

Submission to Legal Aid Ontario on Draft Rules under *LASA, 2020*  
from the Alliance for Sustainable Legal Aid  
May 19, 2021

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## Letter of Transmittal



# ALLIANCE FOR SUSTAINABLE LEGAL AID

AN ALLIANCE OF ♦TAS ♦ACLCO♦CLA♦FLA♦LSO ♦OBA♦RLA♦FOLA♦MHLC

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May 19, 2021

Charles Harnick, Chair  
David Field, President and CEO  
Legal Aid Ontario

Dear Mr. Harnick and Mr. Field,

I am pleased to submit perspectives from the Association for Sustainable Legal Aid (ASLA) on key themes pertaining to the draft rules prepared by Legal Aid Ontario under *LASA, 2020*. This submission reinforces and expands upon points that ASLA members raised during the feedback session convened by Legal Aid Ontario on April 29, 2021.

Please note that individual ASLA member organizations are preparing their own submissions to address aspects of the rules that are of particular relevance to them.

Regards,

A handwritten signature in black ink, appearing to read 'Lenny Abramowicz', with a long, sweeping horizontal stroke extending to the right.

Lenny Abramowicz  
Chair of ASLA  
Executive Director of the Association of Community Legal Clinics of Ontario

c.c. Doug Downey, Attorney General of Ontario  
Patrick Schertzer, Senior Advisor, Policy and Legal Affairs, Office of the Hon. Doug  
Downey, Attorney General of Ontario

## Introduction

The Alliance for Sustainable Legal Aid (ASLA) is pleased to have an opportunity to provide feedback on the draft rules that Legal Aid Ontario (LAO) has prepared pursuant to *LASA, 2020*. You will be hearing separately from individual member organizations with more detailed comments.

Our submission covers eight overarching themes that ASLA has identified. We have provided our comments theme-by-theme rather than rule-by-rule since the themes cut across multiple areas.

THEMES ADDRESSED IN THIS SUBMISSION
<ul style="list-style-type: none"><li>• Consultation</li><li>• Relationship with LAO</li><li>• Commitment to certificate and clinic systems</li><li>• LAO's discretion</li><li>• Quality assurance</li><li>• Equity</li><li>• Solicitor-client privilege</li><li>• Fairness and simplicity of accounts</li></ul>

Our comments are intended to be constructive. We have tried to flag elements that could compromise client needs or deter experienced and committed service providers from participating in legal aid.

Overall, ASLA is concerned that the draft rules make fundamental changes to LAO's relationship with the private bar and clinics through a substantial increase in LAO's powers and discretion, and the inclusion of provisions that appear to be overly broad, vague or administratively onerous. Other provisions, such as the assignment by LAO of counsel to clients, and the ability to contract with a variety of corporate entities, could lead to a lessening of the commitment to community clinics and certificate counsel of choice, two mainstays of legal aid services in Ontario. We also have suggestions about approaches to equity, quality assurance, and solicitor-client privilege. And we remain concerned that LAO has not developed a consultation strategy as mandated in section 33 of the legislation.

The rules are a matter of fundamental importance for legal aid in Ontario. We hope there will be opportunities for dialogue with LAO before they are finalized.

## About ASLA

The Alliance for Sustainable Legal Aid is comprised of leaders from nine organizations with expertise and experience with legal aid in Ontario. As part of the Law Society's involvement in

legal aid, the Law Society has been a driving partner in the important work of ASLA for many years. The Law Society plays a facilitative and support role for ASLA in addition to serving as a member.

Originally established twenty years ago as a Coalition on Tariff Reform, ASLA has evolved into an organization that looks at legal aid more broadly in the pursuit of access to justice for low-income people, founded in our shared and strongly held commitment to a sustainable legal aid system. Our work includes government relations, information exchange, and communication with Legal Aid Ontario and other justice sector bodies. Over the years, ASLA has met with representatives of LAO and the Ministry of the Attorney General on a regular basis to engage in constructive dialogue.

