

To: Alternative Business Structures Working Group
Law Society of Upper Canada

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Re: Submission on ABS-WG Discussion Paper

**ABS, Access to Justice and the Legal Needs of People Living on Low-Income:
Towards ABS+**

Introduction

The Alternative Business Structures Working Group (ABS-WG) has identified the potential for ABS to improve access to justice through innovations in legal services processes and ‘products’ as a key reason for allowing ABS, as well as a key factor to take into account in deciding between different models of ABS. At the same time though, the discussion of allowing ABS readily concedes that any access to justice improvements will be unlikely to encompass the legal needs of people living on low income, while maintaining that regulatory reform to allow ABS should nevertheless still be pursued. In this submission I contend that more ought to be done by the ABS Working Group (the ABS-WG) to explore the potential for expanding the reach of ABS-related improvements into the poverty law area – that is, doing more to explore what I will call ‘ABS+’.

Bearing in mind the legal needs of people living on low income, the emphasis being given to access to justice is a promising aspect of the ABS-WG’s work and Discussion Paper. There is an indisputable need to improve access to justice for people living in poverty.¹ Also, given the multi-faceted vulnerability of people living in poverty, including as would-be consumers in the private market for any goods and services,

¹ The need to improve access to justice for both low-income and middle-income groups has been the focus of recent reports by prominent groups within the legal profession, including the report of the CBA Envisioning Equal Justice initiative (see online CBA, <http://www.cba.org/CBA/equaljustice/main/>); the reports of the Action Committee on Access to Justice (AC-A2J) (whose work is hosted by the Canadian Forum on Civil Justice (CFCJ), see online CFCJ, <http://www.cfcj-fcjc.org/action-committee>); and, the report of the Ontario Civil Legal Needs Project (see online LSUC: <http://www.lsuc.on.ca/OCLNP/>).

another promising aspect is the recognition of the potential need to align the type and degree of business structure liberalization with variation in the type and degree of regulatory risk to consumer welfare.

However, and conversely, there is an aspect of the ABS-WG's approach that is potentially deeply troubling from the point of view of poverty law needs. This point arises from the stance that the ABS-WG appears to have taken in response to the general recognition that the potential access to justice gains arising from allowing ABS will likely be confined to the private market for legal services and may not extend beyond the economic strata of the middle class. In its earlier report to Convocation,² in the section addressing the relationship between introducing ABS and access to justice, the ABS-WG indicated that it held only modest hopes for the extent to which allowing ABS would serve existing unmet legal needs, stating that “[w]hile it would be wrong to suggest that ABSs are a panacea, ABSs may play a part in addressing these legal needs.”³ Moreover, the ABS-WG continues, “[p]ermitting new models for the delivery of legal services and the practice of law is not the sole, nor likely the most important, solution to issues of access to justice.”⁴ One way to respond to the apparent limitations of introducing ABS would be to explore the possibility of establishing specific measures, integrated into the regulatory framework for allowing ABS, to expand the reach of access to justice gains and, in particular, to meet the justice needs of people living in poverty. In other words, one response would be to explore the possibility of ABS+. Thus far though, and troublingly, the ABS-WG has given no sign that it even recognizes the possibility of exploration.

In what follows in this submission I first briefly define the general area of poverty law and then describe the extent to which ABS-type entities might be expected to serve those needs and to otherwise have an impact on access to justice for people living on low

² See ABS-WG, *Report to Convocation*, February 2014, online: <http://www.lsuc.on.ca/uploadedFiles/ABS-report-to-Convocation-feb-2014.pdf>

³ *Report to Convocation*, para 119.

⁴ *Report to Convocation*, para 120.

income. It is the likely limits of beneficial impact, as well as a potential for detrimental impact that, in my view, provide reasons for exploring ABS+.

