



**Submission**  
**LSUC Call for Input: Proactive Regulation**  
**COMPLIANCE-BASED ENTITY REGULATION**  
**TASK FORCE**

**THE CRIMINAL LAWYERS' ASSOCIATION**

**March 2016**

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## **PREFACE**

The Criminal Lawyers' Association ("CLA") is a non-profit organization founded on November 1, 1971. The Association is one of Canada's largest legal specialty organizations, comprised of approximately 1350 criminal defence lawyers. The vast majority of our members practise law as sole practitioners or in small firms of fewer than five lawyers. The Association has a mandate to educate and support its members as well as all justice system participants respecting the rights of accused persons in criminal justice. CLA is also committed to raising awareness of the challenges posed by the defence bar in carrying out our role in representing vulnerable accused persons competently, professionally and ethically.

The CLA is routinely consulted and invited by House of Commons and Senate committees to share its views on proposed legislation pertaining to issues in criminal and constitutional law. Similarly, the Association is often consulted by the Government of Ontario, and in particular the Attorney General of Ontario, on matters concerning provincial legislation, court management, legal aid assistance and various other concerns that involve the administration of criminal justice in the Province of Ontario. The CLA has been granted standing to participate in many significant criminal appellate cases and government commissions of inquiry.

## **INTRODUCTION**

The CLA appreciates the opportunity to participate in the discussion concerning the Law Society of Upper Canada's proposal to initiate compliance based, proactive regulatory measures. In our submissions, CLA expands on two main points we make in response to the LSUC Call for Input on Proactive Regulation.

First, CLA opposes the application of the proposed compliance-based regulatory framework to sole practitioners or small law firms, particularly criminal defence lawyers. CLA's position is that the defence bar is already self-regulating effectively in respect of file management and professional conduct, and continues to benefit in this regard from existing proactive regulation, such as the new lawyer practice review, which is tremendously helpful to young lawyers. These measures are sufficient, in our view, evidenced by the fact that defence lawyers already comprise only a small percentage of those against whom



conduct complaints are launched. By contrast to the utility of the existing approach to regulatory oversight of the defence bar, the administrative burden imposed by further regulation would be unreasonable, unmanageable and overly onerous, with diminishing returns beyond the current point.

Second, CLA proposes that Legal Aid Ontario (“LAO”) be designated an ‘entity’ for purposes of compliance-based regulation, which, if introduced, should be applied to it. LAO has gone, over the course of the last very few years, from employing very few (perhaps 75) practising lawyers who provided direct service to members of the public to more than 400 such direct service providers. The nature of the service provided by these employee staff lawyers at LAO has also changed qualitatively significantly from duty counsel ‘day-of’ summary advice or attendance in the Courtroom to ongoing advice and representation even in criminal defence matters, including very recently, complex trial work. In essence, LAO has become a large law firm, providing direct representation including lengthy litigation services in a number of areas, including criminal defence work, but without any regulation or oversight of the staff lawyers’ practice management or adherence to ethical requirements, apart from each lawyer’s own self-regulation. The law practices of these lawyers do not require each to render their self-report regarding income, book-keeping and other practice management issues to the LSUC, but equally lacking now are oversight measures to ensure compliance with even basic file-management and practice issues that otherwise provide checks and balances in the day to day work of private practitioners, who are directly governed by the Rules of Professional conduct individually and as a result, necessarily as a firm. Given the fundamentally altered role of LAO in providing significant levels of direct representation of clients as opposed to linking criminal accused, for example, to private bar counsel, LAO should now be treated as a mid to large-size law firm. It ought not to be exempt as a government organization would be in the normal course, because the exempted organizations are not functioning as law firms providing legal representation in criminal court rooms.

### **Part I - Compliance Based Entity Regulation is Not Appropriate for Sole or Small Firm Practice**

The CLA opposes application of the proposed compliance-based regulation to solo or small firm practitioners, particularly those who focus on criminal defence work.



