

September 23, 2019

BY EMAIL to drd@pc.ola.org

The Honourable Doug Downey
Attorney General of Ontario
Ministry of the Attorney General
720 Bay Street, 11th Floor
Toronto, Ontario M7A 2S9

Dear Attorney General,

Mental Health Legal Committee

Submissions respecting review of Legal Aid Services Act, 1998

These submissions are made on behalf of the Mental Health Legal Committee in respect of the Ministry's review of the *Legal Aid Services Act, 1998*. As the legislation has a profound impact on our clients, we are grateful for this opportunity.

The Mental Health Legal Committee

The Mental Health Legal Committee (MHLC) is an association of lawyers and community legal workers located mainly in Ontario founded in 1997 to promote and protect the rights of psychiatric consumer/survivors. The MHLC has no funding and operates on the volunteer contributions of its members.

Our lawyer members represent clients in all areas of mental health law (criminal, civil and administrative) and all levels of court. The MHLC also advocates for the rights of consumers and survivors through a broad array of public interest activities including systemic advocacy, public legal education, policy work, community development, access to justice and law reform initiatives.

The MHLC has, among other things, assisted Legal Aid Ontario in establishing panel standards for lawyers appearing before the Consent and Capacity Board (CCB), made submissions respecting Provincial and Federal legislation and intervened in a number of Supreme Court of Canada cases.

Of particular significance in the context of the review of legislation governing legal aid in Ontario, is the work of the MHLC in representing clients before the CCB and in appeals from the CCB, as well as clients found unfit to stand trial or not criminally responsible by reason of mental disorder (NCR) before the Ontario Review Board (ORB). The overwhelming majority of this work is funded by Legal Aid Ontario. Finally, members of the MHLC represent consumer/survivors and their families in inquests and other administrative, civil, criminal and constitutional cases where LAO's role can be crucial in ensuring that the experiences of the persons most profoundly affected by institutional conduct are heard and considered. ***The Present Legal Aid Services Act, 1998***

The *Legal Aid Services Act, 1998 (LASA)* established the governance of Legal Aid Ontario as an independent organization. While LAO is no longer operated by the Law Society, nor is this recommended, any amendments to *LASA* should continue to recognize and foster the close relationship between the Law Society and Legal Aid. Participation in a robust legal aid system is the cornerstone of how the legal profession ensures access to justice for low income Ontarians.

Impetus for change

The MHLC supports efforts to modernize LAO in a manner that enhances access to justice by low income Ontarians. The MHLC rejects, however, any suggestion that such changes are needed or appropriate as a cost-cutting measure. On the contrary, the April 2019 budget cuts to LAO undermine the organization's ability to carry out its needed mandate regardless of how it might be organized or governed. Given the lack of consultation preceding the cuts, the present consultation process must be meaningful and not a case of "cut first and ask questions later".

Purposes

Section 1 of the current *LASA* sets out the purpose of the Act, which is to promote access to justice throughout Ontario for low-income individuals and the means of doing so. Each of the means provisions continue to pertain and should remain (i.e. reference to consistent high quality, cost-effectiveness and efficiency, and recognition of the private bar and clinics while promoting innovation).

Innovation is often achieved with the increased use of technology. In adopting new technologies (which LAO should), LAO must ensure at the same time that it does not leave the most vulnerable further behind. Persons in custody, including those detained in psychiatric facilities, are generally deprived of electronic communications. In psychiatric facilities, the only available telephones are shared and located in public areas of the unit. These clients will need real staff to answer the phone and real people to meet with them to overcome communication barriers.

What is missing from the purposes section and what has been the primary impediment to LAO's ability to carry out its mandate stretching back to the predecessor Ontario Legal Aid Plan is the lack of stable, predictable funding. Reliance on cyclical Law Foundation funding for core program costs and government-initiated contractions and clawbacks of surpluses have eroded LAO's independence and its ability to serve low income Ontarians. LAO should be properly recognized as a poverty reduction initiative such that its stable funding, particularly during economic downturns, is assured and this should be added to the purposes section of the Act.

Independence of LAO

Keeping LAO independent from other functions of government,¹ particularly the prosecutorial and liberty-restricting functions, remains as important as ever.

¹ Subsection 3(4) of *LASA*.

In the mental health context, hospitals and psychiatrists perform a governmental role in making decisions restricting the liberty and security of the person interests of patients. As additional resources are added to mental health services in Ontario, including the delivery of services that are coercive, LAO must be in a position to respond to ensure that such services are genuinely consensual or that due process is afforded to Ontarians who are confined or receiving care against their wishes.

