

LAO SUBMISSION TO THE STANDING SENATE COMMITTEE ON LEGAL AND CONSTITUTIONAL AFFAIRS TO INFORM THE SENATE STUDY ON DELAYS IN CANADA'S CRIMINAL JUSTICE SYSTEM

1. Introduction

Legal Aid Ontario (LAO) is pleased to have been invited by the Committee to contribute to this important study. As the independent statutory corporation which administers the legal aid program in Canada's most populous province, LAO has on-the-ground experience of the issues. You may be interested to know, by way of background, that:

- LAO issues approximately 50,000 certificates annually for the defence of criminal charges
- LAO provides over 600,000 criminal duty counsel services annually, and LAO duty counsel contribute to the resolution of approximately 45,000 cases per year

LAO is actively engaged in developing responses to problems caused by delays in the criminal justice system.

Delay is costly, both for LAO as a fiscally accountable, taxpayer-funded organization and for the legally aided clients LAO assists. LAO operates within a fixed budget, and every legal aid dollar that is lost to delay is a dollar that does not go to helping more clients in need. What is more, every delay that affects our clients, who are among the poorest and most vulnerable of Ontarians, adds to the burdens that they face in dealing with their legal issue and being able to move on with their lives. Justice system delays also have a negative impact on witnesses and on the families of witnesses and accused persons alike, and they affect not only the day to day administration of the justice system but also the reputation of the administration of justice, particularly when matters are dismissed on the basis of a finding of unreasonable delay. It is in the best interests of every Canadian to look for ways to reduce delay.

LAO has worked on several levels to address issues related to criminal justice delay. The legal aid system in Ontario is a mixed model system, which means that legal aid assistance is provided through a variety of means: through private bar lawyers who acknowledge legal aid certificates; through staff and per diem duty counsel in the courts; and through legal aid staff lawyers who provide a range of services ranging from brief telephone legal advice to full representation in court. Through each of its service delivery mechanisms, LAO has implemented improvements and worked to improve the efficiency and effectiveness of the overall process. For example:

- LAO has improved its oversight of big cases in the LAO Big Case Management (BCM) Program, and has strengthened its emphasis on quality assurance and mentoring
- LAO's vulnerable client strategies, including the Aboriginal Justice Strategy and Mental Health Strategy, respond to the needs of vulnerable client groups and the over-representation of these groups in the criminal justice system
- LAO's Bail Strategy focuses on addressing bail system problems that contribute to the proliferation of administration of justice charges and the growth of the remand population

It goes without saying that delay in the criminal justice system does not have a single cause, and it is not something that any one justice system participant can "solve" or "fix". The problem is made up of many parts, and it will take a combined and cooperative effort on the part of many players to deal with it effectively. Although legal aid is just one component in the justice system it is, we believe, a very important component and we hope that our experience in dealing with delays, as well as some of our ideas and innovations in this regard, will be helpful to this Committee.

2. LAO's experience: factors contributing to delays in the criminal justice system

Many factors contribute to justice system delay. In LAO's experience, some of the most important of these are the following.

New legislation: there have been numerous legislative amendments in the past several years, many of which have been enacted as "tough on crime" legislation. Some of these may reasonably be assumed to be contributing to criminal justice system delays. In particular:

The increase in mandatory minimum sentences arising out of Bill C-10 has resulted in lengthy Charter motions challenging the mandatory minimums. The

Crown policy manual indicates that the mandatory minimum should be sought unless there are exceptional circumstances, so Crowns are expected to seek those penalties and this makes it difficult to negotiate pleas and means that it is more likely that a case will go to trial: the accused has nothing to lose. Defence counsel argued for a safety valve to allow for the exercise of discretion in the imposition of mandatory minimum sentences, which now exist for many drug offences, sexual offences against children and firearms charges.

The limited availability of conditional sentences as a sentencing option has also made the plea process challenging and provides an incentive for an accused to proceed to trial. It is likely that more accused would opt to resolve their matter if they were not faced with losing their job or their home as a consequence.