## **(a) Criminal Lawyers<sup>1</sup> are a Distinguished Group of Sole Practitioners and Small Firms**

### **(i) Statistical Evidence of Existing Compliance with Rules of Professional Conduct**

In 2013, of the total complaints to the Law Society, only 10% related to the practice of criminal/quasi-criminal law (as with administrative/immigration). In contrast, the majority of complaints were related to civil litigation (26%), followed by matrimonial/family law (20%), and real estate (17%).<sup>2</sup>

In 2014, the complaints regarding criminal/quasi-criminal practice were reduced to 8.7%. Again, the majority of complaints related to civil litigation (25.5%), followed by real estate (18.2%), matrimonial/family (16.4%), while complaints against lawyers engaged in another primarily sole / small firm practice area, namely administrative/immigration, did not increase beyond the low levels seen the year before (i.e. 10%).<sup>3</sup>

In reviewing the previous years, complaints relating to criminal/quasi-criminal practice are significantly lower than the other litigation practice areas and range from 9-11% of the total complaints.<sup>4</sup>

In reviewing the complaints, 59% of the complaints were transferred either to the complaints resolution or investigations.<sup>5</sup> Unfortunately, there is no way to assess, based on the statistics publicly available, what percentage of complaints relating to criminal practice were transferred by intake to either complaints resolution or investigation.

### **(ii) Existing Regulation With Available Supports is Sufficient**

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<sup>1</sup> Criminal Lawyer refers to Defence, excluding Duty Counsel, Legal Aid, and Crown Counsel

<sup>2</sup> The Law Society of Upper Canada, *2013 Annual Report* (Toronto: 2014), online: <<http://www.annualreport.lsuc.on.ca/2013/en/annual-report-data.html#complaints-year-lawyer-breakdown>>

<sup>3</sup> The Law Society of Upper Canada, *2014 Annual Report*, (Toronto: 2014), online: <<http://www.annualreport.lsuc.on.ca/2014/en/annual-report-data.html#area-of-law>>

<sup>4</sup> The Law Society of Upper Canada, *2008-2012 Annual Report Performance Highlights* (Toronto: 2009-2013), online: < <http://www.lsuc.on.ca/annual-report/>>

<sup>5</sup> *Supra* note 3, online: <<http://www.annualreport.lsuc.on.ca/2014/en/annual-report-data.html#new-complaints-year>>



## **Practice Review Program**

The Law Society's Practice Review Program, which only reviews lawyers in private practice, is sufficient as a proactive step in addressing potential concerns. In 2012, approximately 28% of initial attendances found that lawyers were not meeting standards of professional competence and required a revisit.<sup>6</sup> Unfortunately, the statistics do not indicate the practice areas and what issues need to be addressed. In the context of small firms or sole criminal practitioners, such a review often affords one-on-one consultation between the practitioner and the auditor.

## **Mentoring and Support**

CLA notes the critical distinguishing features of Ontario's criminal defence bar when compared to other junior lawyers starting out on their own or in very small firm settings. Senior defence counsel are always available to mentor or guide new sole practitioners or assist small firms. These mentoring relationships exist both formally and informally. In contrast to the practice of family law or civil litigation, for example, defence counsel are unlikely to find themselves in adversarial relationships with each other, as the Crown is the adversary in the proceedings. As a result, there are many avenues of support for a sole practitioner or small firm lawyer to get assistance, including the formal and informal mentorship programs offered through the CLA itself, the CLA listserv and its CPDs, as well as access to other defence lawyers in similar practices who share space in law chambers. The ready availability of all these avenues of support through the collegiality of the defence bar is likely the reason that criminal lawyers do not account for a high number of what is otherwise a large percentage (70%) of the calls made to the LSUC Practice Management Helpline apparently by sole practitioner/small firm lawyers seeking advice.<sup>7</sup>

