



Comments on the Legal Aid Ontario Modernization Project

Submitted to: Attorney General of Ontario and
Legal Aid Ontario

Submitted by: Ontario Bar Association



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Introduction

The Ontario Bar Association (the “**OBA**”) welcomes the opportunity to provide feedback on the Legal Aid Ontario Modernization Project (the “**Project**”) currently being undertaken by the Ministry of the Attorney General in partnership with Legal Aid Ontario (“**LAO**”). The mandate of the Project is to develop and implement reform proposals and legislative amendments that will contribute to moving the legal aid system towards sustainability and modernized service delivery to better meet the needs of low-income Ontarians through governance and service delivery improvements.

The OBA

Established in 1907, the OBA is the largest voluntary legal organization in Ontario, representing lawyers, judges, law professors and students from across the province, on the frontlines of our justice system and in no fewer than 40 different sectors. In addition to providing legal education for its members, the OBA assists government and other decision-makers with many legislative and policy initiatives each year, both in the interest of the profession and in the interest of the public.

This submission was prepared by members of the OBA Working Group on the Project. The Working Group is made up 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 law. Our members represent a broad spectrum of clients with diverse and sometimes competing interests, our goal is to provide decision-makers with recommendations, that represents a consensus view of our members, and bring concrete, meaningful improvements to the delivery of LAO.

Overview

The OBA supports a strong, sustainable legal aid system. All Ontarians benefit from the existence of a robust and reliable legal aid system that provides access to justice to those most in need in our society. Unresolved legal problems often escalate and become costly both for individuals who are



directly affected, and for society as a whole.¹ Earlier this year drastic cuts were made to LAO's current budget that jeopardized fair access to justice and protection of the most vulnerable. It is critical for government to ensure that no cuts to LAO's budget are imposed next year or beyond. Publicly funded legal services are an effective way to assist individuals and families to resolve legal matters, obtain access to opportunities and become full participants in both the community and local economy. Predictable and stable funding for the legal aid system allows for long term, sustainable planning. In turn, it creates a more reliable and resilient system for legal aid clients and the justice system as a whole.

The *Legal Aid Services Act* establishes that the foundation for the provision of legal aid services is through the private bar and clinics.² Our members work in both areas and display their commitment to their clients, communities, and the legal aid system more often than not in 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.

Many factors go into a successful legal aid system. It must ensure ongoing support for clients. Key to that is ensuring that the lawyers providing these services are able to spend more time helping their clients than on inefficient administrative tasks. A commitment to high-quality legal services is also essential. Private lawyers and clinics are the foundation of legal aid service delivery. Providing support that will allow these service providers to excel in their everyday delivery of legal aid is fundamental to upholding a sustainable system. Lastly, enhancing the use of technology and

¹ Evidence shows that there is significant return on investment that is achieved from investing in legal aid services. In the CBA submission on "Access to the Justice System – Legal Aid", December 2016, it was noted that for every \$1 spent on legal aid, the average social return on investment is \$6. In Lisa Moore's and Trevor C.W. Farrow's, *Investing in Justice: A Literature Review in Support of the Case for Improved Access* (Toronto: Canadian Forum on Civil Justice, August 2019) pt. 3 (forthcoming) it was found that for every \$1 spent on legal aid, there is an approximate \$9-\$16 positive return on investment, and often much more.

² *Legal Aid Services Act*, 1988, S.O., 1998, c.26, s.14(2) and s.14(3)



modernizing the justice system as a whole will produce efficiencies for practitioners and the overall system.

Specific Comments

Reducing Administrative Burdens

Administrative burdens reduce productivity, waste scarce resources and impact the overall legal aid system. Finding ways to reduce these burdens will increase efficiency and enhance client service. Increasing case management, streamlining the appeal review process and reviewing the current compensation models are a few examples of ways to address this.

Case Management

Case management enhances efficiencies in the system by streamlining and reducing administrative burdens for courts, lawyers and clients. Effective case management saves resources by allowing all parties to more efficiently organize the flow of files before them and helps facilitate resolution of matters in a timely manner. The current list of matters eligible for mid case management in family law cases has been expanded; however, in criminal matters, 'big case' and 'mid case' management has not been recently updated to reflect the ever-changing complexity of criminal files and frequency of certain types of charges. Increasing the scope of cases eligible for case-management will enhance efficiencies in legal aid cases.