Objects

The MHLC supports the present objects of LAO as set out in section 4 of the *Act* but would add a general object of advocating for changes that will enhance access to justice. This would include the ability to identify and seek changes to systemic barriers to access to justice. As examples, most courts still rely exclusively on in-person paper filings and tribunals like the CCB send all hearing notices and decisions by fax. LAO's objects should also include the ability to advocate for sufficient resources to fulfill its own mandate.

Board of directors

The MHLC notes that LAO's Board is generally passive in the oversight and direction of the corporation. The MHLC would propose to remove the restrictions upon the numbers of lawyers and benchers who may be appointed to the Board in section 5 of *LASA* (as this should be unnecessary) and establish a Board made up of service providing and service receiving constituencies.

Services to be provided

The MHLC seeks the continuation of legislative oversight of the areas in which LAO shall provide services as set out in section 13 of the *Act* and that mental health law services remain enumerated. If the legislature does not mandate the provision of these services, they could become discretionary, which would be unacceptable given the constitutionally protected interests affected.

The withdrawal of services in the area of mental health law is not merely hypothetical. Arising from the April 2019 budget cuts, effective July 7, 2019, coverage has been eliminated for family members in all matters before the CCB. As an example, parents who are financially eligible for legal aid are now forced to respond without a lawyer and appear before the CCB on their own in a facility's application to withdraw their child from life support.

In addition, the preparation hours in appeals from the CCB to the Superior Court were cut in half effective July 7, 2019 from 50 to 25 hours. A similar cut from 50 to 35 hours has been applied to appeals from the ORB to the Court of Appeal. Both types of cases implicate *Charter*-protected liberty rights and the appeals cannot be responsibly handled within the hours now permitted.

In 2008 and 2009, the combination of successive governments' failure to address the need for tariff reform, the inadequate preparation hours allocated to appeals from the CCB, and the general inability of mental health appellants to self-represent meant that the appeals could not proceed. This gave rise to *Rowbotham* and *Fisher* orders or the appointment of *amicus curiae*, all funded by your Ministry. In many cases, treatment could not commence pending the disposition of the appeals. While the months passed, court and hospital resources were burdened to an extent greater than any savings to LAO.

The pressing implications of the July 2019 cuts to LAO mental health law services in terms of the costs to the justice system, the health care system and the lives hanging in the balance cannot wait for new legislation to address them. The MHLC urges the Minister to seek the reversal of the government's decision to underfund LAO that led to the cuts. The present crisis also underlines the need to ensure that mental health law services are mandated by the legislature.

Methods of providing legal aid services

Section 14 of the *LASA* speaks to delivery methods. The means of delivery of agreements with lawyers under section 14(a.1) has been a failure due to limited uptake. Such agreements represent an encroachment upon the independence of certificate-accepting lawyers and could create employment-like relationships and obligations. The MHLC proposes this provision be removed.

The private bar is the foundation of all areas of certificate service

Section 14(2) speaks to the private bar as being the foundation of criminal and family law services. The same can and should be said of mental health law services, which could not be provided province-wide without the private bar's versatility. The MHLC seeks the addition of mental health services to the language of section 14(2).

Legal services must be provided by lawyers

Section 14(4) provides that legal services shall only be provided by a lawyer or a person working under the direct supervision of a lawyer. In areas where the *Charter* and Canadian jurisprudence establish a right to counsel, such as mental health tribunal work, that means the assistance of a lawyer and not simply a person licensed by the *Law Society Act*, which could include unsupervised paralegals.

Even if non-lawyers are technically permitted, at the discretion of the tribunal, to appear at the first level of an administrative process, without the ability to access the supervisory and appellate jurisdiction of the courts, non-lawyers are unable to completely advise or represent their clients. This is a cornerstone of the high quality legal services that should continue to be mandated by the *LASA*.

Eligibility for legal aid services

There needs to be discretion for LAO to provide legal aid services where a person's assets are being withheld from them, which arises on occasion in the mental health law context. Similarly, there needs to be discretion for LAO to provide legal aid services where a client is mistaken about their assets or their ability to pay privately for legal services.

In the CCB context, where hearings are required by statute to be held within 7 days of an application being submitted to the Board, there is no time to waste on retainer-related issues (i.e. to secure funding from a recalcitrant attorney, guardian or family member who is withholding funds or obtain a deposit and confirm the ability to pay of a client who is detained in hospital) before a lawyer must start preparing for the hearing. Failure to start preparing as soon as one is selected or appointed as counsel can lead to inadequate representation or cause adjournments which, in turn, delay decisions respecting involuntary hospital admissions and treatment capacity, needlessly lengthening hospital stays.

