Submission on Draft Rules

under the *Legal Aid Services Act, 2020*

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ONTARIO BAR ASSOCIATION
A Branch of the Canadian Bar Association

L'ASSOCIATION DU BARREAU DE L'ONTARIO
Une division de l'Association du Barreau canadien

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Introduction

The Ontario Bar Association (the "**OBA**") welcomes this opportunity to provide feedback on the draft rules prepared by Legal Aid Ontario ("LAO") under the *Legal Aid Services Act, 2020* ("*LASA 2020*") (the "Draft Rules").

The OBA

The OBA is the largest volunteer lawyer association in Ontario, with over 16,000 members who practice on the frontlines of the justice system, providing services to people and businesses in virtually every area of law in every part of the province. Each year, through the work of our 40 practice sections, the OBA provides advice to assist legislators and other key decision-makers in the interests of both the profession and the public, and delivers over 325 in-person and online professional development programs to an audience of over 12,000 lawyers, judges, students and professors.

This submission was prepared by members of the OBA Legal Aid Working Group. This Working Group is comprised of members who engage in LAO certificate and clinic work and who practise in various areas of law including criminal, family, children and youth, immigration and refugee, and mental health law.

The OBA has been a consistent advocate for a strong, sustainable legal aid system, which is critical to a strong civil society. Our members provide both certificate and clinics services, and display their commitment to their clients, communities, and the legal aid system in, more often than not, expending countless pro bono hours, well over and above certificate hours and long after their clinics have closed for the day. This commitment is representative of the importance legal aid practitioners place on access to justice for those in their communities and is also indicative of the commitment to the shared goal of improving and enhancing the legal aid system.

Comments on the Proposed Rules

Preliminary Comments

Consultation

The OBA has stressed that the success of *LASA 2020* depends on meaningful and robust consultation between LAO and the bar[1]. The Draft Rules are extensive, incorporating many elements from the *Legal Aid Services Act, 1998*, its regulations and LAO policies. Given the voluminous nature of the Draft Rules and the significance of this new rule making authority granted to LAO under *LASA 2020*, it would have been valuable to have a lengthier consultation period and the benefit of the public consultation policy mandated under the legislation.

Despite this, the OBA's Legal Aid Working Group has done its utmost to comprehensively review the Draft Rules and provide the following comments. We continue to encourage LAO to engage extensively with the bar, and to draw on the expertise of these front-line service providers early and often.

Administrative Burdens on Service Providers

In 2019, the OBA's submission on the Legal Aid Ontario Modernization Project outlined the need to reduce administrative burden[2]. Administrative burdens on service providers reduce productivity, waste scarce resources and negatively impact the overall legal aid system. While we recognize the importance of accountability and confidence in the legal aid system, both for the government and the public, unnecessary administrative burdens make it more difficult for lawyers to take on legal aid matters, which they are already doing at significantly discounted rates.

These administrative burdens must be reduced in order to increase the efficiency of the system and enhance client service. This is critical to ensuring that lawyers providing legal aid services are able to spend more time helping their clients than on inefficient administrative tasks.

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[1] OBA Comments on the new *Legal Aid Services Act, 2019* (Schedule 16 of Bill 161, the *Smarter and Stronger Justice Act, 2020*).
[2] OBA Comments on the Legal Aid Ontario Modernization Project.

The Draft Rules do not reduce the significant administrative burden on service providers, and in fact, in some circumstances increase these burdens. In the remainder of our submission, we have highlighted some particular administrative burdens, and provided recommendations to reduce same.

Duplication and Conflict with Law Society of Ontario Rules of Professional Conduct, By-Laws and Processes

There are various instances in the Draft Rules where they either duplicate or conflict with a lawyer's obligations under the Law Society of Ontario (LSO)'s Rules of Professional Conduct ("LSO Rules")[3] or regulatory oversight of lawyers.

