



Canadian Association of Black Lawyers
L'Association des Avocats Noirs du Canada

May 15, 2017

Via Email:
FamilyLegalServicesReview@Ontario.ca

Family Legal Services Review
Ministry of the Attorney General
720 Bay Street, 7th Floor
Toronto, Ontario
M7A 2S9

Dear Madam Justice Bonkalo,

Re: Submission to Family Legal Services Review

Please find enclosed our submission to the Family Legal Services Review.

Sincerely,

CANADIAN ASSOCIATION OF BLACK LAWYERS

Overview

The Canadian Black Lawyers Association (CABL) was formed in March 1996, as a national network of law professionals with an overall mandate to promote the advancement of Black Lawyers within the profession by providing support systems, promoting academic and professional excellence and advancing issues of equity and diversity among the bar and judiciary.

CABL acknowledges the importance of the Family Legal Services Review (FLSR) at this time given the level of unrepresented litigants in the area of family law and concerns about access to justice. CABL's submission is based on consultations with members who practice in diverse areas, some with experience training or educating paralegals or dealing with paralegals in their existing scope of practice.

Licensed paralegals are still a relatively new phenomenon in Ontario, the first jurisdiction in North America to regulate them. CABL's position is that expanding the scope of practice of paralegals into the area of family law at this stage is not only premature, but would not promote access to justice. Instead, the Attorney General must first address the systemic structural problems that riddle the system and the Law Society must address the current deficiencies in the education, training and licensing of paralegals in their existing scope of practice.

Not only do the existing educational standards of paralegals need to be strengthened before any consideration of an expansion of scope of practice, but the licensing exam should act as a better filter to those entering the profession through a more rigorous evaluation process.

Licensed paralegals are still a relatively new phenomenon in Ontario, the first jurisdiction in North America to regulate them. Expanding the scope of practice of paralegals at this stage is premature and would not be in the public's interest. The province must work on broader systemic reforms of the family law system, while the Law Society must turn its attention to strengthening the education, training and licensing of paralegals in their existing scope of practice.

Promoting Access to Justice

Over a decade ago, the Ontario Court of Appeal noted that many individuals who retain paralegals “are particularly vulnerable because of their social and/or economic circumstances”. The 2013 report completed by the Action Committee on Access to Justice in Civil and Family Matters (“the Action Committee Report”) noted: “The civil and family justice system is too complex, too slow and too expensive.”¹ The report further noted that:

- *“Members of poor and vulnerable groups are particularly prone to legal problems. They experience more legal problems than higher income earners and more secure groups.*
- *People’s problems multiply; that is, having one kind of legal problem can often lead to other legal, social and health related problems.”*

In 2008, the Law Society of Upper Canada, Legal Aid Ontario, and Pro Bono Law jointly completed a research project to identify and quantify the civil legal needs experienced by low and middle-income Ontarians, which resulted in the *“Listening to Ontarians: Report of the Ontario Civil Legal Needs Project”* (“the OCLNP report”). The report noted that:

“The study reinforces the necessity of differentiating the needs of low and middle-income earners. There are vulnerability issues among many low-income Ontarians that compound the disruption and challenge created by a civil legal need. The specific legal issues are often different for the two groups. Middle income Ontarians anticipate the need for legal assistance with wills, powers of attorney, or real estate issues. Low-income Ontarians are more likely to need legal help with disability-related issues, social assistance, personal injury or

¹ Action Committee on Access to Justice in Civil and Family Matters, “Access to Civil and Family Justice: A Roadmap for Change,” October 2013, http://www.cfcj-fcjc.org/sites/default/files/docs/2013/AC_Report_English_Final.pdf

employment issues.”

Family law was noted in the OCLNP report to be common to all income groups. Family law is a complex area of practice involving almost 40 statutes, numerous regulations, touches on many areas of practice including estate, tax, business law, among others, and may require the involvement of other professionals. The Bonkalo report recommends expanding the scope of the practice of paralegals to this complex area of law without the requirement that they work under the supervision of a lawyer. According to information published by the Lawyers Professional Indemnity Company:

“Failure to know or apply the law is twice as likely to occur in family law than in other areas of practice. It is one of the most complex practice areas involving dozens of federal and provincial statutes and voluminous case law.”²

LawPRO’s 2016 Malpractice Fact Sheet, indicates that on average \$3.9 million a year is paid in claims for the family law area of practice, which ranks fourth in the number of claims and fifth in claims cost. Insurance by paralegals is not with any single insurer like LawPRO, meaning that the tracking and reporting of any future family law claims against paralegals may be challenging.

