



Law Society
of Ontario

Barreau
de l'Ontario

Tab 6

Access to Justice

An Abiding Interest: Implementation Update

June 23, 2021

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Executive Summary

Legal aid has long been a priority for the Law Society of Ontario and remains so in light of the Law Society's statutory obligation to facilitate access to justice.

In 2018, Convocation approved the Abiding Interest Report to reinforce and reinvigorate the Law Society's involvement in legal aid.

Since then, the Law Society has continued to:

- engage in dialogue with Legal Aid Ontario
- facilitate the Association for Sustainable Legal Aid
- champion a robust system of legal aid in Ontario
- recommend appointments to the LAO board.

In addition, the Action Group on Access to Justice (TAG), established by the Law Society, promotes discussion, research and data collection regarding access to justice for low-income Ontarians.

Further updates will be provided to Convocation to help maintain a vigilant focus on the Law Society's involvement in legal aid.

Purpose

This report provides an update on the Law Society of Ontario's involvement in legal aid after Convocation adopted the 2018 [Report of the Legal Aid Working Group: An Abiding Interest](#) (Abiding Interest Report).

An Abiding Interest

In November 2016, the Law Society established the Legal Aid Working Group, chaired by bencher John Callaghan. The working group was comprised of benchers with a range of knowledge and expertise, including experience as legal aid service providers in the private bar and community legal clinic system.

The working group met with more than forty legal stakeholders from over twenty organizations before developing its report to Convocation. On January 25, 2018, Convocation approved the report, setting the stage for a reinvigorated focus on the Law Society's involvement in legal aid.

The report was called *An Abiding Interest* in recognition of the Law Society's longstanding interest in helping to ensure robust, transparent, and sustainable legal aid services for low-income Ontarians. Key points of the report include

- a. The Law Society was one of the initial architects of our modern legal aid system and the initial administrator of legal aid in Ontario.
- b. The Law Society has a statutory obligation to facilitate access to justice. Legal aid is a key pillar of access to justice due to its life-altering impact on low-income people in criminal, family, refugee, civil, and clinic law.
- c. The Law Society's licensees provide the bulk of legal aid services.
- d. Stakeholders from the legal community welcome active involvement by the Law Society in ways that complement the work of Legal Aid Ontario.

An Abiding Interest recommended ways to strengthen the Law Society's relationship with Legal Aid Ontario (LAO), foster improved relationships between LAO and legal stakeholders, champion the need for robust legal aid, and promote discussion, research and data collection to support improvements and innovation.

Having completed its task with the submission of its report, the Legal Aid Working Group recommended that various structures within the Law Society contribute to implementing the report, with leadership from the Access to Justice Committee.

A list of the recommendations from the Abiding Interest Report appears in **Appendix 1**.

Activities

A. Engagement with Legal Aid Ontario

Since 2018, the Law Society has engaged in informal and formal communications with Legal Aid Ontario. For example, in a letter dated May 20, 2021, the Law Society commented on proposed draft rules to support the implementation of the *Legal Aid Services Act, 2020 (LASA, 2000)*. The letter makes constructive suggestions about expediting the development of a consultation policy as mandated by section 33 of *LASA, 2020*; working collaboratively with the Law Society on quality assurance standards and protocols; and strengthening the protection of solicitor-client privilege for legal aid clients. The Law Society's letter is attached as **Appendix 2**.

In addition, the Law Society has initiated regularly scheduled meetings on an ongoing basis between senior members of the Law Society (including Treasurer Donnelly and the Executive Director of External Relations and Communications) and Legal Aid Ontario (including the Chair, President and CEO, and Vice President of Strategy and Public Affairs). These meetings have been helpful to discuss issues as they arise and provide for more proactive engagement, collaboration, and information sharing.

B. Involvement with Legal Stakeholders

The Law Society plays a role helping legal stakeholders to have an effective voice, individually and collectively, in their interactions with Legal Aid Ontario. Much of this work has been done through the Law Society's work in facilitating and supporting the work of the Alliance for Sustainable Legal Aid (ASLA).

For more than two decades, the Law Society has been a driving partner in the work of ASLA, a group that includes leaders from the Law Society and a range of legal service provider organizations. Law Society members include the Treasurer, two benchers¹ from the Access to Justice Committee, and senior staff. The table below indicates the stakeholder organizations that are members of ASLA.

¹ Jonathan Rosenthal and Dr. Benson Lau.

ALLIANCE FOR SUSTAINABLE LEGAL AID
Association of Community Legal Clinics of Ontario
Criminal Lawyers' Association
Family Lawyers Association
Federation of Ontario Law Associations
Law Society of Ontario
Mental Health Legal Committee
Ontario Bar Association
Refugee Lawyers Association
The Advocates' Society

ASLA has held 24 formal meetings since *An Abiding Interest* was approved by Convocation on Jan 25, 2018. This is in addition to informal interactions among ASLA members and ongoing discussions between the ASLA chair and the Law Society's Executive Director of External Relations and Communications. It has been a busy year for ASLA with frequent meetings to respond to changes flowing from the implementation of *LASA 2020*.

The meetings have worked well to ensure that service providers are aware of ongoing developments and to achieve synergies that come from having a spectrum of criminal, family, refugee, civil and community legal clinic voices around the table. ASLA continues to make best efforts to increase trust, partnership, and cooperation between legal service providers and LAO. ASLA often invites LAO representatives to ASLA meetings to facilitate dialogue on shared issues.

