



OBA Response to Law Society Draft Regulatory Framework for the Provision of Legal Services through Charities and Not-for-Profits

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Alternative Business Structures Working Group

Submitted by: The Ontario Bar Association



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Introduction

The Law Society of Ontario (the “**Law Society**”) Alternative Business Structures Working Group (the “**Working Group**”) has proposed a regulatory framework for consideration by the professions to implement Convocation’s “approval in principle” of a policy to permit lawyers and paralegals to provide legal services through civil society organizations (referred to as “**CSOs**”) such as charities and not-for-profit organizations to clients of such organizations.¹

As we stated in our letter to the Working Group in September of 2017, 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.²

Our previous submission also raised the importance of carefully ensuring that any regulatory changes uphold and support professionalism and the protection of solicitor-client privilege, noting that our support for proceeding with the CSO proposal was predicated on the incorporation of such protections. Our support for this proposal remains predicated on these factors. Indeed, our review of the Law Society Report has considered how the Working Group has responded to our specific recommendations that the CSO framework adequately identify 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, and ensure that any proposed changes adequately avoid potential harm to participating charities, for example, by running afoul of their objects and the Canada Revenue Agency when delivering legal services to their “clients.”³

While the OBA supports the policy intent of this proposal, our members have raised several concerns with respect to implementation. We expand on these below with reference to some of the headings contained in the Law Society report.

The OBA

Established in 1907, the OBA is Ontario’s largest voluntary legal advocacy organization, representing lawyers, judges, law professors and students from across the province, on the

¹ Law Society of Ontario, Report of the Alternative Business Structures Working Group, October 25, 2018 (the “**Law Society Report**”).

² OBA, [Letter to Malcolm Mercer](#) as Co-Chair of the Working Group, September 27, 2017 (the “**September 27th Letter**”).

³ See, in particular, items 4 and 5 in the September 27th Letter.



frontlines of our justice system and in no fewer than 40 different sectors. In addition to providing legal education for its members, the OBA provides input and expert advice on a broad range of topics that affect the administration of justice in Ontario, including submissions the Law Society of Ontario, in the interest of the profession and in the interest of the public.

This response has been primarily developed with the input from the OBA's Charity & Not for Profit Law Section, and the Ontario Branch of the Canadian Corporate Counsel Association. Collectively, their expertise includes the unique laws applicable to charities and other not-for-profit entities, the areas of the law relevant to those organizations, including trusts, income tax, corporate and unincorporated organizations, and experience working in the in-house legal setting.

General Eligibility Requirements

The OBA notes that the Law Society intends to set a definition of CSOs in order to implement the proposed policy. The Working Group has recommended that the draft regulatory framework apply to “registered charities, not-for-profit corporations incorporated under the laws of Ontario, and not-for-profit corporations permitted under the laws of Ontario to operate in Ontario.”⁴

The OBA's previous submission noted:

Law Society policy approval should be limited to [Alternative Business Structures] 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 [Law Society] By-laws as summarized above for charities, in keeping with the other criteria outlined in this letter.

We note that the Law Society has accepted the OBA recommendation 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.⁵ The OBA appreciates the intent of the definition to provide a clear mechanism to determine

⁴ Law Society Report at p. 4

⁵ September 27th Letter at p. 5



eligibility for the program, however, we recommend that the Working Group revisit the definition and certain eligibility requirements.

Our members indicated the view that entities may encounter difficulty in recognizing the application of the CSO framework to their organizations. There are different terms and definitions used across Canada to describe these organizations. A “not-for-profit corporation” is a type of corporation under some corporate legislation such as the *Canada Not-for-profit Corporations Act*.⁶ However, in Ontario, the *Corporations Act*⁷ refers to “corporations without share capital” and “social companies.” While the Ontario *Not-for-Profit Corporations Act, 2010*⁸ does refer to not-for-profit corporations, it is not yet in force. Other provincial legislation poses similar challenges. For example, entities incorporated in British Columbia but registered extra-provincially in Ontario may be incorporated under the *Societies Act*.⁹ A “registered charity” is a type of tax exempt entity under the federal *Income Tax Act*. A not-for-profit corporation is one of the legal forms that a registered charity may take but not all registered charities are not-for-profit corporations. Furthermore, not all not-for-profit corporations are registered charities. We are concerned that the use of terms from different spheres of regulation in the definition of CSO may make it difficult to understand what is included, both for the sector and others, and recommend that the Law Society provide further clarity in its definitions and supporting materials.

