



September 27, 2017

BY E-MAIL

Malcolm Mercer
Co-Chair, Alternative Business Structures Working Group
The Law Society of Upper Canada
130 Queen Street West
Toronto, ON M5H 2N6

Dear Mr. Mercer:

Re: Delivery of legal services by Civil Society Organizations (“CSOs”)

I am writing to you in follow-up to our meeting on August 23, 2017 in which you invited feedback from the Ontario Bar Association (“OBA”) on the Law Society of Upper Canada Alternative Business Structures Working Group Interim Report (the “LSUC Report”). The LSUC Report was first introduced in June 2017 and tabled for discussion in the fall following concerns expressed by the OBA and others that there was inadequate time for consideration of the proposal.

In summary, the LSUC Report seeks policy approval from Convocation for “the direct delivery of legal services through civil society organizations such as charities, not for profit organizations and trade unions (“CSOs”) in order to facilitate access to justice.”¹ As noted in the report, if policy approval is granted, the Law Society would amend its By-laws to permit CSOs registered with the Law Society to provide legal services directly to clients through “embedded” lawyers and paralegals, who would continue to be fully regulated by the Law Society.²

At our meeting, we discussed preliminary views on the LSUC Report in light of earlier OBA submissions on ABS and Compliance-Based Entity Regulation, and options the LSUC Working Group might consider for proceeding with a revised initiative in the fall. As a result of our discussion and your indication that the Working Group would like to consider the issue in September, we have sought preliminary input on this issue from the OBA’s Charities and Not-for-Profit Law Section Executive and from members at our Fall Council Meeting.

This letter summarizes the feedback we have received from discussions with our members based on the scope of the information available from the LSUC Working Group and the timeframe

¹ LSUC Report at para. 29.

² LSUC Report at paras. 32-35.

permitted for consultation, and formally confirms the input we communicated to you following our Council discussions.

The Ontario Bar Association

As the largest voluntary legal organization in the province, the OBA represents approximately 16,000 lawyers, judges, law professors and students in Ontario. OBA members are on the frontlines of our justice system in virtually every area of law and in every type of practice, and provide legal services to a broad range of clients in every region of the province. In addition to providing legal education for its members, the OBA is pleased to assist government, the Law Society, and other decision-makers with dozens of policy initiatives each year – in the interests of the public, the profession, and the administration of justice.

As noted above, in order to garner input for this submission, the OBA hosted a presentation at Fall Council Meeting to solicit the views of our Provincial Council members. The meeting was attended by a cross-section of members of OBA Council, including OBA Board officers and regional directors, other persons elected by and from the OBA membership, chairs of the OBA practice law sections and committees, law school faculty and student representatives, the Law Society and local law associations.

In light of the LSUC Working Group’s focus on charities, we have also sought preliminary input from the OBA’s Charity and Not-for-Profit Law section executive, which include lawyers who represent the widest possible range of charitable and other not for profit organizations, advising boards, management and membership groups on corporate, tax, fund-raising and other regulatory issues, and who have worked with the provincial and federal governments on legislative reform affecting the sector.

Summary

OBA members across Ontario share a fundamental interest in promoting a strong and relevant bar that allows lawyers to best serve our clients in a way that honours the best traditions of public service. We recognize the need for the profession to continually assess and improve our efforts to increase access to justice and address barriers facing those who cannot obtain legal services.

The OBA has previously made submissions on ABS (January 2015) and Compliance-Based Entity Regulation (March 2016) in response to earlier LSUC consultations. The fundamental principles expressed in those reports remain relevant to the more narrowly scoped issues now contemplated in the LSUC Report.

In conjunction with the preliminary responses received as part of the recent outreach on the LSUC Report as described in the following sections, the OBA supports the development of options for amending LSUC By-laws to:

1. permit charities, as distinct from other CSOs, to provide legal services directly to clients through “embedded” lawyers, who would continue to be fully regulated by the Law Society;
2. require that no direct or indirect fee may be charged to the client in connection with such legal services; and,
3. require that no direct or indirect fees may be made for the referral of clients of such legal services.

Earlier OBA submissions on ABS and Compliance-Based Entity Regulation, and indeed the LSUC Report, point out the importance of carefully ensuring that any regulatory changes uphold and support professionalism and the protection of solicitor-client privilege.

