



Law Society
of Ontario

Barreau
de l'Ontario

Report of the Legal Aid Working Group: An Abiding Interest.



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January 25, 2018



Message from the Treasurer

Legal aid is a critical component of access to justice. Since the establishment of the Legal Aid Plan in 1967, legal aid delivered through the Ontario Legal Aid Plan and, more recently, Legal Aid Ontario, has made Ontario a leader in the provision of legal aid services. The Law Society was one of the initial architects of our modern legal aid system. It continues to be an important stakeholder with a long-standing commitment to ensuring that strong and readily accessible legal aid services are available to low-income Ontarians, across the province. Protecting and enhancing legal aid is critical to ensuring that each and every Ontarian can benefit from fair and just treatment in the legal system.

The Legal Aid Working Group was established by the Law Society in November 2016, as part of the Society's statutory obligation to facilitate access to justice in Ontario. The mandate of the Working Group was to identify opportunities to support and enhance the delivery of robust and sustainable legal aid services, and to identify opportunities for engagement with Legal Aid Ontario. The Working Group has consulted widely and worked with Legal Aid Ontario and other stakeholder groups to do just that.

I would like to thank the Legal Aid Working Group, and Law Society staff who have supported it, for their determination and hard work in producing this important report. The discussion and recommendations provide informative findings and set out a responsible way forward for the Law Society to complement and support Legal Aid Ontario in improving access to legal aid, and access to justice, in Ontario.

The Law Society is committed to working with Legal Aid Ontario, the government and all stakeholders to ensure Ontario has a robust and strengthened legal aid system that will serve the people of Ontario well.

Paul B. Schabas

Treasurer (President), Law Society of Ontario

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Message from the Chair

Dear Treasurer

I am pleased to deliver to you the report of the Legal Aid Working Group in response to the terms of reference issued by you on November 9, 2016.

I want to thank the Working Group members who worked diligently to come to the recommendations contained in the report. I want to thank Sheena Weir, Darcy Belisle, and Aaron Denhartog and, in particular, Karen Cohl for their invaluable support to the Working Group. Finally, I would like to thank all those who spoke to the Working Group and shared their insights. It is evident that along with Legal Aid Ontario there are many in our profession that have an abiding interest in ensuring an effective and sustainable legal aid program for the people of Ontario.

It has been my honour to serve as Chair.

John Callaghan

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WORKING GROUP PROCESS

The Legal Aid Working Group met on November 15, 2016, December 5, 2016, December 12, 2016, January 16, 2017, January 26, 2017, March 8, 2017, April 27, 2017, May 8, 2017, May 15, 2017, June 6, 2017, June 8, 2017, August 15, 2017, September 14, 2017, October 11, 2017, November 28, 2017, and January 9, 2018. The meetings were chaired by John Callaghan and attended by Working Group members. The Working Group was supported by Sheena Weir, Executive Director, External Relations and Communications, who also attended the meetings. Additional assistance was provided at each meeting by one or more members of the support team: Darcy Belisle (staff), Aaron Denhartog (staff), and Karen Cohl (external consultant).

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FOR DECISION

REPORT OF THE LEGAL AID WORKING GROUP

MOTION

That Convocation approve the Legal Aid Working Group's recommendations in this report regarding the Law Society's involvement in legal aid in Ontario.

RATIONALE

The Law Society was one of the initial architects of our modern legal aid system and the initial administrator of legal aid in Ontario. Its licensees provide the bulk of legal aid services and, since 2006, it has had a statutory duty to facilitate access to justice for the people of Ontario. In light of its foundational role in legal aid, regulatory function, and access to justice responsibilities, the Law Society has a significant and abiding interest in helping to ensure robust, transparent, and sustainable legal aid services for low-income Ontarians.

Stakeholders welcome more active involvement by the Law Society in legal aid. We need to define our role with care and exercise it diligently and wholeheartedly, ensuring that it complements the work of Legal Aid Ontario (LAO) which has the statutory mandate to administer legal aid in Ontario.

The Legal Aid Working Group views this report as the beginning of a new stage in the Law Society's contribution to a vital component of access to justice.

RECOMMENDATIONS: INVOLVEMENT IN LEGAL AID

It is recommended that the Law Society:

- (a) Work with Legal Aid Ontario to develop a structured and ongoing process for dialogue with the LAO board and senior management to discuss matters of mutual importance in improving access to justice in Ontario.
- (b) Play a role with legal stakeholders and LAO to build stronger relationships and more open dialogue.
- (c) Convene public symposia on legal aid policy issues, involving a range of stakeholders, experts and sectors to explore innovative approaches and to discuss and address concerns and improvements respecting the legal aid system.
- (d) Champion the need for robust legal aid and share the Law Society's insights and concerns regarding legal aid with the federal and provincial levels of government, as part of the Law Society's government relations activities.
- (e) Continue to facilitate and support the work of the Alliance for Sustainable Legal Aid.
- (f) Ensure that its recommendations for appointment to the LAO board include nominees who are experienced in the legal aid system, including the clinic system and the private legal aid bar.

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- (g) Develop a protocol for LAO board members who are recommended by the Law Society to play a role in keeping communications flowing between the two organizations to strengthen the capacity to address legal aid issues, in a way that does not conflict with the board members' fiduciary obligations.
- (h) Encourage the collection of data, including disaggregated demographic data, to ensure greater transparency in legal aid, and to promote more evidence-based research and policy development.

RECOMMENDATIONS: IMPLEMENTATION ROLES

It is further recommended that:

- (a) The Access to Justice Committee assume responsibility for implementing the above recommendations and for maintaining a vigilant role in ensuring effective legal aid strategies for the Law Society.
- (b) The Government and Public Affairs Committee work with the Access to Justice Committee on implementation of the recommendations, with special attention to government relations, stakeholder relations, and the continuing role of the Law Society in legal aid.
- (c) The Access to Justice and Government and Public Affairs Committees work closely with the Law Society's Indigenous Advisory Group in ensuring that Indigenous voices are heard on issues relating to legal aid services.
- (d) The Treasurer's Appointments Advisory Group take the lead in implementing recommendations regarding the Law Society's role in recommending appointees to the LAO board.
- (e) The Access to Justice Committee identify the impact on resources of implementing the recommendations, in consultation with the Audit and Finance Committee.

AN ABIDING INTEREST

I believe today that there is an urgent need to provide legal assistance, as a matter of human rights and common decency to people in Ontario who need that assistance.

— J. D. Arnup, former Treasurer of the Law Society of Upper Canada (1963-1966), at Convocation, April 4, 1997

Legal aid has its origins in the legal profession's tradition of pro bono services. As society became more complex and the need for legal services became more widespread, it was evident that legal services were beyond the reach of the poorest among us.

In 1947, the Canadian Bar Association recommended that the governing bodies in each province should consider a role for the legal profession in providing services to people lacking the means to retain lawyers. In response, the Law Society created a special committee chaired by bencher Michael Chitty. In November 1950, Convocation accepted the committee's proposal to create the Ontario Legal Aid Plan, the first formal, province-wide legal aid system.

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Initially the Law Society felt that it could implement its plan without specific legislative authority. It then decided to seek an amendment to the *Law Society Act* which it requested on March 15, 1951. With record speed, the amendment received third reading on March 30. Ontario became the first province in Canada to enact legislation to establish a legal aid program.

The first Legal Aid Plan, which ran for approximately 16 years, was essentially organized pro bono services provided by the private bar. Lawyers received no fees for their labour but some funding was available to compensate them for disbursements and administrative expenses.

The second Legal Aid Plan was a “judicare” system in which eligible clients received certificates as vouchers to pay private lawyers. This plan was also administered by the Law Society but with significant government funding. It ran for over 30 years, starting in 1967. The second plan was the start of a mixed-model of legal aid services which included duty counsel in addition to the certificate program. Community clinics and student legal aid societies became part of the model when they began to be funded by the plan in the 1970s.

As one of the initial architects of legal aid in Ontario, the Law Society, along with the government and stakeholders, developed a unique and effective delivery model which included involvement from the private bar and a community-based clinic system.

From the outset, legal aid in Ontario has favoured the private bar as the principal service model for service delivery. The primary reason is that it’s long been recognized that independent counsel, free of pressure from government, its agencies or others, provides the most effective means to protect and advance the client’s interests. Society and the justice system benefit from the independent private bar as it provides for a reliable adjudicative system that ensures an objectively fair adjudication in our adversarial system. The legal aid legislation specifically recognizes the private bar as the foundation for criminal and family law, and community clinics as the foundation for clinic law, concepts strongly endorsed by senior legal aid officials who met with the working group.¹

With governments facing fiscal restraints in the 1990s, legal aid funding faced challenges and controversy which persist to this day. For many years, certificates had been provided on an open-ended, demand-driven basis. Costs escalated and this caused confrontations with government and payment delays for lawyers. In 1994, the Law Society entered a memorandum of understanding with the province, limiting the program to a fixed budget for four years.

In 1997, the report of the Ontario Legal Aid Review (“McCamus Report”) recommended an independent body to govern the legal aid plan. The Law Society’s role as administrator came to an end in 1999 – after almost 50 years in that role -- with the creation of Legal Aid Ontario as an independent agency under the *Legal Aid Services Act*, 1998. Since then, LAO has further expanded the mixed model of service delivery by adding staff offices, telephone hotlines and other new approaches.