Our members remain concerned with the inclusion of “not-for-profit” corporations as used in the Law Society’s definition of CSOs, as it may result in some confusion or unintended consequences. In particular, the registration requirements for potential CSOs do not require the applicant to provide the Law Society with documentation relating to the organization’s objects. Instead, the organization is asked to “briefly describe the services provided by the Organization and/or its mandate”. While registered charities will have, by definition, charitable objects (a requirement under the *Income Tax Act*), the objects of a not-for-profit corporation are not similarly limited or prescribed. In this regard, for extra-provincial organizations, it appears that the Law Society’s definition of CSO relies on the entity’s filing with the Ontario Ministry of Government and Consumer Services. Form 2 permits the organization to indicate, in a check-box, that it is a “Not-For-Profit Corporation” along with the organization’s “Jurisdiction of Incorporation.”¹⁰ We therefore recommend that the Law Society revise the definition, provide entities that are considering registration with relevant examples of qualifying CSOs so that such organizations can recognize their legal form in the

⁶ S.C. 2009, c. 23.

⁷ R.S.O. 1990, c. C.38.

⁸ S.O. 2010, c. 15.

⁹ S.B.C. 2015, c. 18.

¹⁰ MGCS. Form 2 – Extra-Provincial Corporations / Initial Return / Notice of Change



CSO definition, and appropriately tailor the registration requirements to ensure that applicants will promote the CSO program's access to justice goals.

Our members have considered scenarios for which additional clarity could be provided and suggest that potential CSOs may benefit from practical examples set out by the Law Society to set out the regulatory requirements for the most common (anticipated) delivery structures. By way of example, our members noted that there was some confusion over the compliance requirements for an in-house legal counsel of a national organization that participates in the CSO program to be able to offer legal services to the separately incorporated chapters of the national organization. And in addition, with respect to the prohibition against charging for the legal services, even indirectly, it remains unclear whether a CSO that charges its members a fee would be able to provide legal services to those members, if membership was not itself a specific requirement to receive legal services, and the CSO also made legal services available to non-members at no cost.

Guidelines for CSOs

As noted above, a key concern for the OBA is ensuring that the Law Society registration requirement can appropriately impose obligations on participating entities to support the embedded lawyer's ability to meet his or her professional obligations.

The Law Society Report states that “Guidelines for CSOs have been developed to explain how to register, **and the key elements of licensee professionalism and ethics which must be safeguarded.**” (emphasis added)¹¹

These draft Guidelines go on to state the following:

Since the lawyer or paralegal is providing its services to clients of the charity or NFPC, the lawyer or paralegal must:

- ✓ Have full control over the delivery of the services
- ✓ Protect confidentiality and privilege
- ✓ Maintain all professional obligations, such as independence, competence, integrity, candour, avoidance of conflicts of interest and service to the public good through professional client relationships and fulfilling responsibilities to the administration of justice

It is the responsibility of the lawyer or paralegal to make sure that these and all other professional obligations are maintained.

¹¹ Law Society Report at p. 6. The draft Guidelines are then attached at Tab 5.1.1.



In our view, there are several deficiencies with these Guidelines:

- they do not explain the concept of licensee professionalism and/or ethics to CSOs which may or may not be familiar with these concepts;
- they are drafted to impose the obligation on the lawyer, alone, to maintain ethics and professionalism in a setting in which they are likely an employee, rather than an owner or a directing mind.

