



OBA Submission on the Law Society of Ontario's Consultation on Family Legal Services Provider Licence

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Introduction

The Ontario Bar Association (OBA) appreciates the opportunity to provide this submission in response to the Law Society of Ontario's (LSO) Consultation Paper on the Family Legal Services Provider (FLSP) Licence (the "Consultation Paper") prepared by the Family Law Working Group ("FLWG")¹.

The Ontario Bar Association

Established in 1907, the OBA is the largest volunteer lawyer association in Ontario, with over 16,000 members who practice on the frontlines of the justice system and who provide services to people and businesses in virtually every area of law in every part of the province.

Each year, through the work of our 40 practice sections, the OBA provides advice to assist legislators and other key decision-makers in the interests of both the profession and the public, and delivers over 325 in-person and online professional development programs to an audience of over 12,000 lawyers, judges, students and professors.

This submission was prepared by members of the OBA Family Law Section, in consultation with the OBA Women Lawyers Forum. These members represent a wide range of clients within the family justice system, both in litigation and various alternative dispute resolution processes. They have significant expertise in provincial and federal family law legislation, case law, and applicable court rules across the full spectrum of family law issues.

Executive Summary

The OBA has and continues to be a strong advocate for access to justice. It is a central interest for the OBA's members and the public we serve. However, the paramount consideration of protecting the public cannot be sacrificed in pursuit of the laudable goal of providing legal services in the name of

¹ Law Society of Ontario, Family Legal Services Provider Licence Consultation Paper, June 2020. Available at <https://lawsocietyontario.azureedge.net/media/lso/media/about/convocation/2020/flsp-consultation.pdf>



access to justice. The objective must be to support “access” without compromising the quality of “justice.” In short, justice must be both affordable and meaningful for the people of Ontario.

The FLWG’s proposed FLSP Licence model does not achieve this objective. The proposed model goes further than the recommendations provided by Justice Bonkalo in the Family Legal Services Review², and it goes further than the task assigned to the FLWG by Convocation³.

There are several fundamental problems with the FLSP licence model as proposed in the Consultation Paper:

1. It fails to reconcile the fact that family law matters cannot be reliably identified as “simple” or “complex” at the outset, and evolve over time;
2. It does not provide a workable proposal for lawyers, paralegals and the public to distinguish between in- and out-of-scope activities;
3. It necessitates such robust training and education that its ability to deliver a competent professional that can provide legal services in a more cost-conscious manner is brought into serious question; and
4. It perpetuates a discussion that is distracting and directs investment away from other meaningful access to justice projects and initiatives.

The answer to the access to justice problem is not, in our submission, to expand the delivery of legal services to additional providers. This adds another tier to an already complicated and overburdened system, while ignoring existing problems that would benefit from scarce resources and reform. Rather, access to justice in family law can be better achieved by:

1. Simplifying and streamlining the family justice system;
2. Encouraging alternative dispute resolution processes where appropriate;
3. Supporting and enhancing the numerous access to justice initiatives already underway which assist the public in obtaining the legal advice they need from lawyers; and

² Justice Annemarie Bonkalo, Family Legal Services Review (December 31, 2016). Available at https://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/family_legal_services_review/

³ Law Society of Ontario, Family Law Action Plan. Available at <https://lawsocietyontario.azureedge.net/media/lso/media/legacy/pdf/2/2017/2017-dec-convocation-access-to-justice-committee-report-final.pdf>



4. Supporting and enhancing the variety of community resources, services and supports available from appropriate professionals and organizations.

The Family Law Context

The OBA's previous submissions to the Ministry of the Attorney General⁴ and to the LSO⁵ detail the critical context for this discussion, including:

- The importance of family law to the people of Ontario;
- The potentially devastating consequences of flawed or inappropriate advice;
- The inherent complexity of the legal area;
- The evolving nature of family law issues; and
- The inability to safely divide these matters into discrete issues.

Other justice participants, including the judiciary⁶, raised similar concerns.

These issues remain critical and yet have not been reconciled by the FLWG or the LSO to date. Access to justice cannot be achieved without recognizing these fundamental underpinnings, and the LSO cannot carry out its mandate to protect the public without adequately addressing this critical context.

The complexity of family law demands work on multiple fronts. The search for a single solution, by way of the creation of a FLSP licence, fails to understand that complexity and the need for a variety of responses. Further, the cost to all justice participants of the continued pursuit of an FLSP licence comes at the expense of investments in other access to justice opportunities.

Self-Represented versus Unrepresented Individuals

While the term "self-represented" is commonly used to describe those who are not represented by a lawyer, it is important to distinguish between self-represented and unrepresented individuals. Self-represented individuals are more appropriately defined as those who elect to represent themselves.

⁴ [Family Legal Services Review, Comments on MAG Consultation Paper](#) (April 29, 2016).