It is critical that lawyers providing legal aid services are not placed in a position of conflict between their professional obligations to their clients and the LSO, and the LAO Rules. Conversely, it is also unnecessary to duplicate obligations in the LAO Rules that already exist for lawyers.

In the remainder of our submission, we have highlighted circumstances in which the Draft Rules either conflict or duplicate LSO Rules or obligations.

Rule 1: Roster Management

Conflicts of Interest (Rule R6)

Rule R6 provides that a roster member shall not act for an individual under a certificate if the roster member has a conflict of interest; however, the LSO Rules provide for circumstances in which a lawyer may represent a client where there is a conflict of interest[4]. Rule R6 ought to align with the LSO Rules on when a lawyer may act. There is no justification for why a lawyer on a private retainer may act in certain circumstances despite a conflict of interest, while a roster lawyer may not. Additionally, this rule may create barriers to accessing legal aid services, particularly in smaller communities or in racialized communities where the number of available lawyers may be lower.

Effect of Suspensions (Rule R13)

Rule R13(f) permits LAO to prohibit suspended roster members from submitting accounts unless permitted in writing. Such a prohibition would create a number of problems, including certificates expiring or financial hardship for the roster member. While a suspended roster member ought not to

[3] Law Society of Ontario, Rules of Professional Conduct,
[4] *Ibid*, s. 3.4-2.

be providing additional services, there is no reason why they ought not to be able to submit accounts for services provided prior to suspension, even if these accounts are subjected to additional scrutiny by LAO.

Schedule: Quality Service Standards

The Quality Service Standards schedules refers to ensuring that roster members "deliver value for money spent" as one of three purposes of the standards. At a minimum, this standard needs to be more clearly defined to ensure roster members understand what is expected of them.

The Quality Service Standards schedule also does not include enhanced panel standards, which LAO committed to developing in the 2016 Mental Health Strategy for Legal Aid Ontario[5].

Schedule: Administrative Burden

The inclusion of a schedule outlining an obligation that roster members not create an administrative burden on LAO reflects a one-sided approach when little has been done in the Draft Rules to reduce the significant administrative burden on roster members.

Additionally, the schedule, and particularly section 1(2)(e), has the potential to prejudice junior lawyers and those new to the roster, who may require some additional supports from LAO.

Rule 2: Payment to Roster Members

General Comments re: Standard of a Private Client of Modest Means

Rules P2(1)(d), P5(2)(a), P6(3)(a) and P14(4)(b) reference the standard of what "a reasonable privately paying client of modest means who had been properly informed by the client's lawyer would expect to pay" [Emphasis added]. This standard does not align with the purpose of *LASA 2020* to provide "effective and high-quality legal aid services". Further, it is difficult to reconcile this with a lawyer's professional obligations to represent clients resolutely and honourably[6], and the ever-present potential for an ineffective assistance of counsel claim. Rather the appropriate standard is *what a reasonable and competent lawyer would do in similar circumstances*. This standard is consistent with the purpose of the Act, and a lawyer's professional obligations.

[5] Legal Aid Ontario, The Mental Health Strategy for Legal Aid Ontario.
[6] *Supra* note 3, s. 5.1-1.

General Obligations (Rule P2)

Rule P2(3) places an onus on roster members to provide proof of and justification for the legal services provided and disbursements incurred. Rule P15 similarly requires lawyers to provide such proof and justification in the context of an examination, audit or investigation. This obligation is very onerous on roster members. Roster members will have to spend significant time and potentially incur substantial costs to meet this onus – for example, to order court transcripts or court informations. Additionally, delays and costs in obtaining independent records or documents may substantially delay payment to roster members.

The requirement in Rule P2(4)(b) that a roster lawyer directly supervise another person in the preparation and submission of the account is unnecessary. Rule 6.1-1 of the LSO Rules already requires lawyers to directly supervise non-lawyers to whom particular tasks and functions are assigned.