Poverty Law and Legal Services

The term ‘poverty law’ has been defined as describing “the broad areas of law and legal needs which arise by virtue of an individual’s or a group’s poverty.”⁵ The areas of law that are typically identified as constituting the traditional domain of poverty law are: housing (especially landlord/tenant); income-maintenance (including social assistance, employment insurance, pensions and old age security); employment (including employment standards, occupational health and safety and workers’ compensation); and, consumer and debt.⁶ It is worth noting that all of these areas comprise civil, as opposed to criminal, legal matters. Other areas of law that can be readily identified as having significant relevance to people living in poverty are: criminal (including provincial offenses); refugee; domestic violence; child protection; mental health; and, human rights and disability.⁷

Insofar as legal services in these areas of poverty law are offered to and utilized by people living in poverty, there has traditionally been a heavy emphasis on in-person individualized legal assistance provided by lawyers. This is evident both in the significant reliance on the *judicare* model by legal aid programs, that provides publicly funded certificates for retention of private market lawyers at specified rates of compensation in areas of coverage, as well as in the significant reliance on staff lawyers in publicly-funded law offices and legal clinics. To some extent this emphasis on in-person individualized lawyer assistance must reflect the nature of the legal needs in poverty law areas. This would certainly seem to make sense in areas where a judicial or administrative hearing process is likely to be involved, and especially where that process

⁵ Ontario Legal Aid Review, *Report of the Ontario Legal Aid Review: A Blueprint for Publicly Funded Legal Services* (Ministry of the Attorney General (Ontario); Toronto, 1996) online <http://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/olar/ch11.asp>

⁶ See *Report of the Ontario Legal Aid Review*, *ibid*, and Social Planning and Research Council of British Columbia, *An Analysis of Poverty Law Services in Canada* (Department of Justice, Canada; Ottawa, 2005) online: http://www.justice.gc.ca/eng/rp-pr/csj-sjc/jsp-sjp/rr03_la13-rr03_aj13/p0.html#executive_summary

⁷ These areas can be identified on the basis that provincial legal aid programs and other forms of publicly funded legal assistance provide service in these areas, albeit to varying extents.

is criminal, adversarial or quasi-prosecutorial (including, for instance, child protection or refugee matters). Consequently, to the extent that there are access to justice needs in poverty law in general, an obvious and important general means for improving access to justice would be to expand the provision of no-fee or very-low-fee in-person individualized lawyer assistance. But, from the perspectives of both theory and practice, allowing ABS is unlikely to produce such an expansion.

ABS and Poverty Law

From a theoretical perspective, ABS is geared to the private, paying, market for legal services, which would rule out the provision of lawyer assistance at no cost and likely at low-cost as well. In theory it may be possible to imagine the provision of some level of lawyer assistance at no or low cost as a form of ‘loss-leader’ that sets up a consumer relationship that might gradually evolve into profit-making through fees-for-service, but that would be dependent upon the likelihood of poverty law clients gradually improving their socio-economic profiles. In-person lawyer assistance is also a relatively expensive ‘loss’ for an ABS entity to absorb as compared, for instance, to providing free publicly-accessible legal information.

Turning to a practical perspective though, there is little sign in ABS-adopting jurisdictions of the provision of no-fee or very-low-fee lawyer assistance in poverty law areas by ABS entities.⁸ A recent study that has attempted to assess the impact on access to justice of allowing ABS in Australia and the UK indicates that even though a community-oriented ABS in the UK is delivering family law legal services, that may be more affordable than pre-ABS equivalents, this has not prevented a surge in self-representation following drastic cuts to family law legal aid.⁹ One factor in the surge is,

⁸ There is some evidence of low-fee lawyer assistance services being provided in the family law area of separation and divorce. For instance, *divorceonline.co.uk* offers completion and filing of documents for £69 or, for £189, will manage the entire divorce process, including “dealing” with court processes: see R. Smith, *Digital Delivery of Legal Services to People on Low Income: Summary and Recommendations* (The Legal Education Foundation; London, 2014) at 8, online: <http://www.thelegaleducationfoundation.org/wp-content/uploads/2014/12/Digital-Delivery-Paper-1.pdf> [Digital Delivery]

⁹ See N. Robinson, “When Lawyers Don’t Get All the Profits: Non-Lawyer Ownership of Legal Services, Access and Professionalism” available online: <http://ssrn.com/abstract=2487878>

presumably, that many people living on low income have lost legal aid representation and yet cannot afford even the more affordable ABS entity alternative.

