



29 Centre Street West  
Richmond Hill, ON L4C 3P3

**The Association of Family and Conciliation Courts, Ontario Chapter (AFCC-O)**

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**Dated: May 4, 2017**

The Honourable Yasir Naqvi  
Attorney General of Ontario  
720 Bay Street, 7<sup>th</sup> Floor  
Toronto, Ontario

Mr. Paul Schabas  
Treasurer of the Law Society of Upper Canada  
Osgoode Hall  
130 Queen St. West  
Toronto, Ontario

[commentsflsr@lsuc.on.ca](mailto:commentsflsr@lsuc.on.ca)

Dear Sirs,

**Re: AFCC-O Response to the Family Legal Services Review**

We are writing to you on behalf of the Board of Directors of the Ontario Chapter of the Association of Family and Conciliation Courts (AFCC-O) in response to the *Family Legal Services Review* of Justice Annemarie Bonkalo, noting that the judicial members of this organization are abstaining from participation in this response.

The Association of Family and Conciliation Courts is an interdisciplinary association of lawyers, mental health professionals, social workers, psychologists, mediators, court administrators, researchers, family law judges and other professionals working in the family dispute resolution field. The AFCC-O has approximately 475 members in Ontario who are dedicated to the resolution of family conflict. Our members share a strong commitment to education, innovation, research and collaboration in order to benefit communities, empower families, promote a healthy future for children, and improve access to family justice. Our focus is on the promotion of the interests of children and parents involved in the justice system and family dispute resolution. The AFCC-O undertook a survey of its members in 2016 on issues related to access to family justice

## AFCC ONTARIO CHAPTER

and made submissions to Justice Bonkalo. In preparing this Response to the *Review*, we again asked for the views of our members. A Working Group of Seema Jain, Maxine Kerr, Julia Tremain and Nicholas Bala prepared a draft Response, which has been adopted by the Board with minor amendments.

The AFCC-O recognizes that separation and divorce are complex human processes that create problems that can best be understood and addressed in a multi-disciplinary way, and that there are many limitations to the present approaches to these problems. We support the need for fundamental changes in Ontario's justice system so that outcomes for children and parents can be improved, and the human and financial costs of dispute resolution reduced.

The *Review* does a good job of identifying issues and problems with access to family justice in Ontario, and recognizes the need for change, including through increasing the use of para-professionals to provide legal assistance to those involved in the family justice process. However, as detailed in this Response, we are concerned that there is insufficient attention to the potential implications and risks of some of the recommendations in the *Review*, in particular in regard to the provision of representation for family litigants by paralegals who are not under supervision of lawyers, especially if cases involve domestic violence or higher conflict. We note that some of the recommendations advocate changes not undertaken in other jurisdictions and must be regarded as a social experiment. We urge a cautious approach to those recommendations, including carefully monitored staged implementation on a limited scale before considering province-wide implementation.

We begin this Response by briefly discussing the broader context of issues related to problems in the family justice system beyond those addressed in the *Review*, and then turn to the specific Recommendations in the *Review*, expressing support for some of the recommendations as well as concerns about some recommendations and suggestions for improving possible implementation.

### **The Broader Context of Problems with the Family Justice Process**

Much of this Response focuses on the issues in the *Review*, namely improving access to legal services, including the provision of family justice services by non-lawyers. However, it is important to see the issue of access to family legal services in a broader context of other measures that the government must take to improve the family justice system and access to family dispute resolution services. The ultimate goal must be to achieve better outcomes for children and families, as well as to reduce costs for litigants and the government.

At present, the family justice process in Ontario is too often cumbersome and imposes significant, unnecessary costs both on individuals and governments. As noted in the *Review*, establishing adequately supported Unified Family Courts throughout the province would improve both the efficiency and effectiveness of the family justice system. Having a single, experienced family law judge to case manage family law files would help to reduce costs, promote settlements, and address some of the problems faced by self-represented litigants, especially for higher conflict cases.

Improved public legal education and better use of accessible electronic forms, with appropriate guides, would also help both self-represented litigants and the courts. Increased funding for

Ontario Legal Aid in family and domestic violence cases would directly address the lack of access to legal advice and representation for many low income Ontarians.

