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FOLA'S SUBMISSION REGARDING THE REVIEW OF THE LEGAL AID SERVICES ACT

Submitted to: Charles Harnick, Chair, Legal Aid Ontario
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Thank you for providing this opportunity to FOLA's Legal Aid Committee to provide comment regarding the Legal Aid Services Act Review.

The Federation of Ontario Law Associations (FOLA), is an organization that represents the associations and members of the 46 local law associations across Ontario. Together with our associate member, The Toronto Lawyers Association, we represent approximately 12,000 lawyers, most of who are in private practice in firms across the province. These lawyers are on the front lines of the justice system and see its triumphs and shortcomings every day.

This Report serves as FOLA's suggestions and comments regarding the Legal Aid Services Act Review.



The Federation of Ontario Law Associations (FOLA) supports the government’s review of the Legal Aid Services Act (the “Act”). By providing better governance and statutory framework, the services provided by Legal Aid Ontario (LAO) can be improved.

FOLA supports the mandate of LAO as defined in the Act. We note that innovation in the provision of legal services is something that is often best provided through examples provided by the private bar. While we always encourage finding efficiencies, it is not felt that LAO should be the leader in innovation in the provision of legal services but rather should adapt good ideas to provide best services in a cost-effective manner.

FOLA strongly supports the independence of LAO from the government. Justice must not only be done, but must also be seen to be done. The state cannot be responsible for both the prosecution of and defence of a person. There must be a clear delineation between these two equally important sides to the criminal justice system. Some tying of funding ratios as between government run prosecutions and similarly funding the defence of individuals brought before the Court by the state would make sense. Similar work should be funded in a similar fashion.

The stated objects in s. 4 of the Act are appropriate. However, the board and administration of LAO must be held to these objectives. Important work has been done to set competencies for panel standards and this should be encouraged. Working with stakeholders to develop mutual efficiencies should also be encouraged but the siloing of crown, CAS, court services, the judiciary, the private bar, and LAO itself does not often lead to the coordination and envisioned in the current wording of s.4.

Regarding s. 5 and the makeup of the Board of Directors, FOLA supports a skills based board with a broad skill-set. When Legal Aid Ontario was initially created, it involved the Ontario Government taking over a function which the Law Society of Ontario had previously managed. It is suggested that practitioners who are empanelled lawyers in each of the practice areas identified in the Act should be represented. Groups such as the Family Lawyers’ Association, the Criminal Lawyers’ Association and the Association for Sustainable Legal Aid (ASLA) would be appropriate groups to draw from.

Section 14 of the Act deals with the methods of providing legal aid services. FOLA strongly believes that the private bar is the foundation for the provision of legal aid services in criminal and family law. One need look no further than the public defender models utilized in other countries to realize the significant flaws in such systems. The private bar is able to react to changes in the legal landscape in a much more nimble way than the leviathan of a centrally run program. The changes in different geographic jurisdictions, the local practices, and the ebb and flow of casework across types of law are all dealt with fairly and deftly by a reactive private bar. The ability to choose counsel of one’s own choice is integral to the criminal justice system and is enshrined in Charter litigation. The maintenance of an



independent private bar is vital to protecting the rights and freedoms in society and maintaining the rule of law.

Legal services are best provided by lawyers. There is no reason to change this requirement. Low-income Ontarians deserve the best service. Providing services through other providers forces those most at-risk to settle on lesser services, and adds to the stigma of poverty by less qualified service providers. This is especially concerning in situations of domestic violence or power imbalances where the abuser has access to superior/traditional resources, and the victim is further put at a disadvantage, and risk, by the quality of representation, which is already limited by tariff hours. When facing a criminal charge or the breakdown of your family, you would seek a lawyer. You would not settle. Low-income Ontarians deserve the same.

Legal Aid Services Offices do not work. They tend to cost more than the certificate systems in similarly provided areas of law, they are not reactive to changes in demand and they are susceptible to even greater increase in cost since the unionization of legal aid lawyers.

Duty Counsel services throughout Ontario provide important same-day service to many individuals. More effective use of these services to support the private bar rather than using them to try to provide ongoing services for which the position was never intended would provide more cost-effective services at higher quality. The mission-creep that has occurred with duty counsel has slowed the justice system and not provided the high level of service which the public should expect. LAO should not be expanding duty counsel services except where there is an identified gap in the system which cannot otherwise be filled.

The current certificate system works well in many ways. Continual development to eliminate barriers to apply must be a mandate. A legal aid system which is not accessible provides no real access to justice. Transparency in the way in which certificates are approved or denied is important. Examples of people whose liberty is at risk but not to a sufficient degree for a particular assessor abound. It is recommended that the financial eligibility test for service be tied to an independently set standard, such as the Low Income Measure set by StatsCan.

A comprehensive evaluation of the fee structure, in consultation with actual practitioners, to determine whether tariffs currently set are in line with time required to perform certain tasks is important. Hourly rates should also be tied to inflation to ensure that there continues to be proper remuneration for services provided at rates which are independently reasonable and not tied merely to the interests of LAO or lawyers providing service.

Quality assurance has been improving in recent years and should be encouraged. This must not act as a bar for new lawyers who wish to provide service but should act as a minimal



set of skills to ensure quality of service while leaving open ways for new lawyers to enter the stream.

Section 92 of the Legal Aid Services Act provides for establishing the process of quality assurance in the provision of services to the public. Subsection (1) provides a general obligation on Legal Aid (the Corporation) to establish a quality assurance program to ensure that high quality legal services are provided in an efficient and cost-effective manner. Subsections (2), (3) and (4) then confers certain powers on the Corporation to facilitate monitoring the sufficiency of services provided by various named entities. Subsection (8), however, specifically excludes lawyers from the authority of the Corporation to conduct quality assurance audits but rather directs the Law Society to do so. Furthermore, the Law Society is to be reimbursed by the Corporation for their efforts in conducting quality assurance audits of lawyers.

It is respectfully submitted that better and more efficient use of funding resources could be accomplished by allowing the Corporation to include lawyers in their mandate of assuring high quality legal services. There is likely already a quantity of information gathered in by the Corporation in the form of dockets billed, opinion letters provided, client feedback and or complaints as well as information gathered by Corporation employees either in direct contact with the lawyer or collateral information available to the Corporation generated over multiple but other client matters.

It is a duplication of investigatory process where, on review of the materials in its possession, Legal Aid can only ask the Law Society to investigate. The Law Society then must go over all the same materials and consider the outcome through the lens of its disciplinary process. While the Law Society has the infrastructure and historical task of lawyer discipline, its process tends to be slow and cautious given the very serious consequences of a potential finding of fault or insufficiency. Law Society sanctions encompass the lawyer's entire ability to practice whereas Legal Aid merely needs to control its own process of service delivery to poor and vulnerable society members.

If Legal Aid's quality assurance program is subject to the higher standard of the Law Society's disciplinary process, it is constrained in its ability to manage the greater bulk of the service providers within their mandate. Simply put, Legal Aid needs to be more nimble than what the Law Society accomplishes.

FOLA's submission is that the following points are most important when reviewing the Act:

- 1) Primacy of the private bar, effective, efficient, reactive, cheapest
- 2) Incremental work on Quality Assurance is good and should be supported
- 3) Funding and tariffs should be considered in light of the cost of other government-employed-lawyers performing similar functions such as Crown Attorneys.