

A Guide to Consideration of the *Legal Aid Services Act*

Introduction

In its 2018 annual report, the Auditor General of Ontario recommended that the Ministry of the Attorney General work with Legal Aid Ontario (LAO) to conduct a comprehensive review of the clinic service delivery model and identify areas for improvement. The Ministry responded by agreeing to conduct a comprehensive review of the *Legal Aid Services Act* (the Act) and the service delivery model and identify areas for improvement, in consultation with LAO. This intention has been reiterated in the Attorney General's April 12, 2019 letter to LAO's CEO.

The following is intended to serve as a guide to consideration of the Act by the Alliance for Sustainable Legal Aid (ASLA) as it prepares to make submissions in the review process. The guide sets out key provisions of the Act and questions to be considered as these provisions are contemplated. Responses to the questions can form the basis of a submission to the Ministry as it conducts its review. The guide follows the structure of the Act and is divided into four parts:

- Part I – Interpretation
- Part II – Legal Aid Ontario
- Part III – Legal Aid Services, Including Staff Offices, Duty Counsel, Certificates and Clinics
- Parts IV to VII – Other Provisions, Including Quality Assurance Audits

Part I – Interpretation

Purpose

1 The purpose of this Act is to promote access to justice throughout Ontario for low-income individuals by means of,

- (a) providing consistently high quality legal aid services in a cost-effective and efficient manner to low-income individuals throughout Ontario;
- (b) encouraging and facilitating flexibility and innovation in the provision of legal aid services, while recognizing the private bar as the foundation for the provision of legal aid services in the areas of criminal law and family law and clinics as the foundation for the provision of legal aid services in the area of clinic law;

- (c) identifying, assessing and recognizing the diverse legal needs of low-income individuals and of disadvantaged communities in Ontario; and
- (d) providing legal aid services to low-income individuals through a corporation that will operate independently from the Government of Ontario but within a framework of accountability to the Government of Ontario for the expenditure of public funds. 1998, c. 26, s. 1.

Framework Questions:

- *Are the stated purposes still applicable and appropriate? If so, why?*
- *If not, what should be added or removed? Why?*
- *With respect to section 1(b) of the Act, please see section 14 and accompanying framework questions, below*

Part II – Legal Aid Ontario

Independent from but accountable to the Ontario government

3 (4) The Corporation shall be independent from, but accountable to, the Government of Ontario as set out in this Act. 1998, c. 26, s. 3.

Framework Questions:

- *Is the independence of LAO from government a key element of the legal aid system? If so, why?*

Objects

4 The objects of the Corporation are,

- (a) to establish and administer a cost-effective and efficient system for providing high quality legal aid services to low-income individuals in Ontario;
- (b) to establish policies and priorities for the provision of legal aid services based on its financial resources;
- (c) to facilitate co-ordination among the different methods by which legal aid services are provided;
- (d) to monitor and supervise legal aid services provided by clinics and other entities funded by the Corporation;

- (e) to co-ordinate services with other aspects of the justice system and with community services;
- (f) to advise the Attorney General on all aspects of legal aid services in Ontario, including any features of the justice system that affect or may affect the demand for or quality of legal aid services. 1998, c. 26, s. 4.

Framework Questions:

- *Are the stated objects still applicable and appropriate? If so, why?*
- *If not, what should be added or removed? Why?*

Board of directors

5 (1) The affairs of the Corporation shall be governed and managed by its board of directors.

Composition

(2) The board of directors of the Corporation shall be composed of persons appointed by the Lieutenant Governor in Council as follows:

- I. One person, who shall be the chair of the board, selected by the Attorney General from a list of persons recommended by a committee comprised of the Attorney General or a person designated by him or her, the Treasurer of the Law Society or a person designated by him or her and a third party agreed upon by the Attorney General and the Treasurer of the Law Society or persons designated by them.
- II. Five persons selected by the Attorney General from a list of persons recommended by the Law Society.
- III. Five persons recommended by the Attorney General.

Non-voting member

(3) The president of the Corporation shall be a non-voting member of the board.