Recently, the Law Society played a facilitating role in the creation of ASLA's submission to LAO in relation to the draft rules. Individual ASLA member organizations prepared their own submissions which elaborated on issues of particular interest to them. The Law Society's submission, referred to above, appears in Appendix 2. Submissions from the [Federation of Ontario Law Associations](#), [Ontario Bar Association](#), and [The Advocates' Society](#) can be found on these organizations' websites. The ASLA submission is attached as **Appendix 3**.

C. Policy Discussions, Research and Data Collection

The Law Society established The Action Group on Access to Justice (TAG) in 2015 to facilitate coordination and collaboration across the justice sector. With ongoing

leadership and support from the Law Society, TAG works with justice stakeholders to develop meaningful, public-centred solutions that advance systemic change.

TAG has been instrumental in generating policy discussions and sharing information on access to justice issues. Access to Justice Week, launched by TAG in 2016, is a key vehicle for achieving this. Many Access to Justice Week events address issues and innovations aimed at improving access to justice for the benefit of low-income persons who require legal assistance. The events are attended by a broad range of lawyers, paralegals, the general public, students, academics, community organizations, and subject-matter experts.

Sample topics covered in Access to Justice Week events since 2018, including events planned for 2021	
Research and data	<ul style="list-style-type: none"> • Research on Ontario’s vulnerable communities (2018) • Leveraging data for a better justice system (2019)
Specific populations	<ul style="list-style-type: none"> • Indigenous justice (2018, 2019, 2020, 2021) • Access to justice and systemic racism (2020)
Areas of law	<ul style="list-style-type: none"> • Access to justice in family law (2018, 2020, 2021)
Community support	<ul style="list-style-type: none"> • Updates and action for community workers (2020) • Public legal education (2021)

TAG also launched a Research Community of Practice in 2020 to facilitate collaborative research, knowledge and data sharing within the justice sector. Members include a variety of access to justice partners, including Legal Aid Ontario.

D. Championing Legal Aid

The Law Society is a champion for a robust and sustainable system of legal aid in its own capacity and as a member of ASLA. A large part of this role involves engaging in advocacy with the provincial and federal governments. This is done through letter-writing, appearances at standing committees, and meetings or conversations with senior government officials. The Treasurer has personally raised the importance of legal aid funding with provincial and federal Attorneys General Downey and Lametti.

The Law Society and its ASLA partners successfully lobbied for improvements to the eligibility thresholds for both LAO’s certificate program and clinic law services that resulted in the thresholds increasing by over 30% over five years (2014-2019).

The Law Society also spoke out against the provincial government’s 2019 33% reduction in their funding transfer to Legal Aid Ontario. Fortunately, many of the impacts of that reduction were cushioned somewhat by an unprecedented transfer from the Law Foundation of Ontario, and the impacts of the pandemic, which had temporarily reduced the demand for Legal Aid’s services. The 2019 announcement had envisioned a second round of cuts in 2020, but strong advocacy from the Law Society and ASLA helped to

convince the Ontario government not to proceed with any further reductions. However, the full impact of the reduced funding is not known.

The Law Society and ASLA have also urged the federal government to meet their obligations with regard to legal aid funding generally and more specifically to increase their commitment to immigration and refugee funding. A federal contribution of \$42.6 million was critical in managing the gap created by Ontario's elimination of funding for refugee legal services in 2019. This contribution ensured the continued provision of essential legal services to vulnerable refugees and immigrants.

On June 10, 2020, then Treasurer Mercer and the Executive Director of External Relations and Communications appeared before the provincial Standing Committee on Justice Policy to comment on the *Smarter and Stronger Justice Act, 2020, Bill 161*. During their presentation, they advised the committee about the Law Society's abiding interest and ongoing commitment to legal aid. They indicated that the Law Society:

- engages in robust dialogue with the provincial and federal governments to ensure the sustainability and health of legal aid;
- has always taken opportunities to meet with Attorneys General of the day, both federally and provincially; and
- plays a facilitative role with ASLA which has as its sole priority speaking out about legal aid issues.²

E. Appointments to the Legal Aid Ontario Board

In 2020, the Law Society made recommendations to the Attorney General for appointees to the LAO Board of Directors.

Under the *Legal Aid Services Act, 2020*, the Law Society provides recommendations for the appointment of five people to the LAO Board. Typically, the Law Society provides three names for each of the five appointments. The Law Society takes this role seriously. Recommending strong candidates underscores the importance the Law Society places on the vital role of LAO in ensuring equitable access to justice.

Treasurer Donnelly, with the assistance of the Treasurer's Appointments Advisory Group, composed of benchers, oversaw the 2020 application process. To ensure a broad range of applications, the opportunity was advertised through all Law Society member communication channels (e-newsletters, Ontario Reports, website, social media). To further attract a diverse range of applicants, the Treasurer engaged in outreach with lawyer and paralegal associations.

² [Legislative Assembly of Ontario, Official Report of Debates \(Hansard\), JP-17, Standing Committee on Justice Policy, Smarter and Stronger Justice Act, 2020, 1st Session, 42nd Parliament, Wednesday 10 June 2020.](#)

In keeping with *An Abiding Interest*, the individuals recommended to the Attorney General included licensees with a range of legal aid experience, including in private bar and clinic settings. Equity, diversity and inclusion principles and other factors were also applied to ensure a variety of relevant knowledge, expertise and experience.