The inability or unlikelihood of ABS entities providing no-fee or very-low-fee lawyer assistance in poverty law areas would therefore represent a significant limit on the relevance of allowing ABS in terms of improving access to justice for people living in poverty, but recent reports and scholarship have emphasized that this is not the only means by which access to justice can be improved in poverty law areas. Leaving aside lawyer-centric measures, such as expanded duty counsel services and allowance of unbundled legal services (both of which would seem equally unlikely to be offered in poverty law areas by ABS entities), there are three other measures that are receiving attention: improved public legal information and education; technology-enhanced document-building for legal claims and legal transactions; and, expanded scope for non-lawyer assistance with legal problems. The potential of these three measures to improve access to justice has been attested to both at a general level in recent reports on access to justice,¹⁰ as well as in reports and scholarship directed at legal aid and the legal needs of people living on low income more specifically.¹¹ A collective scholarly collaboration on the issue of improving middle class access to justice in Canada provides examples of consideration and recommendation of the use of these measures at the more particular level of family law, employment law and consumer/debt law.¹²

Although aimed at people living in the middle income strata, some of the recommended measures, such as enhanced public legal information and education, could clearly also be

¹⁰ See the reports mentioned above, n 1.

¹¹ See R. Smith, *Digital Delivery*, above, n 8. See also S. Choudry, M. Trebilcock, and J. Wilson, "Growing Legal Aid Ontario into the Middle Class" (at 408) in M. Trebilcock, A. Duggan and L. Sossin, *Middle Income Access to Justice* (University of Toronto Press; Toronto, 2012). [*Middle Income Access to Justice*] See also Ontario Ministry of the Attorney General, *Report of the Legal Aid Review 2008* (by Michael Trebilcock).

¹² The collaborative effort is captured in M. Trebilcock, A. Duggan and L. Sossin, *Middle Income Access to Justice*, *ibid.* The specific studies are: N. Semple and C. Rogerson, "Middle Income Access to Justice: Policy Options with Respect to Family Law" (recommending mandatory information sessions and other enhancements to public legal information and education on family law, at 422-3); J. McCormick and A. Remani, "Middle Income Access to Justice: Policy Options with Respect to Employment Law" (recommending enhanced employer and employee information and education programs, at 462, and recommending online claim filing, with template coaching, and increased scope for assistance from court staff (i.e. non lawyers), at 481); and, A. Duggan, A. Remani and D. Kao, "Middle Income Access to Justice: Policy Options with Respect to Consumer and Debtor/Creditor Law" (recommending increased consumer information, a citizens advice (non-lawyer) pilot project, and expanded non-court dispute resolution and mediation mechanisms, at 517-8).

accessed by, and of benefit to, people living in the low income strata. Other recommended measures – such as, non-lawyer volunteers providing free advice via citizens advice bureaus or online claim filing with coaching templates – could likewise also be accessible to, and of benefit to, people living on low income. Moreover, the techniques lying behind these measures, such as development of smart technology and online delivery, as well as substitution of low-cost niche-trained customer service staff for high-cost generally-trained professionals, are of a type that ABS entities are typically regarded as being interested in exploring. In terms of the likelihood of ABS entities pursuing these measures in relation to traditional poverty law areas, the ultimate lack of purchasing power of people living in poverty would be expected to have, at least, a dampening effect. Nevertheless, as I explain in what follows, there is some potential for some degree of what I will call ‘collateral benefit’ to people living on low income, although also some potential for ‘collateral damage.’