Criteria for selection

(4) In selecting and recommending persons under paragraphs 2 and 3 of subsection (2), the Attorney General shall ensure that the board as a whole has knowledge, skills and experience in the areas that the Attorney General considers appropriate, including the following areas:

- I. Business, management and financial matters of public or private sector organizations.
- II. Law and the operation of courts and tribunals.

- III. The special legal needs of and the provision of legal services to low-income individuals and disadvantaged communities.
- IV. The operation of clinics.
- V. The social and economic circumstances associated with the special legal needs of low-income individuals and of disadvantaged communities.

Same

(5) The Attorney General shall ensure that the persons selected and recommended under paragraphs 2 and 3 of subsection (2) reflect the geographic diversity of the province.

Majority non-lawyers

(6) The majority of the appointed members of the board shall be persons who are not lawyers.

No more than three benchers

(7) No more than three of the appointed members of the board shall be benchers of the Law Society.

Framework Questions:

- *Would the Board, composed and selected as defined above, most effectively enable LAO to fulfill its objects and the purposes of the Act? If not, what should be changed and why?*

Part III – Legal Aid Services, Including Staff Offices, Duty Counsel, Certificates and Clinics

Corporation to establish system for legal aid services

12 (1) The Corporation shall establish and administer a cost-effective and efficient system for providing high quality legal aid services within the financial resources available to the Corporation.

Corporation to establish priorities, policies

(2) For the purpose of subsection (1), the Corporation shall,

- (a) determine the legal needs of low-income individuals and of disadvantaged communities in Ontario;

- (b) establish priorities for the areas of law, types of cases and types of proceedings for which it will provide legal aid services; and
- (c) establish policies for the kinds of legal aid services to be provided in the different areas of law, types of cases and types of proceedings. 1998, c. 26, s. 12.

Legal aid services to be provided

Specified areas of law

13 (1) The Corporation shall provide legal aid services in the areas of criminal law, family law, clinic law and mental health law.

Other areas of law

(2) Subject to subsection (3), the Corporation may provide legal aid services in areas of civil law not referred to in subsection (1).

Framework Questions:

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| <ul style="list-style-type: none">○ <i>Are the statutory duties outlined in sections 12 and 13 appropriate and comprehensive? Should other duties be added or should some duties be removed?</i> |
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Methods of providing legal aid services

14. (1) Subject to subsections (2) and (3), the Corporation shall provide legal aid services by any method that it considers appropriate, having regard to the needs of low-income individuals and of disadvantaged communities, the need to achieve an effective balance among the different methods of providing legal aid services, the costs of providing such services and the Corporation's financial resources, including,

- (a) the authorization of lawyers, by means of certificates, to provide legal aid services to individuals or a group of individuals;
 - (a.1) entering into agreements with lawyers, groups of lawyers or law firms under which the lawyer, group or law firm provides legal aid services;
- (b) the authorization of service-providers, by means of certificates, to provide legal aid services other than legal services to individuals or a group of individuals;
- (c) the funding of clinics;
- (d) the establishment and operation of legal aid services staff offices;

- (e) the funding of student legal aid services societies;
- (f) the funding of Aboriginal legal services corporations to provide legal aid services to Aboriginal individuals and communities;
- (g) the provision of duty counsel;
- (h) public legal education;
- (i) assistance to individuals representing themselves, including the provision of summary advice, assistance in preparing documents, information packages or self-help kits;
- (j) the authorization of alternative dispute resolution services. 1998, c. 26, s. 14 (1); 2002, c. 19, s. 1.

Foundation for criminal and family law services

(2) The Corporation shall provide legal aid services in the areas of criminal and family law having regard to the fact that the private bar is the foundation for the provision of legal aid services in those areas. 1998, c. 26, s. 14 (2).

Foundation for clinic law services

(3) The Corporation shall provide legal aid services in the area of clinic law having regard to the fact that clinics are the foundation for the provision of legal aid services in that area. 1998, c. 26, s. 14 (3).