This process resulted in the appointment of five outstanding LAO board members:

- Jennifer Gold (Dec 2020 - Dec 2022) is a partner in a small firm that focuses on family law, mediation and wills. She is a mentor to other lawyers in the family law bar and an advocate for diversity and inclusion in the legal profession. She is the current president of the Women's Law Association.
- Bryn Gray (Jan 2021 - Jan 2023) has expertise in Aboriginal law and relationship-building with Indigenous groups. He is a member of his law firm's Pro Bono Committee and a regional lead for the firm's Pride Action Group.
- Deborah Moriah (Jan 2021 - Jan 2023) has experience as a paralegal in immigration and social justice tribunals that address human rights, social benefits and criminal injuries compensation. She is also a founding member of the Ontario Association of Black Paralegals.
- John Callaghan (Jan 2021 - Jan 2023) practises in the areas of civil and commercial litigation and regulatory offences. During his eight years as a benchler, he chaired the Legal Aid Task Force and authored *An Abiding Interest* as chair of the Legal Aid Working Group. He is also a former member of ASLA.
- Chris Uwagboe (April 2021 - April 2023) is a sole practitioner practising in the areas of criminal defence, real estate, immigration, and small claims. He is experienced in serving communities with the assistance of legal aid.

Now that this latest round of appointments has been made, the Law Society will consider the development of protocols for communicating with the LAO board members it recommended, taking care not to create a conflict with their fiduciary obligations.

Conclusion

Approval of *An Abiding Interest* was an important milestone and indication of the Law Society's commitment to legal aid and continuing work in this area as part of its access to justice mandate.

During debate on the report in 2018, a number of benchers stressed the importance of updates to inform Convocation of progress made to implement the report's recommendations. This was seen as essential for maintaining a vigilant focus on the Law Society's involvement in legal aid. As progress continues to be made, Convocation will receive further updates on this crucial access to justice issue.

Appendices

Appendix 1: Working Group recommendations 2018

RECOMMENDATIONS: INVOLVEMENT IN LEGAL AID

It is recommended that the Law Society:

- (a) Work with Legal Aid Ontario to develop a structured and ongoing process for dialogue with the LAO board and senior management to discuss matters of mutual importance in improving access to justice in Ontario.
- (b) Play a role with legal stakeholders and LAO to build stronger relationships and more open dialogue.
- (c) Convene public symposia on legal aid policy issues, involving a range of stakeholders, experts and sectors to explore innovative approaches and to discuss and address concerns and improvements respecting the legal aid system.
- (d) Champion the need for robust legal aid and share the Law Society's insights and concerns regarding legal aid with the federal and provincial levels of government, as part of the Law Society's government relations activities.
- (e) Continue to facilitate and support the work of the Alliance for Sustainable Legal Aid.
- (f) Ensure that its recommendations for appointment to the LAO board include nominees who are experienced in the legal aid system, including the clinic system and the private legal aid bar.
- (g) Develop a protocol for LAO board members who are recommended by the Law Society to play a role in keeping communications flowing between the two organizations to strengthen the capacity to address legal aid issues, in a way that does not conflict with the board members' fiduciary obligations.
- (h) Encourage the collection of data, including disaggregated demographic data, to ensure greater transparency in legal aid, and to promote more evidence-based research and policy development.

RECOMMENDATIONS: IMPLEMENTATION ROLES

It is further recommended that:

- (a) The Access to Justice Committee assume responsibility for implementing the above recommendations and for maintaining a vigilant role in ensuring effective legal aid strategies for the Law Society.
- (b) The Government and Public Affairs Committee work with the Access to Justice Committee on implementation of the recommendations, with special attention to government relations, stakeholder relations, and the continuing role of the Law Society in legal aid.
- (c) The Access to Justice and Government and Public Affairs Committees work closely with the Law Society's Indigenous Advisory Group in ensuring that Indigenous voices are heard on issues relating to legal aid services.
- (d) The Treasurer's Appointments Advisory Group take the lead in implementing recommendations regarding the Law Society's role in recommending appointees to the LAO board.
- (e) The Access to Justice Committee identify the impact on resources of implementing the recommendations, in consultation with the Audit and Finance Committee.

Appendix 2: Law Society letter on draft legal aid rules 2021



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Teresa Donnelly
Treasurer
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May 20, 2021

Mr. Charles Harnick
Chair, Board of Directors

Mr. David Field
President and CEO

Legal Aid Ontario
Atrium on Bay
40 Dundas Street West, Suite 200
Toronto, ON
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2021rulespublicfeedback@lao.on.ca

Dear Mr. Harnick and Mr. Field:

Re: Proposed draft rules to support the implementation of the *Legal Aid Services Act, 2020*

Introduction

The Law Society of Ontario (“LSO”) appreciates the opportunity to comment on Legal Aid Ontario’s proposed draft rules, which have been released to support the implementation of the *Legal Aid Services Act, 2020*. The Law Society is hopeful that the implementation of the new *Act* and rules will lead to improvements and a modernization of Ontario’s legal aid system, and looks forward to working with Legal Aid Ontario in ensuring that the system continues to provide high quality legal aid services to low-income clients.

