



# Black Legal Action Centre

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September 16, 2021

Mr. David Field  
President and CEO  
Legal Aid Ontario  
40 Dundas St. West, Suite 200  
Toronto, Ontario M5G 2H1

## **Re: Submissions on Legal Aid Ontario's Draft Service Agreement under LASA 2020**

Thank you for the opportunity to comment on Legal Aid Ontario's Draft Service Agreement under the *Legal Aid Services Act, 2020*.

The Board of Directors of the Black Legal Action Centre (BLAC) met on September 15, 2021 and approved the following submissions on behalf of our organization.

These submissions were prepared through an engagement process led by BLAC's dedicated Task Force on Clinic Modernization. The Task Force includes members from BLAC's staff, the legal academy, the Board of Directors, the legal profession, and the Black community at large. It thus uses a broad-based and participatory approach to analyzing developments in LAO's 'modernization' regime and to making recommendations that the Board of Directors considers when determining the vision, scope and content of BLAC's submissions. The Task Force is also mandated to examine possibilities for broader advocacy within the Black community on LAO 'modernization' under the Board of Directors guidance and approval.

We ask that LAO take these submissions into account in your review of the Draft Service Agreement as well as all other aspects of LAO's interlocking 'modernization' framework, namely LASA 2020, the amended Draft Rules before the Attorney General, the Service Proposal, and policies.

BLAC reserves the right to comment further on the draft policies that LAO recently disseminated for comment as well as on all other aspects of the 'modernization' framework, because the framework is a series of cross-referencing and mutually reinforcing instruments that cannot be understood or commented on separately.

In particular, BLAC reserves the right to make further submissions on any changes that LAO and the Ministry are undertaking to the documents provided for the present consultations. Should the Draft Service Agreement and Draft Rules shift during this consultation period, without formal notice, BLAC considers the consultations to be extended, according to principles of due process.

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We also request that LAO consult further with the Association of Community Legal Clinics of Ontario and individual clinics, including BLAC, before finalizing any aspect of the 'modernization' framework.

Specifically, BLAC wishes to arrange a meeting with LAO to discuss our submissions to date and the ongoing process of clinic modernization.

Yours truly,

*Aba Stevens*

Aba Stevens, Chair  
On Behalf of The Board of Directors  
Black Legal Action Centre

Encl. Submissions to Legal Aid Ontario

Cc.: BLAC Executive Director; BLAC Board of Directors; Association of Community Legal Clinics of Ontario, Lenny Abramowicz; Attorney General of Ontario, Doug Downey; Board of Directors of Legal Aid Ontario, Charles Harnick, Bryn Gray, Deborah Moriah, Jennifer Gold, John Callaghan, Malcolm Heins, David Wexler, Julia Bailey, Peter Johnson, Judy Mintz; Vice President Clinic Law Services of Legal Aid Ontario, Rod Strain.

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## 1 Introduction

These submissions on Legal Aid Ontario's (LAO) Draft Service Agreement under the *Legal Aid Services Act, 2020* ('LASA 2020' or 'the Act') explain how the Draft Service Agreement as well as LAO's overall approach to access to justice for racialized communities in the 'modernization' process must change to meet the needs of the Black community.

The Black Legal Action Centre (BLAC) was established in 2017 as a specialty legal clinic with a mandate to combat systemic and individual anti-Black racism in Ontario. BLAC provides free legal services to low- and no- income Black Ontarians who face anti-Black racism, including through legal representation, summary advice and other legal services. Our clients experience anti-Black racism in their encounters with multiple areas of regulation, which BLAC addresses, such as housing, social assistance, policing, human rights, education and employment. To realize systemic transformation, BLAC also engages in far-reaching practices of test case litigation, law reform, research projects and community development. This includes giving public legal education to the Black community, to the public at large and to many community agencies that enable us to reach marginalized people. BLAC's physical centre is located in Toronto, but we operate a satellite clinic in Western Ontario and have plans to establish satellite clinics in the Eastern and Northwest regions.

In these submissions, we expand upon submissions that BLAC made to LAO on the Draft Rules, dated May 25, 2021. Given that LAO's 'modernization' framework comprises various mutually reinforcing components, including the Rules, Service Agreement, Service Proposal, Statement of Principles and policies, the present submissions must be read **after and in light of our prior submissions on the Draft Rules**. BLAC wishes to reinforce our prior submissions, subject to few changes discussed in this present document, which reflect amendments that LAO did, or did not, undertake to the Draft Rules following the spring 2021 consultations. **BLAC reserves the right to make further submissions on each interlocking part of LAO's 'modernization' package, before the coming into force of LASA 2020 and thereafter.**

The present submissions must be read with the essential background that BLAC provided in our last submissions on the legal aid needs of Ontario's Black community. Those submissions described forms of anti-Black racism in Ontario, drawing on the historical record, research studies and a 2018 needs assessment commissioned by BLAC. As we demonstrated,

anti-Black racism can be traced to the enslavement of Black people across Turtle Island before Canada became a nation as well as to legalized segregation, restrictive immigration, labour conditions and other practices extending into the 20th century. Anti-Black racism thus became embedded in the fabric of Canadian society, alongside the dispossession of Indigenous peoples, and both persist today across all areas of regulation. For too long, direct government violence and the state-condoned violence of individuals and companies have oppressed Black peoples, putting their lives at risk. BLAC strives to transform this virulent anti-Black racism, which is constantly retrenched, including through the legal aid system.