Legal services must be provided by lawyers

(4) Legal services shall only be provided by a lawyer or a person working under the direct supervision of a lawyer. 1998, c. 26, s. 14 (4)

Framework Questions:

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| <ul style="list-style-type: none"> ○ <i>Should LAO's discretion to choose the method of providing legal aid services be circumscribed in any way? If so, how and why?</i> ○ <i>Should the private bar still be statutorily recognized as the foundation for the provision of legal aid services in the areas of criminal and family law? If so, why? If not, why not? (See also section 1(b) of the Act and related questions)</i> ○ <i>Should the statutory recognition of clinics as the foundation for the provision of legal aid services in clinic law be preserved or enhanced? If so, why? If enhanced, how should the statutory recognition be enhanced? For example, should specific areas of clinic law receive statutory protection?</i> ○ <i>Should the requirement that only lawyers provide legal aid services be abolished or amended? If so, how and why?</i> |
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Eligibility for legal aid services

16. (1) An individual is eligible to receive legal aid services, by the method that the Corporation considers appropriate, having regard to its policies and priorities established under section 12, if,

- (a) he or she applies in accordance with the regulations;
- (b) he or she meets the prescribed financial eligibility requirements;
- (c) the matter for which he or she requires legal aid services is in an area of law and is a type of case and type of proceeding for which the Corporation provides legal aid services;
- (d) he or she pays the application fee, if any; and
- (e) the application for legal aid services is approved, in accordance with the procedures set out in the regulations. 1998, c. 26, s. 16 (1).

Direction under *Youth Criminal Justice Act (Canada)*

(2) If a court makes a direction under paragraph 25 (4) (b) of the *Youth Criminal Justice Act (Canada)*, the Attorney General may direct the Corporation under subsection 25 (5) of that Act to provide legal aid services, in accordance with the court direction, to the young person who is the subject of the court direction. 2006, c. 19, Sched. D, s. 10 (2).

Direction under *Young Offenders Act (Canada)*

(3) If a court makes a direction under paragraph 11 (4) (b) of the *Young Offenders Act (Canada)*, the Attorney General may direct the Corporation under subsection 11 (5) of that Act to provide legal aid services, in accordance with the court direction, to the young person who is the subject of the court direction. 2006, c. 19, Sched. D, s. 10 (2).

Framework Questions:

- *Should the statutory requirements for eligibility be preserved or amended? If so, why? If amended, how?*

Legal aid services staff offices

Legal aid services staff office

19. (1) A legal aid services staff office established and operated by the Corporation may provide general legal aid services or may specialize in one or more areas of law or types of cases or

types of proceedings or may specialize in providing legal aid services to one or more disadvantaged communities.

May be staffed by Corporation employees

(2) A legal aid services staff office established and operated by the Corporation may be staffed by lawyers and service-providers who are full or part-time employees of the Corporation or who enter into contracts with the Corporation to provide legal aid services. 1998, c. 26, s. 19.

Framework Questions:

- *Should LAO's discretion to establish staff offices be circumscribed in any way? If so, how and why?*

Duty counsel

Duty counsel

20. (1) The Corporation may employ lawyers to act as duty counsel on a full or part-time basis or may enter into contracts for the regular or occasional services of lawyers as duty counsel.

Functions

(2) A lawyer who acts as duty counsel shall perform such functions as may be prescribed.

Panels of duty counsel

(3) An area director appointed under subsection 22 (3) may establish, in accordance with the regulations, a panel of lawyers who agree to provide professional services as duty counsel on a contract basis.

Payment for duty counsel

(4) Every lawyer who is not an employee of the Corporation who acts as duty counsel shall be paid by the Corporation a fee for the services rendered, determined in accordance with the regulations.

Overpayments

(5) Where the Corporation determines that a duty counsel has been overpaid by the Corporation for legal aid services, the Corporation may deduct the amount of the overpayment from any money payable by the Corporation to the duty counsel. 1998, c. 26, s. 20.

Framework Questions:

- *Should LAO's discretion to employ duty counsel be circumscribed in any way? If so, how and why?*

Certificates

Area Committees, Directors and Panels

Area committees

22. (1) The Corporation shall establish an area committee for each area established under section 15. 1998, c. 26, s. 22 (1).

Functions

(2) Area committees shall be responsible for the functions assigned to them under this Act and any additional functions assigned to them by the board of directors of the Corporation. 1998, c. 26, s. 22 (2).