ABS and Collateral Benefits

In areas where issues arise for both middle- and low-income strata, there may be a business case for pursuing these measures and providing services at no-cost or low-cost as a gateway to selling higher-cost, higher-profit, services. This has been referred to as the business practice of ‘winnowing’ or ‘gleaning’ and there is some evidence of its adoption by innovative non-ABS legal services entities that have adopted business techniques that are likely to be exploited by ABS.¹³ In circumstances where this occurs, people living on low-income could presumably enjoy some access to and benefit from such measures, even if it is more the middle class – paying – consumers that the ABS entities are really trying to reach. I will refer to this as the potential for ‘collateral benefit.’ But at the point where people living on low income have distinct issues and needs, either in relation to areas of legal problems that are shared by the middle-income strata, or in relation to areas of legal problems that disproportionately affect the low-income strata, the potential for collateral benefit will run out. The prime example of an

¹³ See *roadtrafficrepresentation.com* and discussion of it in R. Smith, above n 8 at 7. It does not seem that *roadtrafficrepresentation.com* is an ABS, but the lawyer behind it (Martin Langan) has noted that the technology tools it uses will likely be exploited by and taken to new scales of service by ABS entities, see GCRC Interview: Martin Langan, online: <http://gcresearchclub.com/2013/09/gcrc-interview-martin-langan-road-traffic-representation-whole-interview/>

area of legal problems where there would be little economic incentive for ABS entities to pursue any measures is social assistance rights and entitlements. Even if an ABS entity could devise a measure for providing legal services in relation to social assistance, and even if the legal services measures were used successfully, and even if the success was in the form of additional social assistance income, the low-income beneficiary would still have little or no capacity to pay for those services.¹⁴

The potential for collateral benefit will also be limited by any aspects of difference or disadvantage that present challenges to accessing legal services for people living on low income, regardless of the affordability of those services. For instance, to the extent that ABS entities may innovate in online delivery of services, the accessibility of those services to people living on low income will be impacted by a variety of factors other than any cost associated with the services themselves, such as the extent of access to the internet, the extent of ‘digital literacy’, the extent of traditional literacy, and the language in which the services are provided.¹⁵

ABS and Collateral Damage

Not only is the potential for collateral benefit to people living on low income from ABS activities limited, there is also the potential problem of ‘collateral damage’. This could occur in areas of private or civil legal problems where middle-income and low-income strata have shared issues, but on opposite sides. ABS entities may have sufficient economic incentives to develop legal services for would-be consumers on the middle-income side of the problem, but if equivalent services are not available for people on the low-income side, then disparities in power and vulnerability may end up being exacerbated to the detriment of people living on low income. A prime example of this potential for collateral damage to the relative access to justice of people living on low-

¹⁴ Robinson’s study considers the experience with social security disability representation in the US where ABS-type entities do provide legal representation to a client group that would include people living on low income, but this is a distinct context because the awards obtained are sufficient to warrant contingency fee arrangements. (The relevant entities are ‘ABS-type’ in the sense that, although ABS is not allowed in the US, in this particular area of legal claims, non-lawyers are permitted to provide representation).

¹⁵ Some of the challenges that exist for universal access to digital services are identified in *Digital Delivery*, above n 8, where it is stated that the groups of people experiencing ‘digital exclusion’ will disproportionately found amongst those on low incomes”, at 3, and see at 20.

income is landlord/tenant disputes, but the risk of collateral damage could arise in any private law area where the parties tend to be differentiated by socio-economic status, including consumer (corporate manufacturers and retailers v low-income consumers), debtor/creditor (corporate banks and other money lenders v low-income consumers) and even family law (middle-income-earning spouse v low- or no-income stay-at-home spouse).