Determination of Fees and Disbursements (Rule P4)

The practice of law is constantly evolving. Never has that been more readily apparent than over the past year as the COVID-19 pandemic fundamentally shifted how the courts operate and practitioners pivoted to continue to provide exceptional legal services in changing circumstances. But less obvious and more nuanced changes are happening in the practice of law all the time as a result of new legislation and caselaw, emerging best practices, new practice directions, technology changes, increasing disclosure volume, increasing requests from judges for written materials, and more. The financial pressures of legal practice also continue to evolve with inflation and increased staffing, disbursements, research and other overhead costs. The Draft Rules do not respond to this evolving nature of the practice of law or provide an ongoing, structured approach for addressing these changes over time in a manner that promotes partnership with the bar.

A formal mechanism for regular review of the tariff and rates, in consultation with stakeholders, is critical to ensure that compensation remains in step with the reality of legal practice and the provision of legal services. We recommend the inclusion of a rule requiring LAO to review the tariff and rates, in consultation with the bar and other stakeholders, a minimum of every three years or sooner where there have been significant legislative or rule-based changes impacting the delivery of legal services It is not uncommon for regulations and statutes to include mandatory review periods. Such a requirement here would ensure regular and consistent opportunities for LAO to assess

whether the tariff continues to be reflective of the reality in which legal services operate. It ought to be mandated that this review be conducted in conjunction with service providers.

Case Management (Rule P5 and P6)

We applaud the removal of charge-specific enumerated offences from the case management rules. In both criminal and family law matters, case management can be highly effective in streamlining the course of a matter through the courts or alternative dispute resolution process. It allows for timely and responsive changes to the funding on a given file to take into consideration changing circumstances and allows for greater flexibility on the part of counsel in terms of how to approach the matter to achieve the best result for the client in the most cost-effective manner. It also provides certainty and reliability for both roster members and LAO at the outset about the expected compensation for a particular matter. Finally, case management can also encourage earlier resolution of matters as counsel is able to do more up-front work rather than primarily be compensated through stages of litigation.

We suggest that Rules P5 (big case management) and P6 (mid-level case management) could be merged into a single program for all case management which would assist in simplifying and streamlining processes.

The inclusion of the requirement in Rule P5(1)(a) and P6(1)(d) that a matter must be "exceptionally complex" to be eligible for case management appears to be a new requirement not currently in place. There is no guidance on what is considered "exceptionally complex" or how this assessment will be made. The addition of this requirement appears to conflate case management with the requirements for the complex case rate, and suggests that case management is only available where the complex case rate is applicable. Such an approach leaves counsel who acknowledge certificates for matters that are likely to exceed the tariff but fall short of the "exceptionally complex" threshold with no option but to apply for discretionary increases. This approach, as detailed below, provides very little certainty for roster members as to whether they will be compensated for their services.

Case management can be effectively used for matters which, not while "exceptionally complex", are substantially more work-intensive than the tariff provides (For example, cases with highly technical evidentiary issues, substantial and/or complex disclosure, or clients who are vulnerable or have

mental health challenges requiring additional time with counsel to review and prepare). We propose removal of the "exceptionally complex" requirement for case management.

Rule P5(3) outlines the circumstances in which LAO can refuse a case management application. Case management applications should be assessed on their merits and not the formalities of the application which places onerous administrative obligations on counsel. This is another example of how administrative burdens for roster members can be reduced to allow them to dedicate their time to client matters.

Maintaining Records (Rule P7)

While the obligations on roster members in this rule are not new, they are very onerous. Lawyers already have detailed record keeping requirements and obligations from the LSO. These overlapping and additional obligations create significant administrative burden for counsel.

Submitting Accounts for Certificate Services (Rule P8)

The current calculation of billing deadlines is unnecessarily complicated. We recommend a simple rule that bills must be delivered prior to the expiration of a certificate, with extensions granted only in extenuating circumstances or when a trial has not taken place. This would also address any concern about bills being "banked" for an unreasonable period of time.