## **Rules of Professional Conduct / Rules of Court**

In addition to mentoring and support from senior members of the defence bar, the Rules of Professional Conduct, practice and financial management principles, along with the Rules of the Court, which mirror some of the guidelines,

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<sup>6</sup> *The Law Society of Upper Canada, 2012 Annual Report Performance Highlights (Toronto: 2013)*, at 15, online: <

<http://www.lsuc.on.ca/WorkArea/DownloadAsset.aspx?id=2147494633>>

<sup>7</sup> *Ibid.*



in combination already effectively manage the practice of criminal lawyers. The Law Society also receives annual updates on the status of a sole practitioner's practice by way of the Annual Report which must be filed pursuant to the Rules.

### **Constant Judicial Oversight**

The criminal lawyer is required to attend court until a matter is completed. The criminal justice system is designed to ensure that the accused and/or convicted person's counsel is adhering to the Court rules and representing the client's needs.

### **(b) Administrative Burden on Sole / Small Firm Practice Overly Onerous**

#### **(i) Lack of Administrative Supports**

In the practice of criminal law, the majority of criminal lawyers practice solely or in small firms. Unlike many other areas of law, criminal lawyers are in court daily or almost daily, with the exception of appellate lawyers. In addition, the majority of criminal lawyers are on "on-call" for their clients in case of an arrest. In conjunction with the daily requirements, criminal lawyers must keep up-to-date with the daily changes (some more nuanced than others) in case law that affects criminal law.

#### **(ii) Adverse Financial Impact on Already Limited Ability to Earn a Living Wage**

Along with the time constraints, the ability to earn a wage as a criminal lawyer becomes ever so difficult, as there are still financial constraints such as higher tuition for law school and bar admissions, along with the financial limitations of Legal Aid. Therefore, most criminal lawyers are forced to keep overhead costs low by omitting or sharing the cost for administrative staff. As such, the majority of the administration cannot be addressed until evenings, weekends or holidays.

The limited administrative assistance, combined with the current regulations of the Law Society, result in criminal lawyers dedicating non-court time to administration on top of the time required for case preparation and communication.



### **(iii) Diversity related Concerns**

#### **Sole Practices Cannot Assist in Enforcing Mandate to Increase Diversity**

Increasing diversity at the bar is extremely important to criminal lawyers and the CLA. However, there is no way for a sole practitioner to address this issue. In a small firm, it would be near impossible to implement practices to address diversity-related concerns. The time and cost required for the LSUC to enforce compliance in this area would be unproductive.

#### **Proactive Regulation would Adversely Impact Racialized Lawyers**

27% of Ontario's racialized lawyers practise law in firms of five or fewer lawyers, as do 31% of our Aboriginal lawyers.<sup>8</sup> The addition of yet another administrative task would therefore disproportionately affect racialized and Aboriginal lawyers, who make up 16.9% and 1.4% of all Ontario lawyers, respectively.<sup>9</sup>

## **Part I - CONCLUSION**

### **(1) The Compliance-Based Entity Regulation Should Not Apply to Sole Practitioners or Small Firms in Criminal Law**

The consultation paper has not set out exactly how the Law Society intends to implement the regulation. However, it is the CLA's position that for criminal lawyers, there are currently sufficient safe-guards already in place to ensure compliance and further proactive regulation would be unnecessarily onerous.

It is our submission that any further regulation on the criminal defence bar is both unnecessary and would present administrative and financial challenges that would prove prohibitive.

The term "entity" best applies in the regulatory context to firms with several lawyers, paralegals and/or support staff. As noted in the discussion paper

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<sup>8</sup> *Supra* note 3, online: <<http://www.annualreport.lsuc.on.ca/2014/en/snapshot-lawyers-data.html#Type-Employment-Race-Aboriginal>>

<sup>9</sup> *Supra*, note 3, online: <<http://www.annualreport.lsuc.on.ca/2014/en/snapshot-lawyers-data.html#Representation>>



itself, many medium and large firms already have written operational policies in place. They also have designated individuals to oversee the implementation and monitoring of such policies. By applying compliance-based regulation to small firms or sole practitioners, particularly those who practise in the field of criminal law, the Society would be imposing an enormous administrative burden that is largely duplicative of existing compliance programs.