Although economic issues are a major reason for lack of legal representation, as observed in the *Cromwell Report on Access to Family Justice*, some high-conflict individuals are choosing to self-represent and take their matters to trial, while taking unreasonable positions. As recommended in *the Cromwell Report*, more effective use of cost sanctions would likely assist in addressing some of these cases. Advice and assistance by paralegals with insufficient specialized training regarding high conflict cases may in some cases exacerbate conflict and make resolution more difficult.

### **The Need for Research and Caution**

As recognized in the *Review*, there are great challenges in addressing issues related to the provision of legal services for family cases. On the one hand, there is a continuing concern in Ontario and many other jurisdictions about the increasing number of self-represented family litigants, and the lack of access to affordable legal assistance and representation. On the other hand, family law matters are of profound importance. Poor quality legal assistance can endanger the safety of vulnerable parents and their children, and can result in a significant decrease in their economic and social situations. As the *Review* recognizes, there are times where “no assistance may be better than some assistance” by a non-lawyer who may provide bad advice, making it more difficult or impossible for a judge to provide later assistance. A related concern is that clients may not appreciate that the non-lawyer professional lacks the requisite knowledge and experience to provide any legal advice. As a consequence the clients may instruct the non-lawyers to take positions on their behalf that are unreasonable, potentially unsafe and/or without a legal basis.

There are some very sound recommendations in the *Review*. However, there is a lack of research to support some of the other recommendations, most notably related to paralegals in unsupervised family practice. We would note that much of the research discussed in the *Review*, including from Loom Analytics and the National Self-Represented Litigants Study elides civil and family cases, and does not adequately recognize the distinctive nature of family law and the unique vulnerability of litigants in these cases.

While all jurisdictions in North America are facing challenges related to growing numbers of self-represented family litigants, and a range of measures are being adopted to address them, none of these other jurisdictions have adopted the type of expansive use of *unsupervised* paralegals for family cases that is proposed in the *Review*. It is also unclear how the recommendations in the *Review* will be implemented if Ontario moves towards province-wide Unified Family Courts at the same time as it experiments with the possibility of paralegals providing representation in family court. The wholesale adoption of this set of *Review's* recommendations related to unsupervised paralegals **would result in a social experiment being conducted on vulnerable Ontarians**, and therefore we urge real caution before implementing the recommendations related to use of unsupervised paralegals.

Separation and divorce – and the parenting, financial, and other issues that arise as the sequelae of those – are incredibly complex matters, involving many dimensions, aspects, and

considerations. These aspects and considerations, in turn, are not infrequently in tension with one another, and they are also often interdependent. When seeking to locate solutions for the family justice system, then, it is only to be expected that the remedies that will be effective, or at least most effective, will of necessity also often be complex and multi-faceted. As the old maxim has it, one would do well to be very wary of simple solutions to complex problems, for rarely indeed do they constitute effective solutions. In the same vein, the problem of access to the family justice system cannot be isolated and seen as solely a “legal” issue to be resolved, because separation and divorce invariably engage many important non-legal dimensions, too; perhaps more so than in most other areas of the law. For the families themselves, “separation and divorce are not legal problems with some social aspects; they are social problems with some legal aspects”. In fact, they are not even just legal and social problems; they are also societal matters, as they have an incredible impact upon the members of our society, and quite acutely upon some of society’s most vulnerable and important members: our children. It is therefore critical that a multi-disciplinary, broad, holistic, and integrated approach be seen as the touchstone for finding appropriate and sustainable solutions to problems facing the family justice system. This is entirely consonant with the mandate of AFCC-O, and AFCC-O believes it could play an important role in helping to find the holistic, nuanced, and inclusive solutions that will be necessary.