As a member of the Alliance for Sustainable Legal Aid (ASLA), the Law Society has played a facilitating role in the creation of ASLA's submission and fully supports the submission's recommendations.

With this letter, the LSO would like to provide its own submission, which outlines three areas of immediate concern to the Law Society and recommends solutions in each case. The comments included in this submission are intended to be constructive, and the Law Society welcomes further meetings on any of these areas should there be interest within Legal Aid Ontario.

The Law Society's goal in providing this feedback is to ensure that the rules support the long-term sustainability of legal aid, while maximizing the quality of service available to clients.

Consultation

The 2020 update to the *Legal Aid Services Act* was the biggest change in the legal aid system since the introduction of the original bill in 1998. The Law Society was pleased to engage with the Ministry of the Attorney General and Legal Aid Ontario in the creation of the new *Act* and to offer feedback on how to improve the functionality of the legal aid system. A significant component of that feedback was the need for a comprehensive consultation policy, and the LSO was pleased to see that included in S.33 of the *Legal Aid Services Act, 2020* ("LASA, 2020"). It was the LSO's hope that the inclusion of this language would lead to improved dialogue, and better collaboration between all partners in the legal aid community. As you know, in 2018, the LSO released a report entitled "An abiding interest". In it, the LSO articulated its commitment to consultation and stakeholder engagement, which the LSO considers hallmarks essential to modern, transparent, accountable, and effective public policy development and service delivery.

Unfortunately, the benefits of a fulsome consultation were not realized in the comment period for the proposed draft rules. The posting of the rules, and the process used to create them, was in keeping with the letter of the law, it was not in keeping with its spirit.

By tabling the rules without any opportunity for meaningful engagement beforehand, LAO has put the legal aid community in the position of responding to LAO's rules, rather than collaboratively working together towards a shared vision. A collaborative approach would have enabled LAO to tap into the extensive experience of front-line service providers and officials at the LSO, and could have produced suggestions that would have led to improvements for clients, and the system as a whole. Instead, over 100 pages of technical material was placed in front of stakeholders as a final product with only 30 days to digest, analyse, and respond.

While the LSO appreciates the many opportunities LAO has provided to ask questions and learn about the rules since their initial posting on April 21, it would have been

preferable for these opportunities to have occurred earlier so that the elements outlined in this letter could have been addressed before the rules were posted.

The LSO strongly urges LAO to expedite the development of the required consultation policy so that meaningful dialogue can occur ahead of the next round of potential updates to the rules. Early feedback and an exchange of ideas ensures better products and outcomes. It's also good public policy.

Quality Assurance

The schedule that accompanies the rules for Roster Management includes a section on quality assessments. It reads as follows:

Quality assessments

4 (1) The Corporation may assess the quality of legal services provided by a roster member.

(2) In assessing a roster member's quality of service, the Corporation may take any relevant information into account and consider any relevant factor, including the following:

(a) the roster member's record of compliance with the Corporation's rules, procedures, billing and account submission rules or administrative requirements;

(b) information about the roster member's conduct towards legally aided clients, including as evidenced by the results of any client satisfaction surveys and reviews;

(c) any decision or documents from a court or tribunal;

(d) information received from other lawyers (whether or not they are a roster member), from their legally aided clients and from judges.

As you know, as recently as 2017, the LSO and LAO have been engaged in discussions to explore whether LSO's Practice Review Program could be used to conduct quality assurance reviews of LAO referred members. Unfortunately, these discussions never reached a successful conclusion. While similar language was found in section 92 of the *Legal Aid Services Act, 1998*, this section of the *Act* was not carried through in the 2020 update. Instead, as mentioned above, the language covering quality assessments is now found exclusively in the rules.

While the LSO doesn't necessarily disagree with this approach in principle, it must be noted that section 46 of the *Legal Aid Services Act, 2020* provides very broad rule

making power to the LAO board. The Law Society would like to request that if any changes to the quality assurance rule are under consideration by LAO, that there be proactive dialogue and consultation to ensure that there is no unnecessary duplication, or any appearance of regulatory overlap between LAO and the LSO. It is important that licensees have clarity on the standards that are being used to evaluate their performance, and there is a concern that a siloed approach or a lack of specificity could lead to future challenges in this area. For example, the successful implementation of a quality assurance program requires the development of standards, policies and procedures. None of which have been included in the release of these rules. The Law Society is concerned that, until these new standards, policies and procedures are released, there will be an information gap whereby licensees will not have clarity around the specific standards that will be enforced, or the process to enforce them.

To be clear, the LSO supports the general idea of LAO setting their own standards and conducting their own quality assurance activities to meet their needs and objectives as outlined in the *Act* and the rules. The LSO also supports LAO's ability to manage their rosters by putting reasonable conditions on roster members, or to ultimately remove someone from the roster if LAO believes it is appropriate. The LSO believes that roster management tools are a necessary requirement for the successful functioning of the roster.

However, the Law Society believes there should be information sharing as part of this process, to ensure that the LSO is notified in cases where serious competence, conduct, or capacity issues are suspected by LAO. Under the current draft rules, LAO has a wide discretion in deciding when to notify the LSO on these matters. The rules³ merely state that LAO "may" notify the LSO of any conduct issues. At a minimum, LAO should be reporting anything that falls under the duty to report in Rule 7.1-3 of the Law Society's *Rules of Professional Conduct*.

