



The Advocates' Society La Société des plaideurs

May 20, 2021

VIA EMAIL: 2021rulespublicfeedback@lao.on.ca

Mr. Charles Harnick, Q.C.
Chair of the Board of Directors
Legal Aid Ontario
Atrium on Bay
40 Dundas Street West, Suite 200
Toronto, Ontario M5G 2H1

Dear Mr. Harnick:

RE: Draft Rules for the Provision of Legal Aid Services

The Advocates' Society ("TAS"), established in 1963, is a not-for-profit association of approximately 5,500 members throughout Canada. TAS's mandate includes, among other things, making submissions to governments and others on matters that affect access to justice, the administration of justice, and the practice of law by advocates. The majority of TAS's members practise law in Ontario.

A number of TAS's members do legal aid work, and TAS is a longstanding member of the Alliance for Sustainable Legal Aid. In TAS's view, a well-funded, sustainable, and effective legal aid system is indispensable for ensuring access to justice for low-income and marginalized Ontarians. TAS believes that legal aid clients should be served by high-quality lawyers. Moreover, TAS recognizes that Legal Aid Ontario ("LAO") must be prudent in its expenditure of public funds to fulfil its mandate.

TAS writes this letter to respond to LAO's consultation on the rules for the provision of legal aid services in Ontario (the "Rules").

1. The Need for Meaningful Consultation between LAO and the Private Bar

The Rules will govern the "nuts and bolts" of the legal aid system, addressing fundamental matters such as eligibility for legal aid; the establishment of the roster of lawyers who provide legal aid services; fees, billing, and payment for legal aid services; as well as LAO's relationship with stakeholders, including legal aid clients, the private certificate bar, and community legal clinics. The Rules will have an immense practical impact on access to justice in Ontario.

There is a need for significantly more consultation between LAO and stakeholders, including the private bar, on the matters addressed by the Rules.

The new Rules and Schedules, which span over 100 pages, were published on April 21, 2021. Comments are due by May 20, 2021. A 30-day window for stakeholder input into a systemic overhaul of this

magnitude is wholly insufficient.¹ TAS, for example, is a volunteer-led organization. When the Rules were published, TAS struck a volunteer task force to examine and discuss the draft Rules line-by-line and develop thoughtful and detailed feedback for LAO. Unfortunately, the deadline for comments did not permit TAS to complete this careful analysis and obtain the appropriate input and approval from TAS's task force, policy committee, and Board of Directors. In order to meet LAO's deadline, TAS has instead opted to highlight its significant overarching concerns with the Rules, citing illustrative – but necessarily non-exhaustive – examples.

The Rules have a real-life, day-to-day impact on legal aid clients and lawyers who do legal aid work. They merit genuine stakeholder consultation, and not a consultation in name only. More robust consultation, with enough time for stakeholders to provide LAO with meaningful and useful input, would likely lead to the development of mutually satisfactory solutions to the issues in the draft Rules identified below.²

2. A Particular Area for Consultation: Quality Standards and Quality Assurance Mechanisms

One particular area of consultation between LAO and stakeholders, including the Law Society of Ontario (“LSO”) and the private bar, ought to be the standards applicable to lawyers who engage in legal aid work and the mechanisms for ensuring lawyers' compliance with those standards. As noted above, TAS agrees that legal aid clients ought to be served by high-quality lawyers.

In particular, LAO ought to consult with the LSO and the bar to develop mutually agreeable:

- standards for enrolment on the roster, which are clear, appropriate, and attainable;³
- professional standards applicable to roster members;⁴
- quality service standards and assessments;⁵
- training, professional development, and legal education programs for roster members on substantive law and LAO's administrative requirements, on a forward-looking and remedial basis,⁶ and
- standards for the removal of roster members.⁷

Section 3 of the Professionalism Standards Schedule, which imposes an obligation on roster members to report breaches of standards by fellow roster members to LAO, is especially notable. TAS observes that this obligation significantly exceeds the scope of Rule 7.1-3 of the LSO's *Rules of Professional Conduct* (Duty to Report). LAO's proposed duty to report is highly controversial, and TAS believes its membership

¹ TAS recognizes that subsection 46(3) of the *Legal Aid Services Act, 2020*, only requires LAO to post proposed rules on its website for 30 days.

² In this regard, TAS draws LAO's attention to section 33 of the *Legal Aid Services Act, 2020*, which requires LAO to “develop a public consultation policy containing, [...] a description of whether and how the Corporation will consult with the public when changes are being considered to the rules [...]”. Such a public consultation policy has not yet been developed by LAO.

³ See e.g. Rule R3 [Application for enrolment on roster].

⁴ See e.g. the Professionalism Standards Schedule. These need to be further examined to determine where they may overlap unnecessarily with the *Rules of Professional Conduct*; and to determine where they may be lacking standards that are specifically related to meaningful aspects of legal aid work.

