

Risk determination policy memorandum



To: Clinic Board of Directors and Executive Directors; Student Legal Services Organizations Deans and Executive Directors
From: Clinic Law Services
Re: Risk Level Determination and Risk Management for Community Legal Clinics and Student Legal Services Organizations
Date: September 13, 2022

Purpose

The purpose of this memorandum is to provide additional information with regards to the operationalization of the Risk Level Determination and Risk Management for Community Legal Clinics and Student Legal Services Organizations policy (“the Risk Determination Policy”). This document should serve as a high level overview to how risk management should be approached by clinics, SLSOs, and LAO.

Introduction

Risks are inevitable for every individual and organization, including community legal clinics (clinics) and Student Law Services Organizations (SLSOs). The management of those risks is essential to an organization’s success.

“Managing risk is very different from managing strategy. Risk Management focuses on the negative-threats and failures rather than opportunities and successes.”

– Robert S. Kaplan

The Risk Determination Policy outlines a course of action to assist clinics/SLSOs and LAO to work together to proactively identify, assess and manage risks that are likely to occur and likely to negatively impact the provision of clinic/SLSO services. The goal is for collective threat detection and early problem solving, not fault-finding¹. It will be a collaborative

¹ See Lindsay, Hugh, “20 Questions Directors of Non-Profit Organizations Should Ask about Risk,” CPA Chartered Professional Accountants, 2009. Available at: <https://www.cpacanada.ca/en/business-and-accounting-resources/strategy-risk-and-governance/not-for-profit-governance/publications/20-questions-for-nfp-directors-on-risk-management>.

process and will support the joint objectives of LAO and clinics/SLSO's. Emphasis will be on providing high quality legal services to low-income Ontarians in accordance with their individual mandates and service agreements.

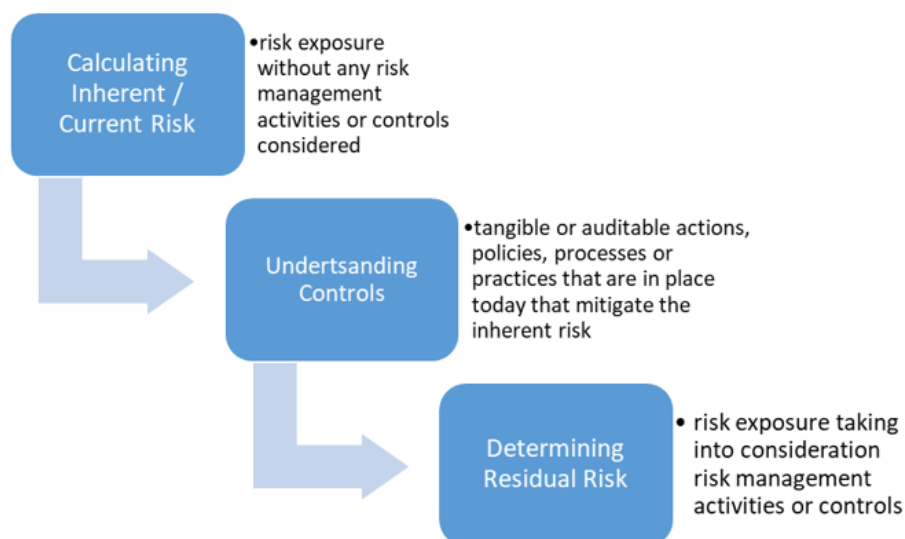
LAO will engage with and support clinics/SLSOs throughout the risk level determination and management process: when risks are identified, during the assessment of identified risks, and during the development of the risk mitigation plan. Prior to assigning a medium-high or high risk level to a clinic/SLSO both LAO and the clinic/SLSO will have clearly identified critical risk(s) and the actions required to address them.

The early identification, assessment and management of risks will serve clinics and SLSOs in the following ways:

- by supporting the clinic/SLSO in maintaining a stable, resilient and less vulnerable organization that meets its service and strategic goals;
- by preparing clinics/SLSOs to foresee and proactively intervene, prevent or lessen the impact of risk events;
- by mitigating potential high risk events from turning into issues that a clinic/SLSO has to contend with reactively triggering remedial measures;
- by allowing room for unprecedented challenges (such as COVID-19) to be managed strategically and from a less vulnerable state, if more routine risks remain sufficiently managed and less of a hindrance;
- by allowing room for organizational growth

Risk assessment generally

The assessment of risk is the process of analysing, evaluating and characterizing risks, or threats, to the objectives or goals. It involves several steps.



