Law Society of Ontario | Barreau de l'Ontario

Tab 1

Submissions to the Standing Committee on Justice Policy Regarding Bill 161's Proposed Amendments to the *Law Society Act* and the *Legal Aid Services Act*

[June 10, 2020]

Prepared By:

[Malcolm Mercer, Treasurer]

[Sheena Weir, Executive Director, External Relations and Communications]

Submissions Regarding Bill 161's Proposed Amendments to the *Law Society Act* and the *Legal Aid Services Act*

Introduction

The Law Society of Ontario regulates over 55,000 lawyer licensees and over 9,500 paralegal licensees in the public interest. The Law Society's role is to ensure that all persons who practise law or provide legal services in Ontario meet high standards of learning, professional competence and professional conduct. The Law Society has a duty to protect the public interest, to maintain and advance the cause of justice and the rule of law, to facilitate access to justice for the people of Ontario, and to act in a timely, open and efficient manner. The Law Society primarily carries out its functions through its board of directors, called Convocation, which meets regularly to make policy and regulatory decisions, including through the creation of professional conduct rules and by-laws.

We believe that *Bill 161, Smarter and Stronger Justice Act, 2020* ("Bill 161" or the "bill"), will enable the Law Society to carry out its mandate more effectively through the amendments to the *Law Society Act* proposed in Schedule 14. If passed, the bill will increase the Law Society's capacity to ensure that not only individual licensees, but also firms, are accountable to the public. It also will reduce regulatory burden to both licensees and firms.

The Law Society supports the purpose of the amendments to the *Legal Aid Services Act* ("*LASA*") proposed in Schedules 15 and 16 of the bill, which is to maintain and enhance a flexible, sustainable legal aid system that provides high-quality services in a client-focused and accountable manner. We also continue to support a mixed delivery model of services which allows community legal clinics and the private bar to meet the varying needs of their clients. However, we propose some modest changes designed to ensure effective consultation between Legal Aid Ontario ("LAO") and its stakeholders. These proposed changes are detailed further below.

Proposed Amendments to the *Law Society Act*

i. Firm Regulation

As firms establish organizational cultures and policies, the influence they have on their members can often impact individual licensees' compliance with certain regulatory requirements. Currently, however, the *Law Society Act* is largely focused on the regulation of individual licensees. This has created a gap in regulation, in which firms cannot be held accountable in certain areas where they are well placed to assume responsibility.

The Law Society faces several regulatory limitations because of this gap. For instance, the Law Society is not able to investigate or discipline a firm for either systemic breaches of conduct, or where a firm holds partial responsibility for a licensee's conduct. Further to that, a lack of firm regulation creates barriers to gaining cooperation from firms with respect to individual licensees who are the subject of an investigation. Finally, the lawyer and paralegal rules of conduct currently only apply to individual licensees, even though some duties are more appropriately placed on firms.

The firm regulation regime proposed in the *Smarter and Stronger Justice Act, 2020* advances two key policy objectives:

Firstly, it would enhance public protection by providing greater clarity and access for potential complainants, and increasing investigative efficiency and effectiveness, thereby increasing firm accountability. For instance, if a client thinks that they are retaining a firm, but responsibility for a breach is focused on an individual licensee, the client may have no avenue for regulatory redress against the firm. Firm regulation would change this. Firm regulation is also expected to raise standards for professional competence and conduct by making firms accountable and by imposing certain conduct requirements on them.

Secondly, firm regulation would also enhance efficiency and reduce regulatory burdens for both licensees and firms by transferring certain regulatory requirements from licensees onto firms, and by harmonizing regulatory requirements across jurisdictions. Because other Canadian provinces have already adopted firm regulation, this harmonization would provide predictability for firms that conduct business in multiple provinces.

The proposed amendments to the *Law Society Act* would grant Convocation the authority to make by-laws to govern the practice of law or provision of legal services through a firm. As enabling legislation, these amendments would allow the Law Society to implement firm regulation in stages, and at a time that it considers appropriate. The Law Society would consult with licensees as to the scope and nature of firm regulation prior to making any by-laws.