⁵ [Comments on the Family Legal Services Review Report](#) (May 15, 2017).

⁶ See Association of Ontario Judges submission to Justice Bonkalo (April 29, 2016); Ontario Court of Justice submission to Justice Bonkalo; Superior Court of Justice submission to Justice Bonkalo (May 16, 2016).



This could be for a variety of reasons, but is unrelated to the accessibility or cost of legal representation. Unrepresented individuals, on the other hand, are those who are unable to access legal representation, for a variety of reasons, and are the proper focus of this discussion.

The Proposed FLSP Licence Model

The FLSP licence model as proposed by the FLWG is not a viable access to justice solution, nor one that adequately protects the public. The model fails to reconcile the fundamental underpinnings of family law, including the inability to reliably assess the complexity of a matter at the outset, and artificially distinguishes between areas of family law that cannot realistically be divided in practice.

The model proposes such a broad scope that, in order to ensure competence and protection of the public, it requires very robust training. The extent of the training required makes it highly improbable that FLSPs will be able to truly serve the segment of the public that the model aims to serve.

Erroneous underlying assumptions and gaps in supporting data risk a model that creates an illusion of assisting in the access to justice crisis, while actually exacerbating pre-existing systemic issues and inequalities, and potentially creating new problems. Some systemic issues relate to the complexity of the process, the underlying adversarial nature of family court, and chronic underfunding of the courts, Legal Aid Ontario and community supports. The creation of a new license will not solve these issues and must be sensitive to this broader context.

The Consultation Paper also does not reconcile the experience in other jurisdictions, including Washington's Limited License Legal Technician (LLLT) model which was cancelled earlier this year given the significant cost of administering the program and the limited interest⁷.

⁷ Moran, Lyle. *Washington Supreme Court subsets limited license program for nonlawyers*. ABA Journal. June 8, 2020. Available at: <https://www.abajournal.com/news/article/washington-supreme-court-decides-to-sunset-pioneering-limited-license-program#:~:text=The%20court's%207%2D2%20vote,have%20considered%20approving%E2%80%94similar%20programs>.



Answers to the specific questions posed in the Consultation Paper can be found in **Appendix “A”**.

A Problematic Approach to Access to Justice

The average family of modest means

The FLSP licence model is premised on the circumstances of “an average family of modest means”. The fundamental flaw in utilizing this foundation is that the means of the parties and the complexity of the matter are not correlated. Lower means simply do not equate to simpler issues.

Some of the most complex parenting issues arise where there has been family violence or parental alienation, which we know crosses all segments of the population, including “an average family of modest means”. Many self-employed individuals also fall into this category of “an average family of modest means”; however, determining self-employment income for the specific purpose of child and/or spousal support can be very complex.

In short, considering the legal needs of an average family of modest means does nothing to narrow the scope of potential legal issues or their complexity.

Impacts for marginalized groups

The development of the FLSP licence risks further marginalizing vulnerable groups, including those with low incomes and survivors of family violence (discussed further below), by creating a three-tier system in which those with higher means can access a higher calibre (perceived or actual) of legal advice and representation, a second group can only access limited legal advice and representation, while still leaving a third group unrepresented.

This creates an inherently discriminatory system wherein women⁸ and other marginalized individuals may be more likely to remain unrepresented or be represented by non-lawyers (assuming FLSPs will, in fact, charge less than lawyers, which we dispute as detailed below), which could lead to real or perceived power imbalances.

⁸ Women in Canada have lower average personal incomes than men since 1976, the earliest year for which comparable data has been available: Statistics Canada, *The Economic Well-Being of Women in Canada: Women in Canada: A Gender-based Statistical Report*, by Dan Fox & Melissa Moyser (Ottawa: Statistics Canada, 16 May 2018) at Chart 1, online: <https://www150.statcan.gc.ca/n1/pub/89-503-x/2015001/article/54930-eng.pdf>, at p. 4.



Cost and billing practices of paralegals

If the fundamental barrier to legal advice and representation by lawyers is cost, there is no indication that another regulated profession that is likely to be, at best, marginally cheaper will be able to overcome that barrier. The scope of proposed practice for FLSPs is so broad that the cost of education and training, coupled with insurance, software (such as DivorceMate) and other overhead costs, makes it highly questionable as to whether FLSPs will be more affordable for the targeted “average family of modest means”.

The Consultation Paper suggests that paralegals bill clients smaller amounts, bill more frequently, charge lower hourly rates than lawyers and are more likely to charge block fees. However, the Consultation Paper also acknowledges that there is “no relevant data to support a comparison between what paralegals would charge for family law services and the amount lawyers currently charge”. Lawyers’ fees vary substantially across the province and based on the experience of the practitioner. Similarly, lawyers’ billing structures also vary. Today there are significantly more lawyers in Ontario than even a few years ago who are offering options other than a traditional full retainer or billable hour model.

