



SOCIETY *of*
UNITED PROFESSIONALS
IFPTE 160

BILL 161 SUBMISSION TO THE STANDING COMMITTEE ON JUSTICE POLICY



INTRODUCTION:

The Society of United Professionals represents approximately 400 legal aid staff lawyers and articling students working at Legal Aid Ontario (LAO). Our bargaining unit consists of research counsel, policy counsel, and family, criminal and immigration counsel – all of whom provide a much needed service to some of the province’s most vulnerable people. In addition, the Society represents legal aid clinic staff from the Chinese and Southeast Asian Legal Clinic, Aboriginal Legal Services and Willowdale Community Legal Services.

The Society of United Professionals welcomes the opportunity to share the concerns of our members on the impact Bill 161 would have on their work, as well as on the vulnerable Ontarians who rely on legal aid services. Our submission on Bill 161 focuses on Schedules 15 and 16, and the impacts the proposed changes in these schedules will have on the work of Legal Aid Ontario and the work of community and specialty legal clinics across the province.

We share the interests of Legal Aid Ontario and of the Attorney General of Ontario in ensuring the long-term effectiveness of Legal Aid Ontario, and in providing high-quality, cost-effective assistance to low-income Ontarians. However, we have serious concerns about Bill 161, and the impact it will have on the ability of our legal aid system to provide access to justice for vulnerable Ontarians.

While this submission will focus on Schedules 15 and 16, the Society is concerned that measures throughout the bill will negatively impact access to justice in Ontario. It is the Society’s position that Ontario should be actively improving access to justice, not hindering it. As such, we are fully opposed to Bill 161, and believe that the government should not move forward with this legislation. However, if this bill is to proceed, the Society strongly urges the committee to remove Schedules 15 and 16 from the legislation.

IMPACTS OF BILL 161 ON LEGAL AID ONTARIO

FUNDAMENTAL CHANGE TO THE PURPOSE OF LASA

The Society is deeply troubled by changes to the Purpose clause of the Legal Aid Services Act (2019). The new purpose clause removes the phrase “access to justice” in defining the fundamental purpose of the Legal Aid Services Act. Additionally, the new Purpose clause removes the subsection of LASA (1998) which references “identifying, assessing and recognizing the diverse legal needs of low-income individuals and of disadvantaged communities in Ontario” as a fundamental purpose of the legislation. Instead, the new Purpose clause includes, as an explicit priority, the goal of “ensuring value for money.”

In its current form, Legal Aid Ontario already provides outstanding value for Ontario taxpayers, without compromising access to justice. Studies show that, on average, every \$1 spent on legal aid ultimately saves \$6 in expenditures on other social services¹. If the Government is serious about providing the best value for Ontario’s taxpayers, rather than proceed with this bill, it should restore the more than \$130 million it cut from LAO’s budget in 2019.

¹ Canadian Bar Association, 2013. “Reaching Equal Justice Report: An Invitation to Envision and Act”.
http://www.cba.org/CBAMediaLibrary/cba_na/images/Equal%20Justice%20-%20Microsite/PDFs/EqualJusticeFinalReport-eng.pdf



The current version of the Legal Aid Services Act (1998) makes clear the intent that access to justice be made available to Ontarians regardless of their ability to pay or other systemic barriers to justice facing disadvantaged communities. Replacing this purpose with the purpose of providing value for money undermines the core principles on which Ontario's legal aid system is based, and would only serve to hinder access to justice for the vulnerable Ontarians who depend on that system.

On December 13, 1996, then-Attorney General Charles Harnick, established the Ontario Legal Aid Review ("the Review"), an independent task force to be chaired by Professor John McCamus, a former Dean of Osgoode Hall Law School. The result of the Review was the publication of the 1997 report, "A Blueprint for Publicly Funded Legal Services" ("the McCamus Report").