### **Specific Comments on the *Review’s* Recommendations**

#### Recommendations 1, 2 and 3

We support recommendations 1-3, which focus on improved access to lawyers, including encouraging greater use of limited scope retainers and coaching. We note that the Canadian Research Institute for Law and the Family is currently undertaking a study on how to increase use and effectiveness of limited scope retainers in family cases.<sup>1</sup>

#### Recommendations 4-15: Unsupervised Paralegals

##### *General Comments*

There is a serious concern about the recommendations that delineate when paralegals can and cannot represent clients. The *Review* recommends permitting paralegals to take on files related to custody, access, “simple” child support, and restraining orders, during the pre-trial stages. The *Review* did not provide a rationale for the distinction between these cases and cases that also involve property, spousal support or less simple child support issues. However, there is a real concern that making this distinction sends a message that preserving wealth is being prioritized over the needs of children. In reality, issues related to custody and access of children and restraining orders for domestic violence are the most important that the family justice deals with, and these are often the cases that are most challenging for even experienced family lawyers. These cases often raise issues of the interaction between the family, child protection and criminal processes; it is clearly not sufficient to know the substantive law, issues of evidentiary and procedural law affect these cases. Further, in family law matters, child related issues are often intertwined with financial ones, and separating them may fail to recognize the complexity and importance of child-related issues.

Additionally, the *Review* appears to minimize the significance of interim and pre-trial stages. These are often the most difficult, challenging and important stages of the process, when critical

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<sup>1</sup> Details respecting this research initiative may be found at [www.crilf.ca](http://www.crilf.ca)

decisions are made that have long term effects on children's well being and the safety of children and parents. It is true that issues related to complex financial matters can and do wait for resolution through a potentially lengthier process. Issues related to children's care must be addressed in a timely way, and decisions about children made at the initial stages of a proceeding can vitally affect the subsequent developments.

The division between trial and pre-trial stages may also create major challenges for the lawyer who "takes over" at the trial stage, especially if significant errors or omissions were made at earlier stages of the proceeding; this may prejudice family litigants in terms of costs and outcomes. Another concern is that new issues could be identified or existing issues could become more complex as the case proceeds, and the scope of the dispute could move outside the practice that the *Review* recommends for paralegals. The *Review* did not identify how these issues would be regulated to ensure that non-lawyers are practicing within the scope set out by the *Review*.

The areas of practice the *Review* proposed for paralegals exactly mirrors the list of issues that duty counsel are permitted to provide advice on both at the Family Law Information Clinic ("FLIC") and in court. In her *Review*, Justice Bonkalo notes that students currently provide some services in these areas, and that students are always supervised by a lawyer. In contrast, she recommends that paralegals act independently and without supervision. Duty counsel and students are permitted to deal with these issues because of the framework in which the service is being provided. In the case of duty counsel, there is a strong "triage" element to their role. They are trained to identify cases that, because of some legal complexity or client vulnerability, should be referred out to other service providers, either to a lawyer on a legal aid certificate, a privately retained lawyer, or to on-site mediation. Students have the guidance of their supervising lawyer.

Concerns about unsupervised paralegals include the financial incentive not to refer the file elsewhere, even if the case is best dealt with by another service provider either because of complexity and/or client vulnerability. Moreover, it may be difficult for a paralegal, even with specialized family law education and training, to identify issues that transcend the scope of their prescribed list of areas of service provision.

One solution would be to allow paralegals to provide services in the areas identified in the *Review* only after a client has had an initial consultation with a lawyer and the lawyer has certified that the client's issues are suitable for paralegal assistance. Lawyers would then be obliged under the Rules of Professional Conduct to advise the client that his or her matter is suitable for a paralegal. The client could then choose whether to proceed with the lawyer or a paralegal of their choosing. The client would then have an expanded range of options available, but would have also had the benefit of legal advice from a lawyer at the initial stage. After a paralegal takes over a case, the paralegal should be required to obtain consultation or involve a lawyer if needed; involvement of the referring lawyer, where possible, may be the least expensive and most appropriate lawyer.

Another option for the government and Law Society to consider would be is a pilot program of family law paralegals in a controlled environment such as Legal Aid Ontario. As noted in the *Review*, Legal Aid Ontario has considerable experience in developing and expanding the scope of services that paralegals can provide within the criminal and immigration law context and they could implement a similar pilot for paralegals in family law in the FLSC and/or FLIC. For example, paralegals could provide services by appointment at FLIC (as opposed to walk-in only) on a fee-for-use basis sliding scale to clients within a certain income band. The results of the

pilot project would inform any expansion of paralegals' ability to provide family law services within the private sector.