The model also fails to consider regional differences, including the extent to which cost is the barrier for access to legal services in different areas across the province and the appropriateness of a FLSP model as a potential remedy. The Consultation Paper references the Final Report of the National Self-Represented Litigants Project⁹ as indicating that the “most consistently cited reason for self-representation is the inability to afford to retain, or to continue to retain, legal counsel”; however, Dr. Macfarlane acknowledges in her Report the limitations of such a qualitative study¹⁰, and difficulties in accessing the selected courthouse sites in Ontario¹¹. Ultimately, only 66 self-selected self-represented individuals were interviewed in Ontario, of which only 15 were outside the Greater Toronto Area (including 14 in Windsor and 1 in Sudbury), and there was no control group. The small size and GTA-focus of the underlying sample in Ontario gives rise to concerns about basing a

⁹ Julie McFarlane, “The National Self-Represented Litigants Project: Identifying and Meeting the Needs of Self-Represented Litigants Final Report” (May 2013). Available at <https://representingyourselfcanada.com/wp-content/uploads/2016/09/srlreportfinal.pdf>

¹⁰ *Ibid* at p. 23

¹¹ *Ibid* at p. 17



province-wide band-aid solution on these results. The nuances of the access to justice problem are much more complex and cannot be solved by adding another questionably more affordable service provider to an already complicated system.

A Problematic Scope of Practice for FLSPs

The broad proposed scope of practice outlined in the Consultation Paper is problematic in that it attempts to include all family law issues, and then creates an unrealistic division of issues by excluding certain issues that are expected to be more complex. This approach highlights two of the fundamental elements of family law which make such an approach unworkable:

1. Family law issues are almost always intricately intertwined and overlapping; and
2. Matters which appear to be “simple” at first instance can quickly and with little warning become complex, either as additional facts are uncovered or as circumstances change.

The result is an unworkable scheme with illusive boundaries that cannot be readily understood by the public and cannot in practice be applied by lawyers and paralegals. Family law needs to be recognized for what it is: a complex area of many layered laws and rules that cannot easily fit into a box of “simple” or “complicated”.

Numerous distinctions between in- and out-of-scope activities as outlined in the Consultation Paper are impractical or unworkable in practice. For example, support issues involving self-employed individuals are within scope, while income determinations are outside of scope. In practice, self-employment income necessarily involves issues of income determination.

The OBA is also concerned about the prejudice to a client who retains a FLSP, but is required to transition to a lawyer when the matter evolves to exceed the permitted scope. The transition between professionals may result in increased costs, delayed resolution, and increased stress and emotional toll on clients who are already in a challenging situation.

With this foundation, the OBA’s comments in respect of specific areas of family law included within the FLSP’s proposed scope of practice is detailed below.



Property

Property issues are an easy example of the complexity of family law. They require the integration of substantive legal analysis across multiple legal areas, and are generally final by nature and trigger limitation periods, carrying significant risk of liability in the event of errors. Claims related to possessory rights to the matrimonial home also have significant ramifications, particularly where there are issues related to family violence or concerns about children.

In determining the equalization of net family property (NFP) under Part 1 of the *Family Law Act (FLA)* for married spouses, the following legal areas must be considered:

- *Tax law* - The requirement to deduct contingent liabilities from date of marriage and date of separation assets requires an understanding and appreciation of income tax law. Experienced family law practitioners routinely retain a consulting accountant to assist and advise on the preparation of even the most basic NFP Statements where contingent tax liabilities may exist. Actual or contingent tax issues exist on almost every file dealt with under Part I of the *FLA*, including on all registered assets, investment accounts, and capital and business property.

Further, an understanding and appreciation of the *Income Tax Act (ITA)* is essential for the treatment of the principal residence and attribution rules under sections 74.1 and 74.2 of the *ITA* for income and capital gains on property transferred between spouses or into a trust.

- *Estates and trusts law* - The definition of property in the *FLA*, and the excluded property under subsection 4(2) require an understanding and appreciation of the law of estates and trusts. Estate freezes, family trusts, trust agreements, family corporations, joint ventures, limited partnerships, and inter vivos transfers are frequent components of this analysis.

There is an inconsistency in the proposed scope in that equitable or trust claims are out of scope, but equalization of net family property is within scope where the latter requires consideration of trust interests.

- *Pension law* - The definition of property requires interests in pension assets to be included in the NFP and valued. Retaining an actuary is required for federal pension assets and is recommended to assist counsel for Ontario plans when interpreting the Statement of Family Value and drafting the correct clauses and forms required by the Financial Services Corporation of Ontario.
- *Personal injury law and civil litigation* - The exclusion of certain specified damage awards under section 4(2) of the *FLA* requires an understanding of personal injury and civil law. An understanding and assessment of the heads of damages including income loss, accident benefits, cost of future care, general and special damages, with an analysis of the pleadings, settlement and mediation briefs and notes is required.