BLAC's prior submissions showed how the Draft Rules fall woefully short of establishing a foundation for legal aid services that respond to the needs of the Black community and, therefore, achieve access to justice. We submitted that LAO must reform the Draft Rules in several respects. We also complemented our submissions on the Draft Rules by showing that LAO's overall approach to racial justice must radically change to achieve access to justice for Black people. We submitted that LAO must engage in a process of visioning, strategic planning and concrete action that is tailored and meaningful to the Black community.

BLAC is seriously disappointed that LAO did not adopt the vast majority of our submissions on the Draft Rules and on the need for LAO to commit to a robust process that seeks to address anti-Black racism across the legal aid system. Our present submissions on the Draft Service Agreement reflect LAO's utter lack of meaningful response to our recommendations, those of other clinics, and those of the Association of Community Legal Clinics of Ontario (ACLCO).

In the present submissions, Section 2 shows how the Draft Service Agreement erects barriers to serving the Black community in a meaningful and effective way. LAO's plans do not reflect the needs of the Black community in Ontario and they hinder access to justice. Contrary to its statutory mandate, LAO would thus play a role in *sustaining* anti-Black racism against individuals and throughout our society. Section 3 highlights, as BLAC did previously, that LAO must undertake a process of engagement to develop a systemic approach to addressing anti-Black racism across the legal aid system. Finally, Section 4 makes recommendations based on BLAC's findings. Please note that BLAC endorses the submissions of the ACLCO, except where they deviate from our own.

## 2 LAO's Draft Service Agreement Does Not Respond to the Needs of the Black Community Nor Does It Promote Access to Justice

As a preliminary matter, BLAC wishes to remind LAO of its responsibilities under LASA 2020 to 1) promote access to justice and 2) respond to community needs. These responsibilities are owed to the Black community in Ontario. We then provide our analysis of how LAO's Draft Service Agreement does not respond to the needs of Ontario's Black community nor promote access to justice, as is required of LAO.

### a. LAO Must Respond to the Needs of the Black Community for Access to Justice

As BLAC explained in our prior submissions, LAO has legislative responsibilities to provide services that address the different needs of communities in Ontario who receive legal aid support. These responsibilities begin with the purpose of LASA 2020, which is to facilitate the establishment of a system that provides effective and high-quality legal aid services in a '**client-focused**' manner.<sup>1</sup> The Act requires LAO to account for the needs of individuals and communities in determining these legal aid services.<sup>2</sup> These responsibilities are reinforced by LAO's duty to operate according to the principle that services should 'be **responsive to the needs** of low-income individuals and disadvantaged communities in Ontario.'<sup>3</sup>

Importantly, LASA 2020 recognizes that legal aid clinics, such as BLAC, are partners in determining community needs. Legal Aid Ontario must generally have regard to 'the foundational role that community legal clinics play in providing poverty law services'.<sup>4</sup> Crucially, when it comes to poverty law, LAO must account for community needs **based on the assessments that community legal clinics provide** and any other information.<sup>5</sup>

In addition to these responsibilities to address community needs in collaboration with legal aid clinics, LASA 2020 affirms that LAO must operate according to the principle that services should '**promote access to justice**'.<sup>6</sup> Access to justice has both procedural and substantive aspects. It goes beyond opening access to formal legal institutions, such as courts, to also encompass just *legal outcomes* and justice at a *systemic level*. In BLAC's view, systemic

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<sup>1</sup> *Legal Aid Services Act, 2020, S.O., 2020, c.11, Sched. 15, s.1.*

<sup>2</sup> LASA 2020, s. 6(a).

<sup>3</sup> LASA 2020, s. 17(2)(1)(iv) [emphasis added].

<sup>4</sup> LASA 2020, s. 5(a).

<sup>5</sup> LASA 2020, s. 5(b)-(c) [emphasis added].

<sup>6</sup> LASA 2020, s. 17(2)(1)(i) [emphasis added].

access to justice is of the utmost importance because it is preventative and transformational. It is only if access to justice includes a break from normal affairs that the concept can enable people to flourish in daily life.

To summarize, BLAC submits that LAO has responsibilities to respond to the unique characteristics and experiences of low-income members of the Black community in Ontario. In doing so, LAO must rely on information that BLAC provides on the Black community's needs and any other relevant information. Legal Aid Ontario's responsibilities toward the Black community, and BLAC, are underpinned by LAO's responsibilities to promote access to substantive justice. This means that LAO must meaningfully address the specific needs of Black Ontarians in a dedicated way by collaborating in good faith with clinics, such as BLAC.

b. The Draft Service Agreement Fails to Meet the Legal Aid Needs of Ontario's Black Community and to Promote Access to Justice

We have shown that LAO has responsibilities under LASA 2020 to respond to the needs of the Black community and to promote access to procedural and substantive justice. However, as it now stands, the Draft Service Agreement would not result in a legal aid regime that fulfills LAO's statutory responsibilities.

This section outlines how LAO's Draft Service Agreement would operate instead to *sustain anti-Black racism* contrary to LAO's mandate under LASA 2020. Below, we therefore also provide recommendations for how the Draft Service Agreement could be changed to mitigate these problems.

i. *LAO Has Failed to Stipulate an Effective Service Agreement Term Length*

BLAC is deeply concerned about the maximum three-year term for service agreements contemplated in the amended Draft Rules that LAO has provided to date.<sup>7</sup> In our view, this provision does not reflect BLAC's practical operational realities, BLAC's mandate, the nature of BLAC's work and the relative infancy of BLAC as an organization. If a three-year term for services agreements were confirmed, quite simply, BLAC's security as an organization would be threatened.

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<sup>7</sup> Amended Draft Rules, s. 79(3).

