



## LSO Increased Transparency Consultation

**Submitted to:** Law Society of Ontario

**Submitted by:** Ontario Bar Association

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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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## Executive Summary

The Ontario Bar Association ("**OBA**") welcomes the opportunity to comment on the Law Society of Ontario's ("**LSO**") proposal to increase transparency through licensee reporting and disclosures to the public. The OBA has several concerns with the proposal and recommends the LSO reject the proposal as currently outlined. We anticipate that the proposed proactive disclosures of information, particularly charges, will have the opposite effect to what is intended, will reduce trust and confidence in the legal profession, and pose serious risks to licensees.

## Ontario Bar Association

Established in 1907, the OBA is the largest and most diverse volunteer lawyer association in Ontario, with close to 16,000 members, practicing in every area of law in every region of the province. Each year, through the work of our 40 practice sections, the OBA provides advice to assist legislators and other key decision-makers in the interests of both the profession and the public and we deliver over 325 in-person and online professional development programs to an audience of over 20,000 lawyers, judges, students, and professors.

This submission was prepared and reviewed by members of more than a dozen OBA practice sections. Members of these sections include barristers and solicitors in public and private practice in large, medium, and small firms, and in-house counsel across every region in Ontario. These members have extensive experience with LSO disciplinary, data management, and Tribunal processes, all of which are implicated in this proposal.



## Comments & Recommendations

The LSO has proposed recommendations through its Professional Regulation Committee that would require:

- Licensees to report additional personal and business information to the LSO; and
- The LSO to disclose some of that information about licensees, if it is in the public interest to do so.

While we understand and support the overall policy objectives behind these policies, we think there is an imbalance between the potential harm to licensees and the public protection goals. If the LSO wishes to proceed with policies aimed at increasing transparency for the bar and the public, the LSO should better balance legitimate concerns of licensees with the public protection goal.

We have organized our submission to highlight several concerns we have with the current proposal.

### ***Sufficient Processes Exist***

As an overall comment on the proposal, the main issue is not the lack of sufficient processes in place to deal with licensee issues for the protection of the public; it is the lack of action or utilization of processes already within the power of the LSO. Some high-profile fraud cases that have received media attention are a prime example of this. The resulting public criticism was not due to regulatory loopholes, or a lack of necessary powers to address the issues - it was due to a lack of utilization of powers already within the LSO's purview.

Existing processes, with which licensees are familiar, work well when utilized. Under the current system, when a licensee reports that they have been charged with an offence, the information is assessed by the Professional Regulation division who can take immediate



interlocutory action. The decision is centered on whether there is a significant risk of harm to the public or the administration of justice. These are two key points that have been lost in this proposal. Instead, the current proposal would subject lawyers to the court of public opinion by publicly reporting potentially irrelevant and highly damaging information. This concern is present for disclosing findings of guilt, particularly under the *Criminal Code* or the *Controlled Drugs and Substances Act* (“*CDSA*”) as there is no consideration of factors regarding risks to the public or the licensee’s fitness to practice law. The issue is more concerning when it comes to proposed public reporting of *charges*, rather than findings of guilt.

### ***Overly Broad Scope of Proposed Offences***

Much of the proposed expansion would include the types of offences that should not be captured by the policy goals, such as tax interpretation disputes in the *Income Tax Act* (“*ITA*”). The current reporting obligations for the *ITA* consider whether the charge alleges, explicitly or implicitly, dishonesty on the part of the licensee, or relates in any way to the professional business of the licensee. This consideration is proposed to be removed, in favor of a blanket reporting obligation for all *ITA* offences to the LSO. Similar factors<sup>1</sup> are proposed for determining whether to publicly disclose these types of charges (compared with reporting them to the LSO), but the highly discretionary nature of the analysis is insufficient for the public disclosure of this type of sensitive information. We also note that there is a lack

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<sup>1</sup> Excluding findings of guilt under the *Criminal Code* and the *Controlled Drugs and Substances Act*, which are proposed to be reported without considering any additional factors, for all other findings of guilt for offences that are reportable to the LSO, public disclosure is proposed when the finding of guilt meets any of the following factors:

- The finding of guilt:
  - Alleges, explicitly or implicitly, dishonesty on the part of the licensee;
  - Reflects adversely on the licensee’s fitness to practice law or to provide legal services; or
  - Relates:
    - To conduct that undermines the administration of justice; or
    - In any way to the professional business of the licensee.



of clarity on the classification of penalties under the *ITA*, and whether that is intended to be captured as a reportable offence.