- *Corporate law* - The value of a private corporation forms part of the shareholder's NFP and must be valued to calculate the equalization payment. This requires a comprehensive understanding of corporate law and corporate tax law. The terms and benefits of any shareholders' agreements play a significant role upon separation and may have an impact on the financial position of the family post-separation.

The same considerations apply where income from the corporation must be determined for child and/or spousal support purposes.

- *Indigenous law* - Property on Indigenous reserves is not subject to the *FLA* rules about property division. This is an extremely complex area as the division of family property on reserve may be covered by a particular First Nations' own land code under the *First Nation Land Management Act*, a First Nation's own matrimonial real property law made under the *Family Homes on Reserves and Matrimonial Interests or Rights Act (FHRMIRA)*, or the default rules under the *FHRMIRA*.

Property issues were not included in the Family Legal Services Review Report Recommendations (the "Bonkalo Report")¹², and no analysis or justification has been provided as to why these issues have been included now.

It is the OBA's position that property claims are not an appropriate area for inclusion in the FLSP scope, regardless of any limitations that might be placed around it.

The practical reality is that many property matters may well fall outside of the proposed FLSP scope, given the limitation on third party experts who are routinely required in these matters. Further, property issues as between unmarried spouses, which require application of equitable trust law, are already outside of the proposed scope. The need for a clear and workable scope further supports exclusion of all property issues.

Spousal support

Spousal support is a complicated legal area. Application of the *Spousal Support Advisory Guidelines (SSAG)* is subject to the complex threshold legal issue of entitlement. In addition, the *SSAG* are reliant on a determination of "income" for each party which can have a large impact on the range of support amounts generated by the *SSAG* and is often an intricate issue involving many intertwined legal issues. Lump sum or fixed term spousal support awards present unique challenges, and settlements

¹² *Supra* note 2.



that include end dates and final releases carry significant risk of liability. Further, spousal support and property division intersect as property division can impact on both the entitlement to and the amount, if any, of spousal support.

It is also inconsistent for the FLSP scope to exclude income determination and tax issues, but permit spousal support claims when all spousal support cases require a detailed understanding and application of income tax law. The basic *SSAG* calculation is based on differing assumptions and applications of after-tax income (NDI) after an assessment and application of various income tax deductions, credits, and benefits. Accountants are also routinely engaged by counsel to assist in spousal support matters.

As with property issues, spousal support was similarly not included in the Bonkalo Report Recommendations, and no analysis or justification has been provided for its inclusion now.

It is the OBA's position that spousal support is not an appropriate area for inclusion in the FLSP scope, regardless of any limitations that might be placed around it.

Child support

While the *Guidelines* (the *Federal Child Support Guidelines* or the applicable *Ontario Child Support Guidelines*) are applicable in the vast majority of cases and the court has limited discretion as to when it may depart from them, the determination of child support can and often does become complicated. For example, this may occur where the income of a parent/spouse is not straightforward and requires consideration of ss. 17-20 of the *Guidelines*, where retroactive or retrospective support claims are made, or where the discretionary sections in the *Guidelines* come into play (e.g., s. 3(2) for a child over the age of majority, s. 9 for shared custody/parenting). In these circumstances, it is the OBA's position that the complexity of the issue, in light of the importance for a child, necessitates the involvement of a lawyer and is not appropriately within the purview of an independent FLSP scope.

While with the benefit of hindsight, it may be possible to identify some simpler child support matters, the practical reality of family law disputes makes it exceptionally challenging to identify such cases at the outset. Many cases may appear to be "simple" but quickly evolve to become more complex as additional facts are learned and/or circumstances change. For this reason, we cannot support the inclusion of child support issues in the FLSP scope.



Parenting

Parenting matters, including decision-making (custody), parenting time (access), relocation/mobility, and contact orders for non-parents (e.g. grandparents), are of fundamental importance and significant consequence to all family members, including vulnerable children. It is extremely difficult to ascertain how simple or complex a particular parenting dispute will be, as children's issues are fluid and multi-faceted. A child or a parent's circumstances will change over time, sometimes rapidly and with little or no warning. Parenting issues can quickly become complex and high conflict. They can also be complicated by concerns related to family violence, safety, a child's special needs, or substance abuse or mental health issues of a parent or caregiver.