In order to ensure that matters that could represent a risk to the public are appropriately investigated, the Law Society requests that a discussion between the LAO and LSO investigations departments occur to ensure that a policy outlining the proper thresholds for reporting is put in place. This policy would allow the LSO the opportunity to investigate matters that could represent a risk to the public, while not bringing an additional administrative burden to LAO.

Solicitor-Client Privilege

The proposed draft rules address solicitor-client privilege in three separate Rules: Rule 1: Roster Management subrule R7(3); Rule 4: Eligibility for Legal Aid Services, subrule EL8; and Rule 6: Entity Service Providers, subrule ESP7(2). While the purpose of each

³ R10(4), R16(2a)

rule is different, the LSO asserts that in each case the proposed rule represents an infringement of solicitor-client privilege.

Roster Management rule R7(3), and Entity Service Provider rule ESP7(2) both state that LAO has the power to request any information or document from a roster lawyer or clinic, including privileged documents. These proposed rules also require the disclosure of privileged information without the client's consent or knowledge.

Furthermore, Eligibility rule EL8 states that clients must agree to waive solicitor-client privilege in order to be eligible to receive legal aid. This rule is a significant invasion of a client's right to solicitor-client privilege. It puts potential legal aid clients in the difficult position of choosing between their right to legal representation, and their right to solicitor-client privilege. In either scenario, the client will have a fundamental right violated. Privilege allows for open and candid discussions between a client and their legal advisor, which in turn also promotes access to justice. As currently drafted, this proposed rule could have a chilling effect on the relationship between lawyers and legal aid clients by eroding the comfort and willingness of clients to openly disclose important information to their legal advisors.

As written these rules will erode the fundamental right of legal aid clients to have privileged communications with their legal advisers. If implemented these rules could fundamentally impair the solicitor-client relationship thereby depriving access to justice for some of Ontario's most vulnerable clients. Any rule that could reduce access to justice is unacceptable to the LSO. Therefore, for the reasons outlined above, the LSO believes that all references to requests for privileged documents be removed from rules R7(3), EL8 (1), and ESP7(2) to ensure that legal aid clients aren't forced to choose between their right to solicitor-client privilege and access to justice.

Thank you for considering the Law Society's comments. If you have any questions regarding this matter, please do not hesitate to contact me.

Yours truly,

A handwritten signature in black ink, appearing to read "Teresa Donnelly". The signature is fluid and cursive, with a large loop at the end.

Teresa Donnelly
Treasurer

Appendix 3: ASLA submission on draft legal aid rules 2021

**SUBMISSION TO LEGAL AID ONTARIO ON DRAFT RULES UNDER
*LASA, 2020***

FROM THE ALLIANCE FOR SUSTAINABLE LEGAL AID

MAY 19, 2021

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Letter of Transmittal



ALLIANCE FOR SUSTAINABLE LEGAL AID

AN ALLIANCE OF ♦TAS ♦ACLCO♦CLA♦FLA♦LSO ♦OBA♦RLA♦FOLA♦MHLC

May 19, 2021

Charles Harnick, Chair
David Field, President and CEO
Legal Aid Ontario

Dear Mr. Harnick and Mr. Field,

I am pleased to submit perspectives from the Association for Sustainable Legal Aid (ASLA) on key themes pertaining to the draft rules prepared by Legal Aid Ontario under *LASA, 2020*. This submission reinforces and expands upon points that ASLA members raised during the feedback session convened by Legal Aid Ontario on April 29, 2021.

Please note that individual ASLA member organizations are preparing their own submissions to address aspects of the rules that are of particular relevance to them.

Regards,

A handwritten signature in black ink, appearing to read 'Lenny Abramowicz'. The signature is fluid and cursive, with a long horizontal stroke at the end.

Lenny Abramowicz
Chair of ASLA
Executive Director of the Association of Community Legal Clinics of Ontario

c.c. Doug Downey, Attorney General of Ontario
Patrick Schertzer, Senior Advisor, Policy and Legal Affairs, Office of the Hon.
Doug Downey, Attorney General of Ontario

Introduction

The Alliance for Sustainable Legal Aid (ASLA) is pleased to have an opportunity to provide feedback on the draft rules that Legal Aid Ontario (LAO) has prepared pursuant to *LASA, 2020*. You will be hearing separately from individual member organizations with more detailed comments.

Our submission covers eight overarching themes that ASLA has identified. We have provided our comments theme-by-theme rather than rule-by-rule since the themes cut across multiple areas.

THEMES ADDRESSED IN THIS SUBMISSION
<ul style="list-style-type: none">• Consultation• Relationship with LAO• Commitment to certificate and clinic systems• LAO's discretion• Quality assurance• Equity• Solicitor-client privilege• Fairness and simplicity of accounts

Our comments are intended to be constructive. We have tried to flag elements that could compromise client needs or deter experienced and committed service providers from participating in legal aid.

Overall, ASLA is concerned that the draft rules make fundamental changes to LAO's relationship with the private bar and clinics through a substantial increase in LAO's powers and discretion, and the inclusion of provisions that appear to be overly broad, vague or administratively onerous. Other provisions, such as the assignment by LAO of counsel to clients, and the ability to contract with a variety of corporate entities, could lead to a lessening of the commitment to community clinics and certificate counsel of choice, two mainstays of legal aid services in Ontario. We also have suggestions about approaches to equity, quality assurance, and solicitor-client privilege. And we remain concerned that LAO has not developed a consultation strategy as mandated in section 33 of the legislation.