General Billing Rule (Rule P10)

Rule P10 provides that the onus is on a roster member to prove and justify that services were performed "in the best interests of the legally aided client". A lawyer's obligation is not to perform services in the *best interests* of the client. A lawyer's obligation is to serve a client's interests and follow a client's instructions. This may or may not be in the client's best interests from another person or LAO's perspective.

Further, lawyers are required to take certain steps to comply with legislation, rules and local practice directions, even where those steps may not demonstrably be in a particular client's immediate best interests.

Compliance (Rule P11)

The basis for disallowing the payment of fees or disbursements outlined in Rule P11(2)(a) do not sufficiently reflect the reality of legal practice. As an example, the portion of Rule P11(2)(a)(ii)

referencing "unreasonably lengthy" documents is concerning. We suggest it would be extremely difficult, if not impossible, for LAO to assess whether a document was unreasonably lengthy in the particular circumstances from an outside perspective. In criminal matters, for example, the Crown often files voluminous materials to which defence counsel must respond or the judge may require specific additional materials to be filed. Many judges are now requiring written submissions at the conclusion of criminal matters. The same is true in family law and immigration matters. These circumstances need to be adequately addressed in assessing accounts, and specifically an exception for materials required by the Court should be included in this Rule.

Discretion must be granted to counsel to assess what is required for each individual case, and roster members ought not to have to be concerned about having their judgment, for example as to the appropriate extent of materials, questioned in each case. Indeed, this rule appears to conflict with rule P10.

Private Retainers (Rule P12)

While legal aid bail coverage has been temporarily reinstated in response to the Covid-19 pandemic, bail is not covered in the ordinary course (coverage having been previously eliminated). Private retainers for bail were therefore previously permitted. Families of clients may be able to raise some limited funds for a bail hearing, but not for a two-week trial. A simple exception needs to be included in this Rule for bail proceedings provided the amount is reasonable. Without such an exception, significant complications will arise for both counsel and clients in respect of when to apply for legal aid and effective dates of certificates.

Discretion Requests (Rule P14)

Requesting an increase to the fees payable at the time of submitting the account places counsel in a very difficult position. Apart from the administrative burden of requesting the increase, the roster member has already completed the work without any certainty as to whether or not they will be compensated for the services. Even if the account, or a portion of it, is ultimately approved, payment is delayed by the administrative steps that need to be taken. Rather than rely on requests for discretion at the time of submitting the account, consideration should be given expanding the circumstances in which case management is available. This would provide both counsel and LAO with greater certainty at the commencement of matter.

Additionally, as case management is largely not available in certain areas, such as immigration and refugee matters, the applicable criteria where discretion will be exercised needs to be expanded. This is particularly important in the current circumstances wherein the tariff is outdated and in urgent need of reform, as discussed further below.

Rule P14(4)(a) requires exceptional circumstances before a discretionary increase will be granted. While this requirement carries over from the regulations under the *Legal Aid Services Act, 1998*, it is often too high a threshold that does not reflect the reality of legal practice today. For example, in human trafficking cases, disclosure often includes thousands of pages of telephone records. This volume is no longer exceptional in human trafficking cases and may fail to meet the requirement for discretion. We suggest that "appropriate circumstances to justify authorizing the increase" would be a more reasonable rule that would allow counsel to be fairly compensated in the particular circumstances of the case.

Finally, where a discretionary increase is refused, the reasons for such a refusal need to be more clearly articulated by LAO.

Examination, Audit and Investigation (Rule P15)

Rule P15(7) prohibits a roster member from requesting any discretionary increases or authorization if an account is or has been audited or investigated. If the result of an audit or investigation is that an account was proper, there is no rationale for prohibiting a roster member from requesting a discretionary increase. This is arguably also the case if any error or omission was inadvertent, and the roster member was acting reasonably and in good faith. A blanket prohibition on requesting a discretionary increase if an account has been audited or investigated appears baseless and unfair.

