

# **A CONSULTATION DOCUMENT ON A PROPOSED REGULATORY FRAMEWORK**

**April 23, 2002**

## **Background**

Over the past 15 years, paralegal groups and legal organizations have sought to obtain a regulatory framework for paralegals. Despite two reports and a number of judicial decisions, no such framework exists.

The most recent attempt at regulation was initiated in the fall of 1999, when the then Attorney General James Flaherty appointed The Honourable Peter deC. Cory to study paralegal activities and recommend a form of regulation. In May 2000, Justice Cory released his report (the Cory Report). It was anticipated that the Cory Report would find its way into the legislative agenda of the provincial government. However, this did not occur.

In the spring of 2001, David Young succeeded James Flaherty as the Attorney General and indicated an interest in developing a regulatory framework based on cooperation between the legal and paralegal communities. In a letter dated October 31, 2001, the Attorney General said that "the government remains committed to protecting consumers who use the services of paralegals and ... consumers deserve access to a range of high quality legal services." Mediation was proposed but deferred in favour of a process designed to develop consensus among the legal stakeholders.

In July 2001, the representatives of the following legal organizations met to consider responding to the Attorney General on this issue: Advocates' Society, County and District Law Presidents' Association, the Law Society of Upper Canada, Metropolitan Toronto Lawyers Association and the Ontario Bar Association. At that meeting, the representatives agreed to work towards the development of certain principles for paralegal regulation and to determine if these principles might find acceptance within the broader legal and paralegal communities. To that end, the legal organizations formed a Working Group, composed of a representative from each organization.

In October 2001, the Working Group made initial contact with a paralegal organization, the Professional Paralegal Association of Ontario (the PPAO). The PPAO is an association which represents several paralegal organizations: The Paralegal Society of Ontario, the Institute of Agents at Court and the Ontario Searchers of Record. The PPAO showed an interest in meeting with the Working Group to discuss paralegal regulation in general and the concerns of paralegals in particular.

Subsequently, certain members of the Working Group and representatives of the PPAO agreed to participate in a series of meetings which were held from February to April 2002. The meetings were designed to find some consensus respecting the regulation of paralegal activities in the Province of Ontario.

The two groups achieved consensus on many principles underlying a proposed framework. This framework is set out below to engage the stakeholder organizations in a broad-based consultation on a new approach to paralegal regulation. It is hoped that all affected organizations will give the framework due consideration and agree on the principles for paralegal regulation.

## **Proposed Framework**

### **I. Statement of Principle**

Historically, the Law Society has governed the practice of law in the public interest. The proposed regulatory model envisions the Law Society as regulating the spectrum of legal services in the public interest, including those provided by paralegals.

### **II. Funding**

It is recognized that funding for paralegal regulation will be required from the provincial government for implementation, including the costs of infrastructure, education, communications and prosecutions for the unauthorized practice of law. It is anticipated that paralegal regulation would ultimately become self-funding, that is, fees from paralegals would pay for the costs of regulation.

### **III. Scope of Regulation**

The proposed framework applies to paralegals working independently. For the purpose of regulation, paralegals will fall into two categories as set out below and more fully described in section VI of this paper:

- Accredited Licensed Paralegals (Advocacy)
- Accredited Licensed Paralegals (Non-Advocacy)

Law Clerks employed by lawyers are currently supervised and trained by those lawyers. Law Society regulation would be optional for employed law clerks, provided they met the qualifications described in Section IV(F) below.

### **IV. Governance**

- A. There should be one body responsible for regulating the provision of all legal services and the Law Society should be the appropriate body.
- B. There should be a Standing Committee of the Law Society with the mandate to deal with issues respecting governing and regulating paralegals.
- C. The Standing Committee should be composed of an equal number of paralegals and elected benchers, plus two or more lay benchers, e.g. 5 paralegals, 5 elected benchers

and 3 lay benchers. The Attorney General would appoint the first 5 paralegals to the Standing Committee, with recommendations from the paralegals.

- D. At all times, a paralegal would either be the chair or the vice-chair of the Standing Committee. An elected bencher would also either be the chair or the vice-chair of the Standing Committee. Both the chair and vice-chair have the right to attend Convocation and address Convocation on Standing Committee matters.
- E. Decisions made by the Standing Committee would be ratified by Convocation. Convocation would not be authorized to substitute its decision for a decision of the Standing Committee but could send a matter back to the Standing Committee for reconsideration on the first hearing of the matter. On the subsequent hearing of the matter, Convocation may substitute its decision for that of the Standing Committee.
- F. The general criteria for becoming an accredited licensed paralegal are:

- 1. Accreditation**
- 2. Grandfathering**
- 3. Licensing and Appeal Processes**

The Standing Committee will establish the process to determine if the applicants meet the criteria for accreditation, grandfathering and licensing, which are outlined below.

