



ALLIANCE FOR SUSTAINABLE LEGAL AID

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

October 29, 2019

The Honourable Doug Downey
Attorney General
McMurtry-Scott Building, 11th Floor
720 Bay Street
Toronto, ON M7A 2S9

Dear Minister Downey,

The Alliance for Sustainable Legal Aid (ASLA) is pleased to share its comments regarding the review of the *Legal Aid Services Act* (“the Act”). The following outlines the shared views of ASLA members regarding the operation of the Act. It is supplemented by separate submissions from some of the legal organizations that comprise ASLA.

Background

ASLA is an alliance of legal organizations dedicated to ensuring that legal aid is sustainable and that all Ontarians have access to justice. Our members are:

- Association of Community Legal Clinics of Ontario (ACLCO)
- Criminal Lawyers’ Association (CLA)
- Family Law Association (FLA)
- Federation of Ontario Law Associations (FOLA)
- Law Society of Ontario (LSO)
- Mental Health Legal Committee
- Ontario Bar Association (OBA)
- Refugee Lawyers Association of Ontario
- The Advocates’ Society

Many of the members of our legal organizations are also lawyers who serve legal aid clients, either through clinics or certificates. Accordingly, ASLA is uniquely situated to identify effective practices and areas for improvement. We support efforts to modernize Legal Aid Ontario (LAO) in a manner that enhances access to justice for low income Ontarians.

General Principles

In ASLA’s view, the delivery of effective legal aid services is premised on the principles set out below.

First, the independence of LAO from government is a key element of our adversarial system. This is especially true given that government is routinely the adverse party in legally aided matters. There must be both the appearance and reality of independence. As is discussed in more detail below, while LAO should be accountable to government for its global spending, it also needs to set priorities without undue influence from the government.

Second, when it comes to the delivery of legal services, a mixed service model that incorporates legal aid clinics, certificates and duty counsel is the most effective approach. This model ensures equitable distribution of funding, a fair funding implementation process, a focus on funding initiatives that support front line legal services, and an evaluation process that appropriately assesses improvements to and expansion of legal aid services.

Third, reviewing the current legislative framework for the operation of LAO is consistent with the government's commitment to accountability and transparency. However, the goal of cost-effectiveness in delivering legal aid services must be balanced against other factors like the need to uphold constitutional rights and the need to support community legal aid clinics.

Fourth, legislation must ensure predictability and certainty in the delivery of legal services. These are the hallmarks of an effective legal aid system. It is critical that clients are able to access the legal aid services they require and that lawyers are able to deliver high quality services. It is our position that access to justice should always be a priority.

Framework Questions

Part I Interpretation

In general, the stated purposes of the Act are still applicable. The creation of a "corporation that will operate independently from the government" is an important aspect of the Act.

A stated purpose of the Act is to encourage and facilitate flexibility and innovation in the provision of legal aid services. To achieve this, we suggest that LAO adopt innovations and best practices from the private bar and clinics to create efficiencies in service delivery.

Given the purposes set out in the Act, we believe that effective legal aid should also be recognized as a poverty reduction initiative to ensure that it has stable funding. The government may wish to incorporate this notion into the legislation.

Part II Legal Aid Ontario

The Act was precedent-setting legislation that created an independent but publicly funded transfer agency to administer legal services for low-income Ontarians. Section 3(4) of the Act enshrines LAO's independence while, at the same time, making LAO accountable to the government of Ontario. This is a critical aspect of the Act given that there are many occasions where the government and lawyers representing legally aided clients are adverse parties to litigation. In the criminal sphere, this is always the case. A lack of independence would diminish the appearance of fairness and raise constitutional concerns.

Keeping LAO independent from other functions of government, particularly the prosecutorial and liberty-restricting functions, remains as important as ever.

In the mental health context, hospitals and psychiatrists may make decisions that impact the liberty and security of the person. LAO must be in a position to ensure that clients' decisions in the mental health context are consensual and that due process is afforded to Ontarians who are confined or receiving care against their wishes.

Objects

We support the objects of LAO as set out in section 4 of the Act. The stated objects speak to LAO's role in coordinating services, but we note that the current siloing of crowns, children's aid societies, court services, the judiciary, the private bar, and LAO likely impedes the system coordination envisioned by the Act.