Review Process (Rule P17)

The changes to the review process eliminate the availability of an impartial third party (an assessment officer) and grant sole discretion to LAO to act as the final decision-maker on disputed accounts. While these changes are purportedly intended to streamline the process, they instead remove access to a neutral decision-maker. It is critical for a fair process that a neutral third party be, at a minimum, available at the request of the roster member to ultimately adjudicate account disputes.

Fees and Disbursements Schedule

While we recognize that tariff reform has not been the focus of LAO in the preparation of these Draft Rules, we would be remiss not to stress that the tariff system continues to be outdated and fails to reflect the reality of current legal practice. Some examples include:

- Waiting time: The experience in the legal system in Ontario is that counsel are often required by the court to wait (sometimes for days) for their matter to be reached; however, roster members are often not compensated for this time. Similarly, for matters before the Immigration and Refugee Board, compensation is only available for time when the hearing recording is on. Roster members are not compensated for time spent addressing matters off the record or while waiting for the tribunal to commence or resume.

- Bail: The maximum hours available in the tariff for judicial interim release and bail reviews is wholly inadequate. It does not reflect the actual time required to prepare for these matters including preparing sureties, drafting written materials that are now required by the court etc. It is not uncommon for hearings to stretch on for a whole day, if not more. Indeed, bail hearings have become more complicated than many small trials. At a minimum, there should be a tariff for preparation time with unlimited time in court for the hearing itself.

- Judicial pre-trials (JPT): The limit on the number of JPTs for which a roster member will be compensated does not align with current court practice in which many judges are requiring two or more JPTs. If a JPT is ordered by a judge, a roster member ought to be compensated for it without making an authorization request.

- Students: Restrictions on when students may attend for roster members to be paid are unduly restrictive. The LSO and the courts govern what matters a student can address. Lawyers are required under the LSO Rules to directly supervise students. Additional restrictions from LAO are unnecessary and interfere with a roster member's ability to effectively manage their practice. This is particularly the case with students attending for withdrawals. There is no reason why a student cannot do so without prior authorization. Again, this saves counsel's time to address more substantive matters.

- Focus on litigation: In family law matters, the tariff is heavily weighted in favour of litigation over out-of-court dispute resolution processes. While specific allotments are available for court appearances, the same cannot be said for most settlement meetings, mediations etc. This is out of step with recent amendments to the *Divorce Act* and *Children's Law Reform Act* which expressly compel lawyers to explore out-of-court dispute resolution processes with clients.

- Expert reports: A matter may be unnecessarily prolonged by restrictions on expert reports until later on in a case. In many circumstances, a matter could be settled much more quickly with the benefit of an early expert report. This restriction is also contrary to the *Family Law Rules* which require an expert report to be delivered 30 days prior to a Settlement Conference.

- Matters resolving together: Often clients may instruct their lawyers to "waive" criminal charges in different jurisdictions for the purposes of resolution. This makes a more favourable sentence likely than if they were resolved together. Such cases often require substantial work to resolve, including the work required to review disclosure for due diligence. Paying one tariff rate on such matters does not fairly take into account the work required. While separate billing of each certificate would also not be appropriate, we propose a modified tariff to reflect the work involved while still providing a cost savings compared to separate certificates.

Given the amount of work reasonably required to provide effective and competent legal services, lawyers often exceed inadequate set tariff rates. Once this limit is met, counsel are required to incur the administrative burden (and uncertainty) of repeatedly applying for discretionary funding to justify the increased costs stemming from current practice that has not been reflected in the tariff. For criminal block fee matters, a request for discretion is not even available despite the fact that some of these matters can be very complex and counsel are already obligated to assume disbursement costs. At a minimum, roster members on block fees ought to be able to retroactively apply to have the hourly rates apply, so an application for discretion is available.