### **1. Accreditation**

Individuals would be eligible for accreditation and licensing upon meeting each of the following criteria:

- a. Completing, at a minimum, a two-year accredited community college paralegal diploma or degree program or equivalent; and
- b. Completing six months mentoring under a lawyer or Accredited Licensed Paralegal, each having a minimum of 5 years experience. If mentoring is not possible for an individual seeking a license as an Accredited Licensed Paralegal (Advocacy), then 6 months of observing procedures and matters before an appropriate court, agency, board or tribunal, with its consent; and
- c. Passing specialized exams in the areas of preferred practice and accreditation. (Individual tribunals should have input into the content of the examination process); and
- d. Meeting good character requirements.

### **2. Grandfathering**

The Standing Committee will establish the process to determine if applicants meet the qualifications for grandfathering described below.

Applicants for grandfathering must meet **all** of the following qualifications:

- a. All applicants for accreditation must pass the specialized certification examinations for their preferred area or areas of work regardless of their prior education or experience.
- b. All applicants for grandfathering must meet the good character requirements.
- c. Only individuals are eligible for grandfathering and not corporations or franchised entities.
- d. Any application for grandfathering must be made by applicants within two years of the legislation coming into force, or such other time as may be set by the Standing Committee.

In addition to meeting all of the foregoing qualifications, the applicant must meet the qualifications described in one of the following paragraphs (e), (f) or (g):

- e. Any applicant for grandfathering as an Accredited Licensed Paralegal (Advocacy) must meet the following minimum conditions:
  - i. the individual has appeared before the particular court or board for which accreditation is sought on a regular basis for a minimum of 5 of the last 7 years from the date of legislation coming into force; and
  - ii. the individual provides an affidavit proving same.
- f. Any applicant for accreditation pursuant to section VI(B) below may apply for grandfathering upon providing proof of completion of the four segments of the “associate level law clerk” course under ILCO or the equivalent.
- g. Any applicant for accreditation pursuant to section VI(B) below may apply for grandfathering in that particular area on satisfaction of the following conditions:
  - i. the applicant was employed by and worked under the supervision of a lawyer for a minimum of 5 of the last 7 years from the date of legislation coming into force; or
  - ii. the applicant was an independent contractor (e.g. corporate law clerk or conveyancer) and worked under the supervision of a lawyer for a minimum of 5 of the last 7 years from the date of legislation coming into force; and

- iii. the applicant provides an affidavit from the supervising lawyer or lawyers establishing that the applicant has the requisite knowledge and has achieved the requisite level of competence to permit the applicant to work as an Accredited Licensed Paralegal (Non-Advocacy) without further experience or education.

### **3. Licensing and Appeals Processes**

- a. Accredited Licensed Paralegals would be described as licensed “pursuant to the laws of the Province of Ontario” and the Law Society, under the mandate of the Standing Committee, would determine if paralegals met the licensing qualifications.
- b. Accredited Licensed Paralegals would become Commissioners of Oaths within their designated areas.
- c. Since Accredited Licensed Paralegals will be privy to confidential client information, the *Law Society Act* should be amended to ensure that an Accredited Licensed Paralegal cannot be required to divulge confidential information, unless a judge of the Ontario Court of Justice or Superior Court of Justice finds that, in the interest of the due administration of justice, it must be disclosed.
- d. The requirements of good character for Accredited Licensed Paralegals should be the same as those established for lawyers under the *Law Society Act*.
- e. A paralegal license can only be granted to an individual, e.g. a license cannot be franchised.
- f. Sections 27 and 49.32 of the *Law Society Act* would apply with necessary modifications to applications for grandfathering and licensing and to decisions on the sufficiency of fulfilling the requirements for accreditation.
- G. The mandate of the Standing Committee would also include, among other matters, policy decisions on the following:
  - 1. Code of conduct**
  - 2. Regulatory fees**
  - 3. Rules of incorporation**
  - 4. Trust accounts**
  - 5. Discipline and Appeal Processes**
  - 6. Insurance**
  - 7. Compensation fund**
  - 8. Continuing education**

#### **1. Code of Conduct**

The Law Society's *Rules of Professional Conduct* would apply to Accredited Licensed Paralegals, with necessary modifications.

