Law Practice Program.

⁴⁸ Thomas, supra note 14 at 9.

6. *What type of prerequisite experience in legal services provision, if any, should be required for the FLSP?*

In addition to the comprehensive legal training provided by a three year law degree, there must be a requirement of significant experience in family law prior to an FLSP license being provided. This was something that LLLTs themselves mentioned as being very important.⁴⁹

7. *What length and form of experiential training should be incorporated into the licensing process for the FLSP to support the competencies? If a field placement is required, who will provide the placements?*

No experiential training or field placement can compensate for the lack of a law degree.

8. *Is a CPD requirement focused on family law appropriate for the FLSP?*

Evidently if FLSP providers are permitted they will require ongoing professional development. As they will not have learned legal research skills they would need much more extensive professional development than lawyers.

9. *Should law clerks be eligible for the FLSP licence? Are there other groups of professionals who should be considered?*

Our view is that it is a mistake to create the FLSP license. Currently there are many skilled law clerks working in lawyer's offices across the province. Under a lawyer's supervision there is scope to expand the tasks that law clerks are permitted to undertake.

10. *What characteristics of an FLSP would make this provider appealing to self-represented litigants? (billing practices, cost structure, accessibility, practicality, other?)*

Presumably the attraction of the FLSP will be the provision of cheaper services. Currently the LSO has not researched the business case but in our view the FLSP will not provide cheaper services. Flexible billing practices, flexible payment plans, virtual delivery of services, delivery of services in multiple languages, and accessibility are all important to current family law clients and self – represented litigants. There is no evidentiary basis to suggest that FLSP will deliver these more effectively than family lawyers.

11. *Given the recent enhancements to accessing family law (i.e. court modernization, Steps to Justice, etc), is the FLSP design appropriate?*

Ontario courts are in the midst of piloting technology to allow motions and conferences to proceed virtually with electronically filed documents.⁵⁰ There is scant evidence to support that

⁴⁹ Thomas, *supra* note 14 at 9.

⁵⁰ "Supplementary Notice to the Profession and Litigants in Civil and Family Matters Including Electronic Filings and Document Sharing (Caselines Pilot)", (2 September 2020) online: Ontario Superior Court of Justice <<https://www.ontariocourts.ca/scj/notices-and-orders-covid-19/supplementary-notice-september-2-2020/>>.

paralegals practicing family law will increase access to justice, but there has been considerable research to show that modernization of the court system will decrease legal costs.⁵¹

12. *Are any aspects of the proposed licensing framework unfeasible?*

The unfeasible aspects of the proposed licensing framework have been previously discussed in this submission.

13. *Is there additional information or are there other factors that should be considered?*

If the FLSP program is to be put into practice, it is an absolute must that a system for clients to assess bills from paralegals be put into place. Access to justice is not served by forcing low-income individuals to pursue claims in small court in the event of a dispute over their bill. There is currently no mechanism by which clients can contest paralegal fees.⁵² While a client can challenge a bill from a lawyer via the assessment office of the Ontario Superior Court of Justice, the current LSO recommendation regarding paralegal fees is for clients to pursue them in small claims court.⁵³ This must be rectified if an FLSP license is put in place.

Thank you for considering these comments.

Yours very truly,

A handwritten signature in black ink, appearing to read 'B. Harrison'.

Brett Harrison
President
Toronto Lawyers Association

⁵¹ Moore, *Supra* note 26 at 74.

⁵² Trabucco, Lisa, "What Are We Waiting For? It's Time to Regulate Paralegals in Canada" (2018) vol 35 Windsor Yearbook of Access to Justice 149 at 175.

⁵³ *Ibid.*