It is the OBA's position that it would be clearly inappropriate for a FLSP to act where:

- A parent is charged criminally with a crime related to the other parent or the child;
- A parent seeks a restraining order, which can result in criminal charges if breached;
- A parent seeks an order for no parenting time or for only supervised parenting time;
- A children's aid society has started an investigation or a court application;
- A "litigation expert" within the meaning of R. 20.2 of the *Family Law Rules* becomes involved;
- Evidence of a "participation expert" is needed to determine parenting ability or issues affecting the best interests of the child;
- A party or a child is outside of Ontario, including child abduction or other international/Hague Convention matters; or
- Where the matter is "complex" or "high conflict" because of concerns such as addiction or parental alienation, which issues are difficult to ascertain and likely increase conflict.

We recognize that there are currently many non-lawyer mediators and parenting coordinators, often with mental health and/or social work training, providing valuable assistance to separated parties involved in parenting disputes. We also recognize that there are some parenting matters that may, with the benefit of hindsight, be considered "simpler" in nature. However, given the practical realities of family law disputes, it is impossible to identify these matters at the outset, and thus we cannot support the inclusion of parenting issues in the FLSP scope.



Family violence

The creation of the proposed FLSP licence is further complicated by the fact that family violence, which disproportionately affects women¹³ and children, adds a layer of complexity and safety concerns to a family law matter, such that we cannot support inclusion of any matter involving family violence in the FLSP scope of practice.

Survivors of family violence require strong legal representation, without limits, to help protect them from their abuser and to empower them to reach just resolutions. It is common for abusers to continue to exert power and control over their former partners by engaging in “legal bullying” either in court or out of court. There are concerns that the FLSP licence could exacerbate challenges faced by survivors of family violence or risk their safety.

That said, given the prevalence of family violence and difficulty detecting it, we do support FLSPs conducting Domestic Violence and Power Imbalance Screening (“Screening”), and in fact, support an obligation for FLSPs to screen potential clients and immediately refer the matter to a lawyer if family violence is detected. This Screening is currently required only for family law arbitrations, but is also common in mediations and can be conducted by non-lawyers. With adequate education and training, this is a role FLSPs can play.

Additional areas of discussion

There have been discussions in the bar that have recognized areas that, in certain instances, may be discrete and separable. These areas include:

- Simple or joint divorces, where all corollary relief has been resolved by way of separation agreement or court order;
- Change of name applications;
- Family Responsibility Office (FRO) enforcement matters;
- Gathering disclosure and preparing financial statements and certificate of financial disclosure, provided these documents are subsequently reviewed by a lawyer;
- Providing legal information on court process, ADR processes and family justice services intended to assist individuals dealing with issues arising from separation and divorce;

¹³ See, e.g., <https://www150.statcan.gc.ca/n1/pub/85-002-x/2013001/article/11805/11805-3-eng.htm>



- Screening for domestic violence and power imbalances (as can currently be conducted by non-lawyers for mediation and arbitration purposes with appropriate training and education); and
- Attending on administrative court appearances where there is no reasonable prospect of a substantive order being made and a lawyer is otherwise retained on the file (i.e. acting as an agent for a lawyer)

However, the Consultation Paper does not reconcile the challenges in identifying how to delineate these areas in a way that is both recognizable for the public and workable for FLSPs and lawyers, while still protecting the public. In fact, by proposing a significantly broader scope, the Consultation Paper detracts from the requisite focused discussion on whether these areas could be adequately separated out and identified, what training and education would be required, and whether it is economically feasible.

Training and Education Requirements

Ultimately, the appropriateness of any training and education requirements cannot be fully assessed until a decision has been made to move forward with the creation of an FLSP licence and the precise scope of practice for FLSPs has been definitely determined. That said, the education that would be required to ensure competency in the broad scope of activities outlined in the Consultation Paper would require a time and financial cost that would jeopardize the viability of the licence and/or its ability to make a notable impact on improving access to justice. It is our position that the competencies required for the proposed scope in the Consultation Paper cannot be achieved with the proposed training program of six to eight months of full time study, plus a short field placement.

Should the LSO proceed to develop a FLSP license, we urge the LSO to consult further on the specifics of any education, training and other licensure components once the scope of practice has been determined.

A Better Access to Justice Solution

The primary question remains how to ensure all Ontarians have access to fair resolution of their family law legal issues, regardless their personal circumstances. This requires, as described by Justice



Cromwell, access to appropriate knowledge, resources, and services to deal effectively with family legal matters.¹⁴

It is the OBA's position that access to justice is better achieved by supporting and enhancing the access to justice initiatives that enable the public to access the proper legal advice and representation they need from lawyers, in addition to a variety of other services and supports from appropriate professionals wherever necessary, to help them resolve their issues. This, coupled with system-wide changes to simplify the court process and further support and encourage out-of-court resolution (where appropriate), is required to truly and meaningfully enhance access to justice for Ontario families. It is time to refocus the discussion on meaningful and actionable access to justice.