## **2. Regulatory Fees**

The proposed regulatory framework is predicated on a commitment of funding from the government to cover the costs of implementation, including the initial costs of infrastructure, education, communications and prosecutions for the unauthorized practice of law. Following the implementation of the regulatory regime, fees will be sufficient to cover the cost of paralegal governance.

## **3. Rules of Incorporation**

Accredited Licensed Paralegals could incorporate as long as the accredited individual paralegal remains personally liable, in a manner similar to lawyers.

## **4. Trust Accounts**

Accredited Licensed Paralegals would be required to maintain trust accounts restricted to retainers. Monies received for any other purpose must be subject to a joint retainer and deposited into the trust account of the affiliated lawyer (see section VI(B)(1) below).

## **5. Discipline and Appeal Processes**

- a. The committee hearing cases of paralegal misconduct at the first instance (Hearing Panel) will be composed of a lawyer benchler, an Accredited Licensed Paralegal and a lay benchler. There will be an appeal process for paralegals similar to that for lawyers. Representation before a Hearing Panel may be by counsel or by Accredited Licensed Paralegals (Advocacy).
- b. Accredited Licensed Paralegals would be governed by a code of conduct and subject to the same disciplinary processes and penalties as those applying to lawyers, with necessary modifications.

## **6. Insurance**

Accredited Licensed Paralegals will have mandatory errors and omissions insurance.

## **7. Compensation Fund**

There will be a compensation fund similar to the one provided by lawyers.

## **8. Continuing Education**

The requirements for continuing education should be within the mandate of the Standing Committee.

## **V. Prosecutions**

- A. There must be enhanced government funding for prosecutions for a period of time to address those individuals who choose not to comply with the regulatory framework.
- B. In dealing with unlicensed individuals, effective remedies and processes must be developed, including:
  - A new and refined definition of “the practice of law” which will both expedite prosecutions and reflect the principles of the proposed framework concerning paralegals. Both the paralegal and the legal community will be consulted on the new definition of the practice of law to ensure that it conforms with the principles of this proposed framework;
  - Enhanced capacity to obtain injunctive relief;
  - The capacity to obtain an order prohibiting the continuation or repetition of the offence when a conviction is entered for unauthorized practice;
  - The creation of a new provincial offence, operating without a license.
- C. Accredited Licensed Paralegals who engage in practice outside their area of accreditation will be subject to:
  - Discipline; and/or
  - Prosecution for the unauthorized practice of law; and/or
  - Prosecution for an offence to be created, i.e. operating without a license.

## **VI. Areas and Scope of Work**

The following is based on the assumption that a paralegal is accredited and licensed pursuant to the requirements outlined above. Licensing and accreditation will be mandatory and provincial legislation referring to representation by agents will be amended as necessary.

Accredited Licensed Paralegals must be specifically accredited and licensed in each specified area in which the paralegal wishes to work as set out in sections VI (A) and (B)(2) below.

### **A. Accredited Licensed Paralegals (Advocacy)**

Accredited Licensed Paralegals (Advocacy) would be authorized to handle all matters pertaining to litigation, prosecution and defence work for disposition in:

1. Small Claims Court – An Accredited Licensed Paralegal (Advocacy) would be authorized to handle all matters in Small Claims Court and be recognized by the Court for the purposes of costs. [Paralegals would like to see a process created whereby Accredited Licensed Paralegals (Advocacy) could continue to appear on behalf of their clients on the appeal of a Small Claims Court matter. The legal organizations do not share this view.]
2. The Ontario Court of Justice with respect to all matters under the *Provincial Offences Act*.
3. Tribunals [other than the Financial Services Commission of Ontario (FSCO)] – An Accredited Licensed Paralegal (Advocacy) could appear in all matters before provincial boards, agencies and tribunals that allow for appearances by agents/paralegals. If a board has specific requirements, those should be incorporated into the licensing exam. It is anticipated that certain boards will require additional levels of education, training and expertise. Regarding FSCO, there was no consensus between the lawyers and the paralegals with respect to whether paralegals could appear, with or without the involvement of a lawyer, on matters before FSCO. It is understood by lawyers and paralegals that this matter is currently under review by the Ministry of Finance.
4. Appeals under the *Provincial Offences Act* – Currently, section 109 of the *Provincial Offences Act* authorizes agents to appear on appeals.