A three year term length would imperil the ability of BLAC to hire and retain skilled permanent staff. Long-term permanent staff are key to the retention of BLAC's institutional knowledge and to the provision of effective services to clients in the Black community. The three year term length would also prohibit BLAC from achieving cost savings by entering longer term financial commitments and entering a regular lease.

The three year term length also does not reflect BLAC's systemic work. Given the breadth of services and areas of law that BLAC must engage in to further its mandate, a sizable portion of our work will exceed three years. Human rights cases often take more than three years to conclude. Law reform efforts, such as test case litigation, can span decades. And our research projects, such as the 'school-to-prison pipeline' project, require extensive consultations with the Black community, information gathering, and collaborations with government. Structuring a legal aid regime that supports such efforts is critical to respond to the needs of Black people in Ontario.

BLAC's infancy is another factor that explains why LAO's proposed three year term limit would prohibit access to justice. BLAC is the newest legal aid funded community legal clinic. LAO and BLAC can both attest to the amount of work involved in establishing a new legal clinic. Such work has included community consultation, recruitment of a Board of Directors, establishing by-laws, entering into a lease, refurbishing our premises, establishing and implementing policies and procedures, hiring and training staff, hiring a new permanent Executive Director, and building trust in the community.

For BLAC, these endeavours have taken place in the midst of once-in-a-generation changes to the clinic system and a global pandemic. At this point, BLAC needs a stable relationship with its primary funder and time to help Black Ontarians feel the impact of the increasing recognition of anti-Black racism in this province, which LAO is otherwise helping to advance.

For these and other reasons BLAC submits that **the Draft Service Agreement between BLAC and LAO should be a 'rolling' agreement.** Previously, BLAC submitted that the Service Agreement should remain in effect until a new or amended Service Agreement is entered into. We also submitted that, should LAO require the service agreement to have a fixed

term, the term should be a minimum of ten years with another term that automatically renews absent a material breach.

Therefore, it is In addition to our previous recommendations that BLAC also supports a ‘rolling’ service agreement, according to which at the end of each year under a three-year term service agreement, LAO would extend the term by an added year. Such a ‘rolling’ service agreement would provide BLAC with the stability and foresight necessary to provide quality legal services to Ontario’s Black community and to better ensure the success of Ontario’s Black legal profession, including BLAC’s staff lawyers and community workers. Specifically, a ‘rolling’ Service Agreement of the kind described here would enable legal clinics, including BLAC, to plan their service delivery and human resources with two to three years of advance notice, which is not optimal but is a sufficient period in BLAC’s view.

**Our endorsement of a ‘rolling’ service agreement nonetheless depends upon BLAC’s other submissions**, including that the terms of the service agreement must be subject to an equitable distribution of LAO funding according to a ‘funding formula’ that LAO must determine in partnership with clinics including BLAC. We explain this and other vital elements of any service agreement below.

**Recommendation**

1. The service agreement should be a ‘rolling’ arrangement whereby each year in a three-year service agreement LAO extends the term by a corresponding year, subject to provisions recommended in BLAC’s submissions

- ii. The Service Agreement Must Be Subject to a Funding Formula that Guarantees Substantive Equality in the Level of Funding for the Black Community*

BLAC has identified a possible risk arising from the ‘rolling’ nature of a service agreement related to the distribution of funding to and across clinics. Specifically, BLAC is concerned that LAO may require a clinic to receive the same level of funding in any ‘roll over’ year that the clinic received during the prior two to three years of the service agreement. The framing of a ‘rolling’ arrangement in terms of an ‘extension’ of the original service agreement throws



this risk into stark relief. In BLAC's view, such a possibility would severely curtail the provision of quality services to the Black community, because LAO must respond on an ongoing basis to the needs of the community, including in the level of funding provided to BLAC.

There is a possibility that Ontario's Black community will grow and that demographics will shift within the Black community. Because the Black community is ever changing, there is no doubt that Black individuals will experience anti-Black racism across domains of regulation in different ways over time and place, as discussed in our prior submissions. Any 'rolling' service agreement must therefore be sufficiently flexible to accommodate *increases in funding over time* that meet the projected costs of supporting the Black community *based on actual needs*, through the full range of services that BLAC is mandated to provide.

BLAC is aware that LAO will embark upon a process after LASA 2020 comes into force to determine how funding is distributed across the legal aid system to clinics. We suggest that any 'rolling' service agreement would need to respond to this new 'funding formula'. That said, BLAC strongly believes that any such formula must advance the goal of equity. Therefore, LAO must engage in a comprehensive consultation process with clinics, including BLAC, to determine this 'funding formula'. In the absence of more information at this time, BLAC submits that, at a minimum, any 'funding formula' must be consistent with substantive equality and human rights. Specifically, given LAO's responsibilities under LASA 2020 to respond to community needs, **any 'funding formula' that alters the terms of future service agreements must correlate to the evolving needs of Ontario's Black community.**

In BLAC's prior submissions, we detailed the *greater needs that Black Ontarians have for legal aid services* due to the persistent legacies of slavery, segregation, and other forms of anti-Black racism. Legal Aid Ontario's own Racialized Communities Strategy recognizes that Black communities face substantial and disproportionate racism across the legal system. The Strategy documents that Black children are 40% more likely to be investigated by child protection authorities than white children, although there are similar rates of neglect and abuse.<sup>8</sup> The Strategy states the fact that Black people are singled out for greater scrutiny, surveillance, questioning and other forms of policing that lead to criminal charges and