On the information presently available, we are not in a position to conclude whether appropriate protections can and will be designed, and note that our support for proceeding with the abovementioned proposal is predicated on the incorporation of such protections. In keeping with that requirement, the OBA also recommends that the Law Society:

4. ensure that any proposed changes adequately avoid potential harm to less sophisticated charities, for example, by running afoul of their objects and the Canada Revenue Agency when delivering legal services to their “clients”; and,
5. adequately propose how the Law Society registration requirement can appropriately impose obligations on participating charities to support the embedded lawyer’s ability to meet his or her professional obligations.

It is important to note that as part of our outreach, members expressed concerns about the depth of information available on the specific measures being contemplated by the LSUC Working Group and the timeframe in which the issue can be considered. Ultimately, while these comments constitute preliminary observations our members felt it was important to express support for the proposal’s objective of facilitating access to justice for vulnerable populations and to identify the key issues that need to be addressed if the Law Society moves forward with this initiative. If this initiative proceeds, we request that the Law Society commit to an effective dialogue with the OBA to ensure that the best advice of the profession informs the development of any associated proposals/By-laws.

Comments regarding the Policy Objective

The OBA’s mandate includes a responsibility to improve the law, improve the administration of justice, and improve and promote access to justice. Throughout our discussions with OBA members, there has been widespread support for facilitating access to the services lawyers provide in areas of unmet legal need, and especially for vulnerable populations.

The OBA's 2015 ABS submission noted:

In short, the [OBA] has asked what would be helpful in achieving the goal of better serving our clients and the public, and to facilitate a determination of what changes, if any, are required in the existing regulatory framework. Focusing on these preliminary questions helps avoid assessing potential solutions that are either non-responsive or over-broad in terms of responding to limitations.

The need for regulatory change to facilitate the policy objective has been a central topic of discussion with our members. At this point, it is not clear to our members from the LSUC Report or the ensuing discussions that there is indeed a regulatory gap, or that the proposal for delivery of services through embedded lawyers and paralegals would be something that charities would pursue if the initiative proceeds. However, our members also recognized that charities may face challenges in helping their clients address legal needs, that this can often have a broader impact on client well-being, and that if properly structured, the Law Society proposal could offer a beneficial opportunity.

In our view, Law Society policy approval should be limited to ABS options related to charities, as a category of entities most directly related to the stated objective of facilitating access to legal services for vulnerable populations. Focusing the proposed regulatory change on charities is also helpful in terms of reducing concerns about professional responsibilities, as discussed in the next section. Accordingly, the OBA supports the development of options for amending LSUC By-laws as summarized above for charities, in keeping with the other criteria outlined in this letter.

Comments regarding Professional Responsibilities

The ability to ensure professional responsibilities are upheld has been a central concern for our members throughout the discussions relating to alternative business structures. The OBA's 2015 ABS submission noted:

In summary, members were generally concerned that the risks identified in safeguarding professional responsibilities were significant, and that the protections proposed for an Ontario context were vague. Members were generally opposed to moving forward with the development of ABS alternatives on the mere assumption that professional responsibilities will somehow be safeguarded. The risk of professionalism concerns did not seem to be warranted at this time given that an ABS model did not appear to exclusively allow benefits for the profession or the public. This is especially so if there are unexplored opportunities to achieve the same objectives within the existing and tested regulatory framework.

The LSUC Report states that the Working Group "is satisfied that legal services could be delivered through charities and other CSOs in new ways which could bring access to justice to Ontarians,

including to some of our most vulnerable segments of society, in a manner whereby professionalism and solicitor-client privilege are safeguarded.”³

As noted above, the OBA believes that the LSUC Working Group should limit the policy approval to charities in keeping with the stated focus on increasing access to justice for vulnerable populations. However, we also believe that limiting the scope to charities is the most appropriate way to minimize concerns about the ability to uphold professional responsibilities.