A risk for an organization is an internal or external factor that would negatively impact its ability to meet the mandate and/or objectives. The number of risks facing an organization can be infinite. In order to prioritize the effort in managing risks, we assess both likelihood and impact. We would like to choose to accept risks that have a low likelihood and low impact to the organization.

The policy makes a distinction between risks (current or inherent) and residual risks.

Current or Inherent risks refer to the *unmitigated* risks that an organization faces. To determine inherent risks, simply consider the likelihood that a risk event might take place and the impact on the clinic/SLSO's goals with existing controls or mitigation strategies.

Controls or mitigation strategies are tangible or auditable actions, processes, policies or practices that are in place to mitigate the inherent risk. Controls and mitigations can be new or existing mechanisms.

Residual risks or net risks refer to the risk exposure that remains after considering the control measures or mitigation strategy. To determine residual risks, consider the estimated effectiveness of the controls or mitigation strategies on the inherent risk.

Risk assessment framework

The process for risk assessment of Clinics/SLSO's in practice occurs on two different levels: at the level of individual risk assessment and on the entity level, the aggregate risk level determination. Once the final risk policy is established, LAO will provide training and supports to clinics on the risk assessment framework.

Individual risk assessment

Under the Rules², clinics are required to establish procedures and strategies for enabling the entity service provider to identify and address, in a timely manner, risks to the successful provision of the entity services. This means that clinics are tasked with continuously monitoring and assessing the inherent risks to their objectives, the control measures they have put in place, and prioritizing and addressing the higher level residual risks that remain.

The process we propose for this is the following:

- 1. Identification of existing and emerging risks** – The identification of risks for evaluation will be a shared exercise between LAO and the individual clinic/SLSO. The policy outlines potential areas where risks could be flagged including through quarterly or annual reporting, through the service proposals, or through correspondence. (For example, a clinic that completes the budget tab in the service proposal and forecasts

2 See s.83(3)(e)

a substantial deficit may be required to develop a mitigation strategy to address the deficit.)

2. **Assessment of inherent risk likelihood and impact** – Once risks have been identified for evaluation, the clinic will assess the likelihood and impact of a risk based on existing controls. The assignment of these ratings will be based on the same guide provided in the policy, which is appended to this covering memo in Appendix A.
3. **Take action or accept risk** – After the initial assessment is completed, both LAO and the clinic need to determine whether action needs to be taken to further manage the risk or whether the risk will be accepted as is.

If it is determined that further action is required, the clinic/SLSO will be responsible for developing a plan outlining controls or mitigation strategies. The plan will need to be approved by LAO and approval of the plan will be based on its feasibility and effectiveness. LAO will be available to support the clinic throughout the development and approval of the plan.

It is important to note that not all risks can be managed; it may be that factors materially influencing the risk are outside the control of the clinic/SLSO. It is also possible that potential controls or mitigations are not reasonably feasible for the clinic/SLSO (e.g. too expensive, requires significant management time, etc.). It may also be that the effort or costs of potential controls or mitigations will not significantly reduce the impact or likelihood of the risk.