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<sup>8</sup> LAO, Racialized Communities Strategy (2020), p. 3

arrests, often for low level offences.<sup>9</sup> The Strategy mentions, ‘anti-Black racism operates at all levels of the criminal justice system from racial profiling, to the exercise of prosecutorial discretion, to the imposition of pre-trial detention, and to disparities in sentencing.’<sup>10</sup> The Strategy lists injustices committed against Black people who are incarcerated.<sup>11</sup> The Strategy also notes anti-Black racism is reproduced in and through legal aid clinics.<sup>12</sup>

To provide another example of the greater substantive need of Black Ontarians for legal aid support, although Black Ontarians make up 8% of low-income Ontarians,<sup>13</sup> Black children make up 41% of children in care in Toronto.<sup>14</sup> This comparison, and the examples above from LAO’s own Strategy, illustrate that the needs of the Black community for legal aid services *exceed* their representation among low-income Ontarians. Any ‘funding formula’ must reflect these considerations of substantive equality and human rights. Moreover, any ‘rolling’ service agreement must conform to an equitable ‘funding formula’ that is based on robust consultations with clinics, including BLAC. For further clarity, it is BLAC’s submission that any ‘funding formula’ related and needs-based increases would be additional to annual increases that BLAC expects from LAO to account for legal obligations, inflation and the cost of living for staff.

### **Recommendations**

2. Any ‘rolling’ service agreement should conform to a ‘funding formula’ that equitably distributes LAO funding across the legal aid system
3. LAO should engage in a comprehensive consultation process with clinics, such as BLAC, in designing the equitable ‘funding formula’
4. At a minimum any future ‘funding formula’ and, therefore, any ‘rolling’ service agreement should guarantee substantive equality and the human rights of Ontario’s Black community in the level of funding to clinics including BLAC

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<sup>9</sup> Ibid, p. 4.

<sup>10</sup> Ibid, p. 34.

<sup>11</sup> Ibid, pp. 4-5.

<sup>12</sup> Ibid, p. 29.

<sup>13</sup> LAO, Racialized Communities Strategy, (2020), p. 22.

<sup>14</sup> CBC News, “‘Crisis’ in Children’s Aid over number of black children in care” (12 January 2016), online: <<https://www.cbc.ca/news/canada/toronto/crisis-in-children-s-aid-over-number-of-black-children-in-care-1.3399114>>.

*iii. LAO Must Guarantee Adequate Support for Clinics to Fulfill Equity and Human Rights Obligations toward the Black Community*

As BLAC mentioned in our prior submissions, the Draft Rules do not identify the Black community as a unique group of individuals who face particular barriers to procedural and substantive access to justice in Ontario. Legal Aid Ontario's amended Draft Rules did not address this deficit. BLAC has previously submitted, and we wish to reinforce, that these omissions compound the failure of LASA 2020 to specifically name Black community needs amongst the needs that LAO must consider when making determinations about legal aid services.<sup>15</sup> On this question, we ask LAO to reconsider our prior submissions on including express language in the Draft Rules and, now, in the Draft Service Agreement that recognizes the priority of addressing anti-Black racism in the legal aid system.

BLAC is encouraged that the amended Draft Rules require clinics to develop 'procedures and policies to ensure that the entity services are delivered in a manner that is respectful, that recognizes the dignity and worth of every client and that is free of bias, discrimination, harassment and racism, including anti-Indigenous and anti-Black racism'.<sup>16</sup> These requirements on clinics support duties under the *Human Rights Code*, which already applies to the provision of legal services. Its express inclusion is encouraging, even if it does not enhance pre-existing human rights obligations under the law.

At the same time, however, BLAC is deeply concerned that the Draft Service Agreement does not mirror these provisions. The Draft Service Agreement does not set out that Black and Indigenous peoples are disproportionately represented among those requiring legal aid services, and that clinics and LAO have obligations to address the individual and systemic experiences of these communities as they interact with the legal aid system. Despite the language in the amended Draft Rules, these issues are of such importance that they should be mirrored in the contractual terms in any service agreement.

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<sup>15</sup> LASA 2020, s 6(a).

<sup>16</sup> Amended Draft Rules, s. 83(3)(m).

In particular, the amended Draft Rules, and the Draft Service Agreement, do not establish a **responsibility on LAO to support clinics in developing and administering their obligations under the Draft Rules to ensure legal services are free of anti-Black racism**. Schedule H of the Draft Service Agreement on ‘Support Services’ states that CLSD staff will ‘provide information to, and field inquiries from, the Clinic’s management and board related to.... equity, diversity and inclusion’. Yet these provisions are limited to ‘information’ and ‘inquiries’. They clearly do not fill the gap that BLAC has identified in the amended Draft Rules and the Draft Service Agreement with respect to LAO’s parallel obligations to support clinics to comply with their obligations in a meaningful and effective way.

Although BLAC supports the express requirement in the amended Draft Rules that clinics address anti-Black racism in their services, it is clear that LAO must have corresponding responsibilities that enable clinics to do so. These LAO responsibilities would involve specific obligations to provide finance and in-kind support to meet the equity obligations imposed upon clinics under the amended Draft Rules and the *Human Rights Code*. BLAC therefore suggests that LAO amend the Draft Service Agreement to recognize LAO’s obligation to provide such support.