(i) Fees for Service or Referrals

One of the central concerns for the profession throughout the discussion of ABS models has been the potential for fee arrangements that can have the effect of reducing competition and limiting the practice options for general practitioners in smaller communities. These concerns have the real potential to reduce access to justice for the public and are not adequately canvassed in the LSUC Report. The LSUC Working Group does state that it expects services provided through CSOs would be delivered at no cost or at a highly subsidized cost to the client.⁴

The Law Society has the power to incorporate any limitation on the payment of fees as part of the proposed regulatory changes. In our view, in order to uphold the focus on access to justice for vulnerable people and reduce significant concerns about upholding professional obligations, it is necessary for the Law Society to require that (1) no direct or indirect fee may be charged to the client in connection with such legal services and, that (2) no direct or indirect fees may be made for the referral of clients of such legal services.

(ii) Impact of Registration for the participating CSO

As noted in our 2015 ABS submission:

Members also noted that if non-lawyer ownership occurs, the regulatory responsibility for compliance with professional standards would not be shared equally amongst lawyers and non-lawyer owners, since only lawyers are accountable to the regulator in terms of their practice license.

In our view, the concern over potential pressures on embedded lawyers that conflict with professional obligations is relevant to any non-lawyer controlled practice setting, even if there are not “owners” in the specific context of charities.

The LSUC Report provides little discussion of what obligations participating charities would have in respect of registering with the Law Society. It is critical that the Law Society adequately consider what requirements should be imposed on charities as a way for the regulator to ensure that professional standards are appropriately protected. By way of example, this could include ensuring the charity has an appropriate system of checks in place to avoid conflicts. Any such

³ LSUC Report at para. 89.

⁴ LSUC Report at para. 97.

requirements should be designed and implemented to avoid undue pressure on licensees and associated practice management problems while minimizing any burdens on charities.

Comments regarding Charities

We have also received preliminary comments from the OBA Charities & NFP Law section executive on the LSUC Report as it applies to charities, highlighting specific issues that the LSUC Working Group should consider, including the following:

- that the LSUC Report does not recognize and reflect the different governance structures for charities and non-profits and the different regulatory regimes they face, which deserve separate consideration under any potential Law Society By-law amendments. These nuances are critical for the LSUC Working Group to understand when devising an appropriate regulatory framework;
- that the LSUC Report does not consider the current Canada Revenue Agency (the “CRA”) regulatory requirements for charities. While the CRA considers the provision of legal services an acceptable charitable object, charities whose objects do not currently include the provision of legal services would need guidance on whether providing legal services would mean they were operating outside of their objects, thereby risking their charitable status;
- that the charitable sector is already highly regulated and additional compliance requirements could be a significant barrier to smaller organizations. Any additional oversight must also take into consideration the charities’ confidentiality obligations to those individuals who are recipients of its services;
- that a new regime should not create an unfair disadvantage for existing licensees. Charities are afforded favourable tax treatment when compared to licensees but would be servicing largely unrepresented populations who could not otherwise access legal services. The Law Society might mitigate this concern by introducing provisions to make it clear that charities can only provide legal services that further a charitable object; and,
- that any new regulations proposed must be clear as to who has ultimate direction over the charity's "embedded lawyer's" practice, and who the lawyer's ultimate allegiance must be to (outside client or charity employer) in cases of potential conflict. Further thought should be given, in addition, regarding whether professional liability insurance appropriately covers embedded lawyers and their charity in the event of complaints or malpractice claims.

Conclusion

Engaging on issues about the ability of lawyers to deliver high quality, cost-effective legal services through the structures in which we practice is one way we are bringing the broad experiences of

our membership to improve challenges facing the profession. We believe it is essential for the Law Society to facilitate an effective dialogue with the OBA to ensure that the best advice of the profession informs the development of any further proposals/By-laws with respect to CSOs.

We support the LSUC Working Group's efforts to move forward with a proposal that would allow charities to offer services to clients through embedded lawyers according to the criteria outlined in this letter; namely, where no fees are directly or indirectly paid by the client for the service and where no direct or indirect fees may be made for the referral of clients of such legal services. The Law Society must also carefully ensure that any proposed changes adequately avoid potential harm to less sophisticated charities and should adequately propose how obligations on charities registering to participate can help ensure that lawyer professional obligations are upheld.

If this initiative proceeds, the OBA requests the opportunity for our members to fully consider and respond to any specific proposals from the Law Society as part of an open and collaborative consultation process.

Yours truly,

A handwritten signature in black ink, appearing to read 'Q. Ross', with a period at the end.

Quinn M. Ross, President
Ontario Bar Association

c. Susan McGrath, Co-Chair, Alternative Business Structures Working Group