From:	Carla Lewis
To:	Consultation 2018
Cc:	Chantelle Choy; Ester Villegas; Floriana Kennelly
Subject:	Feedback on Family Law Alternate Legal Service Providers
Date:	November-07-18 9:10:51 AM
Attachments:	Feedback LSBC.pdf

I attach a memorandum containing my comments about the Family Law Legal Service Providers Consultation paper.

Best,

Carla Lewis

To The Law Society of British Columbia

Feedback regarding the Family Law Legal Service Providers initiative

After reading the Family Law Legal Service Providers: Consultation Paper, I attended the CBA Family Law Subsection meeting on September20, 2018, where I listened to the comments of colleagues at the family bar, and the responses of Ms. Kresivo and Ms. Merrill on behalf of the Law Society.

I disagree with a statement made at the CBA meeting, to the effect that the Law Society is trying to harm the financial interests of family lawyers. The Law Society's proposal is a good faith effort to address the crisis in family law access to justice. I also reject the idea that the Family Law Legal Service Providers' initiative constitutes in some way a betrayal of the Law Society's duty to protect lawyers. The Law Society's mandate is to regulate the legal profession and to protect the public interest in the administration of justice. That being said, I see problems with this initiative which worry me enough to prompt the writing of this memorandum[1]. My concerns fall into three categories:

- The Family Law Legal Service Providers project is based on flawed assumptions;
- There are unintended consequences that need to be considered; and
- It will cause harm to all involved.

Flawed assumptions

It appears, from the language of the Consultation Paper, that a decision has been made to create a new type of legal professional. We are being asked to consult about the refinement of the project. As the committee wrote in paragraph 3 of the Consultation Paper:

> "The purpose of the consultation is to provide the Benchers with input that can be refined to ensure the end product advances the object of improving access to affordable, competently delivered legal services in an area of need, while maintaining public interest in the administration of justice."

More affordable

A key assumption underlying this project is that Family Law Legal Service Providers ("FLLSPs") will be more affordable than lawyers. Ms. Kresivo stated that the Law Society would not regulate fees charged by the FLLSPs, just as they do not regulate lawyers' fees. The committee assumes that FLLSPs will charge less than lawyers because their costs of entry to the profession will be less, and because they will compete for business with lawyers.

While FLLSPs will have lower education costs, their overhead expenses will be similar to lawyers' overhead costs. FLLSPs will be in business to make a profit, just like other professionals. There is no guarantee that the FLLSPs will provide legal services at a lower price point than the rate for articling students or junior lawyers. To be competitive, an FLLSP might charge slightly less than an articling student or junior lawyer: for example, $125 per hour instead of $150 per hour. That will not help the people who are self-representing because they are unable to afford legal fees.

[1] Apologies for flaws including scanty research and a tendency to jump to conclusions.

Notaries have lower costs of entry to their profession than lawyers do, because their training takes 18 months after an undergraduate degree. To my understanding, notaries and lawyers charge comparable fees for real estate transactions and wills.

If there is no way to be certain that the FLLSPs will deliver more affordable services, and legal services at the price point likely to be occupied by FLLSPs are already available, why undertake this project?

Competently delivered legal services:

Another key assumption is that it is possible to train FLLSPs to competently deliver legal services in a short course that focuses on family law. The length of the program has not been decided because the scope of practice of FLLSPs has not been determined. In this memorandum, I describe the course as being of a year to 18 months in duration.

The education of a lawyer mandates thorough exposure to a wide variety of areas of law. We take in-depth courses in core subjects including tax, real estate, administrative law, corporate law, trusts, wills and estates. Ethical issues are dealt with as part of each subject area, and separately. Articles and the Professional Legal Training Course give law students the opportunity to review law, process and ethics in a practical as opposed to academic context. All of these subject areas, and more, are relevant to family law. The legal education process makes us what we are: professionals who competently and ethically deliver legal services. That process cannot be watered down, if the public interest in the administration of justice is to be safeguarded.