In the intervening years, the Law Society has facilitated communication between Legal Aid Ontario and its service providers who are Law Society licensees. This has been achieved through formal committees and more ad hoc communication.

1 See section on “The Independence of the Bar” in Chapter 5 of Lesage and Code, Report of the Review of Large and Complex Criminal Case Procedures, Ontario Ministry of the Attorney General (2008).
https://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/lesage_code/chapter_5.php (Retrieved January 2018)

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The Law Society's mandate was enhanced in 2006 with the statutory duty to facilitate access to justice. As discussed in our interim report, and in the section on Complementary Roles (starting at page 16), the roles of the Law Society and LAO, while distinct, intersect in numerous respects including policy, stakeholders and government interaction. In September 2009, the provincial government announced an additional \$150 million to be invested in LAO over four years.

While the administration of legal aid clearly rests with Legal Aid Ontario, there are compelling reasons for the Law Society to define a role to complement what LAO and others are doing. The Law Society has a statutory duty to facilitate access to justice for the people of Ontario. It is the regulator whose licensees are the main legal aid service providers. As an early leader of legal aid, the Law Society has a deep understanding of the need for a robust, vibrant, independent, thriving, and sustainable private bar to provide a range of legal aid services: the participation of law schools in legal aid; and a strong system of community legal clinics to provide poverty law services and conduct systemic work to advance the interests of low-income people.

In light of this longstanding and abiding interest, it is a worthwhile endeavour for the Law Society to reassess its role in legal aid and to determine how it wishes to meet its obligations to the public and its licensees. As the need for legal services increases and the demand for public funding becomes more acute, the Law Society should engage in legal aid issues to help ensure that the legal aid system is robust and addresses a multitude of interests. At present, we are fortunate that the provincial government has provided additional funding to increase eligibility. It shows a commitment to legal aid that should be lauded and encouraged. More is needed from both levels of government to ensure our justice system is accessible to all. Indeed, more innovation throughout the justice system is required if the rule of law is going to be more than a catchphrase. Legal aid plays a central role in ensuring access to the courts, the ultimate arbiter of the rule of law.

The Law Society brings an important perspective to legal aid issues which should be heard. The Working Group unanimously encourages Convocation to adopt its recommendations due to our belief that the Law Society can make a positive impact on access to legal aid services for which the profession is rightly proud.

LEGAL AID WORKING GROUP

Treasurer Schabas has recognized the need for the Law Society to consider its role and involvement in legal aid. In November 2016, he established the Legal Aid Working Group comprised of a cross-section of benchers with relevant experience, chaired by John Callaghan.

The Working Group met with more than forty stakeholders from twenty organizations before deliberating and developing the recommendations in this report. The stakeholders, including senior officials from Legal Aid Ontario², unanimously welcomed a more active role by the Law Society in legal aid. They also provided many ideas, insights and suggestions about the role the Law Society could play and issues it could help to address.

In this report, the Legal Aid Working Group makes recommendations to Convocation about the Law Society's involvement in legal aid going forward. The recommendations are designed to align with the Law Society's statutory mandate and to complement, without duplicating, the role of Legal Aid Ontario and other organizations.

2 In this report, references to input from Legal Aid Ontario have been taken from a slide presentation from LAO to the Legal Aid Working Group, August 15, 2017 and a subsequent LAO submission on "Strengthening our Relationship and Supporting our Mandates", September 18, 2017.

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The recommendations aim to:

- Build a stronger relationship between the Law Society and LAO;
- Have the Law Society participate with LAO and stakeholders from the legal community to improve relationships and communications between them;
- Facilitate public policy discussions about the need and importance of legal aid to our civil society;
- Clarify the Law Society's goals in recommending appointments to the LAO board of directors and create a protocol for interaction with appointees; and
- Promote improvements in the collection and use of data.

The Legal Aid Working Group has completed its task. It recommends that the Law Society's Access to Justice Committee take primary responsibility for the Law Society's policies and interactions regarding legal aid and for implementing the recommendations contained in this report. The Working Group also recommends defined roles for the Government and Public Affairs Committee and the Treasurer's Appointments Advisory Group.

With the submission of this report, the Working Group has completed the work plan it created to guide its activities:

December 2016 – January 2017: The support team, comprised of Law Society staff and an external consultant, developed materials and provided briefings to ensure all Working Group members had a good understanding about the history of legal aid, the current operations of Legal Aid Ontario, and the environment in which it operates.

January – June 2017: The Working Group convened a series of consultation meetings with LAO officials, academics, and individuals affiliated with various legal organizations to canvass ideas about the Law Society's role in legal aid.

June 2017: The Working Group's interim report was presented to Convocation by John Callaghan, chair.

July – October 2017: Supplementary consultation meetings and discussions were held.

October 2017 – January 2018: The Working Group deliberated and prepared this final report to Convocation, which includes recommendations about the Law Society's future involvement in legal aid.

Additional information about the Working Group, consultation participants, and statutory frameworks are contained in appendices to this report.

- See Appendix A for the Working Group's mandate, membership, and announcement.
- See Appendix B for a list of consultation participants.
- See Appendix C for excerpts from statutes governing the Law Society and Legal Aid Ontario.

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LEGAL AID ONTARIO TODAY

Legal Aid Ontario is an independent agency of the Ontario Government, created in April 1999 as a corporation under the *Legal Aid Services Act*, 1998. It has a statutory mandate to provide legal aid services to low-income individuals. LAO's vision, which it has articulated in furtherance of its mandate, is to ensure that healthy communities include responsive and meaningful legal aid services and improved access to justice. Its mission is to provide fair and equal access to justice for low-income Ontarians.

LAO board of directors

Members of LAO's board of directors are appointed by the Lieutenant Governor in Council after being selected or recommended by the Attorney General. (*Legal Aid Services Act* ("LASA"), s.5(2)). The chair is selected by the Attorney General from a list of persons recommended by a committee composed of the Attorney General (or designate), the Law Society Treasurer (or designate), and a third mutually agreed upon person. (*LASA*, s.5(2)1).

Five board members are selected by the Attorney General from a list of persons recommended by the Law Society. The Law Society typically provides three candidates for each vacancy among these five positions. (*LASA*, s.5(2)2). An additional five members are recommended by the Attorney General for appointment by the Lieutenant Governor. (*LASA*, s.5(2)3).

As a whole, the board is intended to have knowledge, skills and experience in business, management and financial matters; law and the operation of courts and tribunals; special legal needs and provision of legal services to low-income individuals and disadvantaged communities; the operation of community legal clinics; and social and economic circumstances associated with the special legal needs of low-income individuals and disadvantaged communities. (*LASA*, s.5(4)).

The board is supposed to reflect the geographic diversity of the province. (*LASA*, s.5(5)). In addition, the majority of appointed members must be non-lawyers and no more than three can be benchers of the Law Society. (*LASA*, s.5(6) and (7)).

Staff and structures

LAO's workforce consists of just over 1,000 full-time equivalent staff, with 62% providing direct client services. LAO has eight advisory committees to provide the Board with input and advice to support the annual strategic and business planning process.³ LAO has nine area committees to hear appeals related to decisions regarding client eligibility for legal aid certificates. Approximately 300 people, including lawyers and community representatives, serve on these committees.

3 The eight advisory committees address: Aboriginal issues; clinic law; criminal law; family law; French language services; immigration and refugee law; mental health; prison law.

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Mixed model of services

Legal Aid Ontario offers services to clients through a range of programs and delivery models, as highlighted in the table below.

LAO SERVICES FOR LOW-INCOME CLIENTS		
Telephone and online services <ul style="list-style-type: none"> · Toll-free number · Young persons’ diversion hotline · “Brydges” hotline for detained persons · Lawfacts.ca 	Duty counsel	Refugee law offices
	Certificate program	Criminal trial lawyers
	Family law programs <ul style="list-style-type: none"> · Family law offices · Family law service centres · Voluntary mediation · Advice lawyers at Family Law Information Centres 	Community legal clinics
		Student legal aid services societies
		Group applications and test cases

Legal Aid Ontario’s mixed-model delivery system is intended to reflect its statutory mandate under section 1(b) of the *Legal Aid Services Act*:

“encouraging and facilitating flexibility and innovation in the provision of legal aid services, while recognizing the private bar as the foundation for the provision of legal aid services in the areas of criminal law and family law and clinics as the foundation for the provision of legal aid services in the area of clinic law”.

Private bar lawyers who represent legal aid clients must belong to a legal aid panel for the type of law they practise.

Poverty law services are delivered through a network of 74 independent, community based legal clinics. Fifty-seven clinics serve specific geographic communities; 17 clinics are “specialty clinics” that focus on specific areas of poverty law or client populations.⁴ Each clinic is a non-profit legal centre, governed by an independent board that is representative of the community it serves. Clinics employ lawyers, community legal workers, and administrative staff who offer services to low-income people, including: legal advice, representation and education; community development and referrals; and law reform and test case litigation.

4 Specialty clinic areas: African Canadian; Chinese and Southeast Asian; Children and youth; Community legal education; Corrections; Disability; Elderly; Environment; HIV and AIDS; Income security; Injured workers (2 clinics); Landlords self-help; South Asian; Spanish-speaking; Tenants; urban Aboriginals; Workers health and safety.

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The clinics are in a position to take the law to those who need it most. The clinics, located in, and run by, local communities, can reach out to advise people of their rights. They take the law to the people...In doing all of this, the clinics help convince the poor that they have a stake in this society.