During the 2020 Access to Justice week, LSO Treasurer Teresa Donnelly noted *"So much good work is happening on the ground to change how family law clients can get help, both publicly and privately, along the spectrum from public legal education and initial consultations on one end, all the way up to full representation"...* *"I wish to recognize the family law bar for taking on these projects in direct response to challenges that have been identified in terms of access to affordable legal representation."*¹⁵

With a stated mandate to protect the public, the LSO has an important and valuable role to play in promoting, supporting and enhancing the ongoing access to justice initiatives, in the interest in providing fair and reasonable access to competent family law advice and representation.

Attached as **Appendix "B"** is a selection of ongoing access to justice initiatives. Some initiatives are focused on providing legal information, while others are focused on access to affordable legal advice and representation. Many of these initiatives have only become available in the past few years and are continuing to develop and expand (for example, Family Law Limited Scope Services Project, Steps

¹⁴ Action Committee on Access to Justice in Civil and Family Matters, "Meaningful Change for Family Justice: Beyond Wise Words; Final Report of the Family Justice Working Group of the Action Committee on Access to Justice in Civil and Family Matters" (April 2013) at pp. 1-2. Available at: <https://flsc.ca/wp-content/uploads/2014/10/services5.pdf>

¹⁵ The Lawyer's Daily, *Ontario family law event details recent innovations in service delivery* (October 30, 2020). Available at <https://www.thelawyersdaily.ca/articles/22015/ontario-family-law-event-details-recent-innovations-in-service-delivery>



to Justice, Family Law Guided Pathways). New initiatives are also continuing to be launched, including Pro Bono Students Canada's virtual Family Justice Centre, launching in 2021.

These programs have and will continue to significantly improve the options available for many Ontarians to access legal information and advice. Many of these initiatives would benefit from broader support and, in some cases, province-wide coordination.

Further, the COVID-19 pandemic has highlighted new opportunities for improving access to justice. The family law bar has shown great alacrity in making their services available virtually, given the restricted operations of family courts due to the pandemic. They have worked to overcome that challenges of the pandemic, and seize opportunities to support and advocate for modernization of the justice system. The increase in remote hearings enables clients to more easily and cost effectively retain lawyers outside of their jurisdiction. For those who may be unable to afford to retain counsel in a large centre like Toronto, lawyers in smaller centres, with lower rates, are now more accessible. Similarly, in regions which may be experiencing an insufficient number of available family lawyers, retaining counsel from another region is more feasible, without incurring significant travel costs. In fact, with an increase in remote hearings, family lawyers are able to reduce costs for their clients as travel time and costs are eliminated.

It is also important to recognize that access to justice in family law also does not just mean access to the court system. In its 2013 Final Report, the Action Committee on Access to Justice in Civil and Family Matters called for a paradigm shift towards non-adversarial dispute resolution methods such as mediation and collaborative practice.¹⁶ This Report identified the expanded use of these methods to be “probably the single most attainable, efficient and effective way to enhance access to family justice.”¹⁷ The benefits of alternative dispute resolution processes have not been fully realized,

¹⁶ *Supra* note 14, at pp. 6 & 20-23.

¹⁷ *Ibid.*, at p. 23.



although these processes will be further encouraged by the March 1, 2021 amendments to the *Divorce Act*¹⁸ (and largely mirror amendments to Ontario legislation¹⁹).

Additionally, there are other opportunities for the LSO to explore to further support access to justice, which could include financial assistance or incentives for lawyers engaged in access to justice initiatives.

Conclusion

Once again, the OBA appreciates the opportunity to provide these comments in respect of the Consultation Paper and proposed FLSP licence framework. We look forward to continuing a discussion with you on how we can work together to improve access to justice in family law in Ontario.

¹⁸ Bill C-78, *An Act to amend the Divorce Act, the Family Orders and Agreements Enforcement Assistance Act and the Garnishment, Attachment and Pension Diversion Act and to make consequential amendments to another Act*. Available at: <https://www.parl.ca/DocumentViewer/en/42-1/bill/c-78/royal-assent>.

¹⁹ Bill 207, *Moving Ontario Family Law Forward Act, 2020*. Available at: <https://www.ola.org/en/legislative-business/bills/parliament-42/session-1/bill-207>.



Appendix "A"

Responses to Questions Posed in the Consultation Paper

The following questions were outlined in the Consultation Paper for consideration. Below please find our succinct responses to the questions, along with references to more detailed discussion within the body of our submission.

Scope

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

As detailed above, it is the OBA's position that the proposed scope as outlined in the Consultation Paper will not support increased access to affordable, competent family law legal 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?*

The OBA has significant concerns about the assumptions upon which the framework is founded and considerable doubts about the viability of the model, given the extent of training and education that would be required to achieve competencies in the broad scope of activities proposed.

Competence

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?*

The appropriateness of the competencies cannot be fully assessed until a decision has been made to move forward with the creation of a FLSP licence and the precise scope of practice for FLSPs has been definitely determined.