<b>ALLIANCE FOR SUSTAINABLE LEGAL AID</b>
The Advocates' Society
Criminal Lawyers' Association
Family Lawyers Association
Refugee Lawyers Association
Association of Community Legal Clinics of Ontario
Federation of Ontario Law Associations
Law Society of Ontario
Ontario Bar Association
Mental Health Legal Committee

### Theme 1: Consultation

ASLA strongly encourages LAO to engage in constructive dialogue and joint problem-solving with us on areas of concern in the draft rules. This would be better than adhering to traditional methods of consultation in which we provide comments that LAO takes into account without any opportunity for meaningful engagement. The synergies of a more interactive approach would enable LAO to tap into our breadth of experience for the benefit of clients, communities and the legal aid system as a whole.

The draft rules are extensive (over 100 pages) and technical, written in formal statutory language. Even for ASLA members who are legally trained, it has been a challenge to go through

all the material and quickly formulate our response. It must have been an even greater challenge for non-legally trained members of the public, including clients, to digest the information and provide meaningful feedback, especially with a 30-day time limit.

It was also a challenge to review the draft rules without having received an indication from LAO about what elements are a codification of the current state and what is new or different. We hope that LAO has carefully considered existing policies before deciding to include them and is open to comments about them in addition to new elements that have been added.

The 30-day posting provision under s.46 of *LASA, 2020* does not prevent LAO from engaging with stakeholders earlier in a collaborative way rather than presenting what appears to be essentially a final product. During a technical briefing on April 20, 2021, LAO advised that the draft rules had been developed over a lengthy period of time, with full board involvement and vetting by the operations committee. ASLA is not aware of any opportunities for stakeholder dialogue during that period.

The impression left by LAO is that they are open to some tweaking of the rules but not much more at this point. This impression was confirmed by LAO's closing remarks at the ASLA feedback session on April 29. In those remarks, ASLA's offer to work collaboratively in finding workable solutions on some of the issues was politely and firmly declined.

We appreciate the opportunity LAO provided for a technical briefing, feedback session, and submissions. However, we would have preferred more meaningful engagement on rules that will have a major impact on legal aid in Ontario for years to come.

In ASLA's view, this process reinforces the urgency for LAO to produce a public consultation policy, to be approved by the Minister, as mandated by section 33 of *LASA, 2020*. That section specifically requires the policy to describe how consultation with the public will be undertaken when changes are being considered to the rules. It would have been preferable for the public consultation policy to be in place in time for consultation on the draft rules. We strongly urge LAO to expedite the development of the policy, building in principles for respectful and meaningful engagement. In any event, ASLA's offer to engage in dialogue and joint problem-solving to resolve issues relating to the draft rules remains on the table.

## Theme 2: Relationships

Ontario has a world-class legal aid system and ASLA members are proud to work within it. We are concerned, however, that the approach taken in the draft rules has strayed from funder/service provider partnerships that made the system work so successfully over the last 20 years. While *LASA, 2020* envisions a vital partnership between LAO and service providers,

the draft rules shift to a top-down, largely one-sided relationship where service providers are given a limited stake in the system beyond contract-for-hire.

### **Relationship with the Private Bar**

The draft rules create onerous administrative requirements and confer broad powers on LAO to remove roster members. We agree with removing lawyers who abuse the system, but there needs to be a better balance to encourage and enable private bar lawyers to participate. Some provisions risk sweeping in high functioning practitioners and clinics in an attempt to weed out the small minority that may be problematic. The net effect is that such rules may discourage a diverse array of qualified lawyers from entering or remaining in the certificate world.

It is somewhat ironic that the draft rules impose an undue administrative burden on roster lawyers while including a Schedule devoted to preventing roster members from being an administrative burden on LAO. We need lawyers at an early stage of their career to enter the system and go through a learning curve which requires more interaction and support initially with LAO staff. We urge LAO to reconsider the Administrative Burden Schedule. At a minimum, we urge LAO to remove or clarify the section of the Schedule relating to excessive reliance on LAO staff, which could have a have a disproportionate impact on junior members of the bar.<sup>1</sup>

### **Relationship with Community Legal Clinics**

Rule 6 (Entity Service Providers) fundamentally changes the relationship between LAO and the clinics and between clinics and their communities. It makes clinics less stable and more precariously funded, jeopardizing their operations and legal supports for marginalized and vulnerable people.