— The Honourable R. Roy McMurtry, Q.C., Attorney-General for Ontario, “Notes for a Statement to the Ontario Legislature Standing Committee on the Administration of Justice”, December 1, 1982, 30-31.

LAO has strategies at various stages of development to better serve vulnerable client groups. The strategies address Aboriginal justice; mental health; domestic violence; racialized communities; and bail.⁵

LAO’s website contains a large variety of information for potential clients, lawyers, and others, including fact sheets that summarize LAO programs and activities. In December 2015, LAO launched a free mobile phone app. The app helps people to determine, through a series of questions, whether they are financially eligible for a legal aid certificate.

LAO’s Quality Service Office works with district offices, clinics, the certificate bar, duty counsel, Student Legal Aid Services Societies, and stakeholders on ways to enhance the quality of client services. Negotiations between LAO and the Law Society have been underway for some time to finalize an agreement on respective quality assurance roles and responsibilities.

Legal Aid Ontario has launched pilot projects involving paralegals as members of interdisciplinary teams in duty counsel offices.

There are many providers of legal aid – in the broad sense of legal advice and representation for people who cannot afford it – that are not part of LAO funded services. While not detailed in this report, they are a vitally important part of the Ontario legal landscape.⁶

Funding sources

LAO receives most of its funding from the Ontario government, the federal government, and the Law Foundation of Ontario. Its total revenue for the fiscal year ending March 31, 2016 was \$432,642,000.

The ability of Ontarians to receive legal aid has diminished since the 1990s. According to a 2013 presentation by the Policy and Strategic Research Department of LAO, those eligible for legal aid in 2011 were fewer than 7% of Ontarians, even though 16% were living below Statistic Canada’s low-income measure.⁷ Even if government is successful in closing this gap, this will still leave millions of low and middle-income Ontarians without the ability to afford legal services. It is for this reason the Supreme Court of Canada has repeatedly warned about the prohibitive cost to access our justice system. As the Supreme Court said in 2014, “ensuring access to justice is the greatest challenge to the rule of law in Canada today”⁸

5 Information on these strategies can be found on LAO’s website.

6 Examples include: Pro Bono Ontario, Pro Bono Students Canada, Innocence Canada, Office of the Worker Adviser, Office of the Employer Adviser, Human Rights Legal Support Centre, Faculty of law clinical programs, Barbra Schlifer Commemorative Clinic, Aboriginal Courtworker Program, Women’s Legal Education and Advocacy Fund, civil lawyers on contingency fees, Class Proceedings Fund and Class Proceedings Committee.

7 Legal Aid Ontario, Policy & Strategic Research Department, “*Legal Aid Ontario: Thinking about Legal Aid Eligibility*”, April 2013. http://www.cba.org/CBA/cle/PDF/JUST13_Slides_B1.pdf (Retrieved January 2018)

8 *Hryniak v. Mauldin*, [2014] 1 SCR 87.

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The Law Foundation of Ontario is required by statute to give LAO 75% of the interest earned on lawyers' and paralegals' mixed trust accounts after deducting the Foundation's operating expenses. The amount that the Foundation gives to LAO is highly variable due to two factors: the amount of money in trust accounts, which is driven by market factors, and interest rates, which are difficult to predict. Low interest rates have been a major contributor to reduced contributions from LFO in recent years.

Clients who have an income or own property may qualify for a legal aid certificate with a contribution agreement. This means that they will be required to repay LAO for some or all of their legal fees, which results in an additional revenue source.

Federal funding

A portion of the funds that the Ontario government gives to LAO is money it receives from the federal government. For the delivery of legal aid services in criminal, youth criminal justice, immigration and refugee law, the federal funding comes through a contribution agreement with the Department of Justice Canada. For civil legal aid, the federal contribution is made through the Canada Social Transfer (CST), administered by the Department of Finance Canada. The CST is a block transfer for a variety of social services, and it is therefore up to the province to decide how much should be set aside for civil legal aid.⁹

The Working Group heard from several stakeholders that it is not clear how much the total federal contribution is for civil legal aid or refugee matters. This undermines government accountability for legal aid and the capacity for effective advocacy by stakeholders. A recent federal Standing Committee report recommends that the federal government remove the legal aid funds currently included in the CST in favour of a specific, earmarked civil legal aid fund for provinces.¹⁰ The Working Group supports this proposal.

Federal policy changes affect the demand and therefore the expenditure levels needed for refugee legal aid services. Through negotiations, Legal Aid Ontario and justice partners were able to obtain interim funding to avert a potential stoppage in legal aid in this area. A disruption of funding could have both near and long term deleterious consequences, including the migration of highly qualified refugee lawyers to other areas where funding is more stable. The Law Society has a role to play in elevating these issues to government to ensure a stable and predictable legal aid service. Indeed, the Law Society can play a complementary role to LAO by insisting that governments consider the legal aid consequences to changes in government policy.

Financial forecasting

In 2014, the Government of Ontario announced that LAO would receive additional funding to increase the financial eligibility threshold. The following year, LAO also expanded the types of matters for which legal aid clients would be eligible, the first such expansion in over 25 years. In light of projected budget deficits for fiscal year 2016/17, the Ministry of the Attorney General engaged Deloitte to conduct a Legal Aid Ontario Review.

In the Deloitte report¹¹, issued in April 2017, LAO was commended for its forecasting of changes to financial eligibility. This was not the case for assessing the financial impact of changes to legal eligibility which was found to be "inherently more challenging." Deloitte identified opportunities for improved financial monitoring and reporting by LAO and, among other things, noted the lack of meaningful justice sector data to assist the LAO forecasters.

9 *Access to Justice part 2: Legal Aid*, Report of the Standing Committee on Justice and Human Rights, October 2017, House of Commons, Canada ("Standing Committee report"), pp.3-6.
http://publications.gc.ca/collections/collection_2017/parl/x666-1/XC66-1-1-421-16-eng.pdf (Retrieved January 2018)

10 Standing Committee report, p.6.

11 Deloitte, Legal Aid Ontario Review, on behalf of the Ministry of the Attorney General, April 26, 2017.
https://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/lao_review/ (Retrieved January 2018)

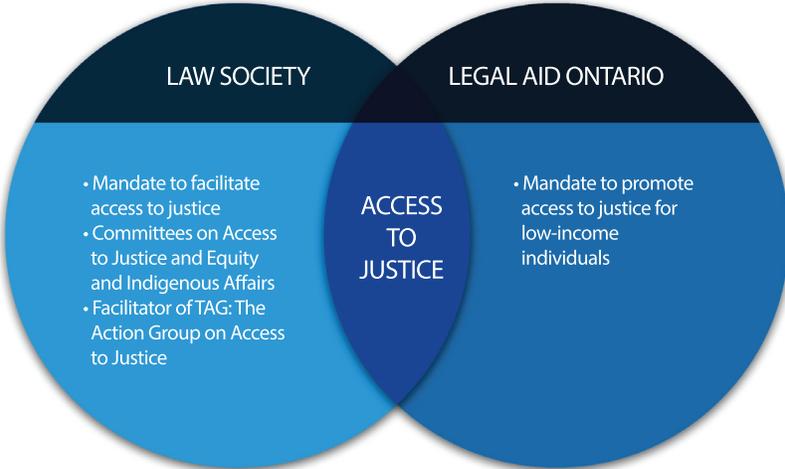
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COMPLEMENTARY ROLES: LAW SOCIETY AND LEGAL AID ONTARIO

In defining the Law Society’s role in legal aid, it is important to ensure that it complements the role of Legal Aid Ontario and other organizations and fits well with the Society’s mandate. The discussion and diagrams below indicate areas of intersection between the Law Society and Legal Aid Ontario.

Access to justice

Both the Law Society and Legal Aid Ontario are major players in access to justice in Ontario. Section 4.2 of the *Law Society Act* establishes the Society’s “duty to act so as to facilitate access to justice for the people of Ontario.” Under s.1 of the *Legal Aid Services Act, 1998*, LAO has a mandate to “promote access to justice throughout Ontario for low-income individuals.” The Law Society, with its duty to facilitate access to justice, recognises that Legal Aid Ontario is a major provider of access to justice services in the province and its daily operations provide Ontarians with much needed access that would not otherwise be possible.

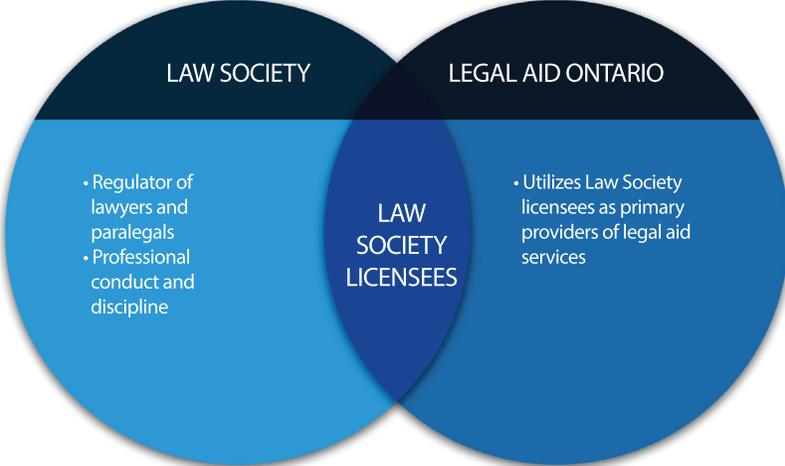


Service providers

Legal Aid Ontario utilizes Law Society licensees as its primary source of service providers, including private bar lawyers, community legal clinic lawyers, staff lawyers and duty counsel. As Legal Aid Ontario has succinctly said, “LAO could not deliver its services without the assistance of Law Society licensees.” According to statistics provided by LAO, over 5,000 members of the private bar provide certificate or per diem duty counsel services as members of one or more LAO panels. Over 840 lawyers and paralegals are employed by LAO and legal clinics.

