

May 8, 2019

Access to Justice Consultation
Law Society of Ontario
130 Queen Street West
Toronto, ON
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Delivered by online submission

RE: TLA SUBMISSIONS TO LSO ACCESS TO JUSTICE COMMITTEE

Thank you for providing members of the legal profession with the opportunity to provide feedback to the Access to Justice Committee on the important issue of improving access to justice in Ontario, and particularly, the approach of the Law Society of Ontario (LSO or Law Society) to the same.

The Toronto Lawyers' Association (**TLA**) is the voice of its 3,700 members who practise law in all disciplines across the Greater Toronto Area. Below are our comments to the questions posed in the Committee's Call for Comment.

1. What do you think of the Law Society's current access to justice initiatives?

According to the Call for Comment, the Law Society's current access to justice initiatives focus on four areas:

- a) Facilitating access to legal services;
- b) Promoting accurate and clear legal information for the public;
- c) Supporting an accessible, fair and effective justice system; and
- d) Providing assistance to external organizations.

Each of these areas of focus are important and consistent with the principles that the LSO is to apply when carrying out its governance mandate under the *Law Society Act*, including maintaining and advancing the cause of justice and the rule of law, and acting to facilitate access to justice for the people of Ontario.

It is the opinion of the TLA that, when considering access to justice issues, the key focus area for the LSO should be facilitating access to legal services for Ontarians. By focusing

on that core mandate, the LSO will, in effect, also be meeting the second and third objectives.

To facilitate access to legal services for Ontarians who are most in need of legal services, namely, those with low and moderate incomes, the TLA supports the LSO focusing its resources on the following:

- a) Maintaining, supporting and promoting the Law Society's Lawyer Referral Service;
- b) Promotion and support for the implementation of Unified Family Courts ("UFCs") across the province;
- c) Facilitating the delivery of access to justice programs by working with external organizations that deliver services to low- and moderate-income Ontarians;
- d) Championing the need for a more robust legal aid program, and sharing the LSO's insights and concerns regarding legal aid with the federal and provincial government;
- e) Continuing to assess and make rule changes that will allow lawyers to deliver cost-effective and client-focused legal services in new and innovative manners, such as those outlined in the Call for Comment (i.e., unbundled legal services, amendments to the *Rules of Professional Conduct* to address Pro Bono Legal Services and permitting delivery of legal services in multi-disciplinary settings); and
- f) Continuing and expanding diversity initiatives to facilitate the public's access to lawyers who reflect the broad diversity of those who seek our services.

2. Should some of these initiatives be enhanced? If so, which ones and why?

There are two initiatives in particular that the TLA believes would benefit from an increased focus.

- a) *Supporting the work of Legal Aid Ontario (as part of the initiative to support an accessible, fair and effective justice system)*

Ontario's Legal Aid "certificate" system is admired for its ability to provide low-income people access to their lawyer of choice. However, as a result of the income restrictions, access to this program is severely limited, leaving a significant number of low-income earners without the realistic ability to retain counsel. The issues facing these individuals are often critical issues involving criminal charges, access and custody of children and landlord and tenant matters. The inability of disadvantaged Ontarians, including the "working poor" to retain counsel is as problematic for the individuals, who often end up representing themselves, as it is for the justice system as a whole.

The Law Society must continue to champion a more robust Legal Aid system that provides creative solutions for the significant proportion of low-income earners who are unable,

under the current system, to obtain a Legal Aid certificate. This should include proactively encouraging the provincial government to:

- Increase the income threshold for access to legal aid to more realistically reflect the current cost of living;
- Allow Legal Aid certificates for unbundled legal services for individuals who are above the income cap; and
- Allow for increased use of stratified income caps combined with payment plans tailored to income.

Creating a more robust legal aid system will inevitably lead to cost savings for the justice system as a whole, as cases are resolved more efficiently and thus ultimately more cost-effectively. Further, and even more importantly, it will provide increased assurance of just outcomes for the participants in the legal system.

b) Promoting accurate and clear legal information for the public

While it is arguably beyond the statutory mandate of the LSO as a professional regulator to be disseminating legal information to the public, it certainly can play an important role in promoting and assisting those that it governs to participate in programs and information sessions that help to make the legal system more accessible and understandable, including such programming as “Law Day”, and the informational programming provided by the Ontario Justice Education Network (“OJEN”).