#### **Recommendation**

5. The service agreement should expressly acknowledge the disproportionate representation of Black individuals and communities in the legal system for reasons of historical and present racial oppression
6. The service agreement should reinforce the provision in the amended Draft Rules requiring clinics to develop policies and procedures to address anti-Black racism
7. The service agreement should establish a duty on LAO to provide financial and in-kind supports to guarantee that clinics meet their obligations to address anti-Black racism in their services under the amended Draft Rules and to guarantee that clinics fully comply with the *Human Rights Code*

- iv. *LAO Must Be Accountable for Its Own Human Rights Obligations, for Meeting the Needs of the Black Community, and for the Statement of Principles*

Further to BLAC's submission on the need for LAO to support clinics in meeting equity and human rights obligations owed to Black individuals and the Black community, it is apparent that the present 'modernization' package **does not create mechanisms to hold LAO accountable for its own human rights obligations, for meeting the needs of the Black community, and for the aspirational Statement of Principles.**

Just like clinics that receive LAO funding, LAO is bound to comply with the *Human Rights Code* across all of its operations. BLAC submits that these duties on LAO would include measures such as ensuring any 'funding formula' guarantees substantive equality and access to justice for the Black community through the equitable distribution of funding, referred to above. It also provides a basis for obligations on LAO to meaningfully and effectively support legal clinics in meeting their equity and human rights obligations, also referred to above in these submissions.

BLAC understands that LAO released a Statement of Principles on equity and human rights in response to the submissions LAO received in the consultation process. As BLAC and other clinics highlighted, there was an utter lack of reference in the Draft Rules to anti-Black racism, anti-Indigenous racism, equity and human rights. BLAC participated in making submissions on the requirement that LAO address this fundamental gap. However, in our view, the Statement of Principles is not a sufficient response to our previous submissions.

First, the Statement of Principles is an *aspirational* document. Unlike the Rules and the Service Agreement, the Statement does not create precise obligations on LAO. Indeed, the Statement is *formulated in language that affirms LAO does already respect principles of equity and human rights*. It is written as a statement of fact. If these assertions were true, there would be little to no anti-Black discrimination across the legal aid system.

However, LAO itself recognized in the Racialized Community Strategy that clinics provide services that discriminate against Black clients. BLAC's submissions on the Draft Rules documented these deficits in the legal aid system further, based on our experience and our 2018 community needs assessment. Even so, because the Statement of Principles is affirming and aspirational, it in no way addresses how LAO must *improve* its operations to comply with equity and human rights obligations. Notably, there is no reference to LAO's

responsibilities or a system of accountability - whether in the amended Draft Rules, the Draft Service Agreement or the Statement of Principles - to ensure LAO is doing what it says, at all and effectively.

Although a reference in the preamble of the service agreement to the Statement of Principles would be a step in the right direction, in BLAC's view, this alone would be grossly insufficient. Such preambular language would remain non-binding, and deny accountability, because of the affirmative and aspirational language in the Statement as it currently stands as well as because of the legal form of preambular text (which is an interpretive device, rather than an operative provision of a legal agreement).

Therefore, BLAC believes that LAO must amend the Statement of Principles to **clearly stipulate responsibilities and concrete, forward-looking measures that LAO commits to undertake** to address equity, human rights, and the needs of the Black community. In addition to referring to such an amended Statement of Principles in the preamble of the service agreement, LAO should meet its equity and human rights obligations through the means addressed in BLAC's previous recommendations on support for clinics. Moreover, LAO should integrate an express provision in the service agreement that recognizes LAO is bound by the *Human Rights Code* in all aspects of its operations.

**Recommendations**

8. LAO should amend the Statement of Principles to stipulate responsibilities and concrete, forward-looking measures that LAO commits to undertake to address equity, human rights, and the needs of the Black community
9. The service agreement preamble should refer to the Statement of Principles, as revised under recommendation 8 above
10. The service agreement should expressly recognize that LAO is bound by the *Human Rights Code* in all aspects of its operations

- v. *Any Decision Not to Renew A 'Rolling' Service Agreement Must Be Reviewable According to Requirements of Procedural Justice*

As was the case in our submissions on the Draft Rules, an area of significant concern for BLAC is the lack of a fair and adequate review process. We are heartened by the fact that LAO adjusted the Draft Rules somewhat in this respect. However, the amended Draft Rules continue to provide scant grounds to review LAO determinations related to corrective actions and the termination of the service agreement.<sup>17</sup> Furthermore, the amended Draft Rules provide only a narrow process of review restricted to written submissions and based on new information or factual errors. As a result, LAO could ignore community needs in making its determinations. LAO could do so in ways that worsen access to justice unevenly for specific communities. There would be no way for legal clinics, such as BLAC, to ensure that LAO is fulfilling its statutory responsibilities to the very low-income and disadvantaged communities that LAO was established to support.

It is an objective of both Constitutional and administrative law that government and administrative-like decisions should be subject to public accountability, except in highly unusual cases (such as Crown prerogative and statutory clauses). As the amended Draft Rules are presently structured, LAO would evade this public accountability, contrary to fundamental legal principles. Therefore, BLAC wishes to reinforce our prior submissions made on the Draft Rules, and we request that LAO review those again.

In addition to our prior submissions, BLAC maintains LAO should recognize that **any decision not to extend a ‘rolling’ service agreement by a year would create a right of review**. The amended Draft Rules presently do not allow for the review of a decision by LAO not to enter into a new service agreement at the expiry of the term.<sup>18</sup> In any good faith contractual relationship, however, parties should have an opportunity to make submissions on changes that are explicit or implicit in the agreement. In BLAC’s view, such changes would include a decision by LAO to let a service agreement expire at the end of the term. That said, it is BLAC’s submission that under a ‘rolling’ arrangement, there would be no term expiry such that any decision not to ‘roll over’ the service agreement would be reviewable, pursuant to s. 96 of the amended Draft Rules. Of course, any review must also adhere to principles of procedural fairness and natural justice under jurisprudence, as articulated in BLAC’s prior submissions.