Amendments to the Immigration and Refugee Protection Act in 2013 to limit the ability of a permanent resident or foreign national who is inadmissible on grounds of serious criminality to appeal a removal order to the Immigration Appeal Division. Accused may face immediate deportation or the loss of their right to appeal regarding their immigration status as a result of these amendments, and the seriousness of these consequences may contribute to delays as defence counsel will be likely to advise the accused to seek immigration law advice. Where a guilty plea is not informed or the issue of immigration status is not raised in relation to sentencing, it can result in appeals.

Bail system issues continue to strain court resources, cause delays and feed the growth of the remand population. In Ontario, there are more people in custody awaiting trial or sentencing than there are people actually serving a sentence. In-custody accused are supposed to receive priority for trials but it creates bottlenecks, and also makes it more difficult for the accused's counsel to prepare for trial. Bail system problems are well documented, including in recent reports released by the John Howard Society of Ontario and the Canadian Civil Liberties Association. They include police underuse of their discretion to release, bail courts' over-reliance on sureties, and the imposition of bail conditions that are unreasonable or unrelated to the alleged offence, meaning that it is more likely that the person will breach a condition of bail and become further entangled in the mesh of the justice system. Bail system problems have a disproportionate impact on vulnerable client groups who are over-represented in the justice system, including First Nation, Métis and Inuit clients, clients who belong to racialized communities, and clients with mental illnesses.

Over-representation of vulnerable client groups in the criminal justice system: Aboriginal people make up only 2.4 per cent of Ontario's population but approximately 20% of LAO's criminal law certificates are issued to First Nation, Métis and Inuit people. The degree to which legal aid resources and dollars are allocated to responding to the mental health crisis in the justice system is only now becoming more fully understood. LAO's data analysis indicates that services

to clients with mental health and addictions issues account for nearly 25% of LAO's annual budget. As many as one in three legal aid certificates is issued to a client with mental health or addiction needs. The lack of availability of beds in the health system for mental health assessments means that accused with mental illnesses languish in jails waiting to be assessed. There is a need for more resources and training throughout the system, including for police, courts and corrections personnel, to support them in working effectively with people who have mental illnesses.

Ineligibility for legal aid, on financial or legal coverage grounds, can be a contributing factor to delay for more than one reason. Accused who are denied legal aid coverage and who seek to apply for court-appointed counsel must go through the *Rowbotham* process, which takes some time. LAO's statistics confirm that the number of successful *Rowbotham* applications in Ontario has been increasing (2014-2015 saw a 21% increase in *Rowbothams* over the previous fiscal year). Accused who do not meet the *Rowbotham* test, meantime, are assisted by duty counsel or go through the criminal process as unrepresented accused. LAO makes duty counsel assistance available to nearly everyone who appears in the criminal courts, but for those who wish to take their matter to trial there is virtually only option, to self-represent, and this is time-consuming and frequently frustrating for the court as well as for prosecutors and witnesses.

Problems associated with obtaining and accessing disclosure continue to be a major source of delay. In many places, the administrative processes surrounding disclosure is slow. Where the accused person is in custody, changes in enabling electronic viewing mean that electronic disclosure has to be printed out so that the accused can review it. Electronic disclosure was supposed to be the answer but in practice is not, because all too often the disclosure tends to be provided in large unorganized "data dumps" of wiretap transcripts, financial documents and so on. As the volume of evidence that counsel are required to go through continues to grow, resolving this issue will become even more important. For example, many cases now rely on evidence of tweets, texts, and Facebook and other social media postings, which can number in the thousands.

Overcharging continues to be common. When cases collapse on the day of trial it is a serious issue. Court time is left vacant, which does not assist court scheduling processes. The problem could be reduced through better crown screening and vetting policies that require early review to determine whether matters should proceed to trial.