The rules are a matter of fundamental importance for legal aid in Ontario. We hope there will be opportunities for dialogue with LAO before they are finalized.

About ASLA

The Alliance for Sustainable Legal Aid is comprised of leaders from nine organizations with expertise and experience with legal aid in Ontario. As part of the Law Society's involvement in legal aid, the Law Society has been a driving partner in the important work of ASLA for many years. The Law Society plays a facilitative and support role for ASLA in addition to serving as a member.

Originally established twenty years ago as a Coalition on Tariff Reform, ASLA has evolved into an organization that looks at legal aid more broadly in the pursuit of access to justice for low-income people, founded in our shared and strongly held commitment to a sustainable legal aid system. Our work includes government relations, information exchange, and communication with Legal Aid Ontario and other justice sector bodies. Over the years, ASLA has met with representatives of LAO and the Ministry of the Attorney General on a regular basis to engage in constructive dialogue.

ALLIANCE FOR SUSTAINABLE LEGAL AID
The Advocates' Society
Criminal Lawyers' Association
Family Lawyers Association
Refugee Lawyers Association
Association of Community Legal Clinics of Ontario
Federation of Ontario Law Associations
Law Society of Ontario
Ontario Bar Association
Mental Health Legal Committee

Theme 1: Consultation

ASLA strongly encourages LAO to engage in constructive dialogue and joint problem-solving with us on areas of concern in the draft rules. This would be better than adhering to traditional methods of consultation in which we provide comments that LAO takes into account without any opportunity for meaningful engagement. The synergies of a more interactive approach would enable LAO to tap into our breadth of experience for the benefit of clients, communities and the legal aid system as a whole.

The draft rules are extensive (over 100 pages) and technical, written in formal statutory language. Even for ASLA members who are legally trained, it has been a challenge to go through all the material and quickly formulate our response. It must have been an even

greater challenge for non-legally trained members of the public, including clients, to digest the information and provide meaningful feedback, especially with a 30-day time limit.

It was also a challenge to review the draft rules without having received an indication from LAO about what elements are a codification of the current state and what is new or different. We hope that LAO has carefully considered existing policies before deciding to include them and is open to comments about them in addition to new elements that have been added.

The 30-day posting provision under s.46 of *LASA, 2020* does not prevent LAO from engaging with stakeholders earlier in a collaborative way rather than presenting what appears to be essentially a final product. During a technical briefing on April 20, 2021, LAO advised that the draft rules had been developed over a lengthy period of time, with full board involvement and vetting by the operations committee. ASLA is not aware of any opportunities for stakeholder dialogue during that period.

The impression left by LAO is that they are open to some tweaking of the rules but not much more at this point. This impression was confirmed by LAO's closing remarks at the ASLA feedback session on April 29. In those remarks, ASLA's offer to work collaboratively in finding workable solutions on some of the issues was politely and firmly declined.

We appreciate the opportunity LAO provided for a technical briefing, feedback session, and submissions. However, we would have preferred more meaningful engagement on rules that will have a major impact on legal aid in Ontario for years to come.

In ASLA's view, this process reinforces the urgency for LAO to produce a public consultation policy, to be approved by the Minister, as mandated by section 33 of *LASA, 2020*. That section specifically requires the policy to describe how consultation with the public will be undertaken when changes are being considered to the rules. It would have been preferable for the public consultation policy to be in place in time for consultation on the draft rules. We strongly urge LAO to expedite the development of the policy, building in principles for respectful and meaningful engagement. In any event, ASLA's offer to engage in dialogue and joint problem-solving to resolve issues relating to the draft rules remains on the table.

Theme 2: Relationships

Ontario has a world-class legal aid system and ASLA members are proud to work within it. We are concerned, however, that the approach taken in the draft rules has strayed from funder/service provider partnerships that made the system work so successfully over the last 20 years. While *LASA, 2020* envisions a vital partnership between LAO and service

providers, the draft rules shift to a top-down, largely one-sided relationship where service providers are given a limited stake in the system beyond contract-for-hire.

Relationship with the Private Bar

The draft rules create onerous administrative requirements and confer broad powers on LAO to remove roster members. We agree with removing lawyers who abuse the system, but there needs to be a better balance to encourage and enable private bar lawyers to participate. Some provisions risk sweeping in high functioning practitioners and clinics in an attempt to weed out the small minority that may be problematic. The net effect is that such rules may discourage a diverse array of qualified lawyers from entering or remaining in the certificate world.

It is somewhat ironic that the draft rules impose an undue administrative burden on roster lawyers while including a Schedule devoted to preventing roster members from being an administrative burden on LAO. We need lawyers at an early stage of their career to enter the system and go through a learning curve which requires more interaction and support initially with LAO staff. We urge LAO to reconsider the Administrative Burden Schedule. At a minimum, we urge LAO to remove or clarify the section of the Schedule relating to excessive reliance on LAO staff, which could have a disproportionate impact on junior members of the bar.⁴

Relationship with Community Legal Clinics

Rule 6 (Entity Service Providers) fundamentally changes the relationship between LAO and the clinics and between clinics and their communities. It makes clinics less stable and more precariously funded, jeopardizing their operations and legal supports for marginalized and vulnerable people.