A new definition of 'firm'

Subsection 1(1) of Schedule 14 would amend subsection 1(1) of the *Law Society Act* by adding a new definition of 'firm' that is both descriptive and non-exhaustive, and that focuses on certain entities or joint arrangements through which one or more licensees practise law or provide legal services to members of the public.

Included in the definition of firm is:

- a sole proprietorship owned by one licensee;
- a professional corporation;
- an association of licensees, where the licensees hold themselves out as practising law, providing legal services or both, through an entity or joint arrangement;
- an ordinary partnership;
- a limited liability partnership; and
- any other entity or joint arrangement specified by the by-laws.

Excluded from the definition of firm is:

- any governmental or public sector entity, including a governmental organization or municipal sector entity, as those terms are defined in the *Ombudsman Act*;
- a broader public sector organization as defined in the *Broader Public Sector Accountability Act, 2010*;
- Legal Aid Ontario; or
- an entity or joint arrangement specified by the by-laws.

The definition addresses the need for clarity in the mind of the public, who should not be expected to understand the technical differences between various types of entities and arrangements. Creating a descriptive and inclusive definition of the term 'firm' protects the public by ensuring a clear understanding of exactly which entities or arrangements will be subject to Law Society regulation and discipline. The proposed definition also distinguishes between different types and sizes of firms, thus providing a foundation for the Law Society to explore ways to reduce regulatory burdens on small firms and sole practitioners.

In addition, the definition harmonizes the regulatory framework across jurisdictions by including entities and arrangements similar to those listed in other law societies' governing legislation.

Finally, the non-exhaustive nature of the definition gives the Law Society flexibility to adjust regulation as changes in the legal landscape occur.

By-Law making authority with respect to firms

The addition of firm regulation is largely governed by enabling provisions, meaning that the amended provisions would allow Convocation to make by-laws governing the practice of law and provision of legal services through firms. Any such by-laws would be made by Convocation only after appropriate consultation with the professions. The regulatory requirements that may be made through Convocation are aligned with the policy objectives of these amendments—to enhance public protection, increase efficiency and reduce regulatory burdens.

In particular, the proposed amendments to the by-law making authority in subsection 62(0.1) of the *Law Society Act* would empower Convocation to make by-laws respecting the registration of firms. Registration lays the groundwork for the establishment of a public register of firms, which would serve to improve public protection by providing consumers with information about a firm, its licensees, and its regulatory history. Public protection is enhanced through transparency and access to information. This requirement would also allow the Law Society to gather relevant firm information and ensure that there are no gaps in data.

The new legislation would also empower Convocation to make by-laws that will enhance efficiency and reduce regulatory burden at firms. One of these by-law making powers contemplates a requirement for firms to assign designated practitioners through which to channel communications to and from the Law Society. By-laws may also require the designated practitioner to meet reporting requirements on behalf of licensees at the firm. This role would allow firms to have a single point of contact for regulatory compliance issues, thus promoting more accurate and efficient filings and streamlining reporting requirements. Convocation may also make by-laws respecting reporting requirements for firms specifically, which could allow firms to file an annual report on behalf of some or all licensees of the firm and reduce the reporting burden placed on individual licensees.

Extending the Law Society's regulatory powers to firms

Currently, under the *Law Society Act*, professional corporations are the only entities subject to comprehensive regulation. Essentially on the same regulatory footing as lawyers and paralegals, professional corporations are subject to the Act's provisions on audits, investigations, prosecutions and discipline, in addition to those regarding compliance, freezing and trusteeship orders—with necessary modifications. Because no other type of entity is subject to these regulatory powers, the public has been left without a regulatory avenue against a significant portion of the entities through which law is practised and legal services are provided in Ontario.