Streamline the Review Appeal Process

The current review appeal process for the denial of legal aid certificates is overly time consuming, expensive, and burdensome on clients and the system. For instance, legal aid applicants can sometimes be denied a legal aid certificate in cases involving serious charges. Oftentimes, having been refused a certificate through the two-step appeal process, a *Rowbotham* application will be necessary. Courts frequently grant these applications. Once granted, the government is required to pay for legal representation for the individual charged. This process can take months, with costly delays to the system and delays to matters, and even adjourning trials to the detriment of co-accused and victims and running afoul of strict *Jordan* timelines. A review of the appeal process would help ascertain whether or not a streamlined approach to appeals may result in a more efficient use of both LAO resources and government resources.



Compensation Model

The current compensation model for legal aid certificate work is outdated and no longer reflects current practice realities. The tariff system has not been adjusted to reflect the growing complexity of files and the time it involves to carry them. Disclosure in cases can be voluminous, often involving thousands of pages of documents to review as a result of increasing advances in technology (electronic disclosure including cell phone extraction reports, computer analysis, social media and content of communication apps, etc.). Further, judges increasingly request more written materials, and counsel are frequently required to attend and prepare for multiple court appearances, including conferences (case, settlement, case management and trial management conferences), multiple judicial pre-trials and motions (evidentiary motions are becoming increasingly frequent under the revised s.276/278 regimes in the *Criminal Code*).

Additionally, in immigration and refugee matters, the complexity of refugee claims at the Refugee Protection Division (the “**RPD**”) of the Immigration and Refugee Board has increased due to the intensified evidentiary demands on claimants from Members, such as the requirement for enhanced corroborating evidence. This has resulted in requiring lengthier preparation time whether it is for an expedited or full hearing. Further, with the new RPD triage system, cases that are expedited and cases selected under the Instructions Governing Streaming of Less Complex Claims are treated as requiring less preparation time than cases that are sent to a full hearing. In fact, disclosure preparation time is identical whether the case is dealt with by paper, expedited hearing, or full hearing, as the intensified evidentiary demands are the same in all. The only difference being that in cases dealt with by paper, there is no in-person client hearing preparation. In cases that are selected for an expedited hearing as opposed to a full hearing, the only difference is in hearing time; disclosure preparation time and client meeting preparation time remain the same.

The compensation model has not kept up with these rapid developments. Given the amount of work involved, lawyers often exceed set tariff rates. Once this limit is met, counsel are then faced with the administrative burden of repeatedly applying for discretionary funding to justify the increased costs stemming from new legal developments and technological changes. This can be a lengthy process, and delay cases. Clients are often caught in the middle not understanding the limitations of LAO funding and the impact it has on their legal representation. Updating the tariff system to accurately



reflect the time lawyers spend on their files would significantly reduce this issue. Alternatively, it is also an option to move away from the tariff system entirely and towards upfront budgeting of cases, such as arises in case management files. This enhances budgetary and time certainty for lawyers. With a better estimate of the amount of hours they can spend per file, lawyers can in turn allocate their resources more efficiently in lieu of uncertain, after-the-fact discretionary payment applications.

Supporting the Delivery of High-Quality Legal Services

There are several approaches to enhance high-quality legal services. These approaches ought to ensure quality through a mix of resource supports, strengthened legal networks and quality control evaluation. Some recommended approaches to ensuring high-quality legal services include mentorship, capitalizing the value of community legal aid clinics, peer reviews and more effective leveraging of non-lawyers under lawyer supervision.

Mentorship

Currently, LAO has a formal mentorship program to enhance the learning opportunities of panel lawyers. Matching senior and junior panel lawyers strengthens the quality of daily legal aid work but also provides for development of legal skills for more complex cases. For example, the LAO Second Chair program provides junior lawyers the opportunity to learn first-hand from senior practitioners on a variety of legal matters. Maintaining and expanding current mentorship opportunities, such as the Second Chair program, is key to ensuring high-quality legal services. Further examples can be found in strengthening mentoring opportunities in rural and northern Ontario and consideration of expanding mentoring between regions not just within regions would enhance the current mentoring program in rural and remote regions.

Capitalizing on the Value of Community Legal Aid Clinics

a. Fostering and Capitalizing on Clinic Poverty Law Expertise

Fostering and capitalizing on poverty law expertise in legal aid clinics is an essential element to ensuring ongoing high quality legal services in our communities. Supporting LAO clinics in their ongoing development of poverty case law enhances efficiencies in the court system by reducing



redundant legal issues and clarifying laws. When a clinic identifies an issue and engages in law reform, and/or test case work on it, and is successful in obtaining judicial clarity on that issue, it effectively serves multiple clients at once who face that issue. This is much more efficient than dealing with such issues on an individual basis for each affected client and frees up resources for other client services.