FLLSPs can set up shop when they finish their training program. Because of our lengthy training process, lawyers enter the practice of law at around 25 or 26 years of age at the earliest. This is good, because the rational part of the human brain is not fully developed until we reach the age of 25 or so. FLLSPs could be practicing family law within a year or so of graduating from high school. Family law clients put what is most important to them in our hands, including their children, their safety, the assets they have worked to build. A 20 year old who has completed a summary course about family law cannot safely be entrusted with the diverse responsibilities of practicing family law, which include – if it needs to be mentioned – operating a trust account which could on any given day be holding millions of someone's hard-earned money.

FLLSPs will not be supervised or mentored. When family doctors, or doctors in rural areas, were in short supply, the medical profession responded by permitting nurse practitioners to fill a role comparable to that of a general practitioner. The nurse practitioner program is a two year masters program; applicants must be registered nurses with a bachelor's degree and must have 2 to 3 years of clinical nursing practice. Nurse practitioners receive a general as opposed to a limited education in their field, which enables them to practice safely within their scope, and to identify problems that exceed their training. The FLLSP training program is more comparable to a licensed practical nurse program. Licensed practical nurses fill an important role within the health care system, but they work as part of a team and under supervision. Studying only family law, with a few hours devoted to other issues, does not give the breadth of knowledge necessary to competently practice family law.

There are almost no simple family law scenarios. This is one: two people with comparable careers, no children and no assets wish to get divorced. If any of those factors should change (career,

children, assets), the complexity of the case increases exponentially. It seems unlikely that a FLLSP would decline a retainer as potentially outside the scope of his or her practice. Without a broad educational background, the FLLSP may not be able to identify issues that complicate the client's situation. There is a financial incentive to at least get started and see how things go. If things go sideways, and the FLLSP understands that things are going sideways, perhaps at that point the FLLSP would say, "I no longer think your case is within my scope of practice." The lawyer who then takes over would not just be dealing with the client's presenting legal issues, but cleaning up mistakes, where possible.

The annotations to paragraph 3.1-2 of our *Code of Professional Conduct* state in part, "A lawyer who is incompetent does the client a disservice, brings discredit to the profession and may bring the administration of justice into disrepute." The implementation of the FLLSP program by us, as members of the Law Society, risks all of these outcomes.

An area of need:

There is a crisis in family law access to justice. That is not a flawed assumption. The flaw is the failure to correctly identify why this has become an area of need.

I moved to British Columbia in 1990, having worked for 5 years in Manitoba, including articles with Legal Aid Manitoba. In 1990, there were few self-represented litigants in family law cases. This was not because lawyers' fees were more affordable in 1990. There were few self-represented litigants because the Legal Services Society of BC provided broad coverage for family law litigants. The crisis in family law access to justice is a result of government policy about funding legal aid.

In 1992, Finance Minister Glen Clark of the NDP brought in the provincial sales tax on legal fees. Lawyers were the only professionals obliged to charge this tax to their clients. This discriminatory tax was acceptable to us because we were told that it would be used to fund legal aid. The devil is in the details: the PST went into the provincial government's general revenues. Some of it did go to legal aid. For example, in 2009, lawyers remitted PST of $144,800,000, of which $80,000,000 was allocated to legal aid.[2]

The Liberals criticised the NDP, stating that all of the PST should be used for legal aid. When the Liberals came into power in 2001, they were asked whether they would correct the NDP's wrong-doing and direct the tax on legal fees to fund legal aid. Then attorney general Geoff Plant said,

> " While I criticized the former government for failing to keep the political promise it made when it introduced the tax – to spend the money on legal aid services – during five years as opposition justice critic I never once said that if we became government we would dedicate the revenue stream. …Nor did I ever promise to maintain legal aid funding."

True to Mr. Plant's word, the Liberals reduced legal aid funding by about 40%. There has been a long-standing governmental mindset that family law disputes do not belong in the court system. Instead of adequately funding legal aid, there have been initiatives such as the justice access hubs, an increased presence of family law duty counsel, Dial-a-Law, and advocates at non-profit organizations such as BWSS. From these sources, family law litigants can obtain summary advice about their cases,

[2] This information was provided in response to a freedom of information request, and quoted by Ian Mulgrew in a Vancouver Sun article dated June 27, 2014. If I had more time I would track down the freedom of information request.

but they are on their own in the courtroom. Over time, the diversion of funds from legal aid resulted in a rise in self-representation.

