



The Law Society of
Upper Canada

Barreau
du Haut-Canada

Regulating Paralegals: *A Proposed Approach*

A CONSULTATION PAPER

The Law Society Task Force on Paralegal Regulation

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I. Paralegals Remain Unregulated

IN ONTARIO, PARALEGALS PROVIDE THE PUBLIC WITH A considerable range of services, including representing individuals in Small Claims Court, before administrative tribunals and in Ontario's criminal courts – all without regulation or standardized accreditation. While the majority of paralegals may be honest and hard working, they are currently allowed to conduct business without educational standards, liability insurance, or a code of conduct, and they are not accountable to any governing organization for their professional activities. Law Society research has shown that the majority of the public is unaware that paralegals are unregulated. Unlike lawyers, there is no regulatory authority to ensure that paralegals are competent to serve the public, thereby placing the public at risk. When something goes wrong, the consumer is not protected.

It is generally recognized that paralegals can play a useful access-to-justice role in Ontario by providing assistance to individuals who, for various reasons, are unable or unwilling to hire a lawyer. However, increased access to justice is not sustainable until and unless paralegals are, like lawyers, governed by a regulatory body mandated to govern in the public interest. The majority of paralegals believe they should be regulated. Successive Ontario governments have recognized the desirability of developing a scheme of paralegal regulation. Paralegal organizations, consumer groups and legal organizations including the Law Society of Upper Canada have repeatedly endorsed the necessity of regulating paralegals. Nonetheless, paralegals remain unregulated. ❖

II. Brief History of Paralegal Regulation

For more than fifteen years, attempts to develop a regulatory framework for paralegals have failed. In August 1999 the Ontario Court of Appeal commented in the case of *R. v. Romanowicz*:

“A person who decides to sell t-shirts on the sidewalk needs a licence and is subject to government regulation. That same person can, however, without any form of government regulation, represent a person in a complicated criminal case where that person may be sentenced to up to 18 months imprisonment. Unregulated representation by agents who are not required to have any particular training or ability in complex and difficult criminal proceedings where a person’s liberty and livelihood are at stake invites miscarriages of justice. Nor are *de facto* attempts to regulate the appearance of agents on a case-by-case basis likely to prevent miscarriages of justice”.

In the fall of 1999, then Attorney General James Flaherty appointed the Honourable Peter de C. Cory to study paralegal activities. In May 2000, Justice Cory released his report (the ‘Cory Report’).

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 consensus between the legal and paralegal communities. In a letter dated October 31, 2001, Mr Young said, “the government remains committed to protecting consumers who use the services of paralegals.” Mediation was proposed but deferred in favour of a process designed to develop consensus among the legal stakeholders.

In July 2001, representatives of legal organizations (the Advocates’ Society, the County and District Law Presidents’ Association, the Law Society of Upper Canada, the Metropolitan Toronto Lawyers Association and the Ontario Bar Association) formed a

Working Group and contacted a paralegal organization, the Professional Paralegal Association of Ontario (PPAO) that represents several paralegal organizations: the Paralegal Society of Ontario, the Institute of Agents at Court and the Ontario Searchers of Record.

Members of the Working Group and representatives of the PPAO agreed on many principles underlying a proposed framework, embodied in a document circulated in April 2002 entitled *A Consultation Document on a Proposed Regulatory Framework*, often referred to as ‘the Consultation Document’ or ‘the Framework’. It was hoped that this would lead to action on the issue but again, this did not occur. However, many aspects of the 2002 Consultation Document form the basis for the present proposed regulatory approach and consultation document. ❖

III. Where We Are Today

On January 22nd, 2004, the current Attorney General of Ontario, the Honourable Michael Bryant, attended a meeting of the Law Society of Upper Canada's ruling board of governors (Convocation), to advise that he regarded the regulation of paralegals as necessary, and that the Law Society is the appropriate authority to do it. He requested that the Law Society agree to take on this responsibility, and that it propose a regulatory structure for that purpose. In response, Convocation voted in principle to accept this responsibility and authorized the Treasurer of the Law Society to establish a working group to develop a detailed proposal for the regulation of paralegals in collaboration with the Ministry of the Attorney General.