Recommendation 5: Areas of Paralegal Practice

The *Review* sets out recommendations for the services that licensed, unsupervised paralegals could provide, including custody, access, simple child support cases, restraining orders, enforcement, and simple and joint divorces without property. However, it does not identify who is responsible for distinguishing between a simple and complex child support case. If an Applicant serves a claim that deals with custody, access and child support, which are all within the recommended realm of action for a paralegal, and the Respondent makes a counter claim for spousal support and a constructive trust, how will this be handled? Will a paralegal be required to hand over the file in its entirety to a lawyer, or will the paralegal be allowed to recommend that the issues be severed? What if severing the issues ultimately prejudices the client? This concern may become less pressing in a Unified Family Court system, but it could still be a problem if the issues are not identified early in the proceeding. Another concern is that vulnerable individuals may feel pressured to waive valid claims, for example spousal support or interest in a trust, in order to get under the paralegal threshold.

In her discussion of this recommendation Justice Bonkalo notes: "The fact that advocacy work is conducted in a public forum in the presence of a neutral third party should also provide some element of monitoring and oversight. If there was misconduct or incompetence on the part of the paralegal, there would be the ability to report it to the LSUC". The *Review* does not specify whose responsibility it would be to make this report, and what mechanisms would be used. It should not fall to judges, or the court, to report these incidents, as adding another procedural requirement to the courts would impede rather than increase family access to justice.

Recommendation 6: Services that may be provided by Paralegals

This recommendation states, *inter alia*, that unsupervised paralegals should be able to draft and revise materials for court, represent a client in court (other than at trials) and negotiate on behalf of clients. In the *Review*, Justice Bonkalo states: "For greater clarity, I am not proposing that paralegals be permitted to draft domestic contracts, except where they are the result of mediated negotiations and are drafted in conformity with a mediated agreement". Drafting a separation agreement can have the same implications as drafting and signing minutes of settlement at a court appearance. All family law lawyers are aware that poorly drafted separation agreements can result in problems for clients who may not understand the agreement, and lawyers may face complaints if the agreement is unclear. The same problems can arise if a consent order or minutes of settlement are not prepared properly while the clients are at court. An interim order can also set up a status quo that can be difficult to change. Justice Bonkalo does not comment on whether a paralegal can help a client prepare Minutes of Settlement at court.<sup>2</sup>

Additionally, Justice Bonkalo states: "The Ontario Paralegal Association ("OPA") submitted that a paralegal should be licensed for at least two years before being able to provide family legal services. While I believe completing the current requirements for a paralegal license would be beneficial to a paralegal seeking a specialized license, **I do not think it necessary that a**

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<sup>2</sup> Item nos. 5 and 6 under Recommendation 6 contemplate representation of a client in mediated negotiations and preparation of a written settlement agreement in conformity with the mediated agreement, an unexplained exception to the prohibition on drafting domestic contracts.

**paralegal practice for two years (*emphasis added*)** in another area of law when he or she would like to specialize in family law.” The two years practice requirement recommended by the OPA would be an important mechanism which would provide minimal assurance that paralegals have appropriate knowledge, judgement and experience for these new responsibilities. Other professional associations (such as psychologists) ensure skills are developed through mentoring processes (period of supervised practice) and examinations focused on specified areas of skill competence; that should also be considered for unsupervised paralegals.

#### Recommendations 8 and 9: Education and Training

Justice Bonkalo recommends that paralegals wishing to practice in family law receive specialized education and training in the following topics: gender-based violence, family dynamics, client counselling, forms completion, ethics and professionalism, substantive and procedural family law, and indicators that a client requires referral to a lawyer.<sup>3</sup> These topics could be taught as three modules<sup>4</sup> in each of the three semesters of a one-year paralegal course such as the course offered at Centennial College, or as one intensive family law specialization semester within a two-year course, as the one that is offered at Seneca College. Given the sensitivity and challenges of family law, it might well be appropriate to require a university degree or significant relevant experience as a condition of entry into the family paralegal program.