## **(2) In the Event LSUC chooses to Include Sole / Small Firm Practitioners:**

### **A Measured Response Required for Sole or Small Law Practices**

If the LSUC determines that some form of proactive compliance measures should be implemented for lawyers practicing in sole or small law firms, it is important to recognize that the “entity” being regulated does not have a managing partner. It is further important to underscore that regulating the entity in the case of sole or small firms is one and the same as ensuring that the individual lawyers are complying with the Rules Professional Conduct and associated By-laws.

A proactive approach for such firms would utilize existing platforms (such as the Law Society portal) and requirements (such as the Continuing Legal Education requirements) to ensure that the administrative burden of these programs does not impose a disproportionate burden on sole or small firms. For example, a requirement that small firms or sole practitioners complete a compliance “self-assessment” each year, perhaps as part of the Annual Report process, could be such a proportionate yet proactive approach.

Alternatively, the Law Society could require practitioners in small or solo firms to complete an hour of practice management continuing legal education as part of the three hour professionalism component of the existing continuing legal education requirements. Such a requirement would likely inspire programs designed to address the specific, and unique, practice management and regulatory compliance issues that arise in the majority of small or sole criminal law practices.





## **Part II – Legal Aid Ontario (“LAO”) Is an “Entity” that must be Subject to Compliance-Based Regulation**

In calling for input for compliance-based entity regulation, the Task Force noted that LSUC says that while there may be some benefits for practitioners in other structures, such as government legal departments and legal clinics, these practitioners would be consulted at a later stage regarding the possible application of proactive regulation to them. While this delay may be appropriate for the vast majority of government legal departments, it is inappropriate to wait to develop compliance-based regulation for Legal Aid Ontario. Since 2011, Legal Aid Ontario has grown the number of lawyers and articling students in its employ substantially. Further, the scope of work that Legal Aid lawyers undertake has moved beyond the model in which duty counsel simply play a complementary role to that of private counsel.

Given the recency with which this scope of work has expanded, CLA’s concern is that LAO has not developed the necessary internal structures designed to positively influence its counsel. The stakes are high: Legal Aid lawyers represent indigent accused facing serious charges. Negative effects if counsel do not act competently or run afoul of best practices can include loss of liberty, incarceration, and/or a criminal record for an indigent accused.

CLA takes the position that proactive compliance-based regulation must apply to Legal Aid Ontario. Our submissions, below, set out why Legal Aid Ontario must be mandated immediately to develop practice-management protocols.

### **(a) WHY PROACTIVE, COMPLIANCE-BASED REGULATION SHOULD APPLY TO LEGAL AID ONTARIO**

The Criminal Lawyers’ Association recognizes that the Law Society has had a primary focus on the individual, rather than the practice entity. The Call for Input signals the willingness of the Law Society to consider regulation of the practice entity.

Since 2011, Legal Aid Ontario has significantly expanded both the number of lawyers it employs and the scope of work that these lawyers undertake. The budget for duty counsel employed by Legal Aid Ontario has increased by \$8 million. LAO has also increased the number of “staff lawyers” it employs. These staff lawyers conduct far more complex work than duty counsel, who traditionally



assisted by representing indigent accused in bail hearings, guilty pleas, and set date court. Staff lawyers go beyond this relatively narrow scope by conducting judicial pre-trials, trials, and other complex litigation that has been the traditional domain of private counsel. The role of staff lawyers is now entrenched within Legal Aid. An indigent accused financially qualifies for assistance from a private lawyer provided he/she earns less than \$14,045 per year. An applicant financially qualifies for assistance from a staff lawyer provided he/she earns less than \$20,225 per year. As a result, far more individual accused are able to access the services of LAO staff lawyers to represent them in criminal Courts, than are able to retain counsel of choice through the private bar pursuant to certificate authority.