The work of clinics in this important area of law development is an important aspect of their expertise and has developed over years of work in their communities, strengthening both the legal aid system as well as Ontario's legal system as a whole. Capitalizing on the value of this work and knowledge it produces in clinics should be encouraged. Ensuring that clinic compensation is equitable within the legal aid structure is essential to supporting this value.

The use of this expert legal knowledge and communication of it between clinics, certificate lawyers and legal aid as a whole should be used to its full capacity to drive efficiencies and increase high quality legal services through developing legal expertise in the system among the providers.

b. Broaden Clinic Knowledge Sharing

Another method to capitalize on the value of clinics is the potential use of satellite services between clinics and also between clinics and certificate lawyers. For example, with additional resources, specialty clinics should be encouraged to provide satellite services to other clinics around the province when there is a gap in legal services.

A more structured and organized approach to sharing best practices and information on legal developments would strengthen the system as a whole. For example, if there is an ongoing legal gap regarding children and youth services in northwestern Ontario, it may be beneficial for the appropriate specialty clinic to engage in, for example, formal quarterly knowledge sharing seminars, this would reduce duplication of time and effort and enhance mentorship and legal expertise.

Consideration should also be given to, with additional resources, encouraging clinics to provide mentorship for certificate lawyers on community legal issues or resources and specialty areas of law. As such, certificate lawyers will deeply benefit from strengthened ties to clinic lawyers. Mentorship and shared expertise between these two facets of LAO service delivery will provide certificate lawyers with added expertise for use in their communities. LAO support for strengthening this



relationship through communicating and supporting these services provided by clinics will help with knowledge sharing.

Peer Review

During LAO roundtable Project discussions this summer the question arose as to whether peer reviews should be expanded within the LAO system. Peer review may be of particular importance to junior and mid-level lawyers as a best practice mechanism, where lawyers can meet with senior practitioners and review key cases for them over the year. This could be organized in a fashion to allow for feedback, engagement and learning opportunities instead of limiting it to auditing purposes.

Should a broader peer review system be considered by LAO as an audit function, consideration should be taken to ensure that metrics are fair and recognize the often quick “on your feet” strategic decision-making involved in court matters rather than view every decision with the benefit of hindsight. Further, qualified peer reviewers with recent and relevant experience must be used who have experience with the type of files they are reviewing.

Provision of Legal Services

The eligibility of legal aid services is determined by both financial and legal eligibility of applicants, restricting access to legal aid funding to the cases most in need. Lawyers have the expertise, training and experience to provide the full breadth of critical legal aid services for these cases and do so at significantly reduced market value. By ensuring the provision of legal services by lawyers or under the supervision of lawyers recognizes the critical value of lawyer services in protecting the most vulnerable in the justice system.

Lawyers often utilize the services of non-lawyers working under the lawyer’s supervision. Non-lawyers, such as paralegals, law students and law clerks, have a widespread and important role in assisting on legal files and keeping costs down for clients. Their role in legal offices increases cost effectiveness for the public. At the same time, the public remains protected as the lawyer continues to supervise, retain responsibility and execute ongoing judgment and direction on each matter.



We are of the view that there may be additional appropriate opportunities for non-lawyers to work under the supervision of lawyers, who would remain ultimately responsible for the file. The OBA would be pleased to take part in and contribute to any discussions regarding such opportunities.

Enhancing Support for Clients

Simplifying access for legal aid clients is key to ensuring access to justice for those most in need. LAO clients often face multiple legal issues across various practice areas. The competing and sometimes conflicting legal issues often only become clear after their initial consultation with a certificate lawyer, community clinic lawyer or duty counsel. Because LAO provides services across multiple legal disciplines ranging from criminal and immigration and refugee law to family and poverty law, it is uniquely positioned to ensure an optimal continuity of legal supports and services to address all of a client's issues. Enhancing integration among LAO service providers can help ensure a seamless client experience. There are several ways to accomplish this, including through enhancing integration among LAO service providers (through online resources, and further partnerships among LAO clinic and panel lawyers), maintaining and enhancing relationships within legal networks and supporting the use of unbundled legal services.

Modernization of the Central Online Resource Centre

Currently, LAO's website has a page where certificate and clinic lawyers have access to legal information for a variety of practice areas. This online resource centre is praised by legal aid lawyers as an effective and important tool. Maintaining this online resource and enhancing the information currently available on it will help improve the supports lawyers provide to clients. LAO memos and other resources, such as publications on particular practice areas, are helpful and ought to be expanded, and carefully maintained. Timely production of them enhances efficiencies in the system and reduces costs. Further LAO legal research services are invaluable for both certificate and clinic lawyers and should be maintained and more broadly advertised. The online resource centre could provide links to local panel lawyers practicing in different areas, with an indication of their availability to assist with referrals. It could also identify resources for referrals for non-legal issues saving legal aid lawyers time and resources to look up community resources that community clinics and LAO may already have on record.