Board of Directors

We support the notion of a skills-based board with a broad skill set. The board should include members who have experience in the provision of both certificate and clinic law services.

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

Section 13 of the Act helps to ensure that LAO balances accountability for public funds with the obligation to provide meaningful legal services in criminal, family, mental health and clinic law. The stated role of LAO in determining legal needs and establishing services to meet those needs is generally reasonable. We would stress that boards of clinics are in the best position to determine the legal needs of their communities. LAO should accept advice from the clinics in this regard, unless a clinic is not meeting its statutory obligations.

We believe that mental health services should continue to be included in section 13(1). If the legislation did not mandate the provision of these services they could become discretionary which would be unacceptable given the constitutionally protected interests affected.

We would point out that the Act does not make explicit provisions for immigration and refugee law in section 13(1), but that LAO has discretionary power to provide services in these areas pursuant to section 13(2). Our view is that section 13(1) of the Act should specifically refer to immigration and refugee law as these matters frequently involve individuals' Charter and human rights. It is important that LAO is required to provide legal aid services in these areas for those who qualify.

Methods of Providing Legal Aid Services

Section 14 of the Act speaks to the critical role of the private bar and independent community clinics in service delivery. As mentioned above, ASLA supports a mixed service model where the private bar leads in the delivery of criminal law and family law services while clinics lead in the design and deployment of clinic law services. While section 14(2) and section 14(3) speak to the private bar and the clinics being the foundation for criminal, family and clinic law services, the Act could also mention that the private bar is the foundation for mental health law services in the province.

We question whether it should be within LAO's sole discretion to enter into unique arrangements like Alternative Fee Arrangements, without a demonstrated need for such arrangements. We believe that these types of arrangements could have noticeable impacts on clients and the system and should be left in the hands of the government, not the transfer agency.

Eligibility for Legal Aid Services

ASLA is concerned by the current financial eligibility threshold for legal aid services. We believe that the eligibility test is too restrictive and limits access to justice. A full-time employee earning minimum wage earns \$29,120 annually. Anyone working full-time earning minimum wage must have a family of 3 to qualify for a legal aid certificate. The government may wish to consider engaging an independent body to review the financial eligibility criteria to ensure they reflect regional economic realities. Another option may be to link the financial eligibility test to an independently set standard, such as the Low Income Measure set by Statistics Canada.

There are other considerations with respect to an individual's financial status and their access to legal aid. First, we believe that LAO should be able to provide legal aid services where a person's assets are being withheld from them, which arises on occasion in the mental health context. Second, LAO should have discretion in providing legal aid services where a client is mistaken about their assets or their ability to pay privately for legal services. Third, we would like to draw attention to situations where a person recovers control over their finances and enters into a private retainer. In these cases, a previously approved legal aid certificate can be cancelled without being billed. LAO should be able to retroactively receive an application for legal aid where no funds or inadequate funds have been received by the privately retained lawyer and deduct the amount owing from what would have been paid under a certificate. This proposal is prohibited by subsections 12(c) and (d) of Regulation 106/99 under the Act, which sets preconditions for issuing a certificate retroactively. Failure to address the above provision will result in lawyers declining to enter private retainer agreements as they could be penalized for doing so.

Section 16(1) (d) contemplates a fee that may be charged for processing a legal aid application. This could be a barrier to access to justice and should be removed.

Legal Aid Services Staff Offices

LAO should be able to establish staff offices where there is a clear gap in services. However, there should be caution and oversight related to opening new offices to avoid duplicating existing services. It may be useful for LAO to demonstrate the need for additional staff offices in the form of a business case that can be reviewed in consultation with the private bar. We note that the private bar and clinics are existing resources that are able to provide high quality legal aid services, efficiently.

Duty Counsel

We recognize that Duty Counsel provide important same-day service to many people throughout the province. However, we suggest that LAO staff duty counsel only be used in situations where there is a gap in services or where certificates are not available. We advocate engaging the private bar instead of having

duty counsel provide ongoing services. We believe private practitioners can apply specialized experience to effectively meet individual client needs.

Certificates

In general, the certificate system should be continually reviewed to identify and eliminate barriers to accessing certificates. The decision-making process in approving or denying certificates must be transparent and applied consistently

An appropriate tariff structure is critical to maintaining the certificate system. Currently, there is no mechanism in place, statutory or otherwise, to adjust tariff rates to respond to changes like cost of living increases. Moreover, many legal aid-funded procedures have capped hours that do not reflect actual time spent on a matter. This has led to instability in service provision in the past, notably in the criminal law sphere.