Area directors to be appointed

(3) The Corporation shall appoint an area director for each area, who must be a person licensed under the *Law Society Act* to practise law in Ontario as a barrister and solicitor. 1998, c. 26, s. 22 (3); 2006, c. 21, Sched. C, s. 115 (2).

Area directors may be employees or contractors

(4) An area director may be a part or full-time employee of the Corporation or may enter into a contract with the Corporation to provide his or her services as area director. 1998, c. 26, s. 22 (4).

Functions of area directors

(5) Every area director shall act as the secretary of the area committee of which he or she is area director and shall carry out the functions assigned to him or her by this Act and any additional functions assigned to him or her by the board of directors of the Corporation. 1998, c. 26, s. 22 (5).

Area director not to provide legal services

(6) An area director shall not render legal services to any applicant, except as may be authorized by the board of directors of the Corporation. 1998, c. 26, s. 22 (6).

Panels of persons who agree to accept certificates

- 23.** (1) The area directors may establish, in accordance with the regulations,
- (a) panels of lawyers who maintain an office or have an established practice in the area and who agree to accept certificates to provide legal aid services;
 - (b) panels of service-providers who maintain an office or have an established practice in the area and who agree to accept certificates to provide legal aid services other than legal services;
 - (c) such other panels of lawyers and service-providers as the area director may consider appropriate.

Application for certificate

24. (1) Every application for a certificate shall be made and decided in a manner approved by the Corporation. 2006, c. 19, Sched. B, s. 12.

Framework Questions:

- *Does the current certificate system function well? What, if anything, could be improved? How would those improvements be reflected in the Act?*

Clinics

Corporation may fund clinic

33. (1) The Corporation may provide funding to a clinic to enable the clinic to provide legal aid services to low-income individuals or disadvantaged communities.

Considerations

- (2) In deciding whether to provide funding to a clinic, the Corporation shall consider any matter it considers relevant to the decision, including,
- (a) the legal needs of the individuals or communities that the clinic will serve;
 - (b) the cost-effectiveness and efficiency of providing legal aid services through the clinic;
 - (c) the past performance of the clinic, if any, in meeting the legal needs of the individuals and communities that it served in a cost-effective and efficient manner.

Same

(3) In deciding whether to provide funding to a clinic, the Corporation may also consider the legal needs of other communities, funding applications by other clinics, the Corporation's policies and priorities established under section 12, the financial resources of the Corporation and any other matter that the Corporation considers relevant. 1998, c. 26, s. 33

Framework Questions:

- *Should the considerations with respect to funding a clinic be preserved or amended? If so, why and how? Should any considerations be prescribed as mandatory? If so, what considerations and why?*

Clinic funding and conditions

Funding for clinics

34. (1) The Corporation may agree to provide funding to a clinic for a period of up to three years.

Subsequent funding agreements

(2) The Corporation may agree to provide funding to a clinic for subsequent periods of up to three years each.

Additional funding

(3) The Corporation may provide additional funding for a particular case or project to a clinic at any time during a funding period.

Funding for prior period

(4) The Corporation may provide funding to a clinic in respect of a period before the funding decision is made.

Conditions

(5) The Corporation may impose any terms and conditions on the funding of a clinic that it considers appropriate, including,

- (a) that the members of the clinic and of the board of directors of the clinic are members of the community or communities served or to be served by the clinic;

- (b) that the clinic employ at least one lawyer in the clinic;
- (c) that some or all of the staff of the clinic undergo training specified by the Corporation;
- (d) that the clinic assess the eligibility of applications for legal aid services to be provided by it.

Framework Questions:

- *Is a three-year funding cycle appropriate? If not, why? If not, how should the funding cycle be changed?*
- *Should LAO have complete discretion to impose terms and conditions on the funding of a clinic, as currently set out in the legislation? If not, why? If not, how should LAO's discretion be limited?*

Application for funding

Application for funding

35. (1) An application for funding by a clinic shall be accompanied by information, as requested by the Corporation, respecting the organization, activities, methods of business and financial transactions of the clinic, and such other information that the Corporation may request.