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<sup>17</sup> Amended Draft Rules, s.95(6), s.96(6).

<sup>18</sup> Amended Draft Rules, s. 96(1).

## Recommendation

11. LAO should expressly recognize that under a 'rolling' service agreement, any decision not to extend the term of the service agreement would create a right of review that adheres to requirements of procedural justice

### *vi. The Draft Service Agreement Reinforces Overly Broad Disclosure Rules*

Similar to what BLAC submitted previously with respect to the Draft Rules, the information disclosure requirements in LAO's Draft Service Agreement are overly broad, such that they would violate rights to privacy and solicitor-client privilege. The Draft Service Agreement allows LAO to enter upon any premises used by a clinic in connection with the provision of services, for the purpose of verifying any information or documents requested pursuant to s. 82 of the amended Draft Rules. The amended Draft Rules expressly require clinics to provide information and documents specified by LAO including 'privileged or confidential information relating to an individual or a legally aided client'.<sup>19</sup> Furthermore, the Draft Rules require clients to consent to providing information to LAO that is covered by solicitor-client privilege.<sup>20</sup> In BLAC's view, any requirements to disclose information must be applied very narrowly to financial eligibility and the *status* of court proceedings, without any further requirement to provide information about the client's circumstances.

Presently, the amended Draft Rules require clients to consent to the 'release of any information and documents that [LAO] requires that relate to their legal aid services or court proceedings, including information that is solicitor-client privileged'.<sup>21</sup> This reinforces a provision in LASA 2020, which is unclear about when information disclosure will be required.<sup>22</sup> Although, following the period of consultations on the Draft Rules, LAO amended the provisions on privileged and confidential information to **limit its use by LAO, these**

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<sup>19</sup> Amended Draft Rules, s. 82(1).

<sup>20</sup> Amended Draft Rules, s. 11.

<sup>21</sup> *Ibid.*

<sup>22</sup> LASA, 2020, para. 10(3)(a)(i) is made ambiguous by the use of 'or' in the following provision: (3) A service provider shall immediately notify the Corporation if anything comes to the service provider's attention respecting an individual receiving legal aid services that indicates that, (a) the individual, (i) may have, in requesting to receive legal aid services, misrepresented his or her circumstances **OR** failed to make full disclosure of those circumstances to the extent required by the rules. [emphasis added]



**amendments do not change the basic requirement on clinics to disclose such information. Nor do they change the requirement on clients to consent to such disclosure.**

Presently, the amended Draft Rules and the Draft Service Agreement would impede BLAC's ability to receive private information from clients necessary to advocate for them robustly, as BLAC lawyers are required to do under the Law Society of Ontario rules of professional responsibility. LAO's framework also violates fundamental rights in Canada to solicitor-client privilege. BLAC submits that this interference by LAO will have a chilling effect that will engender mistrust and discourage clients from seeking legal aid services from organizations, such as BLAC. To repeat, these provisions in the amended Draft Rules are reinforced by the Draft Service Agreement and both must therefore be addressed.

#### **Recommendation**

12. The amended Draft Rules must not only restrict the use of privileged and confidential information by LAO, but must also ensure that any requirements relating to the disclosure of privileged and confidential information are narrowly confined to information pertaining to financial eligibility and the status of court proceedings
13. The service agreement should be revised so that it does not reinforce impugned provisions in the amended Draft Rules on the disclosure of privileged and confidential information

#### *vii. The Draft Service Agreement Fails to Define Guidance on Performance Measurement*

Schedule C of the Draft Service Agreement on 'Services' stipulates that LAO will monitor a clinic's performance according to any 'indicators in accordance with the Rules and guidelines'. However, thus far, LAO has not yet developed any such indicators and guidelines in partnership with clinics. This ambiguity in the Draft Service Agreement is highly problematic. For one thing, it requires clinics to enter into a service agreement when key terms have not been defined. This is concerning because clinics should not be bound to policies and guidelines that they have not had an opportunity to consider in order to provide informed consent.

Moreover, BLAC is concerned that, in the absence of a LAO consultation policy required by LASA 2020, LAO may develop indicators and guidelines without the input of those who are directly affected, namely clinics. Therefore, BLAC submits that any future performance indicators and guidelines must be developed through a robust and comprehensive consultation process with clinics, such that clinics can agree upon these elements of the ‘modernization’ framework as full, autonomous partners in the service agreement. LAO must commit at this time to such a process of consultation, which must not be *pro forma* but ensure the meaningful engagement with clinics.

It is also BLAC’s submission that **any future performance indicators and guidelines must account for the complexity and array of services that BLAC provides to the Black community.** BLAC is apprehensive that LAO will formulate metrics focused on quantitative analysis, for example the number of cases opened and resolved, ‘wins’, the costs of individual files, and so on. However, the work that BLAC undertakes goes well beyond individual case files and *cannot be measured by quantitative analysis alone.*

Any future metrics must include *qualitative elements* that respect BLAC’s complex and systemic work to dismantle anti-Black racism. BLAC’s work on individual files has an added degree of complexity insofar as it always addresses questions of anti-Black racism *in addition* to the underlying legal matter. Performance measurements must account for this complexity as well as for the fact that systemic work, such as test cases and law reform efforts, can take years of hiring, project development, research, consultations with the Black community, discussions with government, and other activities that simply cannot, and therefore must not, be reduced to numerical accounting.