The ministry has indicated that the Attorney General is expecting the Law Society to consult with the profession and other stakeholders, including legal and paralegal organizations, the courts, community colleges, adjudicative tribunals and other interested parties.

On April 22, 2004, the Task Force presented Convocation with a preliminary regulatory approach. Convocation was not asked to approve the approach, but to authorize the Task Force to commence stakeholder consultations, using the proposed approach as a starting point and developing further details during the consultations. In response, Convocation authorized the Task Force to proceed with the consultations using the proposed regulatory approach as the starting point. ❖

IV. This Consultation Document

This document is the first step in the Law Society's consultation process. It is being distributed to all affected stakeholders for their consideration.

Following its distribution, the Task Force will conduct direct consultations with stakeholder groups to enable substantive conversations to occur. A facilitator will engage stakeholder groups in extensive discussions to determine the implications of the Task

Force's proposed approach and to formulate further levels of detail where required. There is much the Task Force needs to know from all stakeholders before it can present a well-constructed regulatory approach to Convocation and the Ministry of the Attorney General. This consultation document is designed to initiate that process. ❖

V. Proposed Approach to Paralegal Regulation

Overview

The following regulatory approach for paralegals is constructed to achieve several objectives:

1. Improved consumer protection and access to justice;
2. Improved and enhanced paralegal competence by instituting a standardized licensing and accreditation system;
3. Avoidance of jurisdictional confusion and unnecessary cost by regulating paralegals in a manner that mirrors regulation of lawyers; and
4. Preservation of the Law Society's role to govern the profession in the public interest and maintain the profession's independence, by asserting the jurisdiction of the Law Society over all services specified in the *Law Society Act* and by better enabling the Law Society to prevent the unauthorized practice of law.

To achieve these objectives, the basic components of paralegal regulation are as follows:

1. Clear delineation of the scope of permitted activities.
2. A licensing process for paralegals that will generally consist of:
 - a. A diploma from an accredited community college, after at least two years of study;
 - b. Grand parenting provisions;
 - c. Law Society licensing examinations;
 - d. Good character requirement; and
3. A governance structure, standards and processes for paralegals that mirror those for lawyers.

Scope of Professional Activities

The Task Force recommends that paralegals be authorized to conduct advocacy work in the following areas:

1. **Small Claims Court:** an accredited paralegal would be authorized to handle all matters in Small Claims Court and be recognized by the Court for the purposes of costs.
2. **The Ontario Court of Justice:** an accredited paralegal would be authorized to act with respect to all matters under the *Provincial Offences Act*.
3. **Tribunals:** an accredited paralegal could appear in all matters before provincial boards, agencies and tribunals that allow for appearances by agents. Boards may have specific requirements that may be incorporated into the licensing examination.
4. **Ontario Court of Justice:** appeals under the *Provincial Offences Act*. Currently, section 109 of the *Provincial Offences Act* authorizes agents to appear on appeals.

Given that several areas of advocacy work are already explicitly open to paralegals, and that there is a reasonable consensus on what constitutes advocacy work, it logically follows that paralegals should be authorized to continue working in this field. In addition, recent public concern about paralegals has focused on their engagement in the advocacy field, indicating a need for a priority response. From an access-to-justice perspective, there are advocacy areas where it can be difficult to obtain the services of a lawyer, such as Landlord and Tenant cases and Small Claims Court – demonstrating a clear requirement to meet public demand. Finally, advocacy work is conducted in a public arena in the presence of a neutral third party, thereby enabling effective monitoring and evaluation of the regulatory process.

The Task Force considered the recent creation of a paralegal registry by the Financial Services Commission of Ontario (FSCO). Due to the complexity of matters before FSCO, the Task Force is of the view that the public interest requires that accredited paralegals appearing at FSCO be limited to cases involving the monetary amount that can be claimed in Small Claims Court. Further consultation on this matter is required.