Court administration, management and process issues lead to inefficiency and delay. There are scheduling and time-management issues relating to the hours of operation of courts, prisoner transport issues, the scheduling of appearances, and availability of interpreters. There is a need for better court management programs and electronic document management systems to allow

for better scheduling and time-tracking, greater accessibility of documents, and online filing. Better systems would also produce better data about how the system is working, and this in turn would allow for better management of resources.

3. How has LAO responded to delay issues: improvements, innovations and best practices

LAO has improved its oversight of big cases in the LAO Big Case Management (BCM) Program, and has strengthened its emphasis on quality assurance and outcome tracking. Delays associated with the increasing complexity and length of criminal trials has been the most comprehensively studied aspect of delay in the criminal justice system. As you know, this was the subject of the 2008 Report of the Review of Large and Complex Criminal Case Procedures (the LeSage-Code Report). The report identified several ways in which LAO could contribute to delay reduction, and LAO has made very significant progress in implementing the report's recommendations for legal aid.

For example, LAO has:

- Implemented the Complex Case Rate (CCR), which pays higher hourly fees to lawyers who work on the most complex matters (\$151 per hour as of April 2015). There are approximately 110 lawyers on the CCR panel
- Established a lawyer panel with specific eligibility criteria in relation to homicides and major criminal cases
- Implemented panel application review processes, and established that entry onto the panel and removal from the panel are within LAO's discretion
- Established a time limit on panel membership and requirement for renewal
- Entered into Alternative Fee Arrangements (AFAs), including with leading law firms that specialize in appellate work. Five criminal firms in the Greater Toronto Area and Ottawa have entered into LAO's AFA program
- Reduced BCM program costs by 10% over the past five years, despite a 24% increase in certificate issuance

Many other improvements have been made. Some of the most important are the following:

LAO's vulnerable client strategies are a key piece of LAO's client service prioritization.

The first of LAO's priority client strategies, the Aboriginal Justice Strategy (AJS) was established in 2008 to respond to the over-representation of First Nation,

Métis and Inuit persons in the criminal justice and child protection systems. Recent areas of focus for the AJS include:

- Improving and increasing client access to *Gladue* report-writing services. LAO has been working with partners in the Aboriginal community to make these services available throughout Ontario
- Developing a comprehensive LAO response to the Iacobucci Report, which makes several important recommendations about addressing systemic problems and improving the relationship between Aboriginal people and the Ontario justice system
- Improving LAO's capacity to enhance its Aboriginal services, including through updated cultural competency training for all staff and an ongoing engagement strategy to increase local knowledge and service capacity

The development of the LAO Mental Health Strategy (MHS) reflects LAO's need to respond to the strong correlation that has been established between mental illness and the demand for legal aid services in every area of legal aid coverage, including in criminal law. MHS initiatives include:

- The creation of a new certificate-based Mental Health Appeals Program for appeals from the Consent and Capacity Board (civil) and Ontario Review Board (criminal). The program expands access to representation for mental health appeals
- Development of comprehensive mental health "core competency" training, with the assistance of the Mental Health Commission of Canada and others
- A partnership to enhance telephone referral services delivered through LAO's call centre, the Client and Lawyer Service Centre
- Working with the Canadian Mental Health Association (CMHA) Ontario: to develop a rights-based "guided interview resource" to better help lawyers identify the legal and service options of clients with mental health and addiction needs, and to better identify secondary consequences and inter-related legal matters

LAO's Bail Strategy responds to the strong consensus among justice system stakeholders that there are systemic problems in the functioning of Ontario's bail system. The failings of the bail system disproportionately penalize clients who are low-income Ontarians, and members of already marginalized groups, such as the mentally ill, and Aboriginal and racialized communities. As part of its eligibility expansion initiative, LAO has already expanded coverage for bail variations, second bail hearings, and bail reviews. Through the strategy, LAO will work to further improve its services and will work cooperatively with justice system partners and stakeholders on efforts to improve the system.