In 2000, the Court of Appeal Annual Report did not contain statistics for self-represented litigants. The 2004 Court of Appeal Annual Report was the first to include statistics for self- represented litigants. If I understand figure 11 from that report, 110 of 590 civil appeals involved a self-represented litigant (19%). Out of 430 criminal appeals, about 80 involved a self-represented litigant (19%). Now consider these statistics from the 2017 Court of Appeal Annual Report:

> Of 101 family appeals or leave applications filed in 2017, 43% involved at least one self-represented litigant. Of 37 family appeals disposed of in 2017, 43% involved at least one self-represented litigant.
>
> Of 246 criminal appeals or leave applications filed in 2017, 25% involved at least one self-represented litigant. Of 124 criminal appeals disposed of in 2017, 11% involved at least one self-represented litigant.

Here are statistics from the Provincial Court of BC Annual Report 2016/2017:

Self-represented litigants:

	2012/2013	2013/2014	2014/2015	2015/2016	2016/2017
Criminal	22%	20%	20%	19%	18%
Family	43%	42%	42%	41%	41%
Small claims	70%	69%	69%	73%	70%
Total	26%	24%	24%	23%	22%

It appears from these statistics that legal aid for criminal cases is better funded than legal aid for family law. Why is that? Because families should not be in the court system? The families who can stay out of the court system do. Properly funded legal aid is essential for the families who need the court's help to resolve their problems. This is where we should continue to focus, as opposed to implementing the FLLSP program.

Unintended consequences

If a person wants to practice family law, and has the option to choose between an 18 month program and the seven or so years it takes to become a lawyer, what would be the obvious choice? If people interested in family law see no value in spending seven years on a legal education, in the future there will be no family lawyers. There will only be FLLSPs. The assumption that FLLSPs would provide lower cost services, already questionable, would completely fail in this scenario.

If family law can be competently practiced after a short, focused program, the same is true of other areas of law, for example, corporate and commercial, tax law and securities. Such clients may be able to afford legal fees, but why should they not have the option of lower cost services? Why should

people who want to practice only tax law have to spend seven years on their education when people who want to practice family law do not?

It may be that the way of the future is to replace the current process of educating lawyers, and instead train law practitioners only in the area in which they plan to work. We need to be aware that we are opening that door with the implementation of the FLLSP initiative.

Another concern is that there appears to be no intention to test how the FLLSPs will work out, and no exit strategy if they do not. I would be far less worried about the FLLSP initiative if it commenced as a limited scope project in which everyone involved was clear that the concept would be tested, monitored and possibly discontinued if unsatisfactory. Instead, it appears that the FLLSP project will commence with the enrolment of a cohort of who knows how many future FLLSPs, to be followed by the next year's cohort, and so on.

If the FLLSPs' services are not more affordable or if they are not competently delivered, then what? Who is going to make the determination, and how, and when, that the initiative has not succeeded, is not in the public interest and must be terminated?

If the FLLSP project is terminated, what happens to the FLLSPs? Is the Law Society going to apply to amend the *Legal Professions Act* to remove FLLSPs? Tell the FLLSPs that they are no longer allowed to practice law? That sounds like a promising class action against the Law Society (aka us).

Harm

The FLLSP project's potential to cause harm is disproportionate to its theoretical benefit and reason for being, i.e., the provision of competent legal service at a lower price point.

The people who cannot afford to pay anything for legal services will be harmed. These people cannot afford to pay $125 per hour for legal services, any more than they can pay $500 per hour. This vulnerable population will still have to self-represent. The FLLSP initiative is no substitute for properly funded legal aid; this initiative signals to the government that we have given up trying to get them to properly fund legal aid and undermines those efforts.

Family law litigants who pay FLLSPs for legal work will be harmed. Superficially trained, unsupervised service providers cannot deliver competent family legal services any more than LPNs can practice family medicine. Poorly done pleadings, applications and agreements will cause myriad problems. This category of family litigants will waste their resources on inadequate legal work, and have pay again to have lawyers resolve the fallout of inadequate work.

FLLSPs will be harmed. They will spend their money and time on an education program that will not put them in a position to competently practice family law. They will struggle with the challenges of the work, the mistakes they will inevitably make, the stress of dealing with angry clients and judges, and the regulatory proceedings they will face. They are being set up to fail.