Furthermore, potential disclosure of charges under the *CDSA* ignores the nature of addiction (an issue known to exist within the profession), the complexity of why individuals become addicted, the mental health implications related to substance use, and the stigma associated with addiction. This is even more pronounced for disclosing findings of guilt under the *CDSA*, as that is proposed to be disclosed in all cases without any further analysis.<sup>2</sup> There have been significant improvements to address substance abuse and mental health stigmas within the bar. The proposed changes would have a detrimental effect on the progress made to date and discourage people from seeking support. Certain serious *CDSA* offences (e.g. trafficking or importing, as opposed to possession), are outside the scope of this concern. We recommend scoping down any proposed *CDSA* inclusions to the most serious offences which clearly impact the public interest or the administration of justice and evaluating them differently than more minor offences such as simple possession.

In terms of public disclosure of findings of guilt, it is notable that the proposed disclosures for the *Criminal Code* and the *CDSA* do not include consideration of the factors mentioned above in relation to the *ITA* and other offences. This could result in public disclosures of sensitive and damaging information which does not impact a licensee's ability to practice law and poses no risk to the public or the administration of justice. There are of course, certain serious offences which may warrant the public release of information, but we think the current proposal has an imbalance between the impact on licensees and the public protection goals.

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<sup>2</sup> Refer to footnote 1.



### ***Presumption of Innocence Concerns***

Serious concerns exist regarding the presumption of innocence, particularly in relation to the proposed public disclosure of charges. Regardless of any disclaimers included, publicly disclosing charges directly on a lawyer's record raises concerns about the presumption of innocence and due process; two key principles that lawyers are meant to safeguard. If a charge appears on a licensee's record, the public is unlikely to draw a distinction between a charge and conviction, intentionally or unintentionally.

It is undisputed that most charges do not lead to convictions. It is also undisputed that lawyers are often subject to frivolous and vexatious accusations from the bar and the public, by virtue of the adversarial nature of our justice system. While the proposal does include a consideration of factors to determine whether a reportable charge should be publicly disclosed, the factors are far too discretionary to provide the level of predictability, safeguards, and assurances necessary. We think that a better balance needs to be struck between potential reputational harm from unproven allegations, and the public interest and protection goals.

### ***The Criteria for Assessing Public Disclosure is Highly Discretionary, Broad, and Ambiguous***

The proposal contemplates publicly disclosing charges if any of the criteria below are met:

The charge:

- reflects adversely on the licensee's fitness to practice law or to provide legal services;  
or
- relates to conduct that undermines the administration of justice; or
- otherwise could impact the safety of clients, the public, or other licensees.

There is no information outlining who is proposed to make these determinations or the guidelines they will use to make the decision. A decision as impactful as publicly disclosing



charges must be based on clear criteria where discretion is minimal, and outcomes can be reasonably predictable. A licensee should be able to adduce evidence and make submissions before information is disclosed publicly.

The same concern exists for assessing disclosures of findings of guilt. Setting aside issues already discussed concerning publicly disclosing findings of guilt for offences under the *Criminal Code* or the *CDSA* without further consideration, the factors for all other reportable findings of guilt are similarly overbroad, ambiguous, and lack guidance in how discretion is to be exercised.

The proposal specifically referenced the Committee's view that as much ambiguity as possible should be removed from the licensee's determination about reporting, and a bright line should be established. This perspective should extend to the factors proposed for determining public disclosures of charges and findings of guilt. The irreversible damage that could be done to a licensee's reputation deserves significant clarity and predictability, which is not present in the current proposal.

### ***Disproportionate Impact on Equity-Seeking Groups***

The concerns about reputational harm associated with publishing charges, the application of ambiguous and highly discretionary criteria, and the public's potential misunderstanding or misuse of this information is amplified for equity-seeking groups.