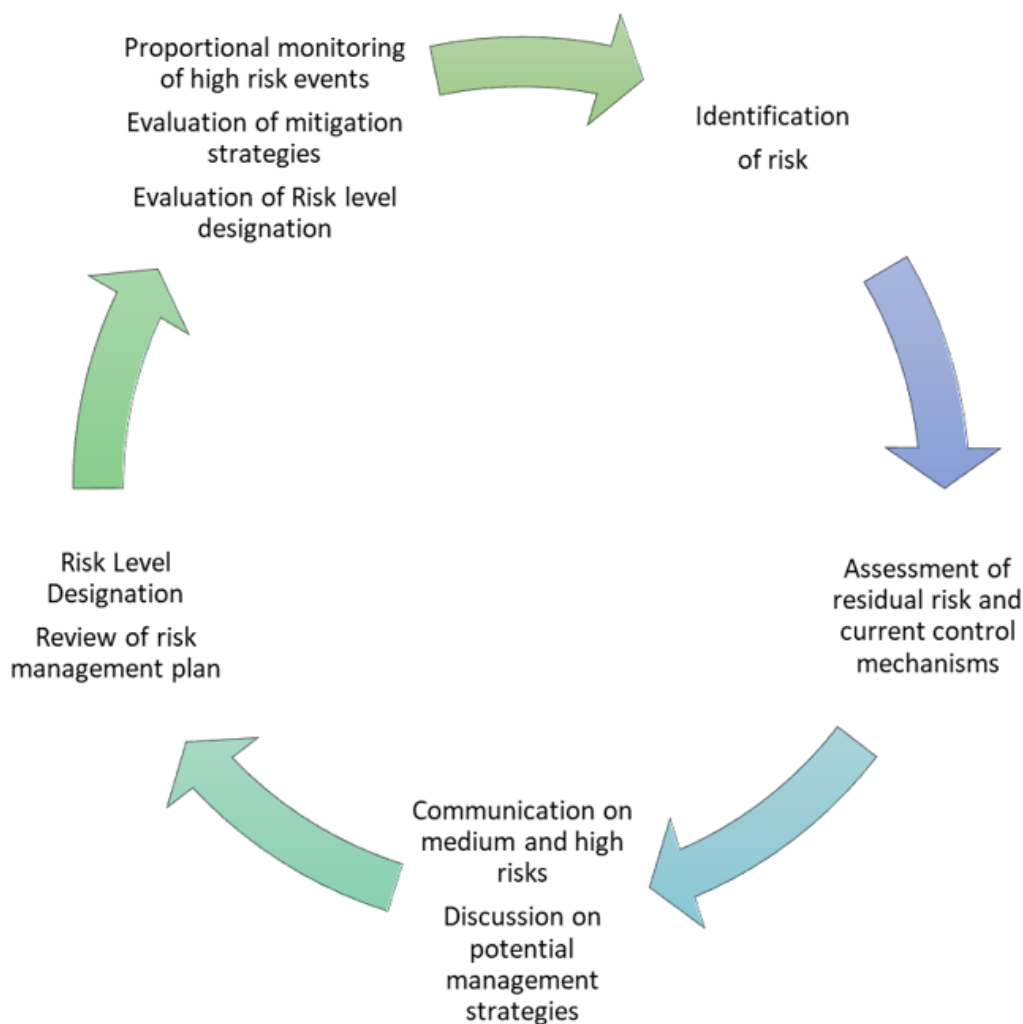
4. **Assessment of the remaining (residual or net) risk likelihood and impact** – The clinic/SLSO will re-assess the impact and likelihood of the identified risks once the proposed controls/mitigations are put into place. Pertinent questions to ask include: has the evaluated rating changed as a result of the additional controls / mitigations? Are there contextual factors that should be taken into account in the evaluation (e.g. some controls take several months to bear value, the controls are dependent on other factors that must be completed first etc.).

Overall entity risk rating (Aggregate risk determination)

The process for determining the residual risk level of a clinic/SLSO builds on the individual risk assessment process. The focus is on the overall likelihood that the clinic/SLSO will provide entity services in accordance with the legislation, the Rules, and the service agreement.

5. **Assessment of clinic/SLSO risk level** – LAO will evaluate and assess the overall risk to entity services based on the residual risk assessments for the entity. The overall assessments will be communicated at least once annually for low, medium-high and high risk clinics as soon as is possible but at minimum at least two months prior to the expiry of a service agreement. Medium-high and high risks clinics will have additional communication and monitoring requirements.

6. **Communication of medium-high or high risk clinic designations** – LAO will communicate the details and risks that contribute to the medium-high or high risk assessment in writing.
7. **Risk Management Plan** – LAO and the clinic/SLSO will work in collaboration to document clear actions to be taken in order to address the risks. Dates and timelines will be assigned to each task in order to create a structured, progressive, and timely plan.
8. **Proportional oversight and monitoring** – LAO will monitor the progress an entity is making on implementing the risk management plan. The clinic/SLSO will report back on the status of the risk management plan at regular intervals, the frequency of which will vary based on the severity of the risk(s)³.



³ See LASA Rules, s.79(2)(a)

Interplay between this policy and remedial measures

Sections 95 and 96 of the Rules articulate LAO's authority to take remedial measures when a default has occurred or is occurring by an entity service provider. Remedial measures are a series of actions that LAO is authorized to take to manage events or issues after the fact, that is, those that that *have already* occurred or are *currently occurring*. Those events or issues must also have caused a default as defined under s. 95(1) of the Rules, triggering the remedial measures authorized actions in s.95(4).

This policy, on the other hand, sets out a process to assess and manage potential events or issues that may or may not occur. This process is distinct from the authority and measures outlined in ss. 95 and 96.