An inadequate tariff, coupled with the uncertainty of discretionary increases, leaves counsel in a tenuous position balancing their obligations to their clients and the likelihood of being paid. This is particularly so for matters where the likelihood of being adequately compensated for the work necessary to effectively and competently represent a client is low, making it harder for lawyers to take on these matters.

Further, a tariff that more accurately reflects the reality of practice today would reduce the administrative burden for both roster members and LAO in preparing, assessing and responding to discretionary requests, as well as the associated delay for clients.

Rule 3: Certificate Management

Issuing Certificates (Rule C2)

Under Rule C2(4), roster members are required to submit a detailed report to LAO if a matter has not concluded within two years. The reality of the justice system is that some matters take a long time to reach resolution. Currently court delays are longer than they have ever been. For example, in family law matters, in some jurisdictions, case conferences are being scheduled as far out as Fall 2021 with trials over five days being scheduled for January 2023. While it is appropriate to require a roster member to request an extension, the significant administrative burden of preparing the detailed report required is unduly onerous. A simple request for an extension with brief reasons ought to be sufficient.

Amendment of Certificates (Rule C3)

Rule C3(2) requires that an application for travel expenses be made within 30 days of acknowledging a certificate. This rule does not reflect circumstances where a client subsequently moves (voluntarily or if transferred to another correctional facility) or where a matter is moved to another courthouse. For example, some jurisdictions can move trials the morning they are set to begin to a courthouse nearly 100km away. We recommend amending this sub-rule to indicate that an application for travel expenses shall be made within 30 days of acknowledging a certificate or within 30 days of a change in circumstances necessitating travel expenses.

A similar amendment is necessary to section 3(3) of Part 1 of the Fees and Disbursements schedule.

Assignment of Lawyers (Rule C4)

The assignment of lawyers under Rule C4(2) and the withdrawal of services from an individual who declines an assigned lawyer under Rule C4(5) may be contrary to the constitutional right to counsel of choice. Additionally, if mental disability is a factor in a client's decision to change counsel, LAO as a service provider is required under the *Human Rights Code*[7] to accommodate the change to the point of undue hardship.

Rule C4(1) permits LAO to assign either a roster member or a staff lawyer. We suggest that it would not be appropriate to assign a staff lawyer unless there is a demonstrated need that the private bar cannot fulfill. This is likely to be only on the rarest occasion and we suggest the rule be amended to reflect this.

The restriction on a lawyer's ability to withdraw or resign from an assignment is particularly problematic. The requirement is onerous and impractical. It has the potential to place lawyers in a conflict of interest and/or in breach of their ethical and professionalism obligations to the Court and their clients, where they are awaiting written permission from LAO or where that permission has been denied. It is not unusual for counsel to be forced to bring a motion or application to be removed from the record because of a breakdown in the solicitor-client relationship, having lost contact with the client or for ethical reasons. In many circumstances, this must happen quickly, for example if a trial date is approaching. Additionally, a lawyer may not be in a position to explain the reason for resignation. In fact, such an explanation is not necessarily required by the court where counsel is seeking to get off the record with the client's consent.

The bar is committed to serving clients, including difficult to serve clients. A lawyer's assessment that they need to resign from a matter ought to be sufficient, without any requirement for approval by LAO.

The restriction on retaining an agent is similarly problematic. For example, in matters before the Consent and Capacity Board, the timelines are very short. The delay associated with obtaining permission from LAO to engage an agent could significantly prejudice the client. It also risks creating

[7] *Human Rights Code*, R.S.O. 1990, c. H. 19.

additional expense for LAO which could be saved by roster members appropriately utilizing agents. The only requirement for engaging an agent ought to be that the agent is on the appropriate roster.

Acknowledgement of Certificates (Rule C5)

We suggest that a period of longer than 30 days be provided under Rule C5(2) for a roster member to notify LAO and the individual of their decision to acknowledge or decline to acknowledge a certificate. It is not unusual for potential clients to delay in meeting with a lawyer or otherwise providing the information needed for a roster member to make a determination as to whether they are able to acknowledge the certificate. A more appropriate period of time would be 90 days.