It is well-known that equity-seeking groups are overcharged and overrepresented in the justice system. They are also underrepresented in the legal profession. The proposed expansion of reportable and publicly disclosable charges and convictions does not adequately account for this reality. The potential reputational damage that would be caused by publicizing charges far outweighs the potential benefits to the public.





The LSO also collects demographic data, and while it is not yet publicly available, we understand that the LSO is considering publicly disclosing this information. Demographic data paired with these proposed disclosure obligations could be used for nefarious purposes including stereotyping licensees.

### ***Unknown Use of Data***

It is unclear how this data would be used by the LSO, how it would be managed, what the retention policies would be, and what safeguards are in place to protect private and sensitive information. For example, will this be roped into good character requirements? What is the purpose of collecting this data, if outside the current processes for discipline?

There are already reporting obligations and processes in place if a licensee is charged with specific offences. The LSO will assign an investigator to see if there is a risk to the public, and immediate action can be taken such as an interim suspension.

The LSOs data management systems are not without issues, and we are concerned with a proposed expansion of reportable and disclosable obligations without first optimizing and enhancing existing systems. For example, we heard from lawyers that in some cases, updating contact information can take a considerable amount of time. When considering the delays associated with routine updates to information in the context of charges and convictions appearing on a licensee's public file, the proposal is more concerning.

### ***Business, Trade, and Operating Names***

We have less concerns with the proposal to publicly disclose all business, trade, and operating names under which a licensee practices law or provides legal services. If this piece moves forward, there should be leniency for good-faith compliance efforts and no fees associated with reporting or updating this information with the LSO. Lawyers indicated that



they have experienced issues with the LSO Tribunal, for example, regarding purported errors in disclosing the order of their names (an unintentional result of different naming conventions around the world). The LSO must be cognizant of this concern and not punish lawyers who make good faith efforts to comply.

### ***Disclosure of Licensure or Discipline in Another Jurisdiction or Profession***

Disclosing whether a licensee is subject to discipline or has been found to have committed professional misconduct in a different regulated profession in Canada is unnecessary. This would be within the records of the other profession, and if the individual remains in good standing with the LSO, it has no impact on their practice. There may be instances where it would be appropriate to disclose certain information if it has an impact on practice or poses risks to the public, but the LSO already has the power to address the matter as it relates to the licensee's ability to practice in Ontario.

Furthermore, the duplication of information already available from the other regulated body is an inefficient use of limited LSO resources. As we mentioned earlier in this submission, there are concerns with the LSOs existing management of data. These concerns exist currently – before any proposed expansion on reportable or disclosable information. From a purely practical perspective, we do not think the LSO should undertake the additional burden of duplicating information already available from other sources. The focus needs to be on improving and rectifying issues within the current information reporting systems before considering expanding the types of information listed. The adage “patch the leaks before you sail farther” rings true here.

### ***Disclosing Ongoing Investigations***

We have the same concerns with disclosing ongoing investigations from the LSO as we do with the disclosure of charges. If an investigation is unfounded, a lawyer should not suffer



potential reputational and economic damage by disclosing this information. Again, if something is so serious that it poses a risk to the public, the LSO already has the power to impose an interim suspension or other disciplinary measures. The reference to providing the LSO with the power to confirm whether a licensee is the subject of an investigation if there is a compelling public interest in the disclosure of that information is another concern. “Compelling public interest” is undefined, highly ambiguous, discretionary, and unclear. Who defines public interest? What are the factors considered? Like our similar comments about the proposed factors for disclosable charges and convictions, the potential consequences are too great to be this discretionary and ambiguous.

### ***Conclusion***

We strongly urge the LSO to reject this proposal as currently formulated. While we support the policy goals of the proposal, the necessary balance is missing with the risks far outweighing the public protection policy goals. The proposal is not properly scoped with sufficient safeguards in place to avoid foreseeable issues that could have an irreversible impact on licensees and the profession. We would be happy to work with the LSO on an updated proposal that better achieves the necessary balance for the profession and the public.

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*The OBA would be pleased to discuss this further and answer any questions that you may have.*