The experiential learning component will be more challenging to provide to those in training. A practical experiential component in family law must be part of the licensing process for paralegals specializing in that area, although how it will be implemented is not clear. Paralegals will likely face the same challenges as law students seeking positions, as there are more students than there are placements available. There is an especially acute shortage of positions for articling and Law Practice Placement (“LPP”) students in the family field, and this situation is likely to be even worse for paralegals.

Those who are already licensed paralegals wishing to expand into the provision of certain family law services should be required to complete these required courses. Depending upon the circumstances, it may be that experienced paralegals should not be required to complete the client counselling/experiential training modules. However, there should be an accreditation/licensing process to monitor and confirm that all of those paralegals practicing in this area have the required training and education.

#### Recommendations 10 and 11: Regulation and Collaboration with Lawyers

The AFCC-O agrees that if licensed unsupervised paralegals are going to be permitted to conduct family law files, they should be subject to regulation and oversight by the Law Society, and that there must be a requirement that they be insured. The ability to provide unsupervised services should only be permitted by paralegals who have demonstrated that they can adhere to criteria that would be developed after careful study, in controlled circumstances, and having regard to the paralegal experience in the areas of criminal and immigration law.

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<sup>3</sup> As noted above, it may be difficult for paralegals to reliably identify clients that require referral to a lawyer. It may be more prudent for a lawyer to certify a client’s suitability for paralegal services rather than rely on paralegals to identify legal issues necessitating a lawyer’s assistance.

<sup>4</sup> For example, (1) gender-based violence and family dynamics; (2) client counselling and forms completion; (3) ethics and professionalism and indicators that client requires referral to a lawyer.

There should be a focus on professional ethics and competency for paralegals so that they are properly aware when there are issues they are beyond their scope of practice, and a lawyer referral is more appropriate. Non-compliance must attract meaningful consequences, such as suspension and financial penalty.

Recommendations 13 and 14: Assisting with Form Completion

These recommendations require individuals assisting clients with form completion to identify themselves as paralegals. We strongly support this recommendation. Where a paralegal or a lawyer providing unbundled legal services has assisted with form completion, on a paid basis, that individual should identify him or herself on the form to ensure accountability.<sup>5</sup>

Recommendation 15: Implementation and Review

If unsupervised paralegals are to be permitted to provide services with respect to custody, access, child support and restraining orders, there should be a staged implementation, with a pilot program before implementing the program province-wide. If the Ministry and Law Society decide to proceed with allowing unsupervised paralegals to provide services in family cases, we strongly urge the implementation of a carefully monitored pilot program in a limited geographical area, with a limited number of participating paralegals, for example perhaps 50 in the GTA. This pilot program should be restricted to professionals already experienced in family justice, especially with child related issues. An example of this experience is at least two years with the Office of the Children's Lawyer or a Children's Aid Society, and 1 year of family focused legal education, with at least two years of supervised practice. There might also be scope for a pilot project to provide paralegal services to specific underserved communities, perhaps First Nations communities or minority communities where there are language issues.

We agree that five years after the implementation of any or all of the recommendations a review should be conducted in order to assess the outcomes and to follow up with areas that need change. Ongoing research and good evaluations should continue to guide any further changes.

Recommendation 16: Further Expansion of Services by Para-Professionals

In her *Review*, Justice Bonkalo notes "I would however, further recommend that, at the five-year review, the LSUC consider whether it would be appropriate to allow others, such as mediators, law clerks and community legal workers to undertake various forms of training to independently provide services in family law matters". This recommendation appears to suggest a further expansion by non-lawyers in the field of family law. Before expanding the model even further, there needs to be an assessment as to the "base line" at present, and the "base line" five years from now, so that there is sufficient information before considering a further expansion.

Present research about paralegals in Ontario courts is inadequate. Further research must be provided about the experience of paralegal representation in criminal court, as perceived both by clients and by the bench, in order to assess whether or not the experience has been positive.