Issuing Retroactive Certificates (Rule C7)

The requirement in Rule C7(a) that the acknowledging lawyer satisfy LAO that the services were provided in an urgent situation is unnecessarily restrictive. It is not uncommon for clients to have difficulties in accessing telephones or otherwise making applications for legal aid. This is particularly so for vulnerable clients, those experiencing language barriers and those with mental health or developmental challenges. Some certificates can also take a long time to be granted, for example for murder charges or when clients attract new charges in multiple jurisdictions. Counsel will often commence work on a file while awaiting a certificate, not because it is urgent but because it is prudent to do so, is in the client's interest and will assist in efficiently moving a matter forward. Roster members should not be discouraged from doing so for administrative reasons. A more appropriate standard would be for the acknowledging lawyer to satisfy LAO that the services were reasonably provided.

Rule 4: Eligibility for Legal Aid Services

Applications and Refusal to Consider Applications (Rules EL3 and EL5)

The stringent application requirements in Rule EL3(2), along with the ability to refuse to consider an application if the information in the current or a previous application is inaccurate or incomplete (Rule EL5(a) and (b)), do not provide the necessary discretion and flexibility required in serving the vulnerable populations that require legal aid services.

This is particularly so in the context of mental-health matters. Complete information may not be available or accessible due to detention or symptoms being experienced by the applicant. Applications with a mental health factor are routinely submitted by a third party (such as a lawyer,

rights advisor, patient advocate, social worker or nurse). These individuals need to be authorized to do so, and may not have access to complete information. Similarly, in family law matters, particularly where there is family violence including financial abuse, the individual applying may simply not have access to the requisite information. Refusing to consider an application in these circumstances will only further disadvantage family violence survivors.

The list of individuals who can apply on behalf of an incapacitated individual in Rule EL3(5) does not accurately reflect legal authority to apply on a person's behalf. A clear distinction should be made between a person who is *assisting* a (presumptively) mentally capable applicant in submitting an application (such as a lawyer, rights advisor, friend or family member), and an attorney or guardian of property who is applying *on behalf* of an individual who is not capable of managing property.

Additionally, Rule EL3(5)(d) references the Public Guardian and Trustee ("PGT"). The PGT only acts where there is legislative authority[8]. There is no statutory authority for the PGT to make such an application unless the PGT is acting as an attorney or guardian, in which case it would be captured by subsection (a) or (b). As such, subsection (d) is unnecessary and we suggest removing it.

While particularly relevant to this Rule, it is critical that all the Rules comply with obligations under the *Human Rights Code* and the *Accessibility for Ontarians with Disabilities Act, 2005*[9], and it would be prudent for LAO to retain a human rights and accessibility expert to review the rules through this lens. Accommodations must be available for those applicants needing them.

Consent to Release Information (Rule EL8)

Rule EL8 requires consent to release information and documents as a requirement of eligibility for legal aid services. Some clients may be capable of instructing counsel, but not capable of consenting to the release of confidential information. As such, discretion needs to be added to this Rule to ensure that vulnerable clients are not denied eligibility due to their capacity.

Financial Eligibility (Rules EL9 and EL12)

Rules EL9 and EL12 establish an inconsistency between financial eligibility depending on whether the client is receiving clinic or certificate services. While an individual is financially eligible for entity

[8] *Public Guardian and Trustee Act*, R.S.O. 1990, c. P.51, subsection 5(1).
[9] *Accessibility for Ontarians with Disabilities Act, 2005*, S.O. 2005, c. 11.

services if the primary source of income of the individual's family unit is one of six enumerated government support programs, this simple eligibility is not reflected in respect of certificate services in Rule EL9.