The McCamus Report laid the groundwork for the Legal Aid Services Act, 1998 and the establishment of Legal Aid Ontario. The McCamus report emphasized that "the fundamental objective of the legal aid system should be to promote equal access to justice by identifying and meeting the diverse legal needs of qualifying individuals and communities."²

Ensuring value for money is a worthwhile and important operational goal for any agency of government, but Bill 161, as currently drafted, conflates an important operational goal with a fundamental purpose. The purpose clause of a piece of legislation is not simply a rhetorical or political statement. It has pragmatic implications, both as an important signal to decision-makers and policy-setters – board and management – about questions of budget allocation and policy, and as a guide to the interpretation of other parts of the Act.

By removing reference to access to justice in the Purpose clause, Bill 161 serves to undermine Legal Aid Ontario's core principles, as emphasized by the McCamus report. There should be no version of LASA in which Access to Justice and "identifying, assessing and recognizing the diverse legal needs of low-income individuals and of disadvantaged communities in Ontario" are not included as part of the fundamental purpose of the act.

FROM "SHALL" TO "MAY" – STRIPPING THE LAO MANDATE

The language used in LASA 1998 provides a clear mandate for Legal Aid Ontario (referenced in legislation as "the Corporation") in defining the services that LAO will provide:

"The Corporation shall provide legal aid services in the areas of criminal law, family law, clinic law and mental health law." (LASA 1998)

Section 4 of Schedule 16 of Bill 161, which enacts the new LASA (2019), however, replaces this clear mandate with a significantly weakened version:

"The Corporation may, subject to the regulations, provide legal aid services in the following areas of law:

1. Criminal law.
2. Family law.
3. Poverty law, being law in relation to housing and shelter, income maintenance or social assistance.

² <https://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/trebilcock/section2.php>



4. Child protection law.
5. Human rights law.
6. Health law, including mental health law.
7. Employment law.
8. Education law.
9. Immigration and refugee law” (LASA 2019)

While such a small change – from “shall” to “may” – may seem innocuous, members of this committee would understand that for legislative purposes this simple change provides for a radically different LAO mandate.

No longer required to provide the services mandated in LASA (1998), the new legislation simply outlines a list of service areas in which LAO may provide services. This, in conjunction with the new Purpose clause, suggests that LAO’s mandate is no longer to provide access to justice for all who qualify, but rather to choose what services to provide on the basis of achieving the best value for money.

Should LAO determine that it can provide better “value for money” through focusing only on criminal law, for example, and cease providing family law legal services, it could do so under the proposed legislation.

Additionally, the new LASA (2019) shifts the LAO mandate from an *inclusive* list of service areas (in that it mandates that LAO shall provide legal aid services in the prescribed areas, but does not limit the services provided to those areas) to an *exclusive* list of service areas (in that LASA (2019) explicitly lists all service areas in which LAO may provide services).

This seemingly minor change has significant repercussions on Legal Aid Ontario’s work, and its ability to provide access to justice for vulnerable Ontarians.

CHANGES TO GOVERNANCE STRUCTURE

Bill 161 proposes to remove an element of independence from Legal Aid Ontario by altering the composition of LAO’s Board of Directors to potentially include more government appointees than those put forward by the Law Society of Ontario. Presently, LASA (1998) provides for a board structure that includes an even split between members appointed by the Attorney General (5), and members appointed from a list provided by the Law Society (5), with the chair being appointed through a list of recommendations from the Attorney General, the Law Society, and a third person agreed to by both parties.

This board structure, while not perfect, allows for some balance between government appointees and appointees recommended by the Law Society. And, with a quorum requirement of a simple majority, means that neither party can reach quorum with only their appointees.

The changes proposed in Bill 161 would change the current Board appointee structure with one that requires only a minimum of 3 (to a maximum of 5) appointees to be recommended by the Law Society. This allows the government to appoint up to 8 members of the 11-member Board, including the chair, providing political appointees with a permanent majority, and quorum, on the Board.

The previously cited McCamus Report stated clearly: “The legal aid system's governance structure must be one that will attract public credibility and legitimacy and will have the capacity to effectively discharge its mandate in the public interest.”



Independence from the Ministry of the Attorney General is essential. There must not be a conflict of interest, nor the appearance of a conflict of interest. Legal Aid Ontario is responsible for appearing against the Ministry of the Attorney General in court rooms across Ontario. LAO must implement policies, procedures, and take actions that will challenge MAG and other government bodies. Independence is essential.