The Task Force recommends that paralegals not be authorized to conduct solicitors' work, primarily because there is no evidence that there is a scarcity of solicitors to provide services such as wills and real estate transactions. Further, there is no evidence that paralegals could provide these services at a more reasonable rate than lawyers. Non-lawyers currently providing solicitor-type services are engaging in the unauthorized practice of law in violation of the *Law Society Act*. The 2002 Consultation Document proposed an arrangement whereby a paralegal could perform solicitors' work in affiliation with a solicitor. The Task Force is concerned that this concept would be difficult to enforce and therefore further study is required. However, the proposed regulatory approach can be designed so that the scope of practice can be adjusted in the future if appropriate.

Further consultation with the legal profession, paralegals, the courts and tribunals will help to further clarify opportunities and issues associated with paralegals' scope of work as proposed.

Exemption from Regulation

Within the broad scope of activities to be regulated, the Task Force recommends that a general exemption from regulation be extended to a variety of individuals, including but not limited to: persons working under the supervision of a lawyer, such as law clerks and paralegals in law firms, legal clinics and student clinics; union representatives appearing in labour arbitrations; mediators; bankruptcy trustees; insurance brokers, and others.

The following criteria are recommended for establishing exemptions:

1. Whether there are vulnerable clients in need of consumer protection;
2. Whether the persons concerned are already adequately regulated by another professional body; and
3. Whether there is a strong policy rationale for exemption.

Further consultation is required to determine a comprehensive list of exempted parties.

Advocacy Work Under Federal Jurisdiction

The regulation of paralegals raises some complex federal–provincial issues. For example, a number of the areas where paralegals are particularly active, such as summary conviction offences under the *Criminal Code* and Immigration and Refugee matters, fall under federal jurisdiction.

The federal government recently enacted new regulations under the *Immigration and Refugee Protection Act* imposing new requirements on paralegals working as immigration consultants. There are a number of aspects of this scheme that are problematic for the Law Society, including the apparent intention to regulate persons supervised by lawyers in law firms. Further consultation and study is required

VI. Licensing and Accreditation

<i>Licensing Requirements</i>	<p>The recommended licence requirements for paralegals are:</p> <ol style="list-style-type: none"> 1. A two-year diploma from an accredited community college; 2. Successful completion of a Law Society Licensing examination; and 3. Good character.
<i>Grandparent Provisions</i>	<p>The Task Force recommends an initial grandparent process whereby paralegals who have worked for five of the last seven years in their proposed area of work, could be excused from the accredited college program requirement. They would, however, be required to take the Law Society licensing examination and to be of good character. Applicants for grandparenting must apply within two years of the regulatory requirements coming into force, or as otherwise set by the regulatory authority, with an affidavit regarding their work experience. Applicants would be restricted to individuals. Corporations or franchises would not qualify.</p>
<i>Paralegal Licences</i>	<ul style="list-style-type: none"> • A license would only be granted to an individual - corporations or franchises will not qualify. • Accredited paralegals would become Commissioners of Oaths within their designated areas. • Given that accredited paralegals will be privy to confidential client information, the regulatory approach must ensure that accredited paralegals cannot be required to divulge confidential information, unless a judge orders it disclosed in the interests of the administration of justice. <p>The Task Force has considered two options for paralegal licences – either a general or a limited licence. Limited licences would authorize paralegals to handle cases pertaining to particular areas, such as cases under the Highway Traffic Act, or appearances before FSCO. An individual could be permitted to apply for more than one limited licence. A general licence would pertain to the full range of permissible advocacy areas. Limited licences would entail separate licence examinations. Further consultation is required on this matter.</p>
<i>Good Character</i>	<p>Lawyers are required to be of good character. It is recommended that this requirement also apply to paralegals.</p>
<i>Accreditation</i>	<p>Currently a wide variety of training programs are offered for student-paralegals, ranging from individual courses run by private schools to two, three and four-year programs offered by various community colleges. The Task Force intends to host extensive consultations with the education sector, including the Ministry of Training Colleges and Universities, to develop a standardized, transparent and rigorous set of professional standards for paralegal accreditation. The Task Force does not recommend that the Law Society prepare courses for</p>

paralegals, rather it will collaborate with the education sector to set clear competence and accreditation standards. Further consultation is required.