Family lawyers in the early years of their practice, often a point when women leave the profession, will be harmed because the goal posts have been moved. When they started out,, they needed to complete seven years of education to practice family law. Now that is not necessary. They will emerge from law school, burdened with student loans, and face poorer prospects of articles and jobs than ever before.

The legal profession will be harmed. The greatest harm comes from failing to honestly acknowledge and address the reason why there are so many self-represented litigants. If we are not honest about what has caused the problem, we create non-solutions like the FLLSP project, which will cause a cascade of new difficulties. We will be harmed as a profession because the failings of the FLLSPs will be perceived as our fault. That will be a fair perception; if the FLLSP initiative goes ahead, it will be because we voted for it and/or failed to vote against it. The FLLSPs will be licensed under the *Legal Professions Act*. We will have created this group of service providers without an exit strategy.

For these reasons, the FLLSP project will be harmful to the administration of justice.

Solutions?

I do not have much to offer. If time permits before the December 31, 2018 deadline for feedback, I will expand on this section of my memorandum. Some thoughts:

1. Continue and increase pressuring the government to properly fund legal aid. Make it an election issue, every time. Make it an issue in between elections.

2. See if the Legal Service Society could provide family law legal aid in more creative ways. For example, eligibility criteria could be changed so that people with some income or some assets could receive coverage, but be obliged to pay Legal Services Society for part or all of the legal fees.

3. Use the money that the Law Society earmarked for the FLLSP program to fund family legal aid.

4. Use the Continuing Practice Development model to ensure that all family lawyers take on pro bono cases as a condition of annual renewal of our licenses. It might be set up so that lawyers in their first 5 years of practice have to take on one case, lawyers in years 5 to 10 have to take on two cases, and so on. An existing service such as Access Pro Bono could be the source of the pro bono cases and perhaps fund the disbursements. Lawyers practicing in other areas where self-representation is common, e.g., immigration, might also be required to take on pro bono cases.

5. Make the FLLSP program a further certification after the paralegal course, but have FLLSPs practice under supervision of lawyers.

6. Enlist those of us who expressed concern about the FLLSP initiative to form a committee to work with the Law Society on access to justice in family law. I volunteer.

Answers to the questions set out in paragraph 21 of the Consultation Paper

I also have to reserve a full answer to these questions to a later date. Brief answers to some of the questions follow.

1. What do I like or dislike about the framework in Schedule A?

The framework is essentially the same as the work done by family lawyers. As mentioned earlier, I think this plan does a disservice to clients, the profession and the administration of justice.

I cannot see an effective and safe role for FLLSPs except as a better qualified paralegal, practicing under supervision of a lawyer. As such, FLLSPs could conduct client interviews, complete forms, prepare correspondence, draft orders and agreements, subject to review by lawyers.

2. Is the framework likely to achieve the desired outcomes?

   If the desired outcomes are provision of more affordable and competent legal service, I do not think the framework is likely to achieve the desired outcomes.

3. Does the framework miss any type of legal services that should be included?

   No.

4. Does the framework include any legal services you think should be excluded?

   I disagree that unsupervised FLLSPs can competently deliver legal services. In a quick review of what is under contemplation in other jurisdictions, none of the alternate service providers have such a wide scope of practice.

   Provision of legal advice, drafting and filing pleadings and applications, appearing for clients in court, mediating and operation of a trust account by FLLSPs seems hazardous.

5. Should the service providers be officers of the court?

   If there are going to be FLLSPs practicing family law, they should be bound by the same duties as family lawyers and other officers of the court, including the duties of candor, fairness, integrity and respect for the administration of justice. How could any type of legal service provider be exempt from such duties? This question baffles me.

6. Is there a broader possible scope of practice that is appropriate for alternate legal professionals who are engaged in collaborative or non-adversarial processes?

   I will respond to this later if time permits.

7. What services contained in the framework are the most complex and fraught with risk of significant and/or enduring harm to the client or their children if not performed by an experienced lawyer? How are these risks mitigated now where they are performed by less experienced lawyers?

   All of the services provided in the framework could have significant and/or enduring negative consequences. Family law deals with the parties' children, safety and financial

security. All of this is central to clients, and if poorly handled, can have significant, enduring negative consequences.