The LSO should also be working proactively with the Ministry of the Attorney General to ensure that any information that it disseminates through its public information initiatives is understandable to the average person, readily accessible, and clearly identified as being relevant to the laws of Ontario (to distinguish these materials from other information sources that may not originate in this Province).

3. Should some of these initiatives be reduced? If so, which ones and why?

Perhaps the most urgent need for better access to justice initiatives lies in the field of family law. The TLA recognizes that the LSO has taken positive steps towards improving access to justice in family law by facilitating unbundling and legal coaching and by reviewing the rules of conduct to remove barriers to court staff providing legal information to self-represented parties.

The TLA is concerned, however, that the main initiative of the LSO in this area has been the action plan to introduce paralegals and others to family law practice. This is a diversion of significant LSO resources into the misguided path of enabling paralegals and others to replace family lawyers in the delivery of legal services, without any evidence that this will result in lower fees or improved access to justice. As paralegals and others have the

same office and insurance overhead costs as lawyers, it seems unlikely that they will be able to deliver services at a lower cost than junior lawyers, and the risks to the public far outweigh any theoretical cost savings.

There is no independent data to support the proposition that reducing the skill level of those delivering legal services will increase access to justice. The Supreme Court of Canada has held that courts must give special consideration to self-represented parties which they will lose if they hire a paralegal or other to represent them. There is a real risk that permitting non-lawyers to practise family law will increase overall costs to clients, causing both financial and non-financial losses because non-lawyers will not have the knowledge or training to identify legal issues in the cases presented to them, or the ability to provide appropriate advice or representation. Family law is a complex legal field. Family law practitioners need to understand family law legislation (provincial and federal), tax law, bankruptcy law, property law, trusts law, contract law, criminal law, and evidence law. The TLA has serious concerns that permitting paralegals and others to practise family law is antithetical to the LSO's responsibility to protect the public. Members of the public will wrongly assume that any licensee of the LSO is capable of providing proper and complete legal advice and representation, and they will ultimately pay the price. Furthermore, this expanded paralegal licensing project is coming at an extraordinary cost that will be shouldered largely by lawyers who have not supported the initiative, and in our view it should be abandoned.

The TLA also recommends that the Law Society promote with the Attorney General the removal of the ban on contingency fees for family law cases where fees will ultimately be payable from equalization of net family property or retroactive spousal support. In the current climate where access to justice is a concern for family law clients in particular, allowing clients to retain lawyers through contingency agreements should also be an option. This would simply recognize that there is already a deferred fee practice carried on by many lawyers. The *Solicitors Act* provides ample checks and balances for contingency fee arrangements. In the TLA's opinion, there is no principled basis for excluding all family law cases from contingency fee billing.

For all Ontarians, establishing the UFCs as quickly as possible is key. The LSO should take the lead in advocating for their accelerated expansion across the province.

4. Should the Law Society launch new access to justice initiatives? If so, which ones and why?

In the area of family law, the TLA sees the single most important step to improving access to justice as being the implementation of Unified Family Courts across the province. The LSO could and should play a constructive role in promoting the expedited construction of these courts, as well as the delivery of access to justice programs through these courts.

UFCs simplify procedures for all parties, whether represented or not, by ensuring that all family law issues are dealt with in one venue. UFCs have specialized judges, which is of value to all parties. Frequently, both parties are self-represented with the judge being the only individual in the courtroom with legal knowledge, making specialized judges of particular importance. Even when parties do have counsel, specialized judges with a strong working knowledge of the complexities of the law allows for more efficient resolution of legal disputes. UFCs enhance the ability to deliver on site mediation to parties at no or low cost. They can also be centres for public education with well-trained court staff, social services, and/or legal service providers on site to deliver legal information.

As part of the Law Society's reconciliation efforts with Indigenous peoples, access to justice must be improved for all Indigenous individuals. It is obvious from a cursory glance that Indigenous peoples have not received the benefit of Ontario's otherwise robust justice system. From criminal law to child welfare to basic human rights such as housing and clean drinking water, it is clear that access to justice is an issue on which Ontario has fallen short vis-a-vis the First Nations people. Access to justice initiatives must be commenced to correct the over-incarceration of Indigenous persons and the number of Indigenous children in government care, to name two critical issues among many. The issues facing Indigenous peoples in which the justice system plays a role are not limited to remote communities, but communities across the province, including Toronto. The Law Society must assist in ensuring that access to justice initiatives focus on Indigenous persons.