⁵ See e.g. the Quality Service Standards Schedule.

⁶ See e.g. Rule R3(4) [Application for enrolment on roster]; Rule R5(1) [Obligations of roster members]; Rule R10(1)(a) [Failure to comply].

⁷ See e.g. Rule R15 [Removal from roster].

will have differing views on its inclusion in the Rules. This Rule strongly merits further consultation and discussion with the LSO and the bar.

3. *A Relationship of Collaboration and Mutual Responsibility*

The viability of the legal aid system in part depends on a healthy working relationship between LAO and key stakeholders, including members of the private bar.

TAS is concerned that the Rules are not sufficiently reflective of a collaborative relationship between LAO and the private bar. The Rules impose a number of obligations on lawyers who provide legal aid services, including expanded obligations over the previous regulations established under the *Legal Aid Services Act, 1998*. Despite imposing a number of obligations on lawyers, the Rules do not define corresponding responsibilities for LAO. For example, in numerous Rules, LAO has no obligation to provide timely responses to roster members, despite imposing strict deadlines on roster members on pain of penalty.⁸

4. *Deterring Lawyers from Engaging in Legal Aid Work*

TAS is concerned that certain of the Rules proposed by LAO, in particular those that make legal aid work unduly precarious as an income stream or unnecessarily administratively onerous, will deter lawyers — including lawyers from diverse communities — from engaging in legal aid work. This is especially the case when combined with LAO’s chronically low and unstable funding.

For example, Rule R15 allows LAO to remove a lawyer from the roster for any reason, without advance notice or the opportunity for the roster member to make submissions.⁹ By way of further example, Rule C8 would permit LAO to cancel a legal aid certificate for any reason, or alternatively on the application of a client, even when the court requires the lawyer to remain on the record.¹⁰ Rule C8 may put the lawyer in the position of having to choose between continuing to represent the client without assurance of payment or breaching their professional obligations as an officer of the court. These provisions are not only unfair, but have the effect of rendering legal aid work unreasonably precarious.¹¹

By making legal aid work precarious and administratively burdensome, the Rules may exacerbate existing difficulties with attracting lawyers to legal aid work, and retaining them in this area of law. These concerns are all the more acute with respect to lawyers who operate in small firms or as sole practitioners, who

⁸ See e.g. Rule R19 [Review process]; Rule P14 [Discretion requests]; Rule P15 [Examination, audit and investigation].

⁹ Rule R15(3), (5).

¹⁰ Rule C8(1)(a), (8), (9), (10).

¹¹ For further examples, see also:

- Rule R13(f) [Effect of suspensions], allowing LAO to prohibit a roster member from submitting any accounts while suspended, even if the suspension is not related to service fraud;
- Part 3, Division 3 [Payment to Roster Members], and the Fees and Disbursements Schedule, which do not provide timelines for the payment of accounts by LAO;
- Rule P2(3) [General obligations], requiring roster members to provide a potentially high degree of proof and justification for legal services provided, without compensating lawyers for the time and expenses incurred in responding to LAO’s request;
- Rule P4(2) [Determination of fees and disbursements], disallowing payment for more than 10 hours of legal aid services in a day outside of a trial or preliminary inquiry, regardless of whether or not the work is necessary.

benefit from less administrative support and financial flexibility and may be disproportionately from equity-seeking groups.¹²

The failure to create and maintain a robust and diverse certificate bar has many negative consequences. First, there is a trickle-down effect on clients. The lack of a wide diversity of lawyers doing legal aid work can operate to deny clients a choice of lawyers who understand the client's unique experience and individual circumstances; or in some cases, a lawyer who speaks the client's language. While there is no recognized right to counsel of choice for indigent clients in Canadian jurisprudence, it is preferable to provide clients with their counsel of choice to ensure the lawyer-client relationship can operate optimally. Second, there is inherent value in ensuring diversity and inclusion amongst practitioners in all areas of law. TAS is committed to the promotion of equity, diversity, and inclusion within the legal profession, and believes the certificate bar should be as diverse as the Ontario population it serves. Third, deterring lawyers from doing legal aid work also limits the availability of qualified lawyers to be elevated to the Bench. The Ontario Court of Justice in particular has advocated for more diverse judicial candidates, which ought to include experienced criminal law and family law private practitioners.

5. *Concerns About the Adverse Effect of the Rules on Low-Income, Marginalized Individuals*

TAS is concerned that certain of LAO's proposed Rules are not consistent with providing high-quality client service to marginalized members of Ontario's population. Some examples of this concern are set out below.