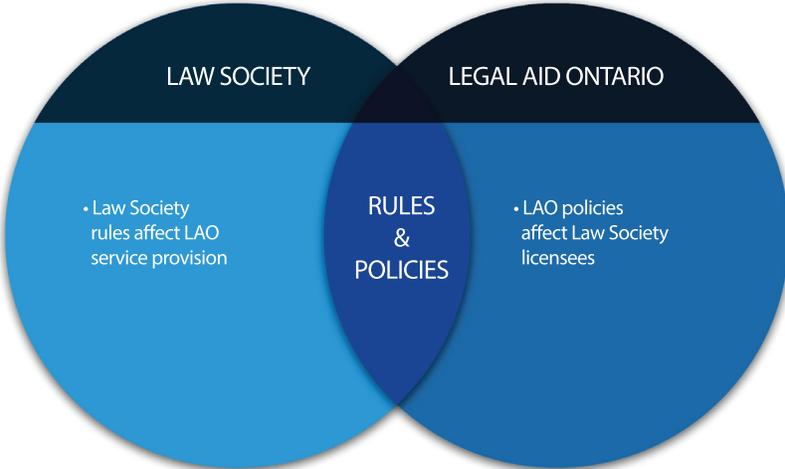
Both organizations have responsibilities regarding the competence and quality of legal services. The Law Society establishes “standards of learning, professional competence and professional conduct” for lawyer and paralegal licensees (LSA, s.4.1(a)). Legal Aid Ontario is responsible for “providing consistently high quality legal aid services” (LASA, s.1(a)).

LAO is required to have a quality assurance program “to ensure that it is providing high quality legal aid services.” (LASA, s.92). The Law Society, however, has the authority to conduct quality assurance audits of lawyers who provide legal aid services (LASA, s.92(8)).



Rules and policies

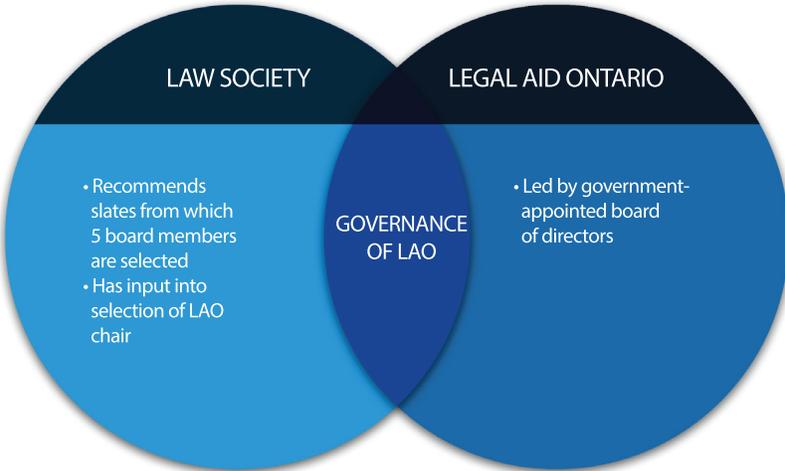
The Law Society’s rules and requirements have an impact on all licensees, including those who provide legal aid services. The nature of legal aid service provision calls for consideration of how the rules should apply in particular circumstances, such as when lawyers are performing legal aid duty counsel work, acting under legal aid certificates, or working in a community legal clinic. In turn, Legal Aid Ontario policies affect licensees working in such capacities.



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Governance of Legal Aid Ontario

Legal Aid Ontario is an independent statutory body, led by a government appointed board of directors. The Law Society makes a substantial contribution to the selection of LAO board members: it recommends slates from which five of ten board members will be selected by the Attorney General and it has input into the selection of the Chair.



Justice stakeholders and government relations

Both the Law Society and LAO connect with government and a wide range of justice sector stakeholders, often with overlapping aims.



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WHAT WE HEARD

Stakeholder views about legal aid today

Although the Legal Aid Working Group was not mandated to conduct a review of legal aid or the operations of Legal Aid Ontario, the vast majority of consultation participants offered their views on areas for improvement in the hope that the Law Society, in whatever role it may define for itself, can help to address them.

LAO culture: communication, transparency and accountability

Stakeholders are capable and willing to advocate for their own interests. However, almost everyone we spoke with raised concerns about the need for more positive relationships with LAO, more openness and transparency, and more meaningful opportunities to contribute to decision making, which appear to have eroded over the past decade. They would welcome the Law Society's assistance to improve stakeholder access to the information they need and to have their voices well heard.

There is a strongly held perception among many stakeholders that Legal Aid Ontario makes policy decisions without sufficient, genuine or early enough consultation or opportunities for discussion and debate. We heard that LAO needs to increase its accountability to stakeholders and to be much more transparent about its activities, policy making and decisions. At the same time, stakeholders are positive about recent improvements under the leadership of the new CEO and urge him to do his utmost to turn around what they perceive to have been a culture of secrecy, lack of meaningful engagement with the profession, and a focus on number crunching as opposed to access to justice impact.

These perceptions of stakeholders are in sharp contrast to the views of LAO officials, who spoke to the Legal Aid Working Group about the organization's extensive consultation activities and support for Ontario's open government principles of open data, open information, and open dialogue.

While LAO believes it is communicating effectively with stakeholders, this was not shared by the others with whom we consulted. It should be noted that the current CEO was repeatedly applauded for his attempts to rectify this perception. Many stakeholders felt that, given the arrival of the new CEO, the Law Society's review is timely and could be productive in enhancing LAO communications and consultation. Highlighted below are the principal issues that we heard about from the consultation we conducted.

A clearer understanding of how LAO spends its allocation of public funds is needed to allow for stakeholders not only to dialogue with LAO but to ensure that the larger policy issues are openly debated. While LAO has been delegated the operational responsibility to administer legal aid in Ontario, the ultimate responsibility to provide legal aid to the people of Ontario rests with the provincial legislature (with financial input from the federal government).

The Working Group heard from some stakeholders who believe that some of the operational decisions of LAO are matters that require debate at a higher level. For example, the *Legal Aid Services Act* recognizes the "private bar as the foundation for the provision of legal aid services in the areas of criminal law and family law" (see sec. 1(b)). A number of organizations commented that they believe the expansion of duty counsel and in-house LAO counsel are putting this legislative directive at risk. In particular, some see the influx of new financial commitments by the province being disproportionately spent on staff duty counsel and management rather than criminal certificates. LAO insists that this is not the case. LAO senior officials unequivocally advised the Working Group that the organization is committed to the private bar. Nevertheless, we heard repeatedly that there is a concern that duty counsel and in-house counsel are being expanded with a decrease in reliance on the private bar.

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Specific concerns raised by one or more stakeholders include lack of access to detailed board minutes, constraints on LAO advisory committees in releasing their advice and decisions, limited opportunities for stakeholders to meet with the board, and missed opportunities for collaboration.

The fact that serious communications problems are so widely perceived to exist is an indication of a problem that needs to be addressed. A potential role for the Law Society is to help focus on this issue, get at the heart of the problem, and be a partner in crafting concrete solutions. Transparency of legal aid activities and processes is essential to promote accountability and credibility among stakeholders and client groups.

Resource allocation

Some consultation participants raised concerns about the growth of middle management and staff duty counsel at LAO. Their preference is for resources to be allocated more to direct services instead of administration and to the support of service delivery by the private bar instead of staff lawyers. Additional suggestions included providing more support to the family bar, refugee cases, child protection bar, and Indigenous services; reinstating family law funding for Student Legal Aid Services Societies; and increasing the budget for LAO group applications and test cases.

Data

Some participants, particularly the academics, stressed the need for empirical data to inform legal aid decision making and to share the data in an accessible way. Access to data is linked to concerns about transparency within Legal Aid Ontario. The lack of sufficient data for LAO forecasting, identified by Deloitte in the recent legal aid review, is just one indicator of the need for improved data capacity.

Empirical data is also seen as something that could help to resolve concerns about resource allocation. For example, concrete evidence and hard numbers would help in conducting cost-benefit analyses about the relative benefits of different delivery models. It was noted that legal aid data should be disseminated in an accessible way. This would require the technical ability to aggregate and present data.

Stakeholders also noted the need for more and better data on access to justice more broadly, not just on legal aid.

Private bar

As discussed above, the legal aid statute recognizes the private bar as the foundation for the provision of criminal law and family legal aid services. Stakeholders fear, however, that a commitment to that fundamental principle appears to be eroding. The main example we heard about was the growing use of duty counsel, to the detriment of clients and the viability of the private bar.

Adequate legal aid funding and tariffs have a significant impact on access to justice. This was emphasized in the final report of the Law Society's Sole Practitioner and Small Firm Task Force. That report noted that lawyers who practise as sole practitioners or in firms of five or fewer provide the vast majority of legal aid services throughout Ontario and experience serious challenges in being able to do so.¹²

Additional concerns

In addition to the above issues, each of the concerns listed below was raised by one or more participants in the consultation. We recognize that LAO is working on some of these issues through various strategies and approaches.