5. What do you or your organization do to facilitate access to justice? Could the Law Society collaborate with you on your initiatives? If so, how?

In helping facilitate access to justice, the TLA promotes participation in Pro Bono Ontario ("PBO")'s volunteer initiatives, and actively supports OJEN's programming. In 2018, we made a significant donation to PBO, which materially assisted that organization in keeping its doors open.

The TLA has advocated for the necessary expansion of Legal Aid, and it will continue to do so. The TLA intends to meet with the Ministry of the Attorney General to address the negative impacts that the provincial government's recently announced intention to cut \$133-million in Legal Aid funding for the coming year. We will explain that the negative impacts that such cut will have on vulnerable populations cannot be quantified. It will have a severe adverse impact on low income Ontarians, and will undoubtedly result in increased court delays as it will inevitably result in more self-represented litigants. Rather than cutting Legal Aid funding, the TLA will impress upon the Government the need for expanded funding of the Legal Aid programing. The TLA would welcome the opportunity

to collaborate with the LSO in lobbying the government for enhancements, not diminishment, to Legal Aid services.

As a potential access-to-justice project, the TLA is considering developing a roster of lawyers who would be prepared to serve as duty counsel, or in another type of pro bono role at self-help legal clinics in the areas of criminal, family and civil law. This roster of lawyers would support the important work of PBO and other not-for-profit service providers. The Law Society can collaborate with and support the TLA on this potential initiative by providing lawyers who sign up to be on the roster and who provide a certain number of pro bono hours annually with CPD credits and/or a discount on their annual Law Society fees.

6. Should the Law Society institute a levy on lawyers and paralegals to support additional access to justice initiatives?

While the TLA strongly supports the creation of innovative and new access to justice initiatives, it does not support an additional fee being levied by the LSO to do so.

The statutory function of the LSO is to govern the legal profession in the public interest, not to create new solutions to access to justice challenges in the province. Any access to justice initiatives, or devotion of its resources to promoting access to justice, must be ancillary to its core function.

If the intent behind this question is that the LSO take on some form of function similar to the United Way in which it would receive the payments and then disburse them to entities which it deems appropriate to receive the funding, this would be fraught with complexity and controversy. The Law Society's administration is not set up as a clearing house for payments to good works, and its bureaucracy is insufficiently trained, and far too expensive to make this an efficient means of funding access-to-justice initiatives. Too much of the fee would be eaten up in LSO administrative overhead.

Furthermore, there are a vast array of access-to-justice initiatives undertaken by various organizations throughout the province. Some are not-for-profit, some are for-profit. The Law Society, as an independent administrative body, should not be put in the position of having to make decisions that would favour one institution or initiative over any others.

Finally, lawyers already pay significant annual fees to the LSO. The fees levied by the Law Society are among the highest in the country. Adding an additional financial burden to licensees to pay for initiatives which they may or may not support is unreasonable and unfair. For example, many family law lawyers (as well as other lawyers) object strongly to the proposed new license for paralegals and others to provide certain family law services, as discussed above. They view it as ill-conceived, and potentially dangerous to the public. Many lawyers would object strongly to being compelled to pay any additional

fees that would be used for funding this initiative, particularly in light of the fact that the LSO has already budgeted the extraordinarily large amount of \$570,000 towards this program. While this is simply one example, it amply demonstrates the point. It is not the place of the Law Society to dictate which access-to-justice initiatives are important, which are not, and the level of compelled support from licensees that each such initiative may receive.

7. Do you have additional comments on the Law Society's approach to access to justice?

The TLA recognizes and appreciates the complexity and pressing need of providing access to justice for Ontarians, and the important role that the Law Society takes in facilitating that process. However, we remind the Law Society that it is not meant to be a front-line service provider. It is a regulatory body. The Law Society's function is not to provide legal services, but to govern those who do, and it should not be seeking to expand its services beyond its statutory mandate, as to do so will put itself into a position of conflict.

The TLA is committed to promoting access to justice initiatives, advocating for proactive, innovative and accessible changes, and it would be pleased to work with, consult with or otherwise assist the Law Society in achieving better access to justice for the people of Ontario.

The TLA appreciates the opportunity to provide its input and looks forward to a continuing dialogue with the LSO as it continues to address evolving access to justice challenges and opportunities.

Yours very truly,



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