For some time, Ontario's community legal clinics have enjoyed a reasonable amount of security. Unless a clinic breached its obligations or there was a drastic change in funding, the community could rely on its local clinic to be there to help them by providing quality service. Under Rule 6, it is completely within the power of LAO to stop funding a longstanding clinic at the end of its term, without recourse or the possibility for the decision to be reviewed.

The draft rules give LAO unfettered discretion to renew a term and to decide whether the term will be three years or less. It is also problematic that Rule 6 departs from five-year agreements that remain in place until renewed. Instead, the maximum term will be three

⁴ Administrative Burden Schedule, s.1(2)(e)

years for clinics deemed to be low risk, and even shorter terms for other clinics.⁵ This creates instability for the clinics, their communities and the low-income clients who need clinic services.

ASLA is also concerned that the draft rules do not refer to the full array of community clinic issues, including work on systemic issues and law reform that helps more disadvantaged people than individual casework.

Theme 3: Commitment to Certificate and Clinic systems

ASLA is concerned that some of the new features in the draft rules may signal or make it possible to depart from the fundamental role of certificates and community clinics as mainstays of legal aid services for the benefit of clients. Two notable examples are provisions relating to the assignment of counsel and the recognition of corporations as entity service providers.

Assignment of Counsel

ASLA understands and agrees that the rules need to protect the most vulnerable clients. We also agree that LAO may need the ability to assign counsel in exceptional circumstances. It is unclear, however, why an assignment could go to a salaried staff lawyer instead of a roster member and whether this signals a greater reliance on staff lawyers going forward. Staff lawyers would, in a sense, have the inside track, putting them in competition with certificate lawyers. The private bar is dedicated to clients, including hard-to-serve clients, and should remain the primary service provider. Unless there is a demonstrated gap, it would be unnecessary and duplicative to assign cases to staff lawyers. We also have some concern that the rules will make it onerous for counsel to resign from an assigned proceeding, even in cases where the lawyer has been fired or permitted to withdraw by the court.⁶

New Entity Service Providers

Under Rule 6, LAO can recognize broadly defined for-profit corporations as entity service providers. These corporations need only have one licensed lawyer or paralegal and do not have to be part of a roster or subject to roster quality standards.⁷ This has the potential to undermine the certificate and clinic systems to the detriment of clients. Corporations could

⁵ ESP3(6) and ESP5.

⁶ C4(2) and (4)

⁷ ESP2(3)(a)-(c)

underbid or undercut experienced, trusted service providers, leaving clients with diminished services from entities that are primarily focused on making a profit.

Theme 4: LAO's Discretion

It is concerning to see provisions in the draft rules that that would give LAO almost untrammelled discretion. Many are overbroad and lacking in specificity, allowing LAO to request any information or documents, consider any factors, or apply any conditions, etc. Examples are provided below in relation to legal aid eligibility, roster members, payment, and entity service providers.

Eligibility

The draft rules give LAO the power to refuse to consider an application for legal aid when the applicant (or a person applying for legal aid on their behalf) has provided incomplete information in the past or has been uncooperative or disruptive.⁸ This is both vague and harsh. It could exclude the most vulnerable applicants, including people with mental health challenges who may appear uncooperative or disruptive or may lack the capacity to provide complete information.

Roster

Overly broad provisions include the ability to refuse an application for roster enrolment for any reason,⁹ to impose any conditions or requirements on a roster member's authorization,¹⁰ to remove a roster member for any reason,¹¹ and to assess the quality of roster member services based on any factor that LAO considers relevant.¹²

Other provisions lack specificity. For example, a roster member can be removed for sexual misconduct but the rules do not indicate how LAO would ascertain that such misconduct had occurred.¹³ This also raises issues of due process for the roster member.

The provision enabling LAO to require someone who has retired from the roster to continue providing services under acknowledged certificates is both overly broad and unfair. This can interfere with a lawyer's ability to arrange for orderly succession planning

⁸ EL5(1)(a)-(c)

⁹ R3(7)

¹⁰ R4(2)

¹¹ R15(3)

¹² Quality Services Schedule, s.4(2)

¹³ R15(1)(c)

and could adversely impact clients should the retiring lawyer become unable to work due to illness.¹⁴

LAO's discretion to require roster members to provide any information or documents specified by LAO for an examination, audit, or investigation of an account is both overly broad and onerous.¹⁵

Payment

The "reasonable privately paying client of modest means" standard for defining the scope of what LAO will pay for is an example of codifying something that is no longer viewed as appropriate. For one thing, no person of modest means can afford to pay legal fees for a complex matter. The standard should be what a reasonable and competent lawyer would do to advance their client's interest.¹⁶

Entity Service Providers

Overly broad provisions include LAO's ability to determine an entity's risk level on the basis of any factors that LAO considers relevant¹⁷ or to form an opinion without limitation that an entity service provider is failing to comply.¹⁸ Provisions that are vague or lack specificity include LAO's ability to renew or decline to renew a service agreement solely on the basis of whether LAO wishes to do so¹⁹, and to decide whether to provide support services to clinics and Indigenous legal services organization.²⁰

Theme 5: Quality Assurance

Harmonization with the Law Society

ASLA recognizes that LAO should have standards and enforcement mechanisms to assure the quality of services provided. Its clients deserve no less. At the same time, LAO's rules must be harmonized with the Law Society's regulatory framework to avoid duplication or conflict between the two regimes and to ensure that nothing undermines the Law Society's exclusive jurisdiction. Protocols are essential to ensure that the Law Society is advised when LAO discovers a breach that may require disciplinary action.