The Draft Guidelines in the Law Society Report goes on to outline that “Client protection” (including confidentiality and privilege) is an item that “NFPC’s may wish to consider” in determining whether to seek to deliver legal service.¹² Again, in our view, the CSO must be required to consider these questions as part of the overall regulatory framework. As we stated in our previous submission:

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

As you know, in May of 2016 Convocation approved the following recommendations of the LSO’s Compliance-Based Entity Regulation Task Force (the “**CBER Task Force**”):

- i.) that the Law Society of Ontario (LSO) seek an amendment to the *Law Society Act* to permit Law Society regulation of entities through which legal services are provided; and
- ii.) that the Task Force develop a regulatory framework for consideration by Convocation based on the principles of compliance-based regulation.¹³

In May of 2018, the CBER Task Force took steps towards completing item ii), above, by developing and releasing a practice assessment tool, for which input will be sought “at a later date.” The OBA is not aware of further steps or progress in respect of Convocation’s approval

¹² See Guidelines at p. 4, 266 of overall document.

¹³ Compliance-Based Entity Regulation Task Force Report to Convocation, May 26, 2016, online at [http://www.lso.ca/uploadedFiles/For the Public/About the Law Society/Convocation Decisions/2016/convocation_may_2016_cber.pdf](http://www.lso.ca/uploadedFiles/For%20the%20Public/About%20the%20Law%20Society/Convocation%20Decisions/2016/convocation_may_2016_cber.pdf), paragraph 1.



to seek an amendment to the *Law Society Act*¹⁴ to permit the regulation of entities through which legal services are provided.

However, our members remain concerned with the lack of oversight for CSOs included in the LSO's current proposal. As we stated in our previous submission, "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."

In the absence of a proposal that includes sufficient oversight for potential CSOs that ensures professional responsibilities are upheld, it is our members' view that this proposal should be suspended until such time as the Law Society has the legal authority to regulate entities through which legal services are provided. In this regard, we would encourage the Law Society to continue its efforts to consult with stakeholders in the bar, and the charitable sector, to ensure a viable path forward.

Practice Supports for licensees working in CSOs

The Law Society Report states that practice supports "may include" mentoring, CPD resources regarding confidentiality & privilege in the CSO; information sharing protocols for the CSO; trauma informed services; and mental health/wellness supports for vulnerable clients.¹⁵

In our view, given the unique nature of these programs, the Law Society must make a firm commitment to licensees that will consider working in the CSO setting (and the CSOs themselves) to provide sufficient resources for licensees and CSOs to identify and manage issues, such as ethical and professionalism risks, that are raised by this proposal.

Potential for Conflicts

Our members have indicated that there is a strong potential for conflicts to arise as between the interests (or objects) of the CSO and the client's interests and/or wishes. Indeed, guidance from the Law Society would be critical for situations in which a licensee is faced with different views as between the employer CSO and the client. In many cases, it was the preliminary view of our members that the lawyer would be required to withdraw from providing services to the client which is not, in our view, the intent of this initiative. As a result, we would ask that the Law Society prepare guidance for lawyers that would address these situations.

¹⁴ R.S.O. 1990, c. L.8.

¹⁵ Law Society Report at p. 9/260



Competence

Our members have raised a concern that lawyers in CSO settings may face significant challenges in delivering legal services in a competent manner. The traditional in-house legal role is complicated enough (i.e. governance, tax, employment), but layering on services to a CSO's clients could add several other distinct and unpredictable areas of practice (like immigration, criminal law, landlord and tenant, civil litigation, health law, or estates law). Similarly, a traditional "in-house" lawyer may face pressures to take on a substantially increased work load due to providing legal services to a CSO's clients. If the lawyer does not have genuine control of service volumes, it could result in the CSO's lawyer/paralegal having a diminished capacity to deliver legal services to the CSO's clients in a competent manner. While lawyers are required to be aware of and adhere their professional responsibilities, and lawyers in firm settings are collectively aware of their respective individual obligations, CSOs must also be made aware of and permit lawyers to adhere to their professional responsibilities. In this context, Rule 3.1-2 and its commentary, which sets out the lawyers duties in respect to competence, is key. In addition, in our view licensees working in CSOs may require a support network of other licensees with relevant experience to call on so that they will succeed. The Law Society should consider its role in promoting the development of such a network in the CSO context.