A situation where the majority of the board is appointed directly by the Attorney General will not achieve the appearance of propriety. Regardless of the ultimate size of the Board, it is essential that the legislation maintains the critical balance between government appointees and LSO appointees.

Additionally, Bill 161 provides the Board of Directors the ability to establish rules respecting the provision of legal aid services, including non-financial eligibility requirements, among other provisions, on only the condition that the proposed rule change be posted on the Corporation's website for a 14-day period. To be effective, consultation must be meaningful, rather than pro forma. This unnecessarily brief constraint on the time allowed for consultations would place an onerous, if not impossible, burden on a number important community and organizational stakeholders, many of whom do not have sufficient staff and operational resources to meaningfully engage in such short-notice processes.

The lack of meaningful consultation on changes to rules that guide the provision of legal aid services will only serve to reduce transparency at Legal Aid Ontario, and further empower the government-controlled Board of Directors.

ADVISORY COMMITTEES

Section 7 of LASA (1998) states that the LAO Board must “establish advisory committees in the areas of criminal, family and clinic law,” and also gives the Board authority to create advisory committees in any other area it considers appropriate.

Under this provision, Legal Aid Ontario has established advisory committees in the areas of Aboriginal Issues, Clinic Law, Criminal Law, Family Law, French Language Services, Immigration and Refugee Law, Mental Health, Prison Law, and Racialized Communities.

Legal Aid Ontario is charged with delivering legal services in a wide range of practice areas to an extremely diverse population of clients. Advisory committees are responsible for reviewing and providing input on proposed service priorities and initiatives that are being considered for the next LAO business plan.

Advisory committees also report to the Board on any other issues that affect access to justice for low-income Ontarians or that inform the development of longer-term strategic and business planning.³

The composition of Board advisory committees reflects a range of perspectives and experiences that would otherwise be unrepresented in the strategic and business planning process, including:

- representation reflective of Ontario's demographically diverse population, including representation by qualified individuals from Indigenous, Black, and other racialized communities
- representation reflective of LAO's diverse client groups, as well as the most marginalized and vulnerable groups who interact with the justice system
- former clients/users of LAO services

³ <https://www.legalaid.on.ca/more/corporate/board-advisory-committees/terms-of-reference-of-the-legal-aid-ontario-advisory-committees/>



- individuals who have worked in community organizations providing services to the same clientele
- geographic representation from across the province;
- academic experts in the relevant area(s) of law as appropriate

At the time of the drafting of the McCamus report, as now, the question of prioritizing delivery of legal services to low income Ontarians at a time of declining resources was recognized as a key consideration in the design of legal aid service delivery. While the report identified a number of considerations to inform the process of priority setting, the first and perhaps most important consideration identified was “the importance of consultation and environmental scanning of needs”: “In our view, however, the overall legal aid system requires a more systematic and consultative approach to needs assessment and must establish appropriate institutional mechanisms for accomplishing that objective.”⁴

Board advisory committees have evolved over the last two decades as one of the most important of these “institutional mechanisms” and their importance remains as great today as it has ever been. The new LASA (2019) as written in Bill 161 does not have any language around the creation or maintenance of these advisory committees. The Society believes that it is critical that LAO maintain these committees and seek advice and opinions beyond the Board of Directors. If there is to be any change to the status of Board advisory committees in the legislation, particularly in the context of increasing societal recognition and concern over the role of systemic racism in the justice system, it should be to explicitly mandate current non-compulsory advisory committees, such as the Racialized Communities Advisory Committee and Aboriginal Issues Advisory Committee, alongside the criminal, family and clinic law committees.

CHANGES TO COURT ORDERED APPOINTMENTS

Schedule 15, Section 39.1(3) of Bill 161 states:

“Despite any order of a court requiring that the cost of providing services under this section to an individual be borne by the Attorney General of Ontario or the Crown in right of Ontario, the cost of providing the services shall be borne by the Corporation.”