The issue can be delicate as a client may be experiencing symptoms of mania or have delusional beliefs respecting their ability to pay and provide incorrect information on an application for legal aid or to a lawyer offering a private retainer. In some cases, whether the client is capable of managing their property may be one of the issues being determined before the Superior Court or the CCB.

Where the person recovers control over their finances and enters into a private retainer or funds are obtained from an attorney or guardian of property, the legal aid certificate can be cancelled without being billed. It is in LAO's interest, however, if it wishes lawyers to attempt to reach a private retainer so as to displace or reduce the need for payment by legal aid in some cases, that it be able retroactively to receive or revive an application for legal aid where no funds have been received by the lawyer on a private retaining basis or, if inadequate funds have been received, to deduct the amount received from the amount that would be paid under a certificate.

Proceeding in the manner proposed by the prior paragraph is presently blocked by subsections 12(c) and (d) of Regulation 106/99 under *LASA*, which include the following preconditions for issuing a certificate retroactively:

- (c) no previous application for the same services has been refused; and
- (d) the lawyer has not accepted a private retainer for the services.

The MHLC suggests the following replacement wording for this section:

- (c) no previous application for the same services has been refused for reasons other than financial eligibility; and
- (d) the lawyer has
 - (i) not received funds under a private retainer for the services; or

- (ii) received inadequate funds under a private retainer for the services, in which case the amount of funds received shall be disclosed by the lawyer and shall be deducted from any amount to be paid under the certificate.

Failure to address the above provision will result in lawyers declining to make efforts to enter private retainer agreements as they could be penalized for doing so (as some have). The *status quo* represents a net loss to LAO.

Section 16(1)(d) of *LASA* contemplates that a fee may be charged for processing a legal aid application. The MHLC is not aware of such charges being levied in the past. As this would serve as a barrier to access to justice, the legislative opening permitting such a fee to be charged should be closed.

Legal aid staff offices

Section 19 provides for legal aid staff offices. The MHLC submits that there is no evidence that staff offices provide service that is superior to the private bar. It submits that the staff office method of service delivery should be limited to where the private bar and clinics are demonstrably unable to meet the needs of a geographic area. Otherwise such offices erode the service-providing capacity of clinics and the private bar. Further, staff offices are unable to leverage non-legal aid services to defray overhead and tend to have higher costs when staff compensation and benefits are considered.

Duty counsel

Consistent with its position respecting staff offices, the roles of duty counsel in section 20 of *LASA* should be restricted to where certificates would not be available. Anecdotally, staff lawyers have acted in CCB and ORB proceedings and duty counsel have conducted NCR proceedings. Lawyers who are not trained or supervised in areas of practice for which certificates are available should not dabble in them.

Certificates

This is addressed in section 24 of *LASA*. Please see the comments above respecting eligibility for legal aid services.

Clinics

The MHLC defers to the submissions of the Association of Legal Clinics of Ontario in the area of clinic independence. The MHLC notes that the current *LASA* review is partly responsive to the 2018 Auditor General's report, which recommended that your Ministry work with Legal Aid Ontario (LAO) to review the clinic service delivery model and identify areas for improvement. The MHLC wishes to express its strong support for community legal clinics and that they retain their independent boards. Community clinics need the flexibility to determine and serve the areas of greatest need in their communities.

The specialty clinics have a particularly important role to play in advancing the interests of marginalized groups. On a number of occasions, the MHLC and its members have collaborated with specialty clinics (such as ACE, ARCH and HALCO) in court interventions, addressing institutional trends and stretching resources, such as using accessible client meeting rooms or making use of a boardroom to hold MHLC meetings. These clinics represent the leading edge of knowledge and expertise, promoting systemic advocacy and raising the quality of service to their target constituencies through all legal aid service delivery paths.

Quality Assurance

The MHLC supports the measures currently available to LAO to ensure the quality of services provided by service providers, including the engagement of the Law Society to conduct quality assurance audits. LAO should also be pro-active in establishing panel standards in all areas of practice and should be prepared to enforce those panel standards upon being informed of lapses through complaints and the results of quality assurance audits. Enforcement should include a range of remedies including temporary removal from a panel pending remedial action and permanent removal from a panel.

Other submissions

The MHLC has had an opportunity to review the submissions of the Criminal Lawyer Association dated September 11, 2019 and wishes to endorse them generally. In particular, the MHLC adopts the submission respecting the need for meaningful tariff reform and automatic updating of the financial eligibility guidelines.

Thank you for your thoughtful consideration. If you have any questions or would like to meet to discuss the above further, please do not hesitate to contact me.

Yours very truly,



Marshall A. Swadron

Chair, Mental Health Legal Committee

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