While claims against lawyers are comparatively higher than claims against paralegals, claims against the latter continue to rise. Expanding the scope of independent paralegals to service potentially vulnerable clients who may not even appreciate their legal issues or potential issues would do a disservice to the public.

To improve access to justice, CABL recommends that the government address the underlying systemic, structural and other issues including expanding the unified family court across the province, modernizing the court processes and simplifying and streamlining procedures, to name a few. Introducing paralegals into a system that is already largely ineffective and broken will not improve access to justice.

² LawPRO, “Family Law Claims,” 2016, <http://www.practicepro.ca/information/doc/Family-Malpractice-Claims-FactSheet.pdf>

Moreover, paralegals are not necessarily less expensive than lawyers. In fact, anecdotally sometimes the opposite may be true, especially if a lawyer must be retained afterwards. CABL is not aware of any empirical evidence to support the notion that paralegals would be less costly than lawyers.

Legal aid funding is available only for those of extremely modest means. The Action Committee Report identified the availability or lack of availability of legal aid funding as an access to justice issue noting that funding in Ontario, at the time, was generally only available for persons with a gross annual salary of less than \$18,000, or \$37,000, for a family of 4.³ Ironically, this would mean that there may be a two tier system with the very poor and the very rich represented by lawyers and individuals in the middle class, who may have more complex issues, represented by a paralegal.

Need for Structural Reform Prior to Expansion of Scope

Justice Bonkalo's primary basis for the position that paralegals, with the appropriate training, would be able to practice aspects of family law is based on her meetings with tribunal adjudicators who regularly have paralegals appear before them.⁴ Although Justice Bonkalo notes that many of these tribunals may not function as effectively or efficiently without the participation of paralegals, this parallel does not apply to the existing family law system.

At the present time, family law is exclusively practiced in the Ontario Superior Court of Justice and the Ontario Court of Justice. Paralegals under their existing scope of practice are excluded from the former court, but may practice in the latter. Judges of the Ontario Court of Justice have notably indicated opposition to paralegals practicing family law, speaking out publicly against it.⁵

There have been suggestions in Ontario that certain aspects of family law, in particular the resolution of parenting schedules and yearly support reviews, may be better resolved in the tribunal context. However, unless these broader systemic changes are made first, the reliance of

³ *Supra*, footnote 1.

⁴ Family Legal Services Review, "iv. Tribunals' Experience With Paralegals"

⁵ Jacques Gallant, "Paralegals in family courts 'not the solution,' Toronto judge says," Toronto Star, March 14, 2017, available at: <https://www.thestar.com/news/gta/2017/03/14/paralegals-in-family-courts-not-the-solution-toronto-judge-says.html>

paralegals' experiences in administrative tribunals does not suggest that expanding their scope of practice to family law would improve access to justice or be in the public interest. More importantly, the report does not address the underlying structural problems that exist in the Ontario family law justice system.⁶

Justice Bonkalo's consultation with tribunal chairs also noted, "In the experience of *many* of these tribunals, paralegals excel at paperwork and advocacy in *less complex cases*" [emphasis added]. The type of paperwork currently required for the family law scope of practice before the Ontario Court of Justice is far more complex than what is found in their existing scope of practice. The financial statement forms for support (Form 13) are based on detailed and intricate tax and business records.

The assumption that paralegal experience in completing less complex paperwork in other areas of practice provides any indication that they may be competent even with training to engage in this type of work is misguided, especially when reviewing the existing educational requirements of paralegals in Ontario.