Through its proposed firm regulation regime, Schedule 14 to Bill 161 would address this regulatory gap. Specifically, section 14 of the bill would amend the *Law Society Act* by adding new sections (sections 61.1.1, 61.1.2, and 61.1.3) that would make certain provisions in the *Act* (previously only applicable to individual licensees and/or professional corporations), apply to firms in the same manner—if and to the extent provided for by the by-laws.

As a result, firms would be subject to the *Law Society Act*'s provisions in areas such as competence, audits of financial records and investigations if Convocation decided that such accountability was in the public interest. Selectively extending these provisions to firms would increase public protection by holding firms accountable to the regulator in areas where firms are in a better position than licensees to address issues of professional competence and conduct.

ii. Disclosure

Schedule 14 would amend section 49.12 of the *Law Society Act*, which deals with the Law Society's duty of confidentiality. Subsection 49.12(1) generally prohibits the disclosure of information that comes to the Law Society's knowledge in relation to audits, investigations, reviews, searches, seizures and proceedings under Part II of the *Act*, whereas subsection 49.12(2) sets out the circumstances in which it is permissible for the Law Society to disclose this information.

Subsection 10(1) of Schedule 14 would extend the prohibition on disclosure to *potential* audits, investigations, reviews or proceedings. To better protect the public, subsection 10(2) of Schedule 14 would allow for more circumstances in which disclosure can be made. For instance, the amendments would make it permissible to disclose information to law societies in other provinces and territories if the law society in question is subject to provisions on the disclosure of information comparable to those in the *Law Society Act*. The Law Society would also be allowed to disclose information if there is a significant risk of financial harm to a person or a significant threat to the life, health or security of an individual, and the disclosure is made to prevent the harm, investigate the risk, or address or investigate the threat, as the case may be. Some of the proposed changes to the confidentiality provisions are enabling, in that they would empower the Law Society to create by-laws setting out specific circumstances in which disclosure of information will be permitted in the public interest.

These proposed amendments are balanced with others prohibiting the disclosure of solicitor-client privileged information, and the disclosure of information that may tend to criminate a person or establish their liability in other proceedings.

The purpose of these amendments is to better balance confidentiality requirements with the need to protect the public and enhance transparency. Because the Law Society is self-regulating, public trust in the effective regulation of lawyers and paralegals requires as much transparency as possible. These amendments would provide clarity around when the Law Society is able to disclose important information about complaints and investigations, thus furthering its ability to remain transparent and accountable to the public. On the other hand, the amendments would provide enough protection to client information and licensee rights so as to ensure fair regulatory proceedings.

iii. Increase of Fines

The final significant amendment proposed in Schedule 14 is found at subsection 3(1), which would amend subsection 35(1) of the *Law Society Act*. This is the provision that sets out the various orders that the Law Society Tribunal may make in professional misconduct matters. The proposed amendment would increase the maximum fine that the Tribunal can order if a licensee has been found to have engaged in professional misconduct or conduct unbecoming a licensee, from $10,000 to $100,000. The bill also would enable the Tribunal to order a summary licence revocation where a licence has been suspended for discipline reasons for over two years.

These amendments would create a stronger accountability framework for licensees and firms, and enable the Law Society Tribunal to provide more appropriate remedies when addressing complaints. Importantly, the increased fine gives the Tribunal more flexibility to address a range of circumstances that may arise.

Proposed Amendments to the *Legal Aid Services Act*

The Law Society agrees with the purpose of the government's bill, which is to maintain and enhance a flexible, sustainable legal aid system that provides high quality services in a client-focused and accountable manner. We also continue to support a mixed delivery model of services which allows community legal clinics and the private bar to meet the varying needs of their clients. We would, however, encourage the following modest changes to the proposed amendments to *LASA.* The suggested changes are intended to:

- Assist in ensuring that LAO remains independent of government – a key element of our adversarial system where the government is routinely the adverse party in legally aided matters
- Enhance collaboration among LAO, its stakeholders and service providers, which will enhance efficacy, sustainability and accountability in the legal aid system
- Create greater transparency in regards to the governance and operations of LAO

i. Board Composition

The bill proposes a new approach to the board composition of LAO. Previously, subsection 5(2) of *LASA* provided for one chair member, five members recommended by the Law Society, and five members recommended by the Attorney General. Subsection 21(3.1) of the newly proposed legislation allows that at least three but no more than five of the appointees be recommended by the Law Society, and no more than five of the board members be practising lawyers. Subsection 21(2) states that the board is to be composed of up to 11 persons.