**Recommendation**

14. LAO should commit, now, to a robust and comprehensive consultation process on any performance indicators and guidelines under the service agreement, and specifically commit to incorporating feedback from clinics in a meaningful way
15. Any performance indicators and guidelines under the service agreement must go beyond quantitative metrics to account for the qualitative work that BLAC undertakes toward systemic change, which

can last for long periods, has an added degree of complexity and involves activities that cannot be captured by numerical accounting

*viii. The Draft Service Agreement Fails to Specify that LAO Will Provide Support Services to Clinics to Fulfill Certain Legal Obligations*

In addition, BLAC is concerned about risks arising from LAO's evolving funding model, according to which clinic funding is restricted to an 'envelope' for services that clinics provide. BLAC is aware that LAO did at one time have partnership arrangements with clinics that were different in kind because, in addition to the funding 'envelope', LAO would cover actual expenses necessary for clinics to fulfil certain legal obligations without undue hardship. Examples of these legal obligations include pay equity under human rights law and leases that increase annually or periodically.

Although LAO may in future allow clinics to apply for one-time funding, which could arguably be used for these purposes, any such application may be denied, may increase a clinic's workload in preparing such an application, and may not cover the actual expenses incurred.

As a result, the current 'envelope' funding model, even if supplemented by one-time funding applications, creates a severe risk to clinics including BLAC. Quite simply, clinics may not be able to cover expenses arising from certain legal obligations without a parallel reduction in funds that would ordinarily be used for their human resources and the provision of services. Legal Aid Ontario's evolving 'envelope' funding model could result in clinic closures, freezes on pay increases, staff layoffs, and the reduction of services to meet the needs of the Black community. It would effectively render clinics incompetent in delivering the services that they commit to provide to communities, should clinics encounter costs associated with legal obligations that are beyond their control.

BLAC submits that LAO should provide a cushion so that clinics are fully able to comply with the law, while delivering quality services in a healthy workplace. Therefore, **LAO should commit to provide funding in Schedule H of the Service Agreement on 'Support Services' that would guarantee clinics are able to fulfill specific legal obligations without undue hardship.** In our view, these obligations must include pay equity, leases, and financial or

in-kind support to develop and administer policies and programs that ensure all clinics across the legal aid system fully comply with the *Human Rights Code*. As alluded to by our submissions above, the latter is necessary to secure equitable staffing across the legal aid system, including from the Black legal community, to guarantee that clinics address anti-Black racism, and to ensure that the Black community can access services without interruption or a reduction in quality.

**Recommendation**

16. LAO should commit in the service agreement to cover increased expenses arising from a clinic’s specific legal obligations, notably in the areas of pay equity, leases, and compliance with the *Human Rights Code* (the latter may also involve in-kind supports)

**3 LAO’s Lack of Response to BLAC on a Process of Engagement to Address the Needs of the Black Community through Systemic Transformation**

To supplement BLAC’s submissions on the Draft Service Agreement, above, we wish to draw attention to our previous submissions on the imperative of an engagement process to address anti-Black racism across the legal aid system as a whole. As BLAC demonstrated in our previous submissions, LAO does not, and will not, achieve the access to justice that it is required to promote under LASA 2020 without significant changes across the LAO system, because there is a fundamental disconnect between LAO’s systemic operations, on the one hand, and justice for the Black community, on the other.

In our prior submissions, we described the nature of this disconnect and the need for radical transformation, focusing on LAO’s Racialized Communities Strategy and Action Plan and the 2018 community needs assessment that BLAC commissioned. Overall, BLAC submitted that LAO must engage in a process of visioning, strategic planning and actionable work toward access to justice for the Black community that is tailored and meaningful.

In these submissions, BLAC wishes to express our serious disappointment that LAO has not responded to this recommendation. Indeed, these present submissions on the Draft Service

Agreement highlight the importance of a process of engagement on anti-Black racism, which BLAC has been calling for. Our submissions, above, relevant to this question include:

- the lack of acknowledgement in the Draft Service Agreement of the imperative to address the disproportionate needs of the Black community for legal aid services
- the absent provisions on LAO's responsibilities to ensure equity and human rights through supports to clinics and through discharging LAO's duties across all of its own operations
- the aspirational nature of the Statement of Principles.

Violence against Black people can, and must, be prevented through the kind of transformational work that BLAC is leading together with the Black community. However, BLAC cannot dismantle anti-Black racism alone. LAO must work to ensure that clinics across the legal aid system have the capacity to meet the needs of the Black community. For example, LAO must empower and encourage clinics to offer services in areas that particularly affect the Black community, which are currently lacking, such as human rights, health, employment and education law.

This specific gap is relevant to our present submissions on the Draft Service Agreement because LAO permits clinics to choose which services they offer under a service agreement. Meanwhile, there is an immense gap between the services that clinics choose to provide and those services that LAO has a duty to promote under LASA 2020 to respond to community needs. Therefore, LAO must ensure that a full range of quality services is available to the Black community, without discrimination, across the province, and across the legal aid system as whole. When clinics are unable to adequately serve the Black community for reasons of capacity, they should make referrals to BLAC. At the same time, BLAC will require assistance from LAO to increase its own capacity, while other clinics develop equitable services with LAO's support, consistent with their and LAO's human rights obligations.

Black individuals and communities must receive tailored support from LAO, across all LAO service channels, and through LAO funded projects that actually respond to the Black community's need for radical transformation. Legal Aid Ontario has recognized that Black

lives matter and has committed ‘to give full meaning to those words’.<sup>23</sup> For LAO to fulfill its stated commitment to address anti-Black racism,<sup>24</sup> substantive access to justice must go beyond LAO’s current approach under the interlocking ‘modernization’ framework to address anti-Black racism *at a systemic level*.