Review

(2) An application for funding by a clinic shall be reviewed by an officer or employee of the Corporation designated by the board of directors of the Corporation.

Decision

(3) The designated person may make a decision in respect of the application or may refer the application to the clinic committee for further review.

Reasons for referral to clinic committee

(4) If an application is referred to the clinic committee, the designated person shall provide the clinic with written reasons for the referral.

Decision or referral back by clinic committee

(5) The clinic committee shall consider an application referred to it and may make the decision in respect of the application itself or may refer the application back to the designated person with directions.

Reasons for decision

(6) If the clinic committee makes a decision in respect of the application, it shall provide the clinic with its decision, and reasons for it, in writing. 1998, c. 26, s. 35.

Reconsideration of funding decision

36. (1) A clinic may ask the clinic committee to reconsider the decision of the designated person or of the clinic committee with respect to its application for funding.

Same

(2) Upon receipt of a request, the clinic committee shall reconsider the decision and may confirm,

Reasons for decision

(3) The clinic committee shall provide the clinic with its decision, and reasons for it, in writing. 1998, c. 26, s. 36.

Framework Questions:

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| <ul style="list-style-type: none">○ <i>Is the funding application process effective and appropriate? If not, what should be changed and why?</i> |
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Clinic operations – Duties of clinic boards and accountability to LAO

Corporation to monitor clinic

37 (1) The Corporation shall monitor the operation of a clinic funded by it to determine whether the clinic is meeting the Corporation's standards for the operation of clinics, and the Corporation may conduct audits of such clinic, as it considers necessary for that purpose.

Reports to Corporation

(2) A clinic funded by the Corporation shall provide the Corporation, in the form and at the times requested by the Corporation,

- (a) audited financial statements for the funding period;
- (b) a summary of the legal aid services provided by the clinic during the funding period, specifying the number of each type of case or proceeding handled by the clinic;

- (c) a summary of the complaints received by the clinic from individuals who received or were refused legal aid services from the clinic, and from persons affected by the legal aid services provided by the clinic and a description of the disposition of each such complaint;
- (d) any other financial or other information relating to the operation of the clinic that the Corporation may request.

Confidential information withheld

(3) The clinic may withhold from the information provided under clause (2) (c) any information that is confidential to an individual to whom the clinic has provided legal aid services, unless the individual consents to the disclosure or unless the information pertains to the financial eligibility of the individual to receive legal aid services.

Corporation to have access to clinic records

(4) For the purpose of verifying any information provided under clause (2) (b) or (d), the Corporation may require that the clinic provide the board of directors of the Corporation, or any person or persons designated by the board of directors of the Corporation, with access to the premises of the clinic at any reasonable time and to all its books, accounts, financial records, reports, files and documents, but the clinic may withhold any of them that is confidential to any individual to whom the clinic has provided legal aid services, unless the individual consents to such access, or unless the information pertains to the financial eligibility of the individual to receive legal aid services. 1998, c. 26, s. 37.

Direction from Corporation

38 (1) If a clinic fails to comply with this Act or to meet the terms and conditions of its funding, the board of directors of the Corporation may direct the clinic to do anything that the board of directors of the Corporation considers appropriate to ensure that the clinic complies with this Act and the terms and conditions of its funding and, generally, for the more effective operation of the clinic.

Request for reconsideration

(2) The board of directors of the clinic may ask the board of directors of the Corporation to reconsider a direction issued by it and the board of directors of the Corporation may reconsider its direction and may confirm, vary or revoke the direction. 1998, c. 26, s. 38.

Duties of clinic board

39. (1) The board of directors of a clinic funded by the Corporation shall ensure that,

- (a) the clinic complies with this Act and the terms and conditions attached to the funding;
- (b) the clinic complies with any direction issued by the board of directors of the Corporation; and
- (c) the clinic meets the operational standards established by the Corporation.

Same

(2) Subject to this Act, the board of directors of a clinic funded by the Corporation shall determine the legal needs of the individuals and communities served or to be served by the clinic and shall ensure that the clinic provides legal aid services in the area of clinic law in accordance with those needs.