Mentoring is another area that requires stakeholder discussion. Previous proposals suggested that students be required to work under the supervision of a lawyer or accredited paralegal for a period of six months as part of their training program. The Task Force has identified some issues associated with this approach:

1. A mentoring period would be difficult to implement unless it is incorporated into a college program;
2. Finding Articling positions for law students presents a challenge, and finding additional placements for paralegals will increase the challenge.
3. The requirement that students “observe” the operation of a Tribunal is another suggested activity that may be difficult to enforce.

It may turn out that a kind of college co-op program could provide students with “real-life” training, but further consultation needs to take place on this subject.

VII. Governance Structure

Paralegal Standing Committee of Convocation

The Task Force recommends that a Paralegal Standing Committee of Convocation be mandated to govern and regulate paralegals in the public interest. The mandate of the Standing Committee would include, among other matters, policy development on the following:

1. Code of conduct
2. Licensing fees
3. Rules of incorporation
4. Books and records/trust accounts
5. Hearing and appeal processes for conduct, capacity, and competence matters
6. Insurance
7. Compensation fund
8. Continuing education

The Standing Committee should be composed of an equal number of paralegals and elected benchers, plus two or more lay benchers, e.g. five paralegals, five elected benchers and three lay benchers. At first, the Attorney General would appoint the five paralegals to the Standing Committee, with recommendations from the paralegals. Subsequently, they would be elected by all accredited paralegals.

At all times, a paralegal would either be the chair or the vice-chair of the Standing Committee. An elected benchler would also be either the chair or the vice-chair of the Standing Committee. The chair and vice-chair would both have the right to attend Convocation and address Convocation on Standing Committee matters. The Task Force also recommends that two of the paralegals on the Standing Committee should become members of Convocation.

As with other Standing Committees, the recommendations of the Standing Committee would be subject to ratification by Convocation. Unlike other committees, however, 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.

The Standing Committee would develop detailed rules pertaining to day-to-day regulation. Further consultation with the profession and paralegals is required.

Code of Conduct

The Law Society's *Rules of Professional Conduct* would apply to accredited paralegals, with necessary modifications.

Licensing Fees

Ideally, paralegal regulation would be self-funding on the same model as lawyers. However, annual fees from over 30,000 lawyers support the Law Society's infrastructure. Every year, bar admission examinations are prepared for a predictable cohort of approximately 1,200 law school graduates who pay \$4,000 for the course and examinations. The number of potential paralegals to be accredited is not known but is estimated to be in the low thousands. The initial number of applicants for paralegal examinations is expected to be rather low. Given that fees for paralegals must be set at a reasonable level, it is critical that funding assistance be provided by the Ontario government, at least for the first few years, to cover the cost of regulating paralegals until self-funding is achieved. This must include funding for appropriate enforcement measures.

Rules of Incorporation

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

Books and Records/Trust Accounts

Accredited paralegals would be required to maintain trust accounts restricted to retainers.

Hearing and Appeal Processes

Accredited paralegals will be subject to the same disciplinary processes and penalties as lawyers, with the necessary modifications. Cases involving paralegal conduct, capacity or competence would be heard in the first instance by a panel of three persons: a lawyer benchler, an accredited paralegal and a lay benchler. The paralegal may be represented by a

lawyer or by an accredited paralegal. The appeal process would be modelled on that for lawyers, with the necessary modifications.

Insurance Paralegals will be required to have errors and omissions insurance at a set level.

Compensation Fund Paralegals will contribute to a compensation fund similar to that for lawyers.

Continuing Education The Standing Committee would recommend continuing education requirements for accredited paralegals.

VIII. Ongoing Work

The Task Force's regulatory approach as set out in this consultation paper is intended to stimulate discussion within the legal profession, paralegals and all affected stakeholder groups. The Task Force's objective is to formulate an approach that Convocation and the Attorney General can use as a basis to implement a successful scheme of paralegal regulation.

Following distribution of this document to stakeholders, a facilitator will meet with selected groups to obtain detailed information that will assist the Task Force to complete its job of designing a workable regulatory approach for paralegals. Participation by the profession, paralegals and all stakeholders will greatly assist the Task Force and will be gratefully received.

Written submissions are also welcome and should be received by June 30, 2004.

All comments should be directed to:

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