Recommendations 17, 18 and 19: Law Students and Law Clerks

We generally support these recommendations for increased use of both law students in Legal Aid Clinics and articling students in Family Court. However, there needs to be more clarity and

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<sup>5</sup> The SDO Information Form is an example of a form already requiring the person who completed it to so indicate. The family court forms could easily be amended in a similar manner.



## AFCC ONTARIO CHAPTER

consistency with Rule 4 of the *Family Law Rules*. If there is a supervising lawyer, there should be a presumptive right to appear at conferences at the pre-trial stage, and if the lawyer has confidence in the student's ability, he or she need not attend court with the student. We also suggest supervised student involvement in spousal support and property issues so that they can obtain the requisite experience in these areas.

### Recommendations 20 and 21: Role of Court Staff

Court staff should certainly be supported in providing as much assistance as possible within the limits of their role. As Justice Bonkalo recommends, court staff should be able to provide more legal information, particularly in terms of explaining how to navigate form completion and informing litigants when information is missing. However, this will require further training to ensure that staff are providing accurate information; further, court staff are already overburdened as it is. Such additional information provision cannot feasibly be added to court staff's current responsibilities as it will only add to frustration on both sides of the counter with an inevitable increase in wait times. There should be a designated staff person who can either provide the litigant with information, or send the litigant to FLIC if what is required goes beyond what can be reasonably and promptly provided by court staff.

### **Additional Comments on the Review**

#### Law Clerks Supervised by Lawyers: Rule 4

There should be more use of law clerks (supervised by lawyers) in Family Court appearances, especially for focussed hearings and procedural matters. This should be considered both in private practice and in law clinics, although there will need to be more clarity and consistency with Rule 4 of the *Family Law Rules*. If there is a supervising lawyer there should be a presumptive right for the clerk to appear at conferences and pre-trial stage, and if the lawyer has confidence in the clerk's ability, then he or she need not attend court with the law clerk, similar to the proposal above for law students. Under lawyer supervision, the AFCC-O also suggests that law clerks be able to contribute to spousal support and property issues.

#### Process of Consultation & Reform – Role of Judges

Judges in Ontario's family courts already deal with self-represented litigants, and have the responsibility of ensuring that proceedings are fair even if one or both of the parties are self-represented. Many of these judges also have experience with paralegals in criminal cases and their feedback on whether or not this has been successful will be essential. Some highly experienced family judges have expressed opposition to the use of paralegals in family courts;<sup>6</sup> and some of these judges have previous experience with paralegals in criminal matters. The views of front-line family and criminal judges, solicited in a discrete fashion, should play a central role as government and the Law Society decide how to respond to the *Review*.

### **Conclusion**

There were numerous concerns raised by a diverse multi-disciplinary group of AFCC-O members in response to the 2016 AFCC-O survey on expansion of legal services. Recurrent themes about the involvement of paralegals in family cases included concerns around quality

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<sup>6</sup> "Paralegals in family courts 'not the solution,' Toronto judge says," *Toronto Star*, March 14, 2017.

AFCC ONTARIO CHAPTER

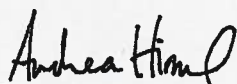
control, the complexity and “high stakes” of family law, cost-effectiveness, and adequate safeguards to protect the public. At the same time, the AFCC-O recognizes the challenging issues associated with growing self-representation in Ontario, especially where children and family relationships are involved.

The AFCC-O believes a careful and limited expansion of Rule 4 of the *Family Law Rules* regarding the right of representation shows promise for improving access to legal services by para-professionals, particularly law students and law clerks who will continue to be supervised by a lawyer. The AFCC-O also believes that with greater and more efficient resource allocation, para-professionals could assist participants in the family justice process in meaningful ways without fully representing them in lieu of lawyers. Given the importance of the financial and custody/access matters involved in family justice, any reforms should be undertaken with due caution and based on cost-benefit analyses to the various stakeholders involved.

Yours sincerely,



Dr. Dan Ashbourne, C. Psych.  
President Elect, A.F.C.C.-O.



Andrea Himel, LL.B., M.S.W., Family Mediator (Accred. OAFM),  
Past President, A.F.C.C.-O.

*\*This letter is supported by the AFCC-O Board members listed above.*