In my office, the risks where such services are provided by less experienced lawyers are mitigated by supervision and mentoring. There are various options for junior lawyers to obtain the advice of more experienced lawyers, for example, the Law Society Practice advisors, ListServes, CBA practice advisors.

8. Should the proposed new service providers be subject to the same or similar professional conduct/ethical responsibilities as lawyers? Should they be subject to the CBA Best Practice Guidelines for lawyers practising family law?

   As stated in my answer to question 5, if there are going to be FLLSPs practicing family law, they should be subject to the same professional conduct and ethical responsibilities as lawyers. It cannot be under contemplation that the FLLSPs will have a lower standard of conduct and ethical responsibilities than family lawyers do. That would wreak havoc.

9. Are there any other reforms to the provision of family law legal services that could be addressed through the use of alternate legal service professionals>

   To be answered later if time permits.

And now I must return to my day job.

Best regards,

Carla Lewis

From: Amy Kelly
To: Consultation 2018
Subject: Feed back from Alternate Legal Providers
Date: November-08-18 4:15:30 PM

Dear BC Law Society:

I am sending my feed back regarding the topic of Alternate Legal Providers. I would like to provide a bit of background on myself to put my feed back into perspective, as this is a topic that I do feel strongly about and perhaps my perspective is totally different than any other paralegal, lawyer, or potential "alternate legal provider".

I am from the U.S. I have a Bachelor's degree from Radford University in Radford VA. I obtained a "Post Baccalaureate" Paralegal Certificate (as I had the pre-requisite Bachelor's Degree) from Central Piedmont Community College in Charlotte NC. I began my legal career in Charlotte, North Carolina and then moved to the Washington DC area, and then to the Hudson Valley in New York state. After that I moved to SW Florida.

In Florida I made the voluntary decision, with the great support of my employer, to take the voluntary examination to become a "Certified Paralegal" in 2004 through the organization NALA, National Association of Legal Assistants. https://www.nala.org

NALA leads the paralegal profession by providing a voluntary certification program, continuing legal education, and professional development for all paralegals.

- NALA Mission Statement

The National Association of Legal Assistants (NALA) is the leading paralegal association in the U.S. Its mission is to provide continuing education and professional development to all paralegals. NALA provides current information about the profession, continuing education programs (publications, courses and webinars), networking opportunities, professional certification programs, occupational survey reports, and publications to help paralegals excel in the workplace. NALA is a non-profit organization, 501(c)(6), representing more than 18,000 paralegals, who are individual members or members of NALA affiliated associations.

NALA is a membership organization. This means that the individual members of NALA are the leading force of NALA programs and policies. Through NALA, paralegals across the nation have come together to develop programs and standard setting codes to help them grow in the workplace. The association is governed by a Board of Directors and maintains an office and headquarters staff in Tulsa, Oklahoma.

I took the 2 day examination and passed and have since been able to designate myself as a Certified Paralegal. I must maintain continued legal education, 50 hours every 5 years to maintain my certification.

In 2007 I moved to Vancouver, BC and found a job at my current firm. I have been here since January 2008.

I became a volunteer at the Amici Curiae Paralegal Workshops at its inception in February 2011. I am now a Manager at 2 of our workshop locations.

Throughout my career here in BC, I have talked about how an organization and certification such as NALA and the CP certification I have would be a benefit here in Canada. I believe that an independent organization which set standards for the Legal Profession on a national platform where all members and those wishing to become "certified" must meet a higher standard than those who do not wish to advance their education levels the playing field for all on a national basis. The organization will have standards and the testing/examination will be standard on a national level. Each member and those wishing to be examined for certification will be voluntary and an independent board will run the organization.

I believe this approach solves many problems. All those wishing to advance their careers will be tested on a even playing field. One test in the Country. All examinees will have to meet the standards to qualify to take the exam. Once certified, continuing legal education will maintain the level of education and excellence and maintain certification.

This independent organization takes the "local" Law Society out of the picture.

In the United States, CP (certified Paralegals) can then take a more specialized exam to become an "ACP" advance Certified Paralegal.