## **B. Areas of Work for Accredited Licensed Paralegals (Non-Advocacy)**

1. General Provisions
  - a. Any work conducted by an Accredited Licensed Paralegal (Non-Advocacy) will be performed pursuant to an affiliation agreement between a lawyer and the Accredited Licensed Paralegal (Non-Advocacy). The affiliation agreement will be registered with the Law Society and must meet the criteria of the Standing Committee before being accepted for registration.
  - b. The Standing Committee will define the nature of the business arrangements between lawyers and Accredited Licensed Paralegals (Non-Advocacy) and determine the content of the affiliation agreement, including the level of supervision required to ensure that the work performed by the Accredited Licensed Paralegal (Non-Advocacy) falls within the criteria set out in section VI(B)(2) below and that the work accomplishes the purpose of the joint retainer (see paragraph (c) below).

- c. Where an Accredited Licensed Paralegal (Non-Advocacy) performs work described in section VI(B)(2) below, the Accredited Licensed Paralegal (Non-Advocacy) and affiliated lawyer must enter into a written joint retainer agreement as among the lawyer, the Accredited Licensed Paralegal (Non-Advocacy) and the client. This joint retainer will set out the respective roles and responsibilities of the lawyer and the Accredited Licensed Paralegal (Non-Advocacy) and the fees to be charged by each. The Standing Committee will determine the criteria required for the content of the joint retainer agreement.

## 2. Functions

The functions performed by the Accredited Licensed Paralegals (Non-Advocacy) will be confined to the following areas and the definitions of these areas will be refined by the Standing Committee:

- a. Basic wills;
- b. Basic incorporations;
- c. Powers of Attorney;
- d. Residential real estate sales on behalf of a vendor where a residential property is either clear of any mortgage encumbrances or subject to only one mortgage;
- e. Change of name applications;
- f. Uncontested divorces where the parties have a separation agreement resolving all corollary issues with a certificate of independent legal advice executed within one year of the commencement of the divorce action or where there is a court order resolving all of the corollary issues granted within one year of commencement of the divorce action.

The Standing Committee will establish a protocol for dealing with requests to provide services which fall outside the areas outlined in section VI(B)(2) above. The protocol should address the following:

- Accredited Licensed Paralegals (Non-Advocacy) would not be permitted to advertise for work outside the defined areas.
- If such work were offered to an Accredited Licensed Paralegal (Non-Advocacy), he /she would be required to state that he or she is not authorized to do the work directly for the client.
- An Accredited Licensed Paralegal (Non-Advocacy) could refer work to a lawyer and have a referral arrangement with the lawyer. However, the joint retainer would not apply in this situation.

## **VII. Further Development of Regulatory Scheme**

The proposed framework must be implemented by legislative amendment to the *Law Society Act*. Such legislation will embody the general concepts of the proposed framework described in this Consultation Document.

The detailed rules pertaining to day-to-day regulation will be developed by the Standing Committee, following a consultation process to obtain input from all interested legal and paralegal organizations and individual members of the legal and paralegal communities. In particular, the Committee will develop rules to:

- Ensure the affiliations between lawyers and paralegals function effectively in the public interest and in compliance with the *Rules of Professional Conduct* governing lawyers and paralegals;
- Ensure that lawyer supervision meets the criteria described in section VI(B)(1)(b) and functions effectively in the public interest;
- Clarify the defined areas outlined in section VI(B)(2) ;
- Ensure that the joint retainer appropriately outlines the respective roles and responsibilities of the lawyer and the Accredited Licensed Paralegal (Non-Advocacy).

## **VIII. Federal Jurisdiction and Shared Federal-Provincial Jurisdiction**

Currently, paralegals act in certain matters which fall, at least partially, within the jurisdiction of the federal government. These matters are:

- Summary conviction matters – *The Criminal Code* permits agents to appear on summary conviction matters. The courts, through case law, have interpreted the extent of the role of an agent. The province’s jurisdiction to deal with this matter is unclear. Under *The Constitution Act, 1867*, the province has jurisdiction over the administration of justice but the federal government has jurisdiction over criminal law.
- Federal boards and tribunals – The status of agents/paralegals appearing before federal boards and tribunals is currently left to the rules of the individual board or to the federal government.

Since regulation of paralegals in the foregoing areas would likely require the involvement of the federal government, these areas have not been addressed at this time. However, it is strongly recommended that the federal government address these matters with input from those involved in the drafting of this document.

## **IX. Next Steps**

There are no doubt issues flowing from the proposed governance structure affecting both lawyers and paralegals which will need to be addressed.

Over the next few weeks, individual legal and paralegal associations will be consulting with their members regarding the proposed framework. In the event that the associations gain the support of their members, a final report will be presented to the Attorney General with the hope that it will form the basis for legislation regulating paralegals.