Language re: "Person Responsible for an Individual"

Throughout this Rule, reference is made to the "person responsible for an individual". This phrase requires definition or reconsideration in light of the above remarks regarding the distinction that must be drawn between a person assisting a mentally capable individual, and a guardian or attorney of an individual who is not capable of managing property. The only other relevant capacity is the capacity to instruct counsel, which is up to the lawyer to determine.

Rule 6: Entity Service Providers

The new Entity Service Provider rule suggests significant changes to the relationship between community legal clinics, Indigenous legal services organizations, and student legal services organizations ("clinics") and LAO - away from one of a partnership and mutual focus on the provision of high-quality legal services by specialized poverty law service providers to vulnerable, and often Black, Indigenous and other people of colour and historically disadvantaged individuals and communities. The Rule leaves clinics in a more precarious and less stable position than under the existing regime. It fails to recognize the critical role clinics play in the legal aid system, especially as service providers who are connected to the communities and clients receiving services. The clients served by clinics are often not served by any other legal service providers, and require the expertise and dedicated services that clinics are best able to provide when funding is stable and secure.

Service Agreements and Funding (Rules ESP5, ESP10, ESP19 and ESP20)

Rule ESP3(5)(a)(i) limits the term of a service agreement between LAO and a clinic to no more than three years. The term is only required to be three years if LAO determines the clinic's risk level to be low (Rule ESP3(6)), suggesting other clinics will be subject to a term of less than three years. Upon the conclusion of the term, the service agreement will terminate unless LAO "wishes to enter into a new service agreement" pursuant to Rule ESP5.

Along with Rule ESP10(1), which provides that LAO will determine the amount of funds to be provided for each year, the funding model creates great instability for clinics that will make it

extremely difficult for them to continue operations, engage in planning for the future, take on multi-year projects, and attract and retain lawyers and other staff.

This vulnerability is further exacerbated by the very limited review process available for funding decisions (Rule ESP10(3) and (6)) and termination of a service agreement with a clinic (Rule EPS19(6) and ESP20(5)), which is not consistent with due process.

Clinics represent very vulnerable clients who cannot otherwise access legal services, and often where the government is the opposing party. Lack of stability in this context leaves vulnerable clients at a further disadvantage, rather than providing the greater support and stability for these groups that underpins the legal aid system. The existing combination of MOUs and funding agreements between LAO and clinics created a setting wherein clinics could rely on presumptive funding unless a particular clinic were to be in breach of their obligations. This would no longer be the case under the Draft Rules. We urge LAO to amend the rule to ensure that clinics retain current levels of funding security and stability.

Requirement to Provide Information (Rule ESP7)

Rule ESP7(2) (and possibly ESP22(b)) requires clinics to provide information to LAO, including privileged or confidential client information. While clinics have accepted the need to provide such information where it is necessary to assess eligibility for services (which is currently in place), the inclusion of an obligation to provide broader information is not appropriate. As the entity retained by an individual, a clinic has confidentiality obligations to the client that ought not to be interfered with. This rule could put legal service providers in conflict with their obligations under the LSO Rules. We recommend that the rule ensure that clinics are able to maintain the confidentiality and privilege of information that would personally identify individual clients, while maintaining LAO's ability to evaluate financial eligibility for legally aided services.

Reviews (Rules ESP26-ESP29)

The review provisions limit the decisions that are reviewable in significant ways. In conjunction with various other provisions throughout the Entity Service Providers Rule, these provisions leave most decision making at the "sole discretion" of LAO. This approach leaves clinics without comprehensive due process with respect to funding and other decision-making regarding their operations. We

recommend a more comprehensive review mechanism that protect access to justice for people with poverty law legal service needs.

Conclusion

We appreciate the opportunity to provide this feedback on the Draft Rules. The legal aid system in Ontario is a vital aspect of our justice system. The bar is committed to working with LAO to ensure a system that provides high quality legal representation to some of the most vulnerable members of our society, and the OBA welcomes opportunities to continue to engage with LAO to provide the insights from the front-line service providers.