It would be preferable, and we believe appropriate, for the previous proportions of the board to remain codified. Safeguarding the Law Society's ability to nominate half of the board will ensure that the Society remains in a strong position to effectively assist in implementing the objective behind this bill—to create a system that better serves the public. A diverse board, as previously imagined by the legislation, allows LAO to remain sufficiently independent from government, encourages consideration of a broad range of perspectives from different areas of the legal community, and ensures that the board is well-placed to make decisions that take into account the needs of all relevant stakeholders.

ii. Consultation Policy

The Law Society believes that in order to effectively carry out the objectives of this new legislation, the *Act* should contemplate a protocol through which LAO can maintain open communication with the Law Society and other stakeholders, in order to strengthen their own capacity and address issues holistically. This framework will also enhance the accountability of the organization through increased transparency and collaboration with key partners. There are some moderate changes to the proposed *LASA* that we would suggest in order to administer appropriate consultation between LAO and its stakeholders.

Subsection 46(3) of the newly proposed legislation provides that the board cannot make a rule before a public consultation process is in place, and must do so by posting proposed rules on LAO's public site for a period of 14 days. It is the Law Society's position that the suggested 14-day period is too short. LAO is involved with a number of institutional stakeholders, which have their own processes for developing positions on any rule. They require adequate time to process and respond to any rule changes that may impact them or the communities that they serve. Further, the new wording of the section suggests that an even shorter period can be determined by the Corporation if 14 days "is not practicable in the circumstances." This clause could result in the elimination of any reasonable notice period, thus undermining the requirement for consultation. The Law Society recommends that this period be significantly increased.

The requirement in subsection 46(3) also states that the method by which rules are to be published for the 14-day period described above is a posting on the Corporation's website. This is an impractical approach which would require ongoing, attention paid to LAO's website, from organizations that are often run on a volunteer basis, with few, if any staff. This will create an unnecessary burden for stakeholders. We suggest a subscription-based posting via email as a more practicable alternative.

The Law Society also recommends, whether as part of a wider consultation policy or perhaps as an addition to the new legislation's requirement for board members to act responsibly (section 23), that there be a requisite amount of in-person meetings between the board and various stakeholders, including the Law Society, to facilitate collaborative and transparent dialogue between parties.

By-Law Review

Along with the suggested changes to section 46.3, transitional provisions may be appropriate to deal with the development of rules and by-laws. Most new rules and by-laws will be implemented by LAO in the first several months following the coming into force of this new legislation. This is a critical period in which LAO should encourage open consultation with all relevant stakeholders as its structure and operations shift. We recommend that a transitional provision be used to establish a collaborative method through which LAO might proceed to implement changes to their rules and by-laws. We propose a transitional period of 18 months. During this period, an independent monitor would be appointed to give advice and guidance to the board with respect to the efficacy and propriety of new rules and by-laws, including when by-laws should be discussed with stakeholders.

Our intent is that these suggestions will serve to enable clear and ongoing communication between LAO and its partners, and specifically help the Law Society engage with LAO in a manner that has a positive bearing on its operations and services.

Conclusion

The Law Society is grateful for these much needed updates to the *Law Society Act.* We hope that the modest changes we have proposed to the *Legal Aid Services Act* will be considered in an effort to further the objectives of the proposed *Smarter and Stronger Justice Act, 2020*. These suggested changes will ensure the independence of LAO, enhance its ability to collaborate with key stakeholders, improve the system's efficacy, sustainability and accountability, and create transparency in its operations.

We look forward to working with the province to implement these amendments to improve the accessibility and efficacy of Ontario's justice system.