The latest figures that CLA has obtained from LAO indicate that LAO employs over 400 staff lawyers and duty counsel, including duty counsel who perform now in an expanded role. In addition, and at the same time, LAO has begun to hire, and continues to hire back, substantially greater numbers of articling students than it had ever previously taken on, peaking at approximately 50 students per year from 2012 to 2015.

As noted above, LAO staff lawyers now frequently engage in complex litigation and act as trial counsel for indigent accused. Further, LAO's employed lawyers conduct other important work within the certificate system. For example: since 2011, duty counsel have determined whether Legal Aid applicants have "serious enough" charges to warrant issuance of a legal aid certificate. This decision is not reduced to writing and is therefore insulated from review.

Currently, therefore, LAO's employed lawyers both: (1) increasingly perform the functions of private bar lawyers (in the way in which a large firm would), and (2) have significant administrative responsibility within the certificate system that may determine whether an accused will be able to access their counsel of choice. As a result, LAO has in effect become an exceptionally large criminal law firm providing direct service to the public, while also remaining a large bureaucracy with a mandate to administer the certificate system and promote access to justice through that certificate system. These responsibilities filter down to staff lawyers and duty counsel. It is imperative that proactive, compliance-based regulation applies to LAO at the earliest opportunity.



## **(b) WHY LEGAL AID ONTARIO SHOULD IMMEDIATELY BE REQUIRED TO DEVELOP PRACTICE-MANAGEMENT PROTOCOLS**

The CLA understands the aim of compliance-based regulation is to emphasize a proactive approach to regulation. The Law Society would identify practice management principles and establish goals, expectations, and tools to assist practitioners in demonstrating compliance. This CLA agrees with the Task Force that the practice environment is a crucial influence on professional conduct. Entity regulation recognizes that decisions are increasingly determined by law firm policies and procedures where they were once made by an individual lawyer or partner. The environment shapes and influences the practice-management principles the individual follows.

LAO's decision to increase the scope of work its lawyers perform has brought into play significant practice-management considerations that did not exist when duty counsel had a strictly defined and limited role. Staff lawyers and duty counsel now perform client services in which they must effectively communicate with indigent accused who are now their "clients", consider and avoid conflicts of interest, and perform to the standard that has always been expected of private criminal lawyers.

### **SPECIFIC CONSIDERATIONS**

#### **(i) Increased Risk of Client Service Related Complaints - Generally**

According to the Task Force, over half the complaints that the Law Society receives involve client services. Client service related complaints include a lack of effective communication by the practitioner, which make up one-third of claims to LawPRO. 8% involved conflicts of interest.

The CLA is not aware of Legal Aid Ontario having developed any practice management protocols in recognition of the changing role of its counsel. There are no publicly-available documents that set out what indigent accused can expect from staff lawyers or duty counsel when LAO employed lawyers represent them.



## **Conflicts of Interest – Conflicts Checks**

CLA cannot ascertain what, if anything, LAO does to avoid conflicts of interest, or whether / how it even defines a conflict. This is crucially important. When duty counsel provided only limited legal services, such as bail hearings or assistance on remand, the risk of a conflict was low. Now, with staff lawyers conducting trials, there is a serious risk that, for example, the complainant in their case will be someone that they (or a fellow duty counsel) represented on a bail hearing.<sup>10</sup> This could affect the duties of confidentiality and loyalty to a client. Given that LAO has, in effect, become a large law firm with several satellite offices, a robust conflict check system is required.