First, the eligibility requirements in the Rules are problematic.¹³ Financial eligibility is applied strictly, meaning that if an applicant's income marginally exceeds the threshold, or an applicant has family members whom LAO deems should pay for legal representation (but who refuse to do so), they do not receive legal aid services. Such clients have no one to advocate for them to have their criminal cases properly resolved.¹⁴ Moreover, eligibility requirements for duty counsel services should be the same as for certificate services; in the criminal law context, it should not be the case that low-income individuals are eligible to receive assistance from duty counsel for a guilty plea, but not assistance from a certificate lawyer to take their matter to trial.

Second, in criminal and child apprehension cases, an applicant may have a constitutional or other legal right to counsel regardless of their eligibility for legal aid.¹⁵ TAS believes that LAO should make its best efforts, and be required by the Rules to make its best efforts, to advise individuals who are refused legal aid of their right to apply for government-funded legal counsel via the courts. LAO should also assist individuals in bringing such applications.

Third, the Rules articulate an inappropriate standard for the scope of legal aid services that LAO will pay for. Rule P2(1)(d) places an onus on the roster member to "ensure that the fees and disbursements billed

¹² Law Society of Ontario, [Statistical Snapshot of Lawyers in Ontario from the Lawyer Annual Report \(LAR\) 2018](#), p. 12.

¹³ See Part 2 [Eligibility for Legal Aid Services].

¹⁴ These failures are most harmful to individuals from equity-seeking groups, such as racialized persons or Indigenous persons. A criminal record for a minor charge is often much more devastating to the future of a racialized individual than it is for others.

¹⁵ For example, pursuant to a *Rowbotham* application; s. 684 of the *Criminal Code*; the *Youth Criminal Justice Act*; or *New Brunswick (Minister of Health and Community Services) v. G. (J.)*, [1999] 3 S.C.R. 46 (establishing a *Charter* right to government-funded counsel for indigent persons in child apprehension cases).

for the legal aid services provided are actual, reasonable and necessary to the standard of what a reasonable privately paying client of modest means who has been properly informed by the client's lawyer would pay for those services under similar circumstances.¹⁶ It is not appropriate to measure the reasonable level of fees and disbursements from the client's perspective, even when properly informed by the client's lawyer. A more appropriate standard would be measured from the perspective of the lawyer, who has a regulatory obligation of professional competence to determine the appropriate services to provide in the circumstances. Moreover, the standard as articulated is unfair. With the advent of the *Charter*, the increase in disclosure (including digital evidence), and the rise in expert evidence, modern prosecutions are complex and require a significant amount of preparation. The Crown has significant resources, and the defence in a criminal proceeding needs to have similar resources to be able to properly defend an individual and ensure they have a fair trial.

TAS suggests the standard should be that a roster member shall ensure that the fees and disbursements billed for the legal aid services provided are "actual, reasonable and necessary to the standard of a competent lawyer taking all reasonable steps to ensure a full and proper presentation of their client's case." Alternatively, TAS suggests that LAO consult with the LSO and the bar on the appropriate standard.

6. *Lawyer-Client Privilege*

Several rules require legal aid applicants and roster members to provide LAO with information or documents that are or may be subject to lawyer-client privilege.¹⁷ This raises significant concerns. TAS questions whether a lawyer can provide privileged documents to LAO without client permission. In order to ensure the client's privilege is appropriately protected, these Rules should be expressly subject to section 40 of the *Legal Aid Services Act, 2020*.¹⁸ Further, LAO should set out in these Rules a limited list of purposes for, or circumstances under which, LAO will request privileged information. LAO should also consider implementing a reasonable time limit on how long LAO can retain privileged information, to protect client privacy.

TAS has a duty to meaningfully express the significant concerns it has with LAO's proposed Rules on behalf of its membership. Owing to the compressed timeline for stakeholder input, TAS has not been able to fully discharge that duty. LAO, the LSO, and the private bar need to work together to resolve these important issues. A robust consultation would go a long way in starting that dialogue. TAS would be pleased to consult further with LAO on the Rules, particularly if LAO would be prepared to provide TAS with additional time to offer more detailed, precise feedback.

¹⁶ See e.g. Rule P2(1)(d) [General obligations], Rule P5(2)(a) [Big case management], Rule P6(3)(a) [Mid-level case management], and Rule P14(4)(b) [Discretion requests], where this standard appears.

¹⁷ See e.g. Rule EL8 [Consent to release information]; Rule R7 [Requirement to provide information or documents]; Rule P2(3) [General obligations].

¹⁸ Subsection 40(3) of the *Legal Aid Services Act, 2020*, sets out that "Disclosure of privileged information to the Corporation that is required under this Act does not negate or constitute a waiver of privilege."

Yours sincerely,



Guy J. Pratte
President

CC: The Honourable Doug Downey, M.P.P., Attorney General of Ontario
David Field, President and CEO, Legal Aid Ontario
Teresa Donnelly, Treasurer, Law Society of Ontario
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The Advocates' Society's Task Force for the Review of Legal Aid Ontario's Draft Rules

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