Many law firms use their CP to the maximum of their ability. Many states now require a "State Certification" modeled after the NALA exam. Paralegals must also become an active member of the state Bar, (law society) being sponsored by a lawyer. A CP can attend, at the direction of a lawyer, a "deposition" (X4D) with a client, can handle a simple real estate transaction in which the client is purchasing a home and signing the closing documents, can prepare simple deeds for property transfers, do simple uncontested divorce pleadings. By allow a "CP" do provide these services to clients, the client can receive "professional legal services" at a more cost effective amount.

While this approach may take a more national collective, but a Provincial organization and testing/certification examination **could** the answer. This would avoid further expensive classes/education and class room work which the alternate legal professional should have, and or could obtain elsewhere and the testing/examination would be standardized to properly ensure all alternate legal professionals have the same knowledge and have taken the same exam and have passed and must maintain continuing legal education to maintain the certification.

As a paralegal who has worked in the US and is has seen first hand what "certification" can do, and how states have embraced the certification and the use of paralegals to the best of their ability to add to the legal profession, I know it can be

successful.

Thank you for your time and attention in reading my extensive feed back. I hope you take the time to go to the link I have provided for additional information and consideration.

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From:	Penny Paul
To:	Communications; Consultation 2018
Cc:	Miriam Kresivo, QC
Subject:	RE: Alternative Family Law Service providers
Date:	November-09-18 9:11:09 AM

Please add these comments to my other comments sent last week.

I stand corrected. The PST collected on Lawyers fees is not $150 million. It is **$210.6 million** and the amount the provincial government funds legal aid is $75 million. Until that injustice is corrected we would be fools to mandate pro bono. The government should be told in no uncertain terms that until all the PST collected on legal fees is used to fund legal aid they can figure out their own solution to access to justice. Lawyers should take a strong stand on this point.

The following article published in the Vancouver Sun on November 9th is very compelling reading.

B.C. keeps collecting law tax while underfunding legal aid
IAN MULGREW
Vancouver Sun
Nov 09, 2018

Per

Penny Paul

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From: Penny Paul
Sent: Monday, November 05, 2018 4:29 PM
To: 'communications@lsbc.org'; 'consultation2018@lsbc.org'
Cc: 'mkresivo@ahbl.ca'
Subject: Alternative Family Law Service providers

Please publish these comments relating to the Law Society Consultation Report recommending that our Law Society license non lawyers to provide legal services in family law matters (unsupervised by a lawyers).

I adopt Gerald Lecovin's, Dinyar Marzban's and Carla Lewis's very able comments published on the law society site and totally agree with what they have written.

I add only that if the Provincial Government applied all the PST that they mandated that lawyers charge for legal services to the legal aid budget, like they promised when they brought it in, that some of the access to justice issues would be resolved. I understand the legal aid budget is 70 million and over 150 million is collected in the PST. This should be a first step and certainly should be a requirement before mandating probono .

I am totally in favor of finding ways of making justice more affordable to the average person. I do not think licensing new family law technicians to give legal advice who are not lawyers will do that when there are plenty of junior lawyers and others willing to take on a file for the legal aid rate of $84.00 per hour. Likely these "technicians" will be more costly.

There is already a plethora of non lawyers working in the family law field such as legal assistants, accountants, financial advisors, psychologists, non lawyer mediators, family court counselors, etc. This can be improved on if necessary. The important part is that the difficult stuff, final agreements and court work comes to us to deal with because we often have to fix it up, fill in the gaps and make it comply with the objectives of the FLA and the DA and the current case law.

Family Law is not an uncomplicated area to practice in. There is overlap with many disciplines. The law is constantly changing. To suggest that an 18 month course can equip a person to give legal advice and prepare final agreements and attend court in a family law matter is just wrong thinking. If this was so, why bother with law school? One can apply the same thought process to Estate Litigation, Personal Injury Law (wait that is already under attack), Corporate, Commercial etc. Soon no lawyers will be necessary in society.

What was that that Shakespeare wrote in his play about King Henry the 8th. He wrote "The first thing we should do is kill all the lawyers". I think the idea was that in this way there would truly be no justice for people and it would be better for thieves and tyrants. Here we have our own Law Society attacking the lawyers. Where is their mandate to do this?????

Per

Penny Paul

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