LAO has improved and enhanced its support for test case work by expanding eligibility for funding through the LAO Group Application and Test

Case Committee, by establishing strengthened criteria for applications and outcome measures for funded cases, by improving coordination, reporting and internal support for its test case program, and by establishing strategic priorities for test cases in key areas. LAO believes that test cases are an important, and cost-effective, way to expand access to justice and protect client rights, and that they can also make the justice system operate more efficiently. A single, effective test case can set a precedent that improves the situation for many low-income or disadvantaged individuals and at the same time, by clarifying the law, eliminates the need to fund subsequent cases raising the same issues.

LAO has been an integral part of the provincial government’s “Justice on Target” initiative, which targeted criminal court system delay relating to the number of appearances required to resolve a matter. In 2008, only eight locations across the province had an on-site legal aid application office. Today, 57 court sites have an on-site office or LAO staff available at the court to process legal aid applications. LAO is currently working with the province on expanding legal aid coverage for ongoing judicial pre-trials, as part of its support for criminal modernization.

Expanded financial and legal eligibility for legal aid services has increased the number of criminal accused who qualify for full legal representation. LAO is currently implementing the first across-the-board expansion program for legal aid services in Ontario in over two decades. Ontario’s provincial government committed in 2014 to raise the eligibility guidelines by nearly 20% over a three year-period, via a series of three 6% increases, as part of a longer-term planned expansion initiative that will, when fully implemented in eight to ten years’ time, allow an additional one million low-income Ontarians to become eligible for legal aid. In June 2015 LAO also introduced a range of legal eligibility expansion initiatives, which increase the types of legal matters for which legal aid assistance is available.

In the area of criminal law, LAO moved beyond the “liberty test”, which restricts eligibility for legal aid to those who face incarceration if convicted, to make legal aid available to “first time accused” who are First Nation, Métis and Inuit, are mentally ill, or are victims of domestic violence. LAO also made coverage available to accused who do not face incarceration if convicted but who do face serious “secondary consequences”, such as loss of employment, immigration consequences, or impact on a family law matter. Expanded coverage was also provided in 2015 for bail variations, second bail hearings, and bail reviews.

LAO has increased its support for mentoring: to build the legal aid bar and promote quality, LAO has invested \$1.8 million over three years to promote mentoring through a “Second Chair Fund” that is available to lawyers in the areas of criminal, family and immigration and refugee law. The fund provides paid “second chair” opportunities for private lawyers, enabling new or mid-level lawyers to apply for mentoring on a complicated matter or to be paid as a second

chair working with senior counsel on the matter. The fund also allows senior counsel on complicated matters to apply to work with a junior counsel.

LAO has made billing improvements: LAO has implemented a block fee billing system which has replaced hourly billing under the tariff for over 80% of all criminal law matters covered by legal aid certificates. The block fee system was designed to provide the private bar lawyers who bill for legal aid services with increased certainty and a reduction in administrative “red tape”, to provide LAO with a more efficient and cost-effective method for paying certificate lawyers, and, on a systemic level, to promote earlier resolutions and reduce delays by rewarding efficiency.

“Enhanced” or “expanded” duty counsel services have been introduced by LAO in certain locations, to provide a fuller range of services. The provision of enhanced duty counsel services is made more efficient in some locations by the addition of non-lawyer staff supports (including paralegals and legal aid workers). Enhanced duty counsel services increase LAO’s capacity to offer specialization and continuity of client service through the staff duty counsel model. The enhanced approach to duty counsel services also allows more clients to resolve their matters earlier in the process, providing better results for the client at lower cost, while still allowing for matters to be referred to the private bar where there are triable issues and the client does not want to resolve the matter.