## **Effective Communications with Clients**

Another consideration involves effective communication with clients. Under the previous role for LAO employed lawyers, duty counsel would generally conduct quick, “day-of” communications with clients and their families. This is entirely insufficient for more complex matters such as trials. Significant preparation is required which in turn requires effective and comprehensive client communication. Private bar criminal lawyers make this a matter of course, as required by the Rules of Professional Conduct. But duty counsel and staff lawyers are influenced by their surroundings, and LAO is new to this increased scope of work. There is nothing to suggest that LAO has prepared itself to be a positive influence on its lawyers’ new role as counsel providing comprehensive direct legal services to indigent accused. There is no indication that Legal Aid Ontario conducts practice management reviews or has any policies with respect to something as fundamental as file creation.

### **(ii) Vulnerable marginalized clientele**

Client-service related practice management issues are especially important given the clients LAO’s lawyers represent. Their clients are poor, often

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**<sup>10</sup> There are further conflicts that can arise at the bail hearing itself where co-accused are both represented by duty counsel. The CLA is aware of one instance at the College Park Courthouse where duty counsel represented both a husband and wife who were charged in a domestic context and both accused sought advice about withdrawing charges and other sensitive issues that put counsel in a conflict.**



racialized, accused who, in years past, would (more often than not) have been afforded an opportunity to retain private counsel of choice on a legal aid certificate. Now, these self-same accused may qualify only for representation by an LAO staff lawyer. However, there is no sign that LAO has ensured this lawyer's work environment will have the same safeguards in place as private counsel have.

### **(c) RECOMMENDATIONS FOR EFFECTIVE REGULATION OF LAO**

The Task Force identified as a key element in proactive regulation, the development of a list of practice management principles that practitioners would be required to implement in their practice. The CLA submits that LAO must develop a structure of practice-management guidelines and safe-guards that ensures its counsel ethically discharge its duties with respect to its relationship to clients, students, employees, and to the public generally. These must include the following:

- Creating a "designated practitioner" within LAO to travel the province and oversee practice management for all of its staff lawyers and duty counsel.
- Defining what a conflict is and creating a system in which staff lawyers and duty counsel can conduct a conflict check.
- Creating detailed guidelines for documenting client communication.
- A regular system to oversee counsel to monitor and ensure competence and ethical behaviour in court, including random ordering of transcripts.
- Regular audits of practice-management systems and internal compliance checks to ensure individual lawyers are developing strong practice-management habits.

## **PART II - CONCLUSION**

LAO is a publicly-funded entity. It now has more than 400 lawyers conducting the work that had historically always been the exclusive domain of the private bar. It has a responsibility as an entity to create an environment in which staff lawyers and duty counsel are encouraged to establish excellent practice-management habits. A comprehensive and wide-ranging system for this entity is necessary to protect indigent accused and maintain the public trust that has been a backbone of the certificate system. Should LAO reverse the current course and return to a more restricted model of service delivery that complements the private bar, without undertaking more complex work, then it may be that much of



what is set out above is no longer required. Unless and until that happens, LAO must be a focus of the Law Society's effort to introduce proactive regulation to large entities.

## **CONCLUSION**

In conclusion, the CLA opposes application of compliance-based regulation to sole or small firm law practices, particularly criminal defence lawyers. CLA's view, supported by the evidence of statistical analyses on point, is that defence lawyers are already complying with their professional obligations, in part due to the fact that nearly all of us practise in solo or small firm settings. At the same time, CLA's position is that LAO should be designated as an "entity" and subject to such proactive regulation, despite the fact that it is a government agency. LAO is now functioning as a large firm providing direct services, including criminal defence representation at complex trials to indigent accused persons. It is the unwieldy nature of a public defender system that creates issues like conflicts of interest within a criminal law firm environment. This is exacerbated when there is no practice management structure in place. Small firms and sole practitioners are inherently limited in size; as a result, practice management essentially and effectively mirrors the Rules of Professional Conduct. Sole practitioners can simply follow the Rules and have an internal system that works for the lawyer, which accords with the Rules. Sole practitioners have no "firm culture" that can sway them away from compliance nor do they have to worry about the practices of lawyers who may be part of the 'firm' but whom they've never met.