



Comments on the new *Legal Aid Services Act, 2019*
(Schedule 16 of Bill 161, the *Smarter and Stronger Justice Act, 2020*)

Submitted to: Attorney General of Ontario

Submitted by: Ontario Bar Association



ONTARIO
BAR ASSOCIATION
A Branch of the
Canadian Bar Association

L'ASSOCIATION DU
BARREAU DE L'ONTARIO
Une division de l'Association
du Barreau canadien



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Introduction

The Ontario Bar Association (“**OBA**”) appreciates the opportunity to provide this submission on Schedule 16 of Bill 161, the *Smarter and Stronger Justice Act, 2020* which proposes a new *Legal Aid Services Act, 2019* (“the **Act**”).

The Ontario Bar Association

The OBA is the largest volunteer lawyer association in Ontario, with over 16,000 members who practice on the frontlines of the justice system, providing services to people and businesses in virtually every area of law in every part of the province. Each year, through the work of our 40 practice sections, the OBA provides dozens of submissions to government for the profession and the public interest and delivers over 325 in-person and on-line professional development programs to an audience of over 12,000 lawyers, judges, students and professors.

The OBA has been a consistent advocate for a strong, sustainable legal aid system, which is critical to a strong civil society. Following last year’s provincial budget, the OBA expressed concerns about the significant cuts to legal aid, and we committed to working with all parties involved in the system to find ways to serve the most vulnerable and treat our members fairly.

Since then, we have worked with the Canadian Bar Association to secure new funding from the federal government for refugee and immigration certificates, including emergency funding of \$26 million announced last July, the bulk of which was allocated to Ontario. The OBA has also contributed the expertise and experience of our members who serve on the frontlines of the legal aid system to the *Legal Aid Ontario Modernization Project* undertaken by the Attorney General and Legal Aid Ontario (“**LAO**”) – providing concrete recommendations to simplify access for clients, leverage the use of technology, reduce administrative burdens, and enhance the clinic service delivery model.



Schedule 16, Bill 161 - Overview

The Attorney General introduced Schedule 16 of Bill 161 with the aim of giving LAO the tools it needs to help clients resolve their legal issues faster and with fewer roadblocks.

The success of these changes depends on clarity in the legislation, appropriate funding and robust consultation between the bar and LAO. The OBA has and will continue to advocate for all three of these. We are pleased to see the consultation requirement for LAO made explicit in the legislation and we expect a consultation policy that provides continual opportunities for meaningful input.

In this submission, we raise three specific issues that we would like to see addressed with respect to Bill 161:

1. Ensuring additional funding for court-ordered services currently covered directly by the Attorney General;
2. Clarifying a fair process regarding information disclosure for lawyers who represent LAO clients; and,
3. Clarifying representation on the LAO Board.

The OBA's recommendations on these issues are described below.

Schedule 16, Bill 161 - Recommendations

Additional funding for court-ordered services

Section 15 of the Act would require LAO to be responsible for the costs of providing court-appointed counsel, such as under Rowbotham orders and *amicus curiae* orders, which are currently covered directly by the Attorney General.



The experience of our members who act as court-appointed counsel is that the system currently in place has worked effectively.

Without additional funding, this new requirement would place additional financial burdens on LAO that would negatively impact its ability to provide quality legal services.

The OBA requests that the Attorney General ensure that an agreement to provide additional funding to LAO to cover the cost of court-ordered services is in effect prior to the coming into force of the above noted provision, to avoid any negative financial pressure by its operation.

A fair process for lawyers who represent LAO clients

Lawyers have existing responsibilities pertaining to information sharing with LAO about the eligibility of their clients who receive legal aid services.

The current act requires that where anything comes to the attention of the lawyer which indicates that a recipient of legal aid services may not be entitled to those services the lawyer shall notify LAO. It also provides that where LAO believes a lawyer has failed to discharge that obligation LAO may, on notice to the lawyer, hold a hearing to determine whether any of the obligations have not been discharged.¹

By contrast, section 10 of the proposed Act places the same proactive disclosure obligation on the lawyer; however if anything comes to the attention of LAO that indicates that a lawyer has failed to discharge this obligation, LAO may declare that the lawyer is not entitled to payment by LAO and recover from the lawyer amounts to which the lawyer is not entitled. Subsequent to this, the lawyer may apply for a review of LAO's determination.

This ability under the proposed Act for LAO to immediately impose negative financial consequences on a lawyer who is providing legal aid services without any obligation to

¹ S. 44 *Legal Aid Services Act, 1998*, S.O. 1998, c. 26



advise the lawyer of the basis of the concern and permit the lawyer to respond is contrary to principles of fairness and due process. It places an unfair burden on lawyers who are providing legal services to Ontario's most vulnerable citizens and could ultimately lead to fewer lawyers being willing to take on legal aid services. Bill 161 should be amended to retain the clear provisions that exist under the current act.

The OBA recommends removing the proposed Section 10(7) from Schedule 16 and amending Subsection 10(6) as follows (Sub-sections 10(6)(a) and (b) are amended, but left in for reference):

(6) If anything comes to the attention of the Corporation that indicates that a service provider has failed to discharge an obligation under subsection (3), the Corporation may, on notice, hold a hearing to determine whether the service provider has failed to discharge an obligation under (3). If a determination is made that the service provider has failed to discharge an obligation under (3), the Corporation may,

(a) declare that the service provider is not entitled to payment by the Corporation for all or a specified part of the legal aid services provided by the service provider to the individual; and

(b) recover from the service provider the amount, if any, paid by the Corporation for the legal aid services for which the service provider is not entitled to payment.

Governance of Legal Aid Ontario

The existing act provides that the Board of Directors of LAO shall be composed of five persons recommended by the Attorney General and five persons selected from a list of persons recommended by the Law Society of Ontario, ensuring proportionate representation of Law Society of Ontario recommended and Attorney General recommended appointees on the Board.²

² S. 5 *Legal Aid Services Act*, 1998, S.O. 1998, c. 26



This recognizes the roles that both government and the legal community, as partners, play in providing legal services to Ontario's most vulnerable.

Section 21 of the proposed Act provides that a minimum of three appointees on the ten person board shall be selected from a list of persons recommended by the Law Society but does not retain proportionality between Law Society of Ontario recommended and Attorney General recommended appointees.

The OBA understands that the Attorney General intends this provision to allow for more flexibility in the size of the Board and not to change the proportionate representation on the Board itself.

To clarify the government's continued commitment to a proportionate Board, the OBA recommends amending the proposed Section 21(3) by adding a third provision as follows:

(3) Appointments made under subsection (2) are subject to the following restrictions:

1. At least three but no more than five of the appointees shall be selected by the Minister from a list of persons recommended by the Law Society of Ontario.
2. No more than five practising lawyers may be members of the board.
3. Excluding the person named as chair pursuant to subsection (4), the Minister shall ensure that an equal number of appointees are from the group described in paragraph 1 and all other appointees.

Conclusion

Once again, the OBA appreciates the opportunity to provide this submission in response to Bill 161. The OBA would be pleased to meet with you and your staff to discuss these issues further, as we work towards the shared goal of serving the most vulnerable.