12 Law Society of Upper Canada, Final Report of the Sole Practitioner and Small Firm Task Force, March 24, 2005 (considered on April 28, 2005). http://www.lsuc.on.ca/media/convmarch06_solepracfinal.pdf (Retrieved January 2018)

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- a. More attention should be paid to ensuring that Indigenous voices are heard and that services to Indigenous clients are provided by highly qualified legal aid practitioners.
- b. The family law tariffs need to be reviewed to ensure individual services are compensated fairly.
- c. More should be done to help vulnerable groups, such as racialized clients and people with mental health issues and addiction, and to expedite LAO strategies directed to vulnerable populations.
- d. There is a need to improve access to legal aid services in French, especially outside Ottawa and Toronto.
- e. LAO should make better use of technology in the provision of services.
- f. Legal Aid Ontario should place a higher priority on systemic issues and law reform that will help more disadvantaged people than individual casework can accomplish, including the systemic and law reform work of community legal clinics.

There are some who, for example, will continue to argue that anything beyond the case-by-case representation of individuals is inappropriate. To them, I would suggest that they look at the services provided by law firms to institutional clients. There you will see a major emphasis on influencing the shape and interpretation of the law, on developing preventive strategies, and on finding allies and alliances for the client's goals.

Do the poor require or deserve anything less?

— R. Roy McMurtry, "Celebrating a Quarter Century of Community Legal Clinics in Ontario",
Osgoode Hall Law Journal, Volume 35, Number 3/4 (Fall/Winter 1997)

Stakeholder ideas about the Law Society role

Consultation participants were asked for their ideas about the Law Society's role in legal aid going forward. Everyone appeared to welcome the Law Society's interest in legal aid but there were differing views expressed about the nature of the role it should assume. It was also noted that institutional support for low-income people is a natural fit with the access to justice duty that the Law Society has been given.

Each of the potential roles listed below was suggested by one or more participants in the consultation.

- a. Advocate to government for adequate legal aid funding, eligibility, and system improvements.
- b. Collaborate with LAO and stakeholders on access to justice initiatives affecting low-income populations.
- c. Engage in regular and ongoing dialogue with LAO.
- d. Serve as a bridge between the private bar and LAO to help mend what has been a somewhat strained relationship.
- e. Consult with licensees on a continuing basis to hear their views about what should be improved and ensure that all benchers understand the importance of the legal aid system.

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- f. As a regulator, focus on quality assurance regarding legal aid services provided by licensees and consider whether rule changes should be undertaken.
- g. Support engagement with the community legal clinics as a system.
- h. Consider ways to ensure that the next generation of lawyers is qualified and engaged in legal aid work.
- i. Think more about how LAO involves paralegals in its delivery of services.
- j. When nominating members to the LAO board, identify candidates who are familiar with the service, who will increase the board's diversity, and be more reflective of the low-income community.
- k. Sponsor symposia or think tanks, including events with a directed approach to Indigenous issues.

Another suggestion, mainly from academics, was to use non-lawyer resources more effectively within the legal aid program and clinic system and to recognize paths to justice outside of the formal justice system for information and advice on matters that most lawyers do not find profitable. One example cited was the UK's Citizens Advice Bureau which utilises volunteers, often retirees, from various disciplines to assist people with everyday contentious problems before the problems escalate to litigious issues.

DISCUSSION OF RECOMMENDATIONS: INVOLVEMENT IN LEGAL AID

As described earlier, there are many compelling reasons for the Law Society to become more involved in legal aid. The challenge is to define a role that complements the roles of Legal Aid Ontario and other organizations and is a good fit with the Law Society's mandate.

We recognize that Legal Aid Ontario has the statutory mandate to oversee and make policy decisions regarding legal aid. We also respect that the Legislature has delegated this role to LAO. The intention of all the recommendations is to ensure that the Law Society can play a role with stakeholders, governments, the public and Legal Aid Ontario that furthers our mutual desire to ensure a robust, transparent and sustainable system of legal aid for the people of Ontario.

The Law Society's aspiration in this area is a reflection of our history with legal aid, our intersections with legal aid and our desire to facilitate greater access to justice in the province.

Relationships

The following two recommendations aim to build a stronger relationship between the Law Society and LAO and for the Law Society to participate with LAO and stakeholders from the legal community to improve relationships and communications between them.

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Recommendations: Relationships

It is recommended that the Law Society:

- (a) Work with Legal Aid Ontario to develop a structured and ongoing process for dialogue with the LAO board and senior management to discuss matters of mutual importance in improving access to justice in Ontario.
- (b) Play a role with legal stakeholders and LAO to build stronger relationships and more open dialogue.

Dialogue with LAO

The Law Society's role as the regulator of legal professionals providing legal aid services creates an indelible link with Legal Aid Ontario. LAO has indicated that it is eager to work with the Law Society on enhancing the relationship and the natural partnership between the two organizations. LAO wishes to strengthen the ties of communication and consultation and is open to establishing a dedicated forum for regular discussion of matters of mutual importance.

It would be beneficial for Legal Aid Ontario and the Law Society to build on their historical relationship by formalizing the existing informal relationships. Communication needs to occur at the operational level, senior management and Board level. We envision Legal Aid Ontario and the Law Society instituting a more structured and regular communication at each level, including annual or bi-annual discussions with the Board.

Formal, regular meetings with Legal Aid Ontario could be used to discuss and address areas of common interest and would help to build the relationship between the two organizations. Such meetings would provide an opportunity to discuss possible areas for collaboration between the Law Society and LAO. For example, the respective quality assurance roles and responsibilities regarding licensees who provide legal aid services is a topic that needs to be further reviewed. Each organization could obtain early and valuable feedback on proposed activities of mutual interest and could discuss areas for joint access to justice initiatives. Given the intent is to be collaborative, the format, timing and structure of such meetings ought to be left for direct discussion with Legal Aid Ontario.

In its submission, LAO suggested that the Law Society's engagement could include encouraging licensees to consider legal aid work. This is a potential area for joint work by the two institutions on an area of mutual interest, since legal aid will not be robust or sustainable if there is not a cadre of legal practitioners willing and well able to do it.

We note that LAO's submission raises many other potential topics as well, which can be considered for discussion at the recommended regular meetings between the Law Society and LAO.

Facilitating constructive stakeholder relationships

A common theme in the Legal Aid Working Group's consultation was the desire for improved communication between LAO and stakeholders from the legal community. The Law Society is in a good position to play a facilitative role in helping this to occur. The Law Society would not supplant direct communication between LAO and its stakeholder groups, or advocate on their behalf. Rather, the Law Society would help to ensure that more constructive communication takes place.

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By investing more energy in its community of interest, LAO would benefit more extensively from the knowledge, experience and insight that stakeholders have to offer. And stakeholders would be better able to advocate their policy positions.

Similar to the discussion on communication between the Law Society and Legal Aid Ontario, the manner in which information flows between Legal Aid Ontario and its stakeholders needs to be a collaborative arrangement. The intent is to foster stronger relationships and more transparency so that all issues may be discussed frankly by fully informed parties.

In the spirit of reconciliation, particularly in the need to establish mutually respectful relationships with Indigenous communities, and in its role as regulator, the Law Society must work collaboratively and proactively with the Indigenous Advisory Group and Legal Aid Ontario. This work must be guided by the Law Society's Indigenous Framework and Legal Aid Ontario's Aboriginal Justice Strategy.

To understand the need for collaboration between the Law Society and Legal Aid Ontario, it is important to clarify the nexus between these organizations, which exists at the very point where licensees, whose work is funded by LAO, act in matters that involve Indigenous peoples and interests.

Understanding this nexus further requires the recognition that Legal Aid Ontario plays a central role in the provision of legal services to many Indigenous communities across Ontario; that Indigenous peoples have faced challenges with the provision of services funded by legal aid; that Indigenous people are overrepresented in their use of legal aid and in the justice system, including incarceration; that there are opportunities to enhance legal services in areas of law including but not limited to Gladue, family, criminal and child custody matters; and that there is a need to provide services specific to unique Indigenous communities, particularly in the North.

Working collaboratively with the Indigenous Advisory Group will help to ensure that the voice of indigenous communities may be effectively heard on legal aid services.

Policy development

The following three recommendations aim to involve the Law Society in facilitating public policy discussions about the need and importance of legal aid to our civil society.

Recommendations: Policy Development

It is recommended that the Law Society:

- (c) Convene public symposia on legal aid policy issues, involving a range of stakeholders, experts and sectors to explore innovative approaches and to discuss and address concerns and improvements to the legal aid system.
- (d) Champion the need for robust legal aid and share the Law Society's insights and concerns regarding legal aid with the federal and provincial levels of government, as part of the Law Society's government relations activities.
- (e) Continue to facilitate and support the work of the Alliance for Sustainable Legal Aid.

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Convening symposia

The Law Society is well positioned to act as a convenor which brings people together to discuss legal aid issues. Legal Aid Ontario would benefit from access to ideas and insights from a broader group of people through public discourse. Stakeholders would benefit from having their voices heard. Involvement of both LAO and stakeholders would help to open up lines of communication, building transparency and trust.

By convening conferences on issues associated with legal aid, much needed public focus will be generated. The Law Society could also convene a forum to generate the exchange of ideas among administrators, practitioners, academics, community groups that serve low-income and vulnerable people, and government officials.

