

Canadian Association for Legal Ethics/Association canadienne pour l'éthique juridique
c/o Professor Stephen G.A. Pitel, Faculty of Law, Western University
1151 Richmond Street, London, Ontario, N6A 3K7

October 18, 2024

Professional Regulation Committee
Law Society of Ontario
Osgoode Hall, 130 Queen Street West
Toronto, Ontario
M5H 2N6

Sent by e-mail to PolicyConsultation@lso.ca

Dear members of the Professional Regulation Committee,

Re: Consultation Report – Considering Increased Transparency

The Canadian Association for Legal Ethics/Association canadienne pour l'éthique juridique (CALE/ACEJ) is a federal not-for-profit corporation whose members are academics, lawyers and regulators interested in topics related to ethics and professionalism in the Canadian legal profession. CALE/ACEJ seeks to encourage and facilitate debate on issues of ethics and professionalism in Canada and to increase awareness about those issues in the public, the profession and the judiciary.

In your above-referenced Consultation Report you have asked for feedback on recommendations for enhanced reporting by licensees and enhanced disclosure to the public. CALE/ACEJ appreciates having been consulted and we are pleased to respond.

(i) Licensee Reporting

In general we favour the proposed broadening of what licensees are required to report to the LSO. However, it is imperative that all information reported but not intended for public disclosure be maintained securely and confidentially. A data breach, for example, involving this information could have grave consequences for individual licensees and for the reputation of the LSO as a regulator.

(ii) Disclosure of Charges

Our central concern is with the proposed public disclosure of charges against licensees. In principle, we consider your goal of a middle ground position to be sensible. Some charges should, in the public interest, be disclosed while many other charges do not bear on the licensee's ability to practice law or the protection of the public and thus should not be disclosed. The very considerable difficulty is in delineating this middle ground.

Your report explains that “only the most serious and relevant of alleged offences, such as financial crimes, violent or sexual offences, or crimes undermining the administration of justice” (p 12) would be in this category. But your definition of the disclosure requirement is considerably broader.

You propose using the following to limit the scope of disclosure: that the charge “reflects adversely on the licensee’s fitness to practise 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” (p 10). In our view, this language could catch almost any charges against a licensee. This makes the scope of disclosure unclear in advance (in that a licensee could not know, with confidence, whether a given charge would be disclosed) and subject to considerable discretion on the part of the LSO. The exercise of this discretion has the potential to embroil the LSO in controversy. You appear to recognize this concern when you indicate that “information that is disclosed to the public will be animated by guidelines that will minimize the exercise of discretion by Law Society staff and provide clear guidance on the inclusion and removal of information from the public register” (p 14). The limiting language you have proposed is, in our view, inconsistent with this objective.

We have given considerable thought to whether it is possible to better define the scope of disclosure of charges. However, despite these efforts, we have been unable to formulate language that would be predictable and fair to licensees. Therefore, our view is that however laudable in principle, in practice the flawed delineation of the scope of disclosure means that disclosure of charges should not be made. In the absence of workable limits, the general concerns about disclosure you identify in your report, especially those relating to fairness, discretion and the over-charging of Black and Indigenous licensees, cannot be overcome.

(iii) Disclosure of Findings of Guilt

We support the general thrust of your proposed disclosure regarding findings of guilt. While there are challenges defining which findings of guilt are to be disclosed, similar to those relating to defining which charges are to be disclosed, in this context the ambiguities and difficulties should be resolved in favour of disclosure. As your report notes (p 13), broad disclosure of findings of guilt is warranted by the regulator’s mandate to act in the public interest and is relevant to a client’s choice of licensee. In this context, fine distinctions risk leaving the public under-protected.

(iv) Other Aspects of Disclosure

We are concerned about inconsistency in the proposed disclosure. For example, you propose disclosure about aspects of membership or licensing in another profession, including the legal profession. But you limit this to Canada (p 13), as you also do with the reporting requirement (p 9). It is difficult to understand the rationale for the limit, since similar information relating to another country, such as the United States, would seem equally relevant to protecting the public. For another example, disclosure about some information relating to the legal profession is limited to information that is disclosed in another jurisdiction, yet disclosure about similar

information relating to other professions does not have this limit (p 13). The rationale for this distinction is unclear.

It is important that any disclosure be clear about its temporal scope. Because you propose to implement disclosure prospectively rather than retroactively (p 15), this needs to be clear in whatever process you adopt for disclosure to the public. Members of the public need to know, for example, that if no findings of guilt are shown, this does not mean that the licensee has never being found guilty. They may have been, but prior to the implementing of this public disclosure.

Finally, we question what consideration has been given to a “sunset” provision in relation to some or all of the disclosure. For example, having been subject to discipline by the LSO, by another Canadian legal regulator, or by the regulator of another profession ten or more years ago arguably need not be disclosed in order to protect the public, at least in the majority of cases (all but the most serious ones). Similar considerations could apply to some findings of guilt. Some events in a person’s life should pass into history without an ongoing reminder in the present.

If it would assist you in your work, we would be pleased to further explain and discuss these submissions.

Yours truly,

A handwritten signature in black ink, appearing to read "Stephen Pitel". The signature is fluid and cursive, with the first name "Stephen" and last name "Pitel" clearly distinguishable.

Prof. Stephen G.A. Pitel
President, CALE/ACEJ