Mid-level case management has been introduced by LAO to complement the pre-existing BCM Program for high-cost criminal cases. Mid-level case management applies to costly, complex criminal matters anticipated to cost more than \$8,000 but less than the BCM Program thresholds of \$20,000 for non-homicide cases and \$30,000 for homicides. This program, which was introduced in tandem with new discretionary payment guidelines, supports the provision of high-quality services by ensuring adequate resources are made available for more costly cases and providing lawyers with certainty regarding payment.

4. LAO’s recommendations: what solutions do we think can be implemented or supported at the federal level?

The time is opportune for investing in new approaches to the problems of the criminal justice system. The Prime Minister’s November 2015 mandate letter to the Minister of Justice and Attorney General of Canada sets out ambitious priorities for the Minister, including conducting a review of the changes in the criminal justice system and sentencing reforms over the past decade, and undertaking modernization efforts to improve the efficiency and effectiveness of the criminal justice system, in cooperation with provinces and territories.

Some of the specific areas of focus identified in the Prime Ministers' letter include the exploration of sentencing alternatives and bail reform, increased use of restorative justice processes and other initiatives to reduce the rate of incarceration amongst Indigenous Canadians, the treatment of those with mental illness, and improved use of information technology to make the system more efficient and timely. These are all areas in which the federal government, working with the provinces and territories and with legal aid plans, can assist, and they are all areas where LAO's experience points to a need for intervention.

LAO does have some specific recommendations for consideration by the Committee. They are:

1. Support Canada's legal aid plans in making effective legal aid assistance available to more criminal accused and in implementing innovations and best practices that help to improve the efficiency and effectiveness of the criminal justice system. LAO has had good success with its expanded duty counsel initiatives and its experience to date with expanded financial and legal eligibility has shown that there is a real need for expanded services. LAO's quality assurance initiatives and the many improvements that have been made to improve the efficacy of the Big Case Management Program have had positive results and are evidence of what properly resourced legal aid plans can do to improve the entire system.
2. Provide federal support to programs and resources that tackle the "revolving door" problem and help address over-representation of vulnerable client groups in the criminal justice system, including Aboriginal people, members of racialized communities, and persons with mental illnesses. Support for specialized courts, diversion programs, the availability of appropriate assessment, treatment and rehabilitative options, and the provision of cultural competency and awareness training to those who deal with these client groups are all good approaches. Anything that can be done to keep people who do not belong there from becoming enmeshed in the system is a step in the right direction.
3. Look at what can be done at the federal level to support or incent improvements in the bail system and to increase pre-trial release. The development and dissemination of standards and best practices could be helpful. One best practice that LAO would like to suggest is the increased

use of bail supervision programs as an alternative to reliance on sureties. It is LAO's understanding that this works well in British Columbia, where bail supervision is delivered directly by the province, through the Community Corrections Division of the Ministry of Public Safety and Solicitor General. The over-reliance on surety releases in Ontario delays the bail process, as accused persons often must seek adjournments to put together a "release plan", and the surety must be available to attend court to testify and be cross-examined under oath. Another very important area to stress is the need to reduce the imposition of unrealistic bail conditions that set the accused up to fail and contribute to the proliferation of administration of justice charges in addition to the original charge against the accused.

4. Revisit recent amendments to the Criminal Code to see where there are opportunities to reduce challenges to legislation and provide incentives to early resolution. It would be a good idea, for example, to revisit the idea of the "safety valve" to allow for the exercise of discretion in the imposition of mandatory minimum sentences, or simply to reduce the number of offences that attract a mandatory minimum. Making conditional sentences more widely available would also be a good option.

5. Bring back the former pardons process. The new record suspension process, which replaced the pardons process, is costly and complicated. It presents a barrier to finding employment and participating fully in the community, including through volunteer work. LAO's Aboriginal Issues Advisory Committee to the Board has advised LAO that the record suspension process has a particularly negative impact on Aboriginal people.

If you have any further questions, please feel free to contact Marcus Pratt, Acting Director General, Policy and Strategic Research Legal Aid Ontario at pratta@lao.on.ca

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