ABS and Regulatory Limitations

Beyond the limited potential for collateral benefit, and the troubling potential for collateral damage, there is another factor that will affect the potential for ABS entities, if allowed in Canada, to pursue measures that might assist people living on low-income. In relation to the measure of expanding the scope for non-lawyer assistance, including substituting trained staff for licensed professionals, the potential for ABS entities to pursue this measure is significantly limited by regulatory restrictions on the unauthorized practice of law in Canada. Specifically, in all Canadian jurisdictions, the provision of legal services, at least in expectation of a fee or other reward, is prohibited to non-licensees of the provincial legal profession and legal services regulators. The only form of legal assistance that can be offered by non-licensees is legal information. These restrictions would prevent Canadian ABS entities from internally substituting non- licensee staff for licensed professionals in relation to the provision of legal services other than the provision of legal information. It is worth noting that the UK, which allows ABS, only ‘reserves’ a narrower core of legal services for lawyer delivery, which means that any evidence of effective exploitation of this measure for the benefit of people living on low income in the UK may not readily translate to Canada.¹⁶

There is also another regulatory difference between Canada and the UK that is cause for caution in seeking comparative lessons in relation to access to justice in poverty law areas. There has been passing reference in the Canadian debate on allowing ABS to the

¹⁶ In general terms, the narrower scope of restricted practice in the UK has meant that community and not-for-profit organizations there that offer free legal assistance to people living on low income have been able to offer a greater level of legal assistance, including legal services provided by non-lawyers, than their Canadian counterparts.

fact that not-for-profit legal service organizations in the UK have expressed interest in applying for approval of ABS entities and at least one – that of the Community Advice and Law Service (CALs), a charitable organization – has been approved. This has been mentioned as a sign that allowing ABS may provide a vehicle for improving access to poverty law services. However, a key regulatory difference between the UK and Canada that is relevant to these developments is that in the UK has established a regulatory framework for so-called Community Interest Companies (CICs).¹⁷ The most relevant aspect of CICs is that they must operate to provide community benefit and are entitled to generate only limited profits for their owners. In applying to establish an ABS, CALs in fact established a separate ABS entity – Castle Park Solicitors (CPS) – using the CIC framework.¹⁸ CPS focuses on family law and immigration law and aims its services at people living on low income. CPS therefore strives to keep fees as low as possible. CALs is regarded as the ‘owner’ of Castle Park Solicitors and all profits generated by CPS are paid to CALs. The hope is that CPS will generate modest surpluses that can cross-subsidize the free services offered by CALs. Significantly, the impetus for CALs taking this step was impending drastic reductions in the scope of coverage of legal aid in the UK, which affected family law and immigration law in particular. CALs developed the plan for CPS as a means of continuing to serve its low-income client population as affordably as possible. It is too soon to tell whether CPS is itself economically sustainable and, beyond that, whether it will generate any surplus for CALs. It is worth noting though that the cross-subsidization-via-ABS strategy was explored by the Law Centers Federation in the UK (an umbrella group for not-for-profit legal clinics) and it concluded that the strategy has only very limited potential to generate meaningful surpluses.¹⁹

¹⁷ For an overview of the CIC regulatory framework, see the website of the CIC regulator: <https://www.gov.uk/government/organisations/office-of-the-regulator-of-community-interest-companies>. In Canada, the only jurisdiction that presently allows the equivalent of a CIC is British Columbia, with its framework for Social Benefit Enterprises. (Ontario has drafted legislation to do similarly, but it remains in limbo.)

¹⁸ See <http://www.legalfutures.co.uk/latest-news/exclusive-legal-advice-charity-becomes-first-not-for-profit-set-abs>

¹⁹ See <http://www.legalfutures.co.uk/latest-news/law-centre-submits-abs-application-not-for-profit-secgears-legal-aid-cuts>. A side note on this issue is that the various not-for-profit providers of legal assistance in the UK are typically ‘owned’ or controlled by non-lawyer entities and now, absent special consideration, will need to seek licensing within the new ABS regime. At present, these ‘special bodies’ have been granted a ‘transition period’ that exempts them from transferring into the ABS regime, while the Legal Services Board examines to