Legislative reform could introduce a semi-regular, comprehensive evaluation of the fee structure. One model to consider might be a review by an independent body with consultation from practitioners in the field. The goal would be to set rates at a level that would enable lawyers to continue delivering high quality legal aid work. Funding and tariffs should be considered in light of the cost of other government-employed lawyers performing similar functions like crown attorneys. It is important that tariff rates are set at levels that will continue to attract lawyers.

Clinics

The primary issue in determining whether to provide funding to a clinic must be the legal needs of the community that the clinic serves. ASLA strongly supports community legal clinics which are in the best position to serve the areas of greatest need in their communities. Specialty clinics have a particularly important role to play in advancing the interests of marginalized groups. These clinics represent the leading edge of knowledge and expertise, promoting advocacy and raising the quality of service for their constituents through all legal aid service delivery paths.

Additional Funding

A 3-year funding cycle is appropriate, however, we note that clinics engage in annual funding applications and receive funding for only one year at a time. This seems an inefficient process that creates an administrative burden for both the clinics and LAO.

With respect to LAO imposing terms and conditions on a clinic's funding, once a clinic is established and operational, LAO should only be permitted to set terms and conditions when a clinic is in breach of its statutory duties.

Clinic Operations

It is important that clinic boards are empowered to ensure the effective operation of their clinics. The Act should clarify that it is the responsibility of the clinic board, not of LAO, to determine the needs of the community and to design services to meet those needs. Currently, there seems to be some overlap between a clinic's prerogative and LAO's general authority to assess need and determine services.

Part IV – VII Other Provisions Including Quality assurance audits

Quality assurance strategies are important for continued improvement in client service, however, quality assurance should not be so onerous that it prevents new lawyers from entering legal aid service. Instead, quality assurance strategies should be modeled as a set of skills to be incrementally developed and improved.

At the same time, LAO must be pro-active in establishing standards in all areas of practice and should be prepared to enforce those standards when serious transgressions occur. Enforcement should include a range of tools including temporary removal from a panel pending remedial action and permanent removal from a panel.

LAO should include lawyers in developing quality assurance programs. We anticipate that there is already a good deal of information gathered by LAO in the form of dockets billed, opinion letters provided, and client feedback that may assist in tailoring quality assurance programs.

Other Provisions

The definition of “clinic” in section 2 must be retained. It is critical that clinics continue to be identified as independent corporations. However, the definition of “clinic law” in section 2 is too narrow. The essence of clinic law is that it is determined based on the community’s priorities. Low-income Ontarians might have legal needs that fall outside of the listed areas included in that section of the Act.

Section 8(1) establishes a clinic committee of the LAO board, which has a particular role in dealing with clinics and clinic funding issues. The provision of clinic law services is very unique from other legal aid services, and as such, it is appropriate for LAO to have a clinic committee of its board to focus on clinic law services. This is an important aspect of LAO’s governance structure.

Conclusion

To conclude, we offer a few general comments related to access to justice. First, we believe there should be an emphasis on user-focused justice through initiatives like increasing the availability of digitized justice services and streamlining court processes. We also encourage the government to modernize the administration of criminal law and family law, as has been done in the civil system. Next, modernizing administration of legal aid certificates could help reduce practitioners’ regulatory burden and make legal aid a more attractive option for private counsel. Finally, notwithstanding the potential amendments that may result from this review, ASLA stresses that adequate and stable funding for legal aid is essential and must remain a priority.

Thank you for the opportunity to provide these comments. We would welcome a meeting with you at your earliest convenience to further discuss these important issues.

Sincerely,

A handwritten signature in black ink, appearing to read 'Lenny Abramowicz', with a long horizontal flourish extending to the right.

Lenny Abramowicz
Chair
Association for Sustainable Legal Aid

cc Charles Harnick, Chair of Legal Aid Ontario

On behalf of our member organizations:
Association of Community Legal Clinics of Ontario
Federation of Ontario Law Associations
Criminal Lawyers Association
Family Lawyers Association
Law Society of Ontario
Ontario Bar Association
Refugee Lawyers Association
The Advocates' Society
Mental Health Legal Committee