For some time, Ontario's community legal clinics have enjoyed a reasonable amount of security. Unless a clinic breached its obligations or there was a drastic change in funding, the community could rely on its local clinic to be there to help them by providing quality service. Under Rule 6, it is completely within the power of LAO to stop funding a longstanding clinic at the end of its term, without recourse or the possibility for the decision to be reviewed.

The draft rules give LAO unfettered discretion to renew a term and to decide whether the term will be three years or less. It is also problematic that Rule 6 departs from five-year agreements that remain in place until renewed. Instead, the maximum term will be three years for clinics deemed to be low risk, and even shorter terms for other clinics.<sup>2</sup> This creates instability for the clinics, their communities and the low-income clients who need clinic services.

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<sup>1</sup> Administrative Burden Schedule, s.1(2)(e)

<sup>2</sup> ESP3(6) and ESP5.

ASLA is also concerned that the draft rules do not refer to the full array of community clinic issues, including work on systemic issues and law reform that helps more disadvantaged people than individual casework.

### Theme 3: Commitment to Certificate and Clinic systems

ASLA is concerned that some of the new features in the draft rules may signal or make it possible to depart from the fundamental role of certificates and community clinics as mainstays of legal aid services for the benefit of clients. Two notable examples are provisions relating to the assignment of counsel and the recognition of corporations as entity service providers.

#### **Assignment of Counsel**

ASLA understands and agrees that the rules need to protect the most vulnerable clients. We also agree that LAO may need the ability to assign counsel in exceptional circumstances. It is unclear, however, why an assignment could go to a salaried staff lawyer instead of a roster member and whether this signals a greater reliance on staff lawyers going forward. Staff lawyers would, in a sense, have the inside track, putting them in competition with certificate lawyers. The private bar is dedicated to clients, including hard-to-serve clients, and should remain the primary service provider. Unless there is a demonstrated gap, it would be unnecessary and duplicative to assign cases to staff lawyers. We also have some concern that the rules will make it onerous for counsel to resign from an assigned proceeding, even in cases where the lawyer has been fired or permitted to withdraw by the court.<sup>3</sup>

#### **New Entity Service Providers**

Under Rule 6, LAO can recognize broadly defined for-profit corporations as entity service providers. These corporations need only have one licensed lawyer or paralegal and do not have to be part of a roster or subject to roster quality standards.<sup>4</sup> This has the potential to undermine the certificate and clinic systems to the detriment of clients. Corporations could underbid or undercut experienced, trusted service providers, leaving clients with diminished services from entities that are primarily focused on making a profit.

### Theme 4: LAO's Discretion

It is concerning to see provisions in the draft rules that that would give LAO almost untrammelled discretion. Many are overbroad and lacking in specificity, allowing LAO to request any information or documents, consider any factors, or apply any conditions, etc. Examples are provided below in relation to legal aid eligibility, roster members, payment, and entity service providers.

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<sup>3</sup> C4(2) and (4)

<sup>4</sup> ESP2(3)(a)-(c)



## **Eligibility**

The draft rules give LAO the power to refuse to consider an application for legal aid when the applicant (or a person applying for legal aid on their behalf) has provided incomplete information in the past or has been uncooperative or disruptive.<sup>5</sup> This is both vague and harsh. It could exclude the most vulnerable applicants, including people with mental health challenges who may appear uncooperative or disruptive or may lack the capacity to provide complete information.