¹⁴ R17(4)

¹⁵ P15(3)

¹⁶ P2(1)(d), P5(2)(a), P6(3)(a), P14(4)b

¹⁷ ESP3(3)(e) & (4)

¹⁸ ESP19(1)(a)

¹⁹ ESP5

²⁰ ESP15



Specific Provisions in the Draft Rules

The requirement for roster members to report breaches of vague professionalism standards – such as not being respectful and civil or communicating in a tone that is inconsistent with professional communication – is controversial and requires further consultation with the Law Society and the bar.²¹ We also question whether it is appropriate to require lawyers to seek costs at their private retainer rate even though they are being paid less than that²². This would force lawyers to seek an amount that no court would award in light of the scales the courts use in awarding costs. Further, we are unsure what quality standards or performance indicators will be used to analyse and measure clinics' performance.

Theme 6: Equity

ASLA would like to see a strong statement about justice for racialized and other equity-seeking groups. There should be a clear expectation that LAO and its service providers will be proactive in that regard. This should be expressed as a fundamental principle that is front-and-centre in the rules.

We also note that the draft rules do not mention LAO's residual discretion to find an applicant eligible despite incomplete information. This can be necessary when a person is involuntarily hospitalized and completing an application for Legal Aid with the assistance of a rights adviser. Such discretion has been exercised historically as an accommodation of the disability of applicants and in recognition of the speed at which Consent and Capacity Board hearings are scheduled.²³

Theme 7: Solicitor-Client Privilege

Under the draft rules, legal aid applicants must consent to the release of privileged information.²⁴ Further, roster members and entity service providers cannot refuse to provide privileged information if requested.²⁵ ASLA is concerned that these broad provisions could create potential vulnerabilities for clients and undermine the solicitor-client relationship, for example by creating a conflict between roster members and their clients.

In the case of clinics, LAO currently can only ask for information about clients when it is relevant to determining eligibility for legal aid. Clinics have accepted this as a reasonable

²¹ Professionalism Standards Schedule, s.2 & 3

²² RC6(1)b

²³ EL3(2)

²⁴ EL8

²⁵ R7(3) and ESP7(2)

limit on confidentiality. The power for LAO to request information that may be privileged, without limiting the purposes or circumstance for making such requests, is another example of overbreadth and unfettered discretion.

Theme 8: Fairness and Simplicity of Accounts

ASLA members had hoped that the new rules would streamline billing processes and remove red tape. Unfortunately, the draft rules make things worse. We recognize LAO needs to have financial tools in place but they should not be so administratively onerous as to deter lawyers from taking on certificates.

The rules also need to be fair. As currently drafted, lawyers cannot bill for the entire time they are required to attend a hearing due to restrictions regarding waiting time and adjournments.²⁶ Further, the ability to bill for waiting time depends on arbitrary distinctions between different types of LAO-funded proceedings. Compare, for example, provisions regarding Indictable 2 offences²⁷ and Immigration and Refugee Matters²⁸.

It is also a concern that there will no longer be access to an assessment officer for the review of accounts. This means that LAO will have the final say on all accounts. Even if it was rarely used, the assessment remedy was a fair process that created an incentive for reasonableness and compromise.²⁹

We are troubled by the numerous references to LAO's power to request any information or documents at its sole discretion.³⁰ Certain requested documents, such as court or tribunal records, may require time or expense for the lawyer to obtain.³¹ The requirement of "proof and justification" of dockets for services provided is over-broad, and imposes an impossible onus on the lawyer. It is unclear how a lawyer could provide proof and justification for routinely required tasks such as conducting research; reviewing documents; preparing for client interviews; conducting client interviews; responding to telephone calls, or much of the work lawyers are required to do.³² There is also a lack of clarity about what an examination, audit or investigation of accounts will entail.³³

²⁶ Fees and Disbursements Schedule, Part 1, s.6(a) and (b)

²⁷ Fees and Disbursements Schedule, Part 2, Table 3, Indictable 2 Offences.

²⁸ Fees and Disbursements Schedule, Part 3, Table 8, Civil Matters, Immigration and Refugee Matters.

²⁹ P17

³⁰ P2((1)(c)(iii), P5(2)(e), P5(3)(c), P5(5), P6(3)(d), P6(4)(c), P6(6), P7(1)(a)(vi), P7(2)(a)(iii), P8(3), P9(2), P11(4), P14(3)(d), P15(3), P15(5)(a) and (b), P17(5) and (7)

³¹ P2(3), P7(1)(b), P15(1)(b), P15(3)(b)

³² P2(3), P7(1)(d) and P15(3)(a)

³³ P15

We urge LAO to limit its billing, accounts and audit provisions to what is actually required for LAO to be accountable for the proper stewardship of its funding without imposing unfair requirements or undue red tape.

Conclusion

Since 1998, Ontario's legal aid model has been recognized by jurisdictions around the world as one of the best. ASLA is dedicated to doing our part to keep the system vital and sustainable. From various vantage points, ASLA members know the impact that legal aid has on clients in need of legal assistance. The rules are fundamentally important, and we would welcome the opportunity to engage in dialogue about them with Legal Aid Ontario.