

# CERTIFICATES FOR PREVIOUSLY INELIGIBLE LEGAL CRIMINAL MATTERS

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## WHY IS LAO EXPANDING ITS CRIMINAL LAW CERTIFICATE COVERAGE BEYOND THE “LOSS OF LIBERTY TEST”?

In criminal law, LAO is expanding certificate services beyond LAO’s existing “loss of liberty” services to eligible vulnerable accused with no prior conviction or eligible accused who may be facing significant “secondary consequences” other than the risk of going to jail. LAO is also expanding certificate services to address systemic problems with bail.

For many years, like a number of other legal aid plans, LAO has applied a “loss of liberty test” to determine legal eligibility for a criminal law certificate. According to this test, certificate eligibility depends upon a probability that the accused, if convicted, will be incarcerated. The likelihood of loss of liberty signifies a serious matter that attracts serious consequences.

LAO’s criminal law initiatives expand certificate services into substantive areas (first time accused, secondary consequences) that have not been covered by LAO or its predecessor agency (the Ontario Legal Aid Plan) since the 1990’s.

LAO’s criminal law initiatives provide full legal representation (up to an including trial) to eligible clients at crucial “tipping points” in the lives of low-income Ontarians charged with criminal offences. LAO’s plan extends certificate services to first-time accused to ensure they have the full protection of their rights. Similarly, being convicted of a criminal offense can mean the loss of a job, professional accreditation, public housing and social assistance. It can also mean a parent may lose access to his or her child. LAO’s plan extends certificate services to eligible clients to ensure these legal proceedings are fair and just.

Stakeholders have strongly recommended that LAO expand its certificate coverage beyond the “loss of liberty” test. The need to expand beyond “loss of liberty” has also been noted in several reports on legal aid.

In consultations with its advisory bodies and stakeholders, LAO heard repeatedly about the need to move beyond the “loss of liberty” test for eligibility for a criminal certificate. The point was made in consultations that the impact of a criminal conviction is much greater now than in recent years. Vulnerable client groups were identified as particularly important for LAO to focus on, on the basis that they face additional barriers to access to justice.

## COVERAGE FOR FIRST-TIME ACCUSED

For those with no prior criminal record, a first conviction can change everything. Many describe acquiring a criminal record as a life-changing event and a barrier to leading a full and productive life. With increasing frequency, employers ask for a criminal record check as a condition of employment. A person with a record may be unable to find work and, as LAO heard in consultations, is likely to stay in “unemployment jail” for a very long time. A criminal record also means that a person faces barriers to contributing to their community, volunteering at their children’s school or being able to travel freely, including for employment. Providing representation to accused with no prior criminal record means that first time accused will have the benefit of full legal representation in any criminal proceedings against them.

LAO will make certificates available to eligible adult accuseds with no prior criminal record or eligible youth accuseds with no prior dispositions if the Crown is seeking a conviction or a discharge and:

- accused is First Nation, Métis or Inuit,
- accused has mental illness, or
- accused is victim of domestic violence charged with offence related to victim’s partner.

Certificates will be available for any summary, hybrid or indictable offence. This will not include matters where the Crown is seeking diversion (unless it is a mental health matter).

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## COVERAGE FOR SECONDARY CONSEQUENCES OF A CRIMINAL CONVICTION

Being convicted of a criminal offense can mean the loss of a job, professional accreditation, or continued eligibility for public housing and social assistance. The impact of a conviction on a family law proceeding could include a parent losing access to his or her child. For a non-citizen, it can result in deportation from Canada. For others, it can lead to the end of an existing course of study or travel restrictions that will have an impact on employment.

LAO may or will make certificates available to eligible accuseds who, if convicted, face the following secondary consequences:

- immediate loss of existing livelihood or professional accreditation
- immediate loss of existing or planned educational opportunity
- significant impact on access to family and child custody
- risk of deportation
- immediate loss of public housing, social assistance, or other public benefits/social services
- risk of being added to sexual offenders registry

# EXPANDED BAIL SERVICES

Across the criminal justice system, there is growing consensus that the bail system is not working as it should. The majority of persons who are jailed in Ontario are not serving a sentence but have been remanded into custody awaiting trial or sentencing. Often persons are denied bail simply because they do not have access to a “surety” with the financial means to secure their release. Those that are able to secure their release from custody are often “set up to fail” (to borrow from the title of a 2014 report about bail from the Canadian Civil Liberties Association (CCLA)) when they are released with so many unreasonable conditions that they are at great risk of being arrested again and having their bail revoked.

The vulnerabilities of over-represented and marginalized groups are exacerbated by the problems in Ontario’s bail system. For example, the lack of treatment programs in remand custody can be particularly damaging to the well-being of persons experiencing mental illness or addiction, and can even be life threatening. For Aboriginal persons from remote communities, a decision by a police officer to detain for trial, rather than release with conditions, results in the accused being taken to a provincial detention centre many kilometres away without access to the very community supports that could sustain their release pending trial.

In consultations, LAO heard that bail is a crucial issue that cuts across every area of concern for LAO in the area of criminal law. The need for representation at bail, particularly for vulnerable and over-represented client groups, was often highlighted: The importance of bail to the eventual outcome of a criminal proceeding was also underlined in the consultations. It was noted that the decision made on bail often inappropriately affects the accused the decision to plead guilty, because the longer a person spends in remand, the more likely that person is to plead. LAO heard that improved coverage for bail proceedings would result in fewer detention orders and less onerous release conditions. The point was made simply and starkly in this manner by one of LAO’s Board advisory committees: “Most charges are decided at bail”.

Ontario’s Ministry of the Attorney General has made addressing bail system issues a priority. The Premier’s 2014 Mandate Letter to the Attorney General asked the Minister to work with partner ministries and consult with stakeholders to develop “a comprehensive strategy to address systemic challenges related to bail, sureties, remand and delay”.

By expanding bail coverage, LAO can be part of the solution. Improved access to bail services will help to reduce the number of people spending time in custody as they wait for a trial or a bail hearing, and can help ensure that fewer people will plead guilty simply to get out of jail.

In some circumstances, LAO will make enhanced certificates available for bail reviews. These enhanced certificates will expand the number of hours lawyers have to challenge bail orders and improper conditions on bail releases. In the coming months, LAO will make a certificate or authorization available to financially eligible accused to vary bail conditions and allow lawyers to conduct a second bail hearing.

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## FOR MORE INFORMATION

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