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

On page 14 above, we have outlined areas that may warrant further consideration if the LSO elects to move forward. That said, it is the OBA's position that the development of a FLSP



licence comes at considerable risk to the public, and that access to affordable, competent family law services can be better achieved by supporting and enhancing the numerous access to justice initiatives already underway which assist the public in obtaining the legal advice they need from lawyers, and the community resources, services and supports available from appropriate professionals and organizations.

Training Program

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

The appropriateness of any training and education requirements cannot be fully assessed until a decision has been made to move forward with the creation of an FLSP licence and the precise scope of practice for FLSPs has been definitely determined. That said, it is our position that the competencies required for the proposed scope in the Consultation Paper cannot be achieved with the proposed training program.

Other Components of Licensure

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

As discussed above, the extent of training and experience required depend on the scope of practice. That said, given the highly personal and emotional nature of family law, communication and client management skills are an essential element of competency. In fact, LawPRO's Family Law Claims Fact Sheet identifies "communication" as the most common source of malpractice claims in family law²⁰. These skills are best learned "on the job", rather than "in the classroom". The same is true for practice management and ethical and professional responsibility. For this reason, experience in practice is an important element of FLSP licensure.

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?*

²⁰ LawPro, Family Law Claims Fact Sheet. Available at <https://www.practicepro.ca/wp-content/uploads/2020/04/Family-Law-Claims-Fact-Sheet.pdf>



The Consultation Paper proposes one to three years of full-time practice experience as a licenced paralegal and/or a two to three month field placement in family law. We reiterate that the requisite training is highly depended on the scope of practice, and cannot be fully discussed until the scope is determined. Generally, however, we would suggest that a two to three month field placement on its own would not be sufficient, but would be valuable in combination with practice experience as a licenced paralegal.

Initially, field placements would need to be with a lawyer practicing in the area of family law. We recommend that, in order to be able to offer a field placement, a lawyer must have been in practice for at least five years, and have a practice that is comprised of, at minimum, 50% of family law matters. In the future, experienced FLSPs may be able to offer field placements for new FLSP candidates; however, this should be considered in the context of a broader review of the model.

Depending on the demand for the FLSP licence, consideration will need to be given to whether sufficient field placements will be available, or whether alternative experiential learning (similar to the Law Practice Program) should also be contemplated.

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

Yes. A CPD requirement focussed on family law is not only appropriate, but essential should the LSO proceed with the development of a FLSP licence. Family law is constantly evolving and it is critical that FLSPs keep up to speed on developing caselaw, trends and best practices to ensure they remain competent.

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

Family law lawyers regularly rely on law clerks and articling students to assist on discrete tasks, subject to their supervision. There is a potential to consider expanding the tasks that law clerks and articling students currently perform under a lawyer's supervision. In fact, expanding the tasks that articling students could perform under the supervision of a lawyer may incentivise lawyers to take on articling students, thereby assisting in reducing the articling crisis.



The OBA does not, however, support creation of a separate FLSP licence as being a viable access to justice solution that can adequately protect the public. If such a licence is nevertheless developed and opened to non-paralegals, careful consideration must be paid to education and training requirements where the licensee does not have the same background experience as required of a licenced paralegal. The discussion and consideration of the FLSP licence to date has been focused on licenced paralegals. The proposed competencies for the FLSP licence build on the competencies of these professionals with an emphasis on specific skills required to provide family legal services. Any discussion on expanding the eligibility to other professionals necessitates an analysis of that profession's educational, professional and licencing requirements and competencies to assess their relative equivalency to that of licenced paralegals, and consideration of whether additional education or other requirements may be needed.

General

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

As discussed above, the OBA challenges the assumption that FLSPs would, in fact, be more appealing to self-represented litigants. There is also significant risk of adding another layer of confusion for the public with a scope of practice for FLSPs that cannot be understood by the public and is not workable for lawyers and FLSPs in practice.

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

Given the underlying systemic issues that the FLSP licence will not address, in combination with recent changes and ongoing enhancements to family law access to justice initiatives, we submit that the FLSP model is not an appropriate path forward at this time, particularly given the concerns it raises in respect of the paramount consideration of protecting the public. For additional discussion on a more appropriate approach to enhancing access to justice, please see the section "A Better Access to Justice Solution" above.

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

Yes, as detailed in our submission, there are many aspects of the proposed licencing framework that are unfeasible, including but not limited to:



- The ability of FLSPs to provide competent legal services in a more cost-effective manner than lawyers;
- The delineation between in- and out-of-scope activities;
- The ability to categorize at the outset of a matter whether it falls in- or out-of-scope for a FLSP;
- The prejudice and cost to clients who must transition from a FLSP to a lawyer when a matter becomes out of scope;
- The ability to achieve competencies in the broad scope of permissible activities within the proposed training framework; and
- Potentially, the availability of field placements for FLSP candidates.