Same

(3) The board of directors of a clinic funded by the Corporation shall, on its own initiative or at the request of the clinic committee, advise the clinic committee on matters relevant to the provision of legal aid services by means of clinics.

Non-compliance by clinic

(4) If the board of directors of the Corporation is of the opinion at any time that a clinic funded by the Corporation is not complying with this Act or with the terms and conditions attached to its funding or with a direction issued under section 38 or is not meeting the operational standards established by the Corporation, the board of directors may reduce or suspend the funding of the clinic.

Notice to clinic

(5) Before taking any action under subsection (4), the board of directors of the Corporation shall give the board of directors of the clinic notice of its intent and a reasonable opportunity to comply with this Act or the terms and conditions or direction or to meet the operational standards. 1998, c. 26, s. 39.

Framework Questions:

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| <ul style="list-style-type: none">○ <i>Does each clinic board have the statutory powers and duties to ensure the effective operation of the clinic? If not, what should be changed and why?</i>○ <i>Does LAO have the appropriate statutory powers and duties to provide effective oversight of the clinics? If not, what should be changed and why?</i> |
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Parts IV to VII – Other Provisions, Including Quality Assurance Audits

Quality assurance program

92 (1) The Corporation shall establish a quality assurance program to ensure that it is providing high quality legal aid services in a cost-effective and efficient manner.

Quality assurance audits

(2) For the purpose of subsection (1) and subject to subsection (8), the Corporation may conduct quality assurance audits of the service-providers, clinics, student legal aid services societies or other entities funded by the Corporation that provide legal aid services.

Powers

(3) For the purpose of conducting a quality assurance audit, an employee of the Corporation may enter the office of a service-provider who is providing or has provided legal aid services, or the office of a clinic, student legal aid services society or other entity funded by the Corporation, during normal business hours and on notice to the service-provider, clinic, society or other entity, and may, despite subsections 37 (3) and (4), review their records with respect to the provision of legal aid services.

Co-operation required

(4) Every student and service-provider, and every employee of a clinic, student legal aid services society or other entity funded by the Corporation shall co-operate with the employee of the Corporation or of the Law Society conducting a quality assurance audit even if that requires the production of information or documents that are privileged or confidential.

Privileged preserved for other purposes

(5) Subsections (3) and (4) do not negate or constitute a waiver of a privilege.

Confidentiality

(6) The Corporation and its employees shall keep confidential any information obtained in a quality assurance audit.

Same

(7) The Corporation and its employees are governed by the rules of solicitor-client confidentiality with respect to any legal communications obtained in a quality assurance audit.

Law Society to conduct audits of lawyers

(8) The Corporation shall not itself conduct quality assurance audits of lawyers who provide legal aid services but shall direct the Law Society to conduct those quality assurance audits.

Law Society may conduct other audits

(9) The Corporation may delegate to the Law Society its power to conduct quality assurance audits on the persons listed in subsection (2), or any of them.

Law Society's audits governed by regulations

(10) The Law Society shall conduct quality assurance audits under a direction or delegation under this section, as directed or delegated by the Corporation and in accordance with the regulations.

Reimbursement

(11) The Law Society shall be reimbursed by the Corporation for its costs of conducting quality assurance audits.

Report to Corporation

(12) The Law Society shall report to the Corporation on the quality assurance audits conducted by it, as directed or delegated by the Corporation and in accordance with the regulations, and shall include in its reports the information required by the direction, delegation or regulations, whether or not such information is governed by the rules of solicitor-client confidentiality, but shall not disclose any information that is subject to solicitor-client privilege.

Same

(13) Subsections (3), (4) and (5) apply with necessary modifications to the Law Society and its employees with respect to quality assurance audits of lawyers in the same manner as they apply to the Corporation and its employees. 1998, c. 26, s. 92.

Framework Questions:

- *Does the current quality assurance program function well? What, if anything, could be improved? How would those improvements be reflected in the Act?*
- *Are the statutory provisions regarding LAO's and the Law Society's respective roles appropriate? Should any provisions be added or removed, and if so, why?*

Other Provisions

Framework Questions:

- *Aside from the provisions discussed above, should other provisions of the Act be added or removed? If so, what should be added or removed and why?*