Symposia should be planned in partnership with stakeholders. The involvement of community organizations will be essential to enhance the dialogue about access to justice, recognizing that traditional legal aid does not meet the needs of all people who find legal services unaffordable or unattainable.

Discussion topics could include those directly relevant to Legal Aid Ontario, its service providers, and people who face access to justice challenges in affording legal help.

The format of the symposia should be structured to both share research and experiences and to brainstorm constructively about potential new directions or policy modifications.

Government relations

While Legal Aid Ontario is responsible for operational policy regarding legal aid, it must be recognised that responsibility for broader legal aid policy issues ultimately rests with the Legislature and the people of Ontario. To the extent there are major policy changes proposed, we hope that improved relationships and more transparency will promote a more informed and open debate thereby resulting in optimal decision making by Legal Aid Ontario and the Ontario Government. The federal government is also a major player, especially on issues regarding federal funding levels.

As the regulator of the legal professions in Ontario, the Law Society interacts with all levels of government. In its position, the Law Society provides an informed and well-regarded voice on justice issues. More importantly, in these times of competing financial programs, the Law Society has an obligation to ensure that the importance of legal aid, including the need for stable funding, is clearly and forcefully made to both levels of government.

Often the demands for other government programs are either more popular or urgent. As such, legal aid is often neglected. Civil society requires an accessible justice system which is provided, in part, by legal aid. As noted in a report from the Legal Aid Task Force of the Law Society of British Columbia, "Legal aid is about more than systems and services, funding and programs – it is a public good."¹³ If lawyers and law societies are unable to make that understood, then it is difficult to understand who will champion this needed but often neglected public good. In Ontario, we have been fortunate that the government has made advances in making legal aid more accessible. Future governments need to be reminded about the value of legal aid so that these gains are not lost and that legal aid remains a priority.

13 Legal Aid Task Force, *A Vision for Publicly Funded Legal Aid in British Columbia*, As approved by the Benchers, March 3, 2017, p.10. <https://www.lawsociety.bc.ca/Website/media/Shared/docs/initiatives/LegalAidVision2017.pdf> (Retrieved January 2018)

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The Law Society is not alone in advocating for more resources for legal aid. For example, the Canadian Bar Association in 2016 reaffirmed its commitment to lobby for more legal aid recognizing that “publicly funded legal services are required to ensure equal participation in Canadian society.”¹⁴ In addition, there is a small but growing body of research affirming that access to legal services may in fact alleviate social costs elsewhere in our social safety net.¹⁵ As an individual’s legal problems spiral out of control, the other elements of our social safety network are left to pick-up the pieces. While research in other jurisdictions demonstrates the financial benefit of legal aid¹⁶, there is a need for more study in Canada. Legal aid needs to be seen as a social good worthy of public assistance. It is incumbent on the Law Society to ensure that the public and politicians are aware of the benefits of legal aid and the need for more legal aid assistance.¹⁷

The federal Standing Committee report, mentioned earlier, notes evidence of the significant return on investment from adequate contributions to legal aid systems. This includes social assistance and healthcare savings along with saving court time through decreases in the number of self-represented parties.¹⁸ The report also comments on the underfunding of legal aid and recommends that the federal government further increase its funding contribution.¹⁹ Family law was noted as an area of concern due to limited legal aid coverage.²⁰

The Working Group heard from both LAO and stakeholders that government policies can increase the demand for legal aid without adequate funding to support legal aid impacts.

It will also be critical to stress the importance of ensuring a robust, vibrant, independent, thriving, and sustainable private bar to provide quality legal aid services and to contribute to other access to justice activities. As mentioned earlier, a private bar is important both to the client and society’s faith in our adversarial justice system.

Proactive discussions with government can help to keep legal aid issues on government “radar” and to address emerging issues before they get to the point of crisis. For example, federal policy changes in criminal law or procedure, immigration levels, or refugee policies can have a direct impact on the required levels of legal aid funding, leading to service shortages if not anticipated and addressed.

14 Canadian Bar Association, Access to Justice Committee, *Study on Access to the Justice System – Legal Aid*, December 2016. <http://www.cba.org/CMSPages/GetFile.aspx?guid=8b0c4d64-cb3f-460f-9733-1aaff164ef6a> (Retrieved January 2018)

15 See, for example, Prairie Research Associates, *Maximizing the Federal Investment in Criminal Legal Aid*, Legal Aid Directorate, Department of Justice Canada, 2014, p. 6. http://publications.gc.ca/collections/collection_2015/jus/J2-406-2014-eng.pdf (Retrieved January 2018). And see Matthews, S. (2012). *Making the case for the economic value of legal aid: Supplemental briefing note*. Canadian Bar Association, British Columbia Branch. <https://legalaidresearch.org/wp-content/uploads/Research-Making-the-Case-for-the-Economic-Value-of-Legal-Aid-Sharon-Mathews.pdf> (Retrieved January 2018)

16 See for example, Florida Tax Watch, *The Economic Impact of Legal Aid Services in the State of Florida*, February 2010. <https://fbfcdn-lwncgfpypgomdk2qxt0e.stackpathdns.com/wp-content/uploads/2015/04/floridalegalaideconomicimpactstudy2010.pdf> (Retrieved January 2018)

17 For a review of the studies on the economic and social benefits of legal aid, see “Return on Investment for Legal Aid Spending” in Canadian Bar Association, *Equal Justice: Balancing the Scales*, 2013, p.55. http://www.cba.org/CBAMediaLibrary/cba_na/images/Equal%20Justice%20-%20Microsite/PDFs/EqualJusticeFinalReport-eng.pdf (Retrieved January 2018)

18 Standing Committee report, pp.1, 7-9, 24.

19 Standing Committee report, pp.9-11.

20 Standing Committee report, pp.12-13.

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A stronger role in government relations would respond to views presented by stakeholders that the Law Society should expand its direct engagement with both LAO and the government on legal aid matters and be willing to expend some of its significant political capital to ensure that adequate funding continues to flow for legal aid.

Continuing to facilitate ASLA

The Law Society facilitates the Alliance for Sustainable Legal Aid (ASLA). ASLA is comprised of organizations with an active interest in legal aid, many of whom represent leading legal service provider groups.

Alliance for Sustainable Legal Aid	
<ul style="list-style-type: none">· Association of Community Legal Clinics of Ontario· Criminal Lawyers' Association· Family Lawyers Association· Federation of Ontario Law Associations	<ul style="list-style-type: none">· Law Society of Ontario· Ontario Bar Association· Refugee Lawyers Association· The Advocates' Society· Mental Health Legal Committee

LAO has suggested that the Law Society could expand on its work in coordinating ASLA, acting as a coordinator for collaborative efforts to support legal aid.

Discussions with ASLA could include ways to broaden the diversity of its membership to include Indigenous and other voices that are underrepresented at the table but overrepresented in terms of legal aid clients. In addition, discussions with ASLA and with Legal Aid Ontario could include the issue of how to include Indigenous, racialized and other voices into legal aid policy making and decision making more broadly.

Appointments to LAO board

The following two recommendations aim to clarify the Law Society's goals in recommending appointments to the LAO board of directors and to create a protocol for interaction with appointees.

Recommendations: Appointments to LAO board

It is recommended that the Law Society:

- (f) Ensure that its recommendations for appointment to the LAO board include nominees who are experienced in the legal aid system, including the clinic system and the private legal aid bar.
- (g) Develop a protocol for LAO board members recommended by the Law Society to play a role in keeping communications flowing between the two organizations to strengthen the capacity to address legal aid issues, in a way that does not conflict with the board members' fiduciary obligations.

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Recommending appointments

Legal Aid Ontario and stakeholders have acknowledged that the Law Society makes a substantial contribution to the selection of LAO board members by recommending slates from which five board members will be selected by the Attorney General and through its input into the selection of LAO's Chair.

LAO and stakeholders have further suggested that the Law Society can help to ensure that the board has members who understand legal aid and the legal aid system and who better reflect the diversity of Ontario's population.

Some stakeholders have pointed out that LAO has no board member who has worked in a community legal clinic or served on a clinic board of directors, despite the statutory intent for the board to include knowledge, skills and experience of "the operation of clinics."²¹

The Legal Aid Working Group agrees with the assessment of LAO and stakeholders that the Law Society has a role to play in ensuring the LAO board has voices from people who have intimate knowledge about the provision of legal aid services. This can be done in a way to provide the benefits of relevant expertise while avoiding actual or perceived conflicts of interest.

We also agree with the need to make recommendations that are consistent with the Law Society's diversity policies. The Law Society is well positioned to make this a reality through the Treasurer's Appointments Advisory Group, established in September 2016 to promote diversity and enhance transparency in the Law Society's procedures for making or recommending external appointments.

Protocol on communication with appointees

At present there does not appear to be any scope for the Law Society to communicate about legal aid with members of the LAO board who had been recommended for appointment by the Law Society. The concern is with breaching the fiduciary responsibilities of the board members to LAO, and expectations of strict confidentiality.

This is a missed opportunity for the Law Society to gain insight into legal aid issues which could inform its own access to justice and legal aid related activities. A protocol, agreed to by the Law Society, Legal Aid Ontario and government, could achieve a balance among competing interests.

Data

The following recommendation relates to the need for improved collection and use of data.

Recommendation: Data

It is recommended that the Law Society:

- (h) Encourage the collection of data, including disaggregated demographic data, to ensure greater transparency in legal aid and to promote more evidence based research and policy development.