ABS and Predatory Practices

A final point that needs to be made about the issue of the potential impact that allowing ABS may have on the justice needs of people living on low income is that, since allowing ABS involves the intentional facilitation of corporatization in the legal services sector, it will be necessary to remain attentive to the risk of what I will call ‘predatory’ corporate practices that can have a particularly detrimental impact on already socio-economically disadvantaged groups. Predatory corporate practices are characterized by a deliberate effort to exploit vulnerable consumers, often low-income, by taking advantage of and, indeed, creating, misunderstandings about the real cost of, and the real need for, particular goods or services. Predatory corporate practices have been identified as playing a significant role in the US sub-prime mortgage collapse, and ensuing global financial crisis, as well as in other economically exploitative business sectors found in the US and Canada, often involving financial services (such as payday lenders).²⁰ Since information asymmetry and other significant market imperfections, which are exploited by predatory actors, are already recognized as characterizing the legal services sector,²¹ there would seem to be a need to remain attentive to the risk that allowing ABS will open the door to predatory practices in relation to legal services. It might be argued, for instance, that there are some signs of such practices in the US social security disability representation sector, as discussed by Robinson.²² Closer to home, Canadian legal scholars have drawn attention to questionable practices, that could be described as predatory, in the form of unjustifiable civil legal demand letters sent by lawyers on behalf of corporate retailers in relation to shoplifting.²³ These demand letters deliberately seek

what extent that should be required. See: <http://www.legalfutures.co.uk/latest-news/allow-not-for-profit-agencies-charge-says-lsb-delays-date-become-abss>

²⁰ Predatory corporate practices have been accessibly, and scathingly, documented in G. Rivlin, *Broke, USA: From Pawnshops to Poverty Inc – How the Working Poor Became Big Business* (HarperCollins Publishers; New York, 2010).

²¹ For an overview and analysis of imperfections in the legal services market, see A. Woolley, “Imperfect Duty: Lawyers’ Obligations to Foster Access to Justice” (2007-2008) 45 *Alberta Law Review* 107, in particular part III.

²² Robinson’s examination of this sector identifies a variety of ethical concerns and sharp practices – such as representatives not meeting with clients until the day of their hearing – that likely pre-dated ABS-type developments but which may to some extent have been normalized and nationalized through the scale that ABS-entities can achieve. Some lawyers in the sector have complained that this has exerted a gravitational pull across the sector that has lowered standards in general. Robinson therefore concludes that a risk with allowing ABS may be that it produces an amplification and formalization of questionable practices that are already present in a legal services sector.

²³ See A. Salyzyn, ‘Of labels and letterheads’ online: SLAW <http://www.slw.ca/2014/08/05/of-labels-and-letterhead/> and links therein

to exploit the lack of knowledge and fear of economic penalty of the parents of youth caught shoplifting. While these letters are being sent in a non-ABS context, they are being sent at the behest of corporate clients and, as with the US experience with social security disability representation, may illustrate a propensity for unethical conduct that could be exacerbated by the arrival of ABS. Of course, as already mentioned, the Canadian debate on allowing ABS recognizes the need to assess regulatory risk and predatory corporate practices could be considered as part of that. But there is a danger that mainstream legal regulators, like mainstream regulators in other sectors, may overlook risks that are disproportionately borne by people living on low income.

A Need to Explore ABS+

In sum then, considering poverty law needs in general, allowing ABS is unlikely to yield direct access to justice improvements for people living on low income because they do not have sufficient purchasing power to participate in the private market for legal services. Even if ABS entities can reduce prices or otherwise make legal services more accessible, their services – and especially in-person lawyer assistance – will likely remain unaffordable to people living on low income. To the extent that areas of legal need of people living on low income overlap with areas of legal need for higher income groups, people living on low income may be able to enjoy collateral benefits from any legal services (such as legal information) that are made available by ABS entities free of charge. But even then the extent of collateral benefit will likely be limited by the potential for divergence in the needs of low income and higher income strata in areas of legal problems that they share. Moreover, there is the potential for collateral damage to the access to justice situation of people living on low income in private law where higher and lower income people are typically on the opposite side of disputes. Indeed, there is potential for direct damage, in the form of the risk of predatory corporate practices.