Privilege and Confidentiality

Our members have raised concerns with respect to "maintaining confidentiality and privilege in multi-disciplinary environments." In our view, the Law Society should provide guidance to licensees in CSO environments with respect to:

- Appropriate file management protocols/techniques. Our members anticipate issues such as how to ensure that the client's confidential/privileged/personal information is not made available to employees of the CSO that are not involved in the delivery of legal services.
- Preserving privilege and confidentiality. Our members have indicated that guidance for licensees in CSOs may be required, for instance, with respect to appropriate training for non-legal staff at a CSO to ensure that privilege and confidentiality can be maintained. For instance, in situations where the client may have attended the CSO for purposes other than obtaining legal advice, if an admission or other information is disclosed in relation to a legal issue, the non-legal staff must be alert to the need to engage the lawyer and protect the client's interests.

Our members have also indicated that, without providing support and guidance to the CSOs in respect of these issues, it may not be reasonable or practical to require the individual lawyers to be immediately familiar with the requirements for compliance. Appropriate support and guidance should be made available to the CSO's themselves.



Requirements for Different Entities

Our members have raised the potential challenge in communicating these requirements to CSOs, particularly in light of the definition that this framework has adopted. Charities and not-for-profit corporations are not necessarily familiar with the kinds of regulations that lawyers must comply with, and some may not be familiar with concepts like professionalism, conflict of interest, and confidentiality. Additionally, there is a wide range of levels of sophistication within charities and not-for-profit corporations, making it difficult to provide materials for guidance. Furthermore, the regulatory and compliance challenges within this framework will be different for charities (which are more highly regulated) than they are for non-charitable not-for-profit corporations, generating more complexity and risk of confusion with respect to any guidance that may be offered to eligible organizations. Accordingly, while some implementation questions and concerns may be shared by a broad range of potential CSOs, the Law Society must be prepared to address the specific questions and concerns raised by individual CSOs based on their individual circumstances.

Impact for Charities

In keeping with the OBA's recommendation in our previous submission that the Law Society ensure that proposed changes adequately avoid potential harm to potential CSOs, the Law Society should ensure that potential CSOs are aware that the current professionalism requirement (whereby the licensee has control over the delivery of services) could interfere with the requirement set out in the *Income Tax Act* (as administered by the Canada Revenue Agency) for registered charities to retain absolute direction and control over their funds and activities. Our members indicate their concern that each registered charity that wishes to be a CSO will need to meet these compliance requirements. This will impose an additional compliance requirement for any charity that may be interested in the framework.

Cost and Evaluation

The Law Society working group has indicated that:

[I]mplementing the regulatory framework will come at no additional cost to the Law Society. The components of the regulatory framework can all be developed using existing staff resources. There are no other significant costs expected.¹⁶

This analysis excludes budget for a “program evaluation” noted as a possibility in the report, if one is to be conducted by a third party. The OBA recommends that a program evaluation

¹⁶ Law Society Report at p. 9/260



be conducted. The OBA takes no position on whether it should be conducted by Law Society internally, or by a 3rd party.

In our view, evaluation measures should be in place as part of guidelines to CSOs. Those organizations will need to track information to submit to the evaluation program, and should know ahead of time what management information systems will be required to collect this information so that an appropriate evaluation can be conducted.

Given the above, if the Law Society is of the view that the program evaluation design will be conducted by a 3rd party, the budget for that should be set out at this time.

Conclusion

The OBA appreciates the opportunity to provide these proposals and looks forward to an opportunity to discuss them in further detail with the Law Society.