## **Roster**

Overly broad provisions include the ability to refuse an application for roster enrolment for any reason,<sup>6</sup> to impose any conditions or requirements on a roster member's authorization,<sup>7</sup> to remove a roster member for any reason,<sup>8</sup> and to assess the quality of roster member services based on any factor that LAO considers relevant.<sup>9</sup>

Other provisions lack specificity. For example, a roster member can be removed for sexual misconduct but the rules do not indicate how LAO would ascertain that such misconduct had occurred.<sup>10</sup> This also raises issues of due process for the roster member.

The provision enabling LAO to require someone who has retired from the roster to continue providing services under acknowledged certificates is both overly broad and unfair. This can interfere with a lawyer's ability to arrange for orderly succession planning and could adversely impact clients should the retiring lawyer become unable to work due to illness.<sup>11</sup>

LAO's discretion to require roster members to provide any information or documents specified by LAO for an examination, audit, or investigation of an account is both overly broad and onerous.<sup>12</sup>

## **Payment**

The "reasonable privately paying client of modest means" standard for defining the scope of what LAO will pay for is an example of codifying something that is no longer viewed as appropriate. For one thing, no person of modest means can afford to pay legal fees for a

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<sup>5</sup> EL5(1)(a)-(c)

<sup>6</sup> R3(7)

<sup>7</sup> R4(2)

<sup>8</sup> R15(3)

<sup>9</sup> Quality Services Schedule, s.4(2)

<sup>10</sup> R15(1)(c)

<sup>11</sup> R17(4)

<sup>12</sup> P15(3)

complex matter. The standard should be what a reasonable and competent lawyer would do to advance their client's interest.<sup>13</sup>

### **Entity Service Providers**

Overly broad provisions include LAO's ability to determine an entity's risk level on the basis of any factors that LAO considers relevant<sup>14</sup> or to form an opinion without limitation that an entity service provider is failing to comply.<sup>15</sup> Provisions that are vague or lack specificity include LAO's ability to renew or decline to renew a service agreement solely on the basis of whether LAO wishes to do so<sup>16</sup>, and to decide whether to provide support services to clinics and Indigenous legal services organization.<sup>17</sup>

## **Theme 5: Quality Assurance**

### **Harmonization with the Law Society**

ASLA recognizes that LAO should have standards and enforcement mechanisms to assure the quality of services provided. Its clients deserve no less. At the same time, LAO's rules must be harmonized with the Law Society's regulatory framework to avoid duplication or conflict between the two regimes and to ensure that nothing undermines the Law Society's exclusive jurisdiction. Protocols are essential to ensure that the Law Society is advised when LAO discovers a breach that may require disciplinary action.

### **Specific Provisions in the Draft Rules**

The requirement for roster members to report breaches of vague professionalism standards – such as not being respectful and civil or communicating in a tone that is inconsistent with professional communication – is controversial and requires further consultation with the Law Society and the bar.<sup>18</sup> We also question whether it is appropriate to require lawyers to seek costs at their private retainer rate even though they are being paid less than that<sup>19</sup>. This would force lawyers to seek an amount that no court would award in light of the scales the courts use in awarding costs. Further, we are unsure what quality standards or performance indicators will be used to analyse and measure clinics' performance.

## **Theme 6: Equity**

ASLA would like to see a strong statement about justice for racialized and other equity-seeking groups. There should be a clear expectation that LAO and its service providers will be proactive

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<sup>13</sup> P2(1)(d), P5(2)(a), P6(3)(a), P14(4)b

<sup>14</sup> ESP3(3)(e) & (4)

<sup>15</sup> ESP19(1)(a)

<sup>16</sup> ESP5

<sup>17</sup> ESP15

<sup>18</sup> Professionalism Standards Schedule, s.2 & 3

<sup>19</sup> RC6(1)b

in that regard. This should be expressed as a fundamental principle that is front-and-centre in the rules.