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Data is critical to inform policy and operational decisions. The Law Society should work with LAO and others to develop strategies for the identification, collection and sharing of data to better understand problems, causes and potential solutions for legal aid. The Law Society is ideally suited to convene a discussion with the justice players from government to the courts to legal aid to the academy to determine how best to ensure the collection and dissemination of data.

Disaggregating demographic data by race, gender, disability and other factors can help to demonstrate specific needs and impacts on specific population groups.

Some concerns people have raised about the current state of legal aid are based on anecdote. The availability of more hard data would serve both LAO and stakeholders well as new directions and policies are developed. As found by Deloitte in its recent review, additional data would also benefit LAO in its efforts to improve financial forecasting.

Quantitative and other research may be warranted on some topics that arose during the consultation, such as serving clients who are vulnerable due to mental health or other issues and evaluating different methods of service delivery. Data can also document access to justice gaps that cannot be filled by traditional legal aid.

Sharing data more broadly would be consistent with the Ontario government's open data policy and would contribute to the principle of transparency as advocated during the Legal Aid Working Group's consultation discussions. In its submission, LAO has suggested that the Law Society can play a role in encouraging justice system data-sharing which could be crucial to the success of reform initiatives.

The chair of the Legal Aid Working Group spoke with the head of the Institute for Clinical Evaluative Sciences ("ICES") on the broader issue of justice data. ICES conducts studies that evaluate health care delivery and outcomes, accessing a vast array of Ontario's health-related data. They do a broad range of interdisciplinary studies but indicated that no appreciable work has been done with the justice sector, apart from a study with Corrections data relating to head trauma and incarceration. Resources such as ICES should be consulted as necessary.

It is beyond the scope of this Working Group to recommend the types of data or research partnerships that could be undertaken. However, the general availability of data is something the Law Society could facilitate by bringing the necessary parties together to explore the issue. It should be noted that data does exist with Statistics Canada as an amalgam of data from federal and provincial ministries.

We also note that the recent federal Standing Committee report on legal aid has highlighted the need to improve legal aid data collection on a national basis. It recommends collaborative efforts to improve national data collection on the administration and delivery of legal aid in Canada.²²

Report of the Legal Aid Working Group: An Abiding Interest.

DISCUSSION OF RECOMMENDATIONS: IMPLEMENTATION ROLES

The Legal Aid Working Group's final recommendation addresses implementation roles within the Law Society committee structure.

Recommendation: Implementation Roles

It is further recommended that:

- (a) The Access to Justice Committee assume responsibility for implementing the above recommendations and for maintaining a vigilant role in ensuring effective legal aid strategies for the Law Society.
- (b) The Government and Public Affairs Committee work with the Access to Justice Committee on implementation of the recommendations, with special attention to government relations, stakeholder relations, and the continuing role of the Law Society in legal aid.
- (c) The Access to Justice and Government and Public Affairs Committees work closely with the Law Society's Indigenous Advisory Group in ensuring that Indigenous voices are heard on issues relating to legal aid services.
- (d) The Treasurer's Appointments Advisory Group take the lead in implementing recommendations regarding the Law Society's role in recommending appointees to the LAO board.
- (e) The Access to Justice committee identify the impact on resources of implementing the recommendations, in consultation with the Audit and Finance Committee.

The Legal Aid Working Group has completed its task. This raises the question of where ongoing leadership and implementation responsibilities for the legal aid role should reside within the Law Society structure.

The Access to Justice Committee is a natural fit to assume primary responsibilities for implementing the recommendations and leading the Law Society's ongoing role in legal aid.

The Government and Public Affairs Committee would be the appropriate group to lead components involving interaction with the provincial and federal governments and stakeholders. In addition, the Government and Public Affairs Committee has been the traditional Law Society point of contact with LAO and the Alliance for Sustainable Legal Aid (ASLA).

Because of the disproportionate impact of legal aid on Indigenous individuals and communities relative to non-Indigenous populations there should be a nexus, qualified by collaboration, between the Indigenous Advisory Group, taking guidance from the Indigenous Framework, and the work of the Law Society, to be monitored and advanced through the Access to Justice and Government and Public Affairs Committee.

The Treasurer's Appointments Advisory Group, established last year, is well positioned to implement recommendations regarding the appointment process.

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Resource requirements will depend on the nature and scale of any future recommendations regarding legal aid from the Access to Justice Committee or Government and Public Affairs Committee and will be assessed at that time.

CONCLUSION

Ontario is fortunate in having a formal legal aid program that includes private bar services, a rich array of community legal clinics, student legal aid societies, and other components. In addition to providing much needed services for vulnerable persons, research shows that investment in legal aid saves substantial time and costs in the provision of other social and justice services. Everyone with whom we spoke agrees that the Law Society's voice matters. With the Law Society's stature and authority comes responsibility. We need to continue to define how we want to engage in legal aid and to do so diligently and wholeheartedly. Approval of this report from the Legal Aid Working Group will mark the beginning of a new chapter in the evolution of the Law Society's role and involvement in legal aid.

Submitted to Convocation with unanimous support from the Legal Aid Working Group:

John Callaghan, Chair
Peter Beach
Suzanne Clément
Paul Cooper
Julian Falconer
Avvy Go
Howard Goldblatt
Janet Leiper
Marian Lippa
Susan McGrath
Susan Richer

Report of the Legal Aid Working Group: An Abiding Interest.

APPENDIX A: Legal Aid Working Group

Terms of Reference

The Law Society of Upper Canada Legal Aid Working Group (the “Working Group”) will:

- (i) inform and educate itself on the legislative framework for Ontario’s current legal aid model, how Legal Aid Ontario (“LAO”) currently administers Ontario’s legal aid program, and on recent developments in Ontario regarding the delivery of legal aid, utilizing a variety of resources;
- (ii) consider these developments in light of LAO’s requirement to promote access to justice throughout Ontario for low-income individuals, including in accordance with its objects prescribed by the *Legal Aid Services Act, 1998, S.O. 1998, c.26 at s.4*;
- (iii) identify opportunities for engagement and enhancing the Law Society’s relationship with LAO, ASLA, government and other justice system and community services partners in accordance with and further to the Law Society’s functions and duties respecting competence, access to justice, the rule of the law and the public interest, as prescribed in the *Law Society Act, RSO 1990, c. L.8, ss. 4.1 and 4.2*;
- (iv) explore opportunities for robust and sustainable legal aid services for Ontarians; and
- (v) create a Work Plan for the Working Group that will include:
 - (a) a project plan outlining key steps, timing and necessary operational resources;
 - (b) budget as required; and
 - (c) the provision of reports to Convocation as appropriate beginning in 2017.

Members

John Callaghan, Chair; Peter Beach; Suzanne Clément; Paul Cooper; Julian Falconer; Avvy Go; Howard Goldblatt; Janet Leiper; Marian Lippa; Susan McGrath; Susan Richer

Announcement

Law Society announces Legal Aid Working Group

Treasurer Paul Schabas announced the formation of a Legal Aid Working Group that will focus on the provision of legal aid in order to support and enhance the delivery of robust and sustainable legal aid services for Ontarians. Led by Bencher John Callaghan, the group will also identify opportunities for engagement and enhancing the Law Society’s relationship with Legal Aid Ontario and the Alliance for Sustainable Legal Aid. It will also seek to involve government and other justice system and community services partners.

Convocation News, Nov 9, 2016

Report of the Legal Aid Working Group: An Abiding Interest.

APPENDIX B: Consultation participants

The Legal Aid Working Group conducted consultation meetings from mid-November 2016 through October 2017. This involved over 40 people from a variety of justice stakeholder organizations.

Academics

- Les Jacobs, Professor, Department of Social Science, York University
- Janet Mosher, Professor, Osgoode Hall Law School, York University
- Michael Trebilcock, Professor, Faculty of Law, University of Toronto

l'Association des juristes d'expression française de l'Ontario

- François Dulude

Alliance for Sustainable Legal Aid (ASLA) and Association of Community Legal Clinics of Ontario (ACLCO)

- Lenny Abramowicz, Chair of ASLA and Executive Director of ACLCO

Community Legal Education Ontario

- Julie Mathews, Executive Director

Criminal Lawyers' Association

- Anthony Moustacalis, President
- Michael Mandelcorn, Board Member
- Sam Boutzouvis, Provincial Director
- Andrew Furguele, Director in Toronto region

Family Lawyers Association

- Katharina Janczaruk, Chair
- Julia Vera, Board Member

Federation of Ontario Law Associations

- Michael Ras, Executive Director
- Jane Robertson, Chair, Legal Aid Committee

Friends of the Community Legal Clinics

- George Thomson, Chair

Historical perspective

- W.A. Derry Millar, former Law Society Treasurer and current LAO board member

Income Security Advocacy Centre

- Mary Marrone, Director of Advocacy and Legal Services

Indigenous Advisory Group

- Kathleen Lickers, Chair
- Senator Constance Simmonds
- Chief Myeengun Henry

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Law Commission of Ontario

- Aneurin Thomas, Executive Director

Law Foundation of Ontario

- Tanya Lee, Chief Executive Officer
- Judy Mark, Director, Strategic Finance & Administration

Legal Aid Ontario

- John McCamus, Chair
- David Field, CEO
- David McKillop, VP, Policy and Research
- Kathleen Murphy, Director, Communications and Stakeholder Relations

Ministry of the Attorney General

- Ali Arlani, Assistant Deputy Attorney General, Agency and Tribunal Relations Division

Ontario Bar Association

- Christopher Cheung, Director, Policy and Public Affairs
- Steve Pengelly, Executive Director & Counsel
- Daniel G. Goldbloom, Criminal Justice Section Executive
- Robert Shawyer, Family Law Section Executive

Mental Health Legal Committee

- Marshall Swadron, Chair

Refugee Lawyers Association

- Raoul Boulakia, President

Student Legal Aid Service Societies

- Lisa Cirillo, President, Association for Canadian Clinical Legal Education and Executive Director, Downtown Legal Services Clinic, University of Toronto
- Doug Ferguson, Executive Director, Community Legal Services Clinic, Western University

The Action Group on Access to Justice

- Sabreena Delhon, Manager

The Advocates' Society

- Alexandra M. Chyczij, Executive Director,
- Dave Mollica, Director of Policy and Practice
- Jessyca Greenwood, Partner, Greenwood Lam LLP

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In March 2017, members of the Legal Aid Working Group conducted a tour of community legal clinics and met with representatives from various clinics.