Although remedial measures and the risk management process are independent from each other, there are natural interplays between the two. A default that results in remedial measures being taken by LAO, will likely mean that the clinic/SLSO is also assessed at high risk. However, a clinic/SLSO being assessed as high risk does not necessarily mean that a default has occurred requiring remedial measures. The approach to both the risk assessment process for a high risk clinic/SLSO and remedial measures are similar in that LAO and the clinic/SLSO will work together to establish a means to resolution.

Samples of the risk assessment process

Introduction

The purpose of the examples below is to provide some context to the information provided above and help clinics see how they may be applied in a certain situation. This is not meant to be exhaustive but simply illustrative of the process. This process of identifying and mitigating risks is one that will be done jointly between LAO and clinics with the ultimate goal of reducing the risks across the clinic system. Ultimately, LAO's desire is to have all clinics on multi year agreements and properly managing their risks.

Individual risk assessment

Any brick and mortar office can be broken into and have items stolen. This risk is inherent for any organization with a physical location. While the likelihood of a break and enter might be low, the financial impact and impact on a sense of personal security could be quite high.

A possible control measure for this inherent risk is to purchase property and commercial general liability insurance. This transfers the risk from the organization to the insurance

company, who is willing to accept that risk for a fee. Another control measure is to have a security alarm that might prevent entry into the office and provide an additional barrier to a break and enter taking place. It is imperative to evaluate the control mechanisms to ensure that they are functioning properly; for example is the insurance policy satisfactory, does the alarm system work properly.

In this example, residual risk would be the risk that remains when controls are taken into consideration, such as the insurance deductible if the clinic were to have a break-in and have to pursue a claim. A further residual risk is if the doors remain unlocked and the security system is not activated as required. This is a minimal risk.

Residual risk management could include ensuring that the budget includes annual contingencies for expenditures of deductible or an ability to obtain funds to support the deductible. Another management strategy includes having a checklist for the last person to leave the office that includes checking the doors and activating the security system. The remaining residual risk at this point remains minimal.

This low risk type of situation would not, on its own, contribute to a higher clinic/SLSO aggregate risk designation.

Entity risk assessment and risk level determination

A situation that a clinic might encounter is a substantial surplus (e.g. 20% of total annual revenues) at the end of the fiscal year. It is not unusual for an entity to have a small amount of unspent funds at the end of the fiscal year and it does not indicate any particular risk. In some circumstances, the amount of surplus forms a large percentage of an entity's annual funding allocation. The large surplus is an indication that the entity may not have effectively used the funds provided and the community has not received the level of services had the funding been expended throughout the year. In these situations it is important to understand how the surplus originated, the complexity of the underlying reasons for the surplus, and the timeframe surrounding a surplus or potential surplus accumulation.

Potential Risk Event: the potential risk event is a reduction of services as a result of a large year-end surplus of the entity's annual funding allocation. Clinic A and Clinic B each have a forecasted surplus of around a quarter (25%) of their respective annual funding amounts. LAO became aware of the forecasted surplus for each clinic after reviewing financial quarterly reports. CLSD staff have reached out and scheduled meetings to discuss the forecasted surplus.

CLINIC A

Surplus	Projected surplus of \$350,000 was forecasted in the Q1 financial report, early in the fiscal year
Reasons	<p>The clinic advises that the majority of this projected surplus arose as a result of two senior caseworkers unexpectedly leaving the clinic at the start of the fiscal year: one decided to retire early with short notice and the other moved on to an executive director position elsewhere.</p> <p>Both caseworkers left amicably with no outstanding financial liability for the clinic. The remainder of the projected surplus is the result of a negotiated reduction over the first year of their current lease renewal.</p>
Mitigation	<ul style="list-style-type: none">• The board has struck an ad hoc committee to support the executive director and office manager and has been actively working with the management to prioritize hiring for the vacant positions.• The Board wants to use this opportunity to ensure the positions are staffed by employees who can expand their service areas in alignment with their recent strategic plan.• Job postings have been posted on several websites with a deadline of next week. They have already received several applications for both.• In the interim, the board has given approval for the Executive Director to retain a private bar lawyer on a Per Diem basis to provide supplementary services until new staff can be hired

CLINIC B

Surplus	Projected surplus of \$280,000 was forecasted in the Q3 financial report, late in the fiscal year.
Reasons	Clinic B hired two staff to replace the three caseworkers that had left last year, but only one of the replacement staff been a caseworker. Now both of those new staff have left, citing difficulties with the work environment.
Mitigation	<ul style="list-style-type: none">• The executive director has been attempting to hire staff, but has had to take on a lot of extra casework and her time is limited.• The board is aware of the current situation, but there are no plans in place other than having the executive director post the positions again
Additional concerns	<ul style="list-style-type: none">• The previous fiscal year had an actual surplus of \$250,000 due to turnover with three clinic caseworkers.

