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BY COURIER

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Attorney General Downey
Ministry of the Attorney General
McMurtry-Scott Building
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Dear Sir:

As you are aware, Mr. Boris Bytensky, an executive member of the Criminal Lawyers' Association attended the August 15, 2019 roundtable discussion related to the modernization of Legal Aid Ontario (LAO), which requested input from various criminal law stakeholders. Further to that meeting, we are pleased to have the opportunity to provide further input, observations and recommendations concerning the modernization review including potential amendments to the *Legal Aid Services Act, 1998* (LASA).

The CLA is the largest organization of criminal defence lawyers in the Province and our members are the largest group of service providers for criminal LAO work

The CLA is the professional association representing criminal defence lawyers. Serving as the voice of the criminal defence bar, the CLA is a not-for-profit organization and one of the largest specialty legal organizations in Canada, with about 1,400 members. Founded in 1971, the CLA's advice and perspective is often sought by the federal and provincial governments on matters related to legislation and the administration of criminal justice. In addition, the CLA provides support to its members in all aspects of practice management; offers continuing legal education programs; acts as an intervenor in relevant criminal cases; publishes a nationally-circulated newsletter to highlight developments in criminal law; and is a long-standing advocate on access to justice issues, including the need for a strong, independent and well-funded legal aid program. In recent years, the CLA has also focused on supporting women, racialized and young lawyers in the profession.

Our organization acknowledges the laudable goal of the government to ensure that provincially funded programs like LAO are cost-effective, efficient and accountable for the way in which funds are expended. Reviewing the current legislative framework for the operation of LAO is consistent with the Government's commitment to accountability and transparency. However, the goal of streamlining and reducing the cost of funding LAO must also be balanced against other important factors particularly in the area of criminal law including constitutional considerations. In that regard, the funding of criminal services through LAO is informed by the following non-exhaustive constitutional considerations:

- The constitutional requirement that the provincial government is responsible for the administration of criminal justice (s.91(27) of the *Constitution Act*);
- The obligation on the part of Government to respect the constitutional right to reasonable and timely bail as guaranteed in s.11(e) of the *Charter of Rights and Freedoms* (“*Charter*”);
- The obligation on the part of Government to ensure that cases are brought to trial in timely way (s.11(b) of the *Charter*);
- The constitutional requirement/guarantee unique to criminal proceedings of the right to counsel in s.10(b) of the *Charter*;
- The constitutional requirement to ensure that criminal trials are fair as required by ss.7 and 11(d) of the *Charter*; and
- The constitutional requirement to fund criminal counsel where necessary to ensure a fair criminal trial.

Overview

The *Legal Aid Services Act, 1998* was precedent setting legislation that created an independent but publicly funded transfer agency to administer the public funding of legal services for poor Ontarians. Section 3(4) of the *Act* currently legislates the independence while, at the same time, making LAO accountable to the Government of Ontario. This is a critical aspect of the *Act* given that there are many occasions where the Government and lawyers representing legally aided clients are adverse parties to litigation. In the criminal sphere, this is always the case. A lack of independence would raise appearance of fairness and constitutional concerns.

At the same time, LAO does not need to be accountable to the government in terms of the way money is spent. In recent years, LAO has received greater funding to address historic underfunding. Additional funds were meant to enable greater access to justice for more Ontarians. However, the funding increase was not specifically tied to providing more certificates. Instead, there’s been a growing bureaucracy at LAO. Based on data from 2018, there are 321 employees of LAO that earn more than 100,000 a year. Many of those are “staff” lawyers. Legal Aid Ontario must remain focussed on being the administrator of the certificate program, with legal aid services provided by the private sector bar, rather than a public sector law firm, with many lawyers on the government payroll, receiving benefits and pensions, whether they’re providing services or not. This will ensure legal aid funding goes where it was intended to go, rather than to a growing bureaucracy. Although there need not be an amendment to the *Act* to accomplish this, the Government needs to actively hold LAO accountable and consider directing where funds must be allocated to avoid a ballooning government agency that puts undue resources into administering the plan as opposed to assisting clients.

Maintaining the current foundation of the provision of legal aid services – s.14 of LASA

The current legislation provides that “the private bar is the foundation for the provision of legal aid services” in the areas of criminal and family law (s.14(2)). The legislation also directs that Legal Aid Ontario will “establish and administer a cost-effective and efficient system for *providing high quality legal aid services* within the financial resources available to the Corporation (s.12(1)).” These statutory requirements promote independence, ensure access to justice, and comply with the constitutional and other obligations of the Government of Ontario to provide legal aid services for poor Ontarians particularly where it is necessary to ensure a fair trial.