We also note that the draft rules do not mention LAO's residual discretion to find an applicant eligible despite incomplete information. This can be necessary when a person is involuntarily hospitalized and completing an application for Legal Aid with the assistance of a rights adviser. Such discretion has been exercised historically as an accommodation of the disability of applicants and in recognition of the speed at which Consent and Capacity Board hearings are scheduled.<sup>20</sup>

## Theme 7: Solicitor-Client Privilege

Under the draft rules, legal aid applicants must consent to the release of privileged information.<sup>21</sup> Further, roster members and entity service providers cannot refuse to provide privileged information if requested.<sup>22</sup> ASLA is concerned that these broad provisions could create potential vulnerabilities for clients and undermine the solicitor-client relationship, for example by creating a conflict between roster members and their clients.

In the case of clinics, LAO currently can only ask for information about clients when it is relevant to determining eligibility for legal aid. Clinics have accepted this as a reasonable limit on confidentiality. The power for LAO to request information that may be privileged, without limiting the purposes or circumstance for making such requests, is another example of overbreadth and unfettered discretion.

## Theme 8: Fairness and Simplicity of Accounts

ASLA members had hoped that the new rules would streamline billing processes and remove red tape. Unfortunately, the draft rules make things worse. We recognize LAO needs to have financial tools in place but they should not be so administratively onerous as to deter lawyers from taking on certificates.

The rules also need to be fair. As currently drafted, lawyers cannot bill for the entire time they are required to attend a hearing due to restrictions regarding waiting time and adjournments.<sup>23</sup> Further, the ability to bill for waiting time depends on arbitrary distinctions between different types of LAO-funded proceedings. Compare, for example, provisions regarding Indictable 2 offences<sup>24</sup> and Immigration and Refugee Matters<sup>25</sup>.

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<sup>20</sup> EL3(2)

<sup>21</sup> EL8

<sup>22</sup> R7(3) and ESP7(2)

<sup>23</sup> Fees and Disbursements Schedule, Part 1, s.6(a) and (b)

<sup>24</sup> Fees and Disbursements Schedule, Part 2, Table 3, Indictable 2 Offences.

<sup>25</sup> Fees and Disbursements Schedule, Part 3, Table 8, Civil Matters, Immigration and Refugee Matters.

It is also a concern that there will no longer be access to an assessment officer for the review of accounts. This means that LAO will have the final say on all accounts. Even if it was rarely used, the assessment remedy was a fair process that created an incentive for reasonableness and compromise.<sup>26</sup>

We are troubled by the numerous references to LAO's power to request any information or documents at its sole discretion.<sup>27</sup> Certain requested documents, such as court or tribunal records, may require time or expense for the lawyer to obtain.<sup>28</sup> The requirement of "proof and justification" of dockets for services provided is over-broad, and imposes an impossible onus on the lawyer. It is unclear how a lawyer could provide proof and justification for routinely required tasks such as conducting research; reviewing documents; preparing for client interviews; conducting client interviews; responding to telephone calls, or much of the work lawyers are required to do.<sup>29</sup> There is also a lack of clarity about what an examination, audit or investigation of accounts will entail.<sup>30</sup>

We urge LAO to limit its billing, accounts and audit provisions to what is actually required for LAO to be accountable for the proper stewardship of its funding without imposing unfair requirements or undue red tape.

## Conclusion

Since 1998, Ontario's legal aid model has been recognized by jurisdictions around the world as one of the best. ASLA is dedicated to doing our part to keep the system vital and sustainable. From various vantage points, ASLA members know the impact that legal aid has on clients in need of legal assistance. The rules are fundamentally important and we would welcome the opportunity to engage in dialogue about them with Legal Aid Ontario.

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<sup>26</sup> P17

<sup>27</sup> P2((1)(c)(iii), P5(2)(e), P5(3)(c), P5(5), P6(3)(d), P6(4)(c), P6(6), P7(1)(a)(vi), P7(2)(a)(iii), P8(3), P9(2), P11(4), P14(3)(d), P15(3), P15(5)(a) and (b), P17(5) and (7)

<sup>28</sup> P2(3), P7(1)(b), P15(1)(b), P15(3)(b)

<sup>29</sup> P2(3), P7(1)(d) and P15(3)(a)

<sup>30</sup> P15