Duty Counsel Services

Maintaining an effective use of duty counsel services enhances and improves the legal aid system for all the parties involved with it. Duty counsel often improve overall efficiency in the legal aid system by assisting counsel in the courtroom when conflicts arise for certificate lawyers. For example, in certain situations, where a matter is to be adjourned on consent and legal aid lawyers cannot attend in person due to scheduling conflicts, duty counsel historically has made themselves available to speak to the matter. This cooperation between duty counsel and certificate lawyers to assist with scheduling conflicts resulted in efficient service to the client and an important support for legal aid certificate counsel. Allowing and supporting this type of cooperation for duty counsel, when they are able, to assist with scheduling conflicts increases legal aid efficiencies and enhances client support.

Maintaining and Enhancing Legal Networks

Maintaining and strengthening legal networks, particularly within the indigenous communities, will improve supports and resources for clients helping with efficiencies in the system. LAO should consider expanding the partnerships it currently is engaged in with indigenous organizations in remote, rural and urban centres. LAO's Aboriginal Justice Strategy ("AJS") is a good step towards enhancing relationships with indigenous communities including through their work with the Ontario Federation of Indian Friendship Centres' Community Justice Program and Nishnawbe-Aski Legal Services Corporation. Strengthening and expanding the AJS to support an ongoing development of relationships with First Nation, Metis and Inuit peoples and communities would undoubtedly enhance client services.

Offering More Unbundled Legal Services

The Project has indicated an interest in considering offering more unbundled legal services. The OBA is a member of the Advisory Committee of the Family Law Limited Scope Services Project which aims "to improve access to family justice for middle and lower income Ontarians by increasing their use of limited scope retainers"³, among other legal services. The OBA has provided submissions speaking

³ Ontario's Family Law Limited Scope Services Project at <https://www.familylawlss.ca/about-us/>



to the importance of unbundled legal services in family law and have supported and continue to support FLLSS training to ensure lawyers have the skills to effectively support their clients in this model of delivering family law. We are a strong advocate for increasing access to justice through unbundled legal services and would welcome an opportunity to engage with you further on any considerations in this area.

Improving and Increasing the use of Technology

The OBA continues to support efforts to modernize and digitize the justice system as a whole. A modernized system will lead to faster, more efficient services not just in the legal aid system but across the province. In the last few years the government has introduced online service for filing civil claims and begun on-line filing for family matters. The OBA continues to encourage timely expansion of on-line filing for family law matters and criminal law matter. This will enhance efficiencies within the legal aid system saving resources for both government and LAO.

Improving access to justice and efficiency through innovative ways of delivering services should be an ongoing focus, including on-line scheduling, electronic disclosure and the use of tele-conferences to avoid unnecessary, costly court appearances for administrative matters.

LAO has improved its use of technology in recent years, reducing administrative issues for legal aid lawyers - for example, allowing lawyers to reset passwords after LAO business hours, fixing errors made on LAO Online within 48 hours and providing online videos on billing. However, further improvements can be found, by example, in reducing IT system shutdowns during the day on weekends. Given the realities of a trial practice, trial lawyers often do not have time to access the LAO portal to bill accounts, respond to LAO inquiries, or submit requests to LAO until the weekend, or late into the night. The present practice of preventing online access every night from midnight to 6:00 am, as well as for entire weekends once per month, is not conducive to the realities of practice for many lawyers, especially sole practitioners who may not have legal assistants or clerks. A further example of a potential improvement would be easing access to information for lawyers interested in applying to become panel members. In certain circumstances, lawyers are required to have formal LAO mentors prior to applying to become a panel member. However, obtaining access and contact information for potential LAO mentors is not easily obtained on the LAO website. Further those



interested in applying to become a panel lawyer are required to email, fax or mail in their panel applications. Dependent on the LAO region, email addresses are not all readily available on-line, nor is there an easy way for potential LAO panel lawyers to speak to the district manager regarding questions on their application. Enhancing the information available to potential panel lawyers on the LAO websites and including email addresses for all District offices for applying lawyers would ease the process for those interested in joining LAO.

Conclusion

The legal aid system in Ontario is a vital aspect of our justice system. Ensuring the LAO system is running as efficiently and effectively as possible will support and strengthens our legal system as a whole. Reducing administrative burdens, supporting the delivery of high-quality legal services, enhancing supports for clients, and increasing and improving technology are some of the ways to meet these goals. The OBA welcomes opportunities to continue to provide feedback on this important Project as it moves forwards.