From its inception, legal aid has favoured the private bar as the principal service delivery model. The reason for this was recently summarized in the Law Society of Ontario 2018 “Report of the Legal Aid Working Group: An Abiding Interest (<http://www.lawsocietygazette.ca/wp-content/uploads/2018/02/2018-LAWG-Report.pdf>), as follows:

From the outset, legal aid in Ontario has favoured the private bar as the principal service model for service delivery. The primary reason is that it’s long been recognized that independent counsel, free of pressure from government, its agencies or others, provides the most effective means to protect and advance the client’s interests. Society and the justice system benefit from the independent private bar as it provides for a reliable adjudicative system that ensures an objectively fair adjudication in our adversarial system. The legal aid legislation specifically recognizes the private bar as the foundation for criminal and family law, and community clinics as the foundation for clinic law, concepts strongly endorsed by senior legal aid officials who met with the working group.

The preference for the private bar certificate model (particularly in criminal law) is a product of much consideration and discussion. The key advantages for a certificate model as opposed to a public defender model where staff lawyers deliver all legal services for poor Ontarians include the following:

- The ability of clients to have greater choice as to what lawyer they will hire;
- Costs are based on services delivered (fee for service) without concerns about pay and benefit equity with other government employees (such as Crowns) including pensions;
- Lawyers work at deeply discounted rates (20 to 30 per cent of private hourly rates);
- The overhead costs are borne by the lawyer who accepts the certificate;
- There is no concern about independence of the lawyers;
- A properly funded judicare model ensures that experienced and highly qualified lawyers will take on lengthy and complicated cases. As LeSage & Code observed in their 2008 “Report of the Review of Large and Complex Criminal Case Procedures

[\(\(https://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/lesage_code/chapter_5.php\)\)](https://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/lesage_code/chapter_5.php):

In short, there is a broad consensus that it is worthwhile to invest in a strong and capable defence. We agree with this view. It makes sense to pay the best lawyers appropriately because the return on the investment is a shorter trial that saves costs in all parts of the justice system. We do not believe that there is a sound fiscal argument for paying the defence at uneconomical rates as it often contributes to overly long trials. A poor-quality lawyer being paid inadequately to conduct an unduly long trial does not save money for the justice system.

The current legislation also directs in s.14(4) that “legal services shall only be provided by a lawyer or a person working under the direct supervision of a lawyer.” This prohibits Legal Aid Ontario from issuing certificates to non-lawyers, including paralegal, or other agents. It is important that the legislation maintain this requirement.

Limiting payment to lawyers or persons working under the supervision of lawyers, ensures high quality legal services are being provided. This is particularly important in the area of criminal law where the constitutional right to counsel (s.10(b) of the *Charter*) and the constitutional right to a fair trial (ss.7 and 11 of the *Charter*) are engaged. Permitting non-lawyers to provide legal services would create a constitutional problem in the criminal sphere. It would also raise concerns about the appearance of fairness. In the same way that the Attorney General of Ontario does not employ unsupervised paralegals or non-lawyers to prosecute criminal cases, public funds should be used to pay unsupervised agents or paralegals to defend such charges.

There is no gap in service delivery for criminal services that would support allowing public funds to be used to fund non-lawyers or persons who are not working under the supervision of a lawyer. In criminal proceedings, Courts have concluded that accused persons are not entitled to argue that they were entitled to the “effective assistance of counsel” if they are represented by paralegals (*R. v. Bilinski* 2013 ONSC 2824 at paragraph 65). This is so notwithstanding that paralegals are regulated and may, with the implementation of Bill C-75 (pending the Law Society of Ontario approval) be permitted to appear in summary conviction matters. As Justice Durno noted:

[66] The differences between paralegals and counsel remain. No doubt paralegals are now regulated, and some have professional legal training outside of on-the-job training in court. There is now a LSUC rule setting out the standard for a competent paralegal. However, that does not remove the main differences identified in *Romanowicz*. Neither is there any support for the appellant’s submission in *Hill*. There remains a clear distinction between the representation that an accused person is entitled to when they retain a lawyer versus when they retain a paralegal.

[67] The LSUC draws such a distinction. The LSUC’s advice in regard to choosing the right legal professional includes that a lawyer’s qualifications comprise a Bachelor of Laws or juris doctor degree, or equivalent. The lawyer must have successfully completed the LSUC’s licensing process, including licensing exams, articles of clerkship, and an online professional responsibility and practice course. On the other hand, paralegals’ qualifications include completion of an approved legal services program and the licensing process, which also involves less substantive licensing examinations.

The *Charter* does not provide a right to competent or effective legal representation in the form of a paralegal or some other agent and LAO should not have the ability or flexibility to issue certificates to such agents vis-à-vis criminal proceedings.