Appendix “B”

Selection of Ongoing Access to Justice Initiatives

I. Access to Legal Advice and Representation

Billing Models and Rates

Lawyers’ fees vary substantially across the province and based on the experience of the practitioner. Similarly, lawyers’ billing structures also vary. Today there are significantly more lawyers in Ontario than even a few years ago who are offering options other than a traditional full retainer. Many lawyers now offer alternative fee structures, designed to reduce overall legal fees, as compared to the traditional “billable hours model.” These alternative fee structures may include, but are not limited to, unbundled legal services (i.e. limited scope retainers), flat-rate fee structures, and sliding scale fee structures.

Legal Coaching

Through legal coaching, lawyers assist clients in moving their own matters forward by providing, among other things, substantive legal advice, hearings coaching, and negotiation and settlement coaching.

[Family Law Limited Scope Services Project \(FLLSS Project\)](#)

This province-wide initiative offers clients the opportunity to get legal advice where needed and act for themselves where preferred, reducing their reliance on counsel and the associated expense. The project involves more than 200 family lawyers in over 50 communities, who can be found through the project website. This project seeks to improve access to justice by offering limited scope retainers, legal coaching services, and summary legal counsel for family law matters. Because this project offers unbundled legal services, it can be more affordable for the client, and the client maintains control over what they are engaging the lawyer to do.

[Advice and Settlement Counsel \(ASC Project\)](#)

This pilot program is part of the FLLSS Project which was developed in cooperation with the 393 Bench and Bar Committee and the Judiciary and Court Services. The ASC Project gives access to counsel where litigants request it, at a lower overall cost to the litigant. This project has a roster of approximately 50 trained family law lawyers in Toronto; they provide summary legal advice to unrepresented litigants and can assist in negotiating consents at meetings where both parties are present.

[JusticeNet](#)

This is a not-for-profit service for persons who need legal assistance but cannot afford standard legal fees and are ineligible for legal aid. The lawyers listed on the JusticeNet website offer reduced legal fees to qualifying clients.

Pro Bono Lawyer and Law Student Initiatives

Some lawyers provide legal services to qualifying clients at no charge (pro bono legal services). For example, [Pro Bono Ontario](#) manages projects and services that seek to connect volunteer lawyers



and law students to assist Ontarians facing legal issues who cannot otherwise afford standard legal fees.

In January 2021, Pro Bono Students Canada will also be launching virtual legal clinics as part of the Family Justice Centre (FJC). The FJC will offer free summary legal advice for qualifying Ontario residents for family law matters. Law students will have the opportunity to participate in FJC initiatives, and will be supervised by pro bono private bar lawyers. The income eligibility thresholds for the FJC will be higher than the limits established by Legal Aid Ontario, thereby serving more families and creating greater access to justice. Since these FJC clinics will operate virtually, this may help to increase access to justice in underserved and remote communities.

Free Legal Clinics Held by Not-For-Profit Organizations

Several not-for-profit organizations, such as [The Women's Centre of Halton](#) and [Luke's Place Virtual Clinic](#), offer free legal clinics for their clients. Lawyers who participate in these initiatives volunteer their time to assist vulnerable persons who need legal assistance but cannot otherwise afford standard legal fees.

II. Access to Legal Information

Community Legal Education Ontario (CLEO)

Community Legal Education Ontario (CLEO) offers expanded public legal education and information resources, which include:

- [Step to Justice](#), a collaborative online public legal information and education project that provides step-by-step information about common family law processes;
- [Steps in a Family Law Case](#), which has three interactive flowcharts to help people understand and work through family law court processes;
- [Family Law Guided Pathways](#), which allows users to participate in online interviews to help to complete family law court forms

These CLEO resources are available in both English and French, and were launched after the Bonkolo report. CLEO also provides free print public publications on family law issues in other languages, such as Spanish, Chinese, and Tamil.

[Mysupportcalculator.ca](#)

This free online resource is a very helpful tool for self-represented and unrepresented parties, as it helps them to assess their child support and spousal support rights and obligations.

III. Other Court-Connected Services

Mediation Services at Family Court Locations

These mediation services are subsidized by the Ministry of the Attorney General. On-site mediation provides 2 hours of free mediation in advance of pending court dates, while off-site mediation is also available on a subsidized fee schedule.



[Ministry of the Attorney General Mandatory Information Program \(MIP\)](#)

This program is designed to give all litigants, whether self-represented or represented, a fulsome understanding of their rights and obligations, as well as an overview of family court processes and alternative dispute resolution mechanisms.

[FLIC Offices](#)

Family Law Information Centers provide public legal information about family law-related issues, family justice services, alternative dispute resolution mechanisms, and local community resources. FLIC offices also provide written aids as well as referrals to mediation services.