To meet the needs of the Black community, and to fulfil LAO’s mandate, BLAC submits that **LAO must adopt a systemic, long-term and meaningful approach to transformative justice for the Black community in collaboration with BLAC, ACLCO, legal aid clinics, and the Ministry of the Attorney General**. Indeed, such an approach might well have anticipated and resolved deficiencies in the Draft Service Agreement, identified in these submissions.

To date, LAO has taken a piecemeal approach to legal aid ‘modernization’ within an intricate, overlapping and self-reinforcing series of instruments. Each of these must alone and together address anti-Black racism, starting from an ambitious vision of Black flourishing.

Without a concerted effort to take a systemic approach to the problem, BLAC believes that LAO cannot produce a comprehensive ‘modernization’ framework that adequately responds to the needs of the Black community. Furthermore, in BLAC’s view, LAO’s current framework would perpetuate *anti-Black racism* insofar as it does not address it. Although, for the most part, we have refrained from repeating our prior submissions here, BLAC therefore wishes to repeat this particular recommendation, given its absolute importance during this crucial period of system change.

#### **Recommendation**

17. LAO should commit to engaging in a process of visioning, strategic planning and concrete actions to meaningfully address the needs of the Black community for access to justice in a dedicated way

## **4 Summary of BLAC’s Recommendations**

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<sup>23</sup> Legal Aid Ontario, “LAO services to assist with anti-Black racism” (25 June 2020), online: <<https://www.legalaid.on.ca/in-briefs/lao-services-to-assist-with-anti-black-racism/>>.

<sup>24</sup> David Field, “Confronting anti-Black racism” (05 June 2020), *Legal Aid Ontario*, online: <<https://www.legalaid.on.ca/news/confronting-anti-black-racism/>>.

To conclude, BLAC wishes to thank Legal Aid Ontario again for taking our submissions into account in order to finalize the amended Draft Rules, the Draft Service Agreement and the Statement of Principles. In addition to these submissions, BLAC reserves the right to make further submissions on these interlocking pieces of the ‘modernization’ framework because they are overlapping and at different stages of execution. We expect that this document, in conjunction with past and future submissions, will provide the basis for future discussions with LAO and the Ministry of the Attorney General on how best to respond to the needs of the Black community through a comprehensive plan.

Below, you will find a summary of the recommendations we made in this document. We also submit two further recommendations 1) about the need to consult with ACLCO and legal clinics, including BLAC, before the amended Draft Rules are finalized, and 2) about the need to consult with ACLCO and legal clinics, including BLAC, before the Draft Service Agreement is finalized. For BLAC, these and our other submissions are part of ongoing collaborations with LAO that BLAC knows are necessary to fulfil both of our mandates.

### **Recommendations**

1. The service agreement should be a ‘rolling’ arrangement whereby each year in a three-year service agreement LAO extends the term by a corresponding year, subject to provisions recommended in BLAC’s submissions
2. Any ‘rolling’ service agreement should conform to a ‘funding formula’ that equitably distributes LAO funding across the legal aid system
3. LAO should engage in a comprehensive consultation process with clinics, such as BLAC, in designing the equitable ‘funding formula’
4. At a minimum any future ‘funding formula’ and, therefore, any ‘rolling’ service agreement should guarantee substantive equality and the human rights of Ontario’s Black community in the level of funding to clinics including BLAC
5. The service agreement should expressly acknowledge the disproportionate representation of Black individuals and communities in the legal system for reasons of historical and present racial oppression
6. The service agreement should reinforce the provision in the amended Draft Rules requiring clinics to develop policies and procedures to address anti-Black racism

7. The service agreement should establish a duty on LAO to provide financial and in-kind supports to guarantee that clinics meet their obligations to address anti-Black racism in their services under the amended Draft Rules and to guarantee that clinics fully comply with the *Human Rights Code*
8. LAO should amend the Statement of Principles to stipulate responsibilities and concrete, forward-looking measures that LAO commits to undertake to address equity, human rights, and the needs of the Black community
9. The service agreement preamble should refer to the Statement of Principles, as revised under recommendation 8 above
10. The service agreement should expressly recognize that LAO is bound by the *Human Rights Code* in all aspects of its operations
11. LAO should expressly recognize that under a 'rolling' Service Agreement, any decision not to extend the term of the Service Agreement would create a right of review that adheres to requirements of procedural justice
12. The amended Draft Rules must not only restrict the use of privileged and confidential information by LAO, but must also ensure that any requirements relating to the disclosure of privileged and confidential information are narrowly confined to information pertaining to financial eligibility and the status of court proceedings
13. The service agreement should be revised so that it does not reinforce impugned provisions in the amended Draft Rules on the disclosure of privileged and confidential information
14. LAO should commit, now, to a robust and comprehensive consultation process on any performance indicators and guidelines under the service agreement, and specifically commit to incorporating feedback from clinics in a meaningful way
15. Any performance indicators and guidelines under the service agreement must go beyond quantitative metrics to account for the qualitative work that BLAC undertakes toward systemic change, which can last for long periods, has an added degree of complexity and involves activities that cannot be captured by numerical accounting
16. LAO should commit in the service agreement to cover increased expenses arising from a clinic's specific legal obligations, notably in the areas of pay equity, leases, and compliance with the *Human Rights Code* (the latter may also involve in-kind supports)
17. LAO should commit to engaging in a process of visioning, strategic planning and concrete actions to meaningfully address the needs of the Black community for access to justice in a dedicated way



18. LAO should consult with the ACLCO and legal clinics, including BLAC, before the amended Draft Rules are finalized
19. LAO should consult with the ACLCO and legal clinics, including BLAC, before the Draft Service Agreement is finalized