Tour of Community Legal Clinics
<p>Specialty clinics</p> <ul style="list-style-type: none">· Metro Toronto Chinese & Southeast Asian Legal Clinic· Advocacy Center for Tenants Ontario· Canadian Environmental Law Association· Justice for Children and Youth· HIV & AIDS Legal Clinic Ontario· Income Security Advisory Centre· ARCH Disability Law Centre· Industrial Accidents Victims Group of Ontario <p>General service clinic</p> <ul style="list-style-type: none">· Neighbourhood Legal Services

In September, 2017, representatives of the Legal Aid Working Group met on two occasions with the Law Society's Equity Advisory Group.

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APPENDIX C: Excerpts from Law Society Act and Legal Aid Services Act

From the *Law Society Act*

Function of the Society

- 4.1 It is a function of the Society to ensure that,
- (a) all persons who practise law in Ontario or provide legal services in Ontario meet standards of learning, professional competence and professional conduct that are appropriate for the legal services they provide; and
 - (b) the standards of learning, professional competence and professional conduct for the provision of a particular legal service in a particular area of law apply equally to persons who practise law in Ontario and persons who provide legal services in Ontario. 2006, c. 21, Sched. C, s. 7.

Principles to be applied by the Society

- 4.2 In carrying out its functions, duties and powers under this Act, the Society shall have regard to the following principles:
1. The Society has a duty to maintain and advance the cause of justice and the rule of law.
 2. The Society has a duty to act so as to facilitate access to justice for the people of Ontario.
 3. The Society has a duty to protect the public interest.
 4. The Society has a duty to act in a timely, open and efficient manner.
 5. Standards of learning, professional competence and professional conduct for licensees and restrictions on who may provide particular legal services should be proportionate to the significance of the regulatory objectives sought to be realized. 2006, c. 21, Sched. C, s. 7.

From the *Legal Aid Services Act, 1998*

Purpose

1. The purpose of this Act is to promote access to justice throughout Ontario for low-income individuals by means of,
- (a) providing consistently high quality legal aid services in a cost-effective and efficient manner to low-income individuals throughout Ontario;
 - (b) encouraging and facilitating flexibility and innovation in the provision of legal aid services, while recognizing the private bar as the foundation for the provision of legal aid services in the areas of criminal law and family law and clinics as the foundation for the provision of legal aid services in the area of clinic law;
 - (c) identifying, assessing and recognizing the diverse legal needs of low-income individuals and of disadvantaged communities in Ontario; and
 - (d) providing legal aid services to low-income individuals through a corporation that will operate independently from the Government of Ontario but within a framework of accountability to the Government of Ontario for the expenditure of public funds. 1998, c. 26, s. 1.

....

Objects

4. The objects of the Corporation are,
- (a) to establish and administer a cost-effective and efficient system for providing high quality legal aid services to low-income individuals in Ontario;
 - (b) to establish policies and priorities for the provision of legal aid services based on its financial resources;
 - (c) to facilitate co-ordination among the different methods by which legal aid services are provided;

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- (d) to monitor and supervise legal aid services provided by clinics and other entities funded by the Corporation;
- (e) to co-ordinate services with other aspects of the justice system and with community services;
- (f) to advise the Attorney General on all aspects of legal aid services in Ontario, including any features of the justice system that affect or may affect the demand for or quality of legal aid services. 1998, c. 26, s. 4.

....

Board of directors

- 5. (1) The affairs of the Corporation shall be governed and managed by its board of directors.

Composition

- (2) The board of directors of the Corporation shall be composed of persons appointed by the Lieutenant Governor in Council as follows:
 - 1. One person, who shall be the chair of the board, selected by the Attorney General from a list of persons recommended by a committee comprised of the Attorney General or a person designated by him or her, the Treasurer of the Law Society or a person designated by him or her and a third party agreed upon by the Attorney General and the Treasurer of the Law Society or persons designated by them.
 - 2. Five persons selected by the Attorney General from a list of persons recommended by the Law Society.
 - 3. Five persons recommended by the Attorney General.

Non-voting member

- (3) The president of the Corporation shall be a non-voting member of the board.

Criteria for selection

- (4) In selecting and recommending persons under paragraphs 2 and 3 of subsection (2), the Attorney General shall ensure that the board as a whole has knowledge, skills and experience in the areas that the Attorney General considers appropriate, including the following areas:
 - 1. Business, management and financial matters of public or private sector organizations.
 - 2. Law and the operation of courts and tribunals.
 - 3. The special legal needs of and the provision of legal services to low-income individuals and disadvantaged communities.
 - 4. The operation of clinics.
 - 5. The social and economic circumstances associated with the special legal needs of low-income individuals and of disadvantaged communities.

Same

- (5) The Attorney General shall ensure that the persons selected and recommended under paragraphs 2 and 3 of subsection (2) reflect the geographic diversity of the province.

Majority non-lawyers

- (6) The majority of the appointed members of the board shall be persons who are not lawyers.

No more than three benchers

- (7) No more than three of the appointed members of the board shall be benchers of the Law Society.

Chair

- (8) The chair of the board shall designate another appointed member of the board to act as chair in his or her absence and, if the chair fails to designate a person, or if the designated person is also absent, the other appointed members of the board shall designate a person to act as chair in the absence of the chair.

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Quorum

(9) A majority of the appointed members of the board constitutes a quorum.

Vacancies

(10) If a position on the board becomes vacant, a person shall be appointed to fill the vacancy under the same provision that the person whose position is being filled was appointed and, until the replacement appointment is made, the board may continue to act.

Same

(11) An appointment to fill a vacancy may be for the remainder of the term of the member being replaced or for a full term, as may be considered appropriate by the Lieutenant Governor in Council.

Remuneration

(12) The Corporation shall pay the appointed members of the board remuneration and expenses as determined by the Lieutenant Governor in Council. 1998, c. 26, s. 5.

....

Quality assurance program

92. (1) The Corporation shall establish a quality assurance program to ensure that it is providing high quality legal aid services in a cost-effective and efficient manner.

Quality assurance audits

(2) For the purpose of subsection (1) and subject to subsection (8), the Corporation may conduct quality assurance audits of the service-providers, clinics, student legal aid services societies or other entities funded by the Corporation that provide legal aid services.

Powers

(3) For the purpose of conducting a quality assurance audit, an employee of the Corporation may enter the office of a service-provider who is providing or has provided legal aid services, or the office of a clinic, student legal aid services society or other entity funded by the Corporation, during normal business hours and on notice to the service-provider, clinic, society or other entity, and may, despite subsections 37 (3) and (4), review their records with respect to the provision of legal aid services.

Co-operation required

(4) Every student and service-provider, and every employee of a clinic, student legal aid services society or other entity funded by the Corporation shall co-operate with the employee of the Corporation or of the Law Society conducting a quality assurance audit even if that requires the production of information or documents that are privileged or confidential.

Privileged preserved for other purposes

(5) Subsections (3) and (4) do not negate or constitute a waiver of a privilege.

Confidentiality

(6) The Corporation and its employees shall keep confidential any information obtained in a quality assurance audit.

Same

(7) The Corporation and its employees are governed by the rules of solicitor-client confidentiality with respect to any legal communications obtained in a quality assurance audit.

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Law Society to conduct audits of lawyers

(8) The Corporation shall not itself conduct quality assurance audits of lawyers who provide legal aid services but shall direct the Law Society to conduct those quality assurance audits.

Law Society may conduct other audits

(9) The Corporation may delegate to the Law Society its power to conduct quality assurance audits on the persons listed in subsection (2), or any of them.

Law Society's audits governed by regulations

(10) The Law Society shall conduct quality assurance audits under a direction or delegation under this section, as directed or delegated by the Corporation and in accordance with the regulations.

Reimbursement

(11) The Law Society shall be reimbursed by the Corporation for its costs of conducting quality assurance audits.

Report to Corporation

(12) The Law Society shall report to the Corporation on the quality assurance audits conducted by it, as directed or delegated by the Corporation and in accordance with the regulations, and shall include in its reports the information required by the direction, delegation or regulations, whether or not such information is governed by the rules of solicitor-client confidentiality, but shall not disclose any information that is subject to solicitor-client privilege.

Same

(13) Subsections (3), (4) and (5) apply with necessary modifications to the Law Society and its employees with respect to quality assurance audits of lawyers in the same manner as they apply to the Corporation and its employees. 1998, c. 26, s. 92.



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