Problems with the Existing Paralegal Education

As part of the creation of the licensed paralegal profession in 2007, there was a 5-year mandatory review implemented in 2012. This review, known as the "Morris Report,"⁷ highlighted a number of challenges with paralegal training. Notably, the Morris Report indicates that the greatest criticisms of paralegal education came from the paralegal community itself. These critiques of paralegal education are echoed and confirmed by CABL members who are involved in teaching paralegal programs and providing supervision as part of their required formal internships.

The general consensus in 2017 is that the majority of issues with paralegal education are still very much true today. In part, this can flow from the nature of paralegal education, which is provided exclusively through community colleges or private colleges, whereas a lawyer

⁶ Robert Shawyer, "Missed opportunity for family law," Law Times, March 20, 2017,

<http://www.lawtimesnews.com/201703206021/commentary/speaker-s-corner-missed-opportunity-for-family-law>

⁷ David Morris, "Report of Appointee's Five-Year Review of Paralegal Regulation in Ontario," November 2012,

https://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/paralegal_review/Morris_five_year_review-

[ENG.html](#)

education can only be found in universities. The disparities in the educational standards and expectations have a direct impact on the public interest.

The Morris Report recommended that the Law Society should conduct a comprehensive review of paralegal training and education, as the appropriate competency profile for newly-licensed sole practitioners may be unacceptable. Although the Law Society made some improvements to paralegal education following this recommendation, the problems identified in the Morris Report still largely persist.

CABL recommends that prior to any expansion of scope of practice, that the existing educational programs be reviewed further by the law society. These audits should go beyond a review of the outline and evaluation tools used, and should include a content audit of how students are evaluated using spot inspections of academic records.

Creation of Sub-Licenses Within the Existing Scope of Practice

The Morris Report also recommended the law society should consider an implementation of sub-classes of paralegal licenses because of the problems with paralegal education and training. Instead of creating this for an entirely new area of practice in family law, the Morris Report was concerned that paralegals are currently graduating without adequate training in their *existing* scope of practice.

This Morris Report suggested that paralegals would be limited to a specific practice area within the paralegal scope, such as Small Claims Court, or a particular tribunal. The rationale was that the existing paralegal educational programs have not provided sufficient background or training to practice in all of the areas of practice within the existing scope of practice for paralegals. Despite the concerns around paralegal education, this recommendation was never adopted.

CABL's position is that before the province expands the scope of practice for the Law Society to create a special license for a sub-class of paralegals practicing family law, that this recommendation of the Morris Report be adopted. Paralegals should be licensed within their existing scope to ensure proper competency, and this should occur prior to any expansion of scope.

Creating sub-classes of paralegals within the existing scope will provide a more accurate insight into paralegal competence than any anecdotal information relayed by some tribunal chairs.

Improvements to the Licensing Exam

The final problem with the existing scope of practice for paralegals is with the licensing exam.

Although 70% of paralegal graduates surveyed in the Morris Report expressed satisfaction with their education for the purposes of the licensing exam, over half were dissatisfied with their education's ability to prepare them for practice.

The Law Society responded to these criticisms by introducing a substantive paralegal licensing exam in 2015. Although this was intended to increase the rigour of the requirements to enter the paralegal profession, many of the paralegals who have completed these requirements still note that it does not provide a sufficient barrier to entry for licensees who do not have the requisite knowledge to practice.

CABL suggests that the contents and application of the licensing exam be fully reviewed and improved further prior to any expansion of scope. The law society's new exam is not even 2 years old, and the ability of the law society to properly assess paralegal competence in the existing scope of practice is still under review.

Conclusions

The creation of the paralegal profession in 2007 was necessitated by a need for greater access to justice. Although paralegals may have assisted in promoting access to justice over the past decade, they are still a newly licensed profession that continues to change and develop.

As a new profession, the educational training and requirements of paralegals have been under review. The investigations conducted to date by the Law Society have already identified significant deficiencies in paralegal training and education in their existing scope of practice. Although improvements have been introduced, they have yet to be fully tested and evaluated.

Before expanding the scope of practice for paralegals further, it is prudent to ensure that paralegals in the existing scope of practice are properly competent. At this juncture, we do not have any indication that they are, and objective reviews and perspectives from within the paralegal community have expressed some concerns. For these reasons, the FLSR is still premature in looking to paralegals as part of the broader reforms to family law.