In my view, these considerations raise the issue of whether there are means to modify the regulatory framework that would apply to ABS to require or, at least, encourage, better outcomes for people living on low income. There are a number of reasons to consider developing a model for allowing not merely ABS but, rather, ABS+.

First, as a matter of normative priority, where regulatory change is sought to be justified by potential for improvements in access to justice, it is arguable that it is the needs of the more disadvantaged and impoverished (people living on low income) that ought to be given priority consideration. More moderately, it might at least be argued that their needs ought to be given no less consideration. This, I would argue, is all the more imperative when there is the potential for access to justice improvements for higher income groups to produce collateral damage to the access to justice interests of lower income groups.

Second, and now as a matter of practical policy-making reality, at a time when governments seem unwilling to devote more attention or expenditure to public provision of legal services for people living on low income, exploring ways to harness private sector innovations may be the most realistic avenue for improving access to justice for that segment of the population. Relatedly, the reality may also be that it will be too late to try to harness private sector innovations after the ABS horse has been allowed to leave the regulatory barn.

Third, and bringing together normative and pragmatic angles, not only has the Canadian legal profession in general, and many of the provincial self-regulatory organizations more particularly, opened up a policy-making space for considering how to reformulate the future of legal services to improve access to justice, but also, the provincial self-regulators all have an implicit or explicit duty to facilitate access to justice in their regulatory activities.²⁴ In my view, that duty ought to be understood to at least require that the debate on allowing ABS and access to justice include consideration of possible means for ensuring that the new and improved services ABS are expected to develop will benefit not just the middle class, but people living on low income as well. Again, this would seem to be especially so where there is the potential for collateral damage. For legal services regulators obliged to facilitate access to justice, it would seem particularly problematic to engage in regulatory reform that might improve one social groups' access to justice at the expense of others who are more disadvantaged.

²⁴ In Ontario, the Law Society is under an explicit statutory duty to 'facilitate access to justice'

A final reason to explore the possibility of ABS+ arises from a more fundamental need to situate the regulatory inquiry into whether to allow ABS in relation to other regulatory reform options that might be able to improve access to justice both for people living on middle incomes and for people living on low incomes. Given the potential for ABS to cause collateral damage to the interests of people living on low income, it may be important to identify any other options for regulatory reform that can assist people living on middle income, albeit to a lesser extent than via allowing ABS, but without the same potential to hurt people living on low income. With scarce reform resources, legal regulators need to compare a full range of options – ABS, ABS+ and other options – in order to maximize the efficiency, effectiveness and fairness of their reform endeavours. Indeed, there is also a need to evaluate all options for reform against more than just a static snapshot of the status quo. Just as the inquiry into allowing ABS is in part prompted by a recognition of broader forces of change in society, it is necessary to compare ABS, and other regulatory reform options, to any future changes in legal services provision that might be expected in the absence of regulatory reform. Changes wrought by regulatory reform are not the only changes that may occur in the legal services sector and it is possible that some of those ‘natural’ changes could affect the calculation of the costs and benefits of particular regulatory reform options, such as ABS and ABS+, as well as priorities among them.²⁵

It is for these reasons that I submit that the ABS-WG ought to consider developing a model for allowing not merely ABS but, rather, ABS+. The purpose of this submission is not to argue that allowing ABS in Ontario cannot be justified. Rather, the purpose is to argue that Canadian legal regulators, including the Law Society of Upper Canada and its ABS-WG, ought to pay particular attention to how allowing ABS might impact on the justice needs of people living on low income and, in doing so, ought to consider the potential of ABS+.

²⁵ There are some signs from new entrants to the legal services market in Ontario that allowing ABS may not be necessary to produce the impacts with which ABS-entities are likely to be associated. See, for example, Axess Law, online <http://www.axesslaw.com/>