Assessment of organizational risk

	CLINIC A	CLINIC B
Risk event	Large forecasted surplus of \$300,000 indicating the non-use of funds for services throughout the fiscal year.	Large forecasted surplus of \$280,000 indicating the non-use of funds for services throughout the fiscal year.
Considerations	<p>The clinic management and board together have developed a plan to address the issues.</p> <p>They have been considering the risks early (from Q1) on both an operational and governance level and have taken steps to mitigate the potential for such a large surplus</p>	<p>The clinic management appears overwhelmed by the current state at the clinic.</p> <p>The risk event already occurred the previous fiscal year.</p> <p>There are no current steps to mitigate the accumulation of surplus other than assigning more work to the executive director who is in demonstrable need of support.</p> <p>There is no indication that the underlying issues related to staff turnover have been explored and therefore very unlikely that they will be addressed.</p>
Risk impact	The impact of the risk in this case is Major (4) because if it occurs it will have an extensive impact on achieving service objectives.	The impact of the risk in this case is Major (4) because, like with Clinic A, if it occurs again it will continue to have an extensive impact on achieving service results.
Risk likelihood	The likelihood of the large surplus occurring at this time is that it is unlikely (2) given the steps already being taken to minimize the risk and because there is time (8 to 9 months in the fiscal year) to mitigate the risk.	The likelihood of it occurring at this point is almost certain (5) given that the clinic has only 5 months to prevent this surplus.
Risk level	This leads to a Medium (8) residual risk level assessment.	This leads to a High (20) risk level determination for Clinic B

Discussion of risk assessment

While neither Clinic A nor Clinic B are in the low risk category, there are significant differences between them that impact their risk assessment and how the risk event will be interpreted.

Clinic A: Clinic A is in the medium risk category because the risk of a surplus, albeit unlikely, remains. However, it can be managed by the clinic leadership, including the board. Clinic A has clearly identified the risk of the surplus, shown why it occurred, and developed a strong plan to address it. While there is no guarantee that they will be able to hire the necessary staff to make use of the surplus and provide those services, LAO in this case would feel confident enough in the risk mitigation plan provided and the steps being taken to continue with the multi year agreement and monitoring the risk. Should the risk assessment and management plan change as the fiscal year progresses, it is possible that the risk determination level will also change. The process is fluid and adaptable to the facts at the time.

Clinic B: The circumstances surrounding the accumulation of surplus by Clinic B are substantially different from those of Clinic A. There is no clear plan to mitigate the risk and concrete steps are not being taken to fill the vacancies which would result in potentially a longer period where services are not being fully provided to the community. The timeframe for Clinic B to mitigate the risk prior to it actualizing is also much shorter – a couple of months. There is insufficient time for the clinic to action any plan to mitigate the substantial surplus prior to the end of the fiscal year. Furthermore, there are additional risks that the meeting with the clinic uncovered including staff turnover that appears to be the result of staff dissatisfaction with the work environment and an overwhelmed management team. This raises issues of governance and oversight that would have to be further explored and assessed.

Appendix A - Likelihood and impact assessment

How to Assess Likelihood			
Assessment	Level	Description	Probability
Rare	1	Risk is very unlikely to occur in most circumstances.	< 10%
Unlikely	2	Risk is unlikely to occur in normal circumstances.	11% - 30%
Possible	3	Risk may occur in certain circumstances.	31% - 50%
Likely	4	Risk is likely to occur in most circumstances.	51% - 90%
Almost certain	5	Risk will occur in normal circumstances.	> 91%

Note: An assessment of likelihood should consider the timeframe for achieving the objectives.

How to Assess Impact		
Assessment	Level	Description
Insignificant	1	A risk that, if it occurs, will have a little or no impact on achieving objectives.
Minor	2	A risk that, if it occurs, will have a negligible/inconsequential impact on achieving desired results, to the extent that one or more stated objectives will fall below goals but well above minimum acceptable levels.
Moderate	3	A risk that, if it occurs, will have limited impact on achieving desired results, to the extent that one or more stated objectives will fall well below goals but above minimum acceptable levels.
Major	4	A risk that, if it occurs, will have an extensive impact on achieving desired results, to the extent that one or more stated objectives will fall below acceptable levels.
Critical	5	A risk that, if it occurs, will have an excessive impact on achieving desired results, to the extent that one or more stated objectives will not be achieved.