This new language contradicts the existing practice of the Ministry of the Attorney General paying for court-appointed counsel in circumstances laid out in Section 39.1(1), including in cases where the court determines that an individual requires representation by a lawyer to meet the requirements of the Charter of Rights and Freedoms (Rowbotham cases).

Instead, this language suggests that Legal Aid Ontario would be responsible for absorbing the cost of these services.

The Ministry of the Attorney General and LAO already have a Memorandum of Understanding in place regarding the costs of court-ordered appointments. The MOU clearly states that in such cases where the court orders public funding (such as in Rowbotham cases), “the Ministry will fund the defence,” while LAO “would manage the case in accordance with legal aid billing and payment rules and processes.”⁵

⁴ Report of the Ontario Legal Aid Review: A Blueprint for Publicly Provided Legal Services, Vol.1 pg 88. McCamus, J.D. (1997)

⁵ <https://www.legalaid.on.ca/wp-content/uploads/LAO-MAG-Memorandum-of-Understanding-2014.pdf>



A spokesperson for the Attorney General has stated that “The government will continue to cover these costs once the legislation is passed, under a formalized agreement,” adding that the funds would be in addition to the \$267.3 million the government already provides LAO.

However, it is unclear to the Society why, if the Ministry plans on continuing to cover the cost of court appointed counsel, this language is included in the bill. By including this language in Bill 161, it suggests that the Government plans to abandon the longstanding arrangement on court appointed counsel and would require LAO to fund such appointments within an already reduced budget.

If the Government truly intends to continue to fund court-appointed counsel, it should not only remove this language from Bill 161 but also incorporate into LASA the clear language that already exists in the MOU, ensuring that the funding arrangement remains in place.

IMPACT OF BILL 161 ON LEGAL AID CLINICS

CLINIC FUNDING

The Society is concerned with the impact that Bill 161 will have on community legal clinics’ funding. These clinics are already feeling the pressure from the province’s recent slashing of over \$130 million from LAO’s budget.

Bill 161 would remove the ability of community legal clinics to request reconsideration of funding decisions:

“Section 36, which provides for a process by which clinics may request reconsideration of funding decisions, is repealed. Under a new section 72.4, any existing reconsiderations are terminated.”

Removing the funding reconsideration process adds a greater burden to already underfunded legal clinics and may also lead to LAO cutting a valued program without a mechanism to learn about and reconsider the impact of its decision.

FROM CLINIC LAW TO POVERTY LAW

The existing LASA (1998) establishes that LAO will provide clinic law services, and that the community legal clinics will be the foundation for the provision of such clinic law services. LASA (1998) defines the scope of clinic law:

“clinic law” means the areas of law which particularly affect low-income individuals or disadvantaged communities, including legal matters related to,

- (a) housing and shelter, income maintenance, social assistance and other similar government programs, and
- (b) human rights, health, employment and education;



However, the updated LASA (2019), as written in Bill 161, shifts the foundational role of the legal clinics from clinic law to poverty law, which the Bill defines as “being law in relation to housing and shelter, income maintenance or social assistance”.

The new language in Bill 161 explicitly removes matters related to human rights, health, employment and education from the mandate of the community legal clinics. This is a significant reduction in the scope of the legal clinics that will harm vulnerable Ontarians’ access to justice.

CONCLUSION

The Society has serious concerns with Schedules 15 and 16 of Bill 161, and the impact these sections will have on the existing mandate of Legal Aid Ontario, the governance structure of LAO, and the impact it will have on the scope and funding of community legal clinics.

The Society does not see the measures contained in this Bill improving access to justice for vulnerable Ontarians. On the contrary, the specific measures mentioned in this submission would dramatically hinder access to justice for many in the province.

The measures contained in Bill 161 would only compound the struggles Legal Aid Ontario and the community legal clinics are facing as a result of the government’s 2019 decision to cut more than \$130 million from the LAO budget – a reduction of over 30%.

As such, the Society strongly opposes Bill 161 and believes that the Government should not move forward with this legislation. However, if this Bill is to proceed, the Society urges the committee to remove Schedules 15 and 16 from the legislation. Furthermore, the Society urges the government to restore the funding that was previously cut from the Legal Aid Ontario budget.