Proposals for legislative reform

Limiting the ability of Legal Aid Ontario to enter into agreements with lawyers or groups of lawyers to provide contract services – s.14(1)(a.1) of the *LASA*

Currently section 14(1)(a.1) of the *Act* permits Legal Aid Ontario to enter into agreements with lawyers, groups of lawyers or law firms” under which the group can contract to provide legal aid services. Legal Aid Ontario has relied on this power in the area of criminal law to enter into Alternative Fee Arrangements (AFAs) with large high-volume legal aid law firms. These arrangements permitted Legal Aid Ontario to contract to pay a flat monthly fee to these large law firms based on an average number of cases taken on by the law firm. Legal Aid Ontario explained the program in 2015 as follows:

An AFA is an alternative to hourly billing for lawyers or law firms where LAO provides monthly payments for a predetermined number and range of legal aid services to LAO clients.

AFAs offer lawyer/law firms simplified administration, predictable income and more autonomy.

It’s been almost two years since the first law firm signed an AFA with Legal Aid Ontario (LAO). Today, more than 100 lawyers and law firms are on AFAs across the province.

The pilot project started in 2014 with the first agreement signed on February 1.

In the fall of 2018, the program was canceled. Although LAO has not formally released the reasons for doing so, it appears that the overall cost of the program was more than would have been paid had LAO simply paid for certificate work. In other words, paying for services delivered on certificates was more cost effective than these mini-public defender contracts in the form of AFAs. The business case for maintaining AFAs did not make sense as it did not result in quality legal services being provided at a more cost-effective rate. Additionally, the AFA had the unintended consequence of providing an incentive for law firms to take on more and more Legal Aid clients (to increase the average monthly payment) without regard for quality legal services with experienced counsel being provided.

Allowing LAO, the flexibility to enter into such arrangements and, essentially, experiment with a mini-public defender system should not be within their legislative mandate or control. Such a decision is for the government and not for a transfer agency. Absent any gap in service delivery or a demonstrated business case being established to permit such arrangements, LAO should not have the flexibility to do so.

LAOs discretion to establish staff offices should be circumscribed—ss.16 and 19 of LASA

The legislation currently empowers LAO to establish “staff offices” as distinct from duty counsel offices to provide legal services. These offices are staffed with full time or part-time employees of LAO who enter into contracts to provide services. At the same time, the legislation also directs that the private bar is the foundation of delivery of legal services in the area of family and criminal law (s.14).

The legislation should be amended to circumscribe the ability of LAO to establish staff offices by limiting the ability to do so. In particular, LAO should be precluded from establishing staff offices unless it is necessary to address a gap in the private certificate delivery model. This will ensure that there is no duplication of services and that the most cost effective and efficient delivery model (fee for service through private certificates) remains the core method by which legal services are employed. There is little value in having salaried employees with benefits, pensions and union representation being employed as full or part-time staff to fill offices with fixed overhead if they are not addressing a need in the community that is not being filled by the private bar. Where LAO wants to create a staff office, they should be required to demonstrate the need in the form of a business case that can be objectively reviewed and scrutinized.

Need for meaningful tariff reform – O.Reg 107/99

The current tariff established by O.Reg 107/99 regulates the hourly rate for legal services as well as the number of hours that can be billed for legal services. The current hourly rate for criminal services is as follows:

Effective	New Rates						
	1-Feb-10 Year 1	1-Apr-10 Year 2	1-Apr-11 Year 3	1-Apr-12 Year 4	1-Apr-13 Year 5	1-Apr-14 Year 6	1-Apr-15 Year 7
Lawyer Rate Tier 1	\$81.44	\$85.51	\$89.79	\$94.27	\$98.99	\$103.94	\$109.13
Lawyer Rate Tier 2	\$91.62	\$96.20	\$101.01	\$106.07	\$111.37	\$116.94	\$122.78
Lawyer Rate Tier 3	\$101.81	\$106.90	\$112.24	\$117.98	\$123.75	\$129.94	\$136.43
Complex Case Rate	\$120.02	\$124.82	\$129.81	\$135.00	\$141.75	\$148.84	\$161.05

There is no current statutory or other mechanism to adjust hourly rates based on Cost of Living Allowance increases (COLA) or any other mechanism. This has led to instability in the past within the criminal sphere. In 2009 experienced criminal lawyers who were members of the CLA engaged in an 8-month boycott of certificate work for serious cases. This resulted in serious prosecutions being delayed and/or Courts appointing lawyers at rates greater than the legal aid tariff allowed and payable by the Attorney General. The boycott created havoc for Courts, Crowns and for low-income Ontarians who were in need of legal assistance. However, it was necessary to bring attention to the inadequate legal aid tariff. Ultimately, an agreement was reached between the CLA, LAO and the Attorney General in the form of a Memorandum of Understanding (MOU) that ended the boycott and provided for 7 years of modest tariff reform. The MOU covered issues

such as the certificate program and the tariff to be paid to private lawyers under the certificate program, was agreed to in January 2010. Unfortunately, the predecessor government allowed the agreement to lapse without a new agreement in place.

The MOU explicitly recognized the importance of the certificate program and that legal aid has a public service component. It was intended to create stability and fairness in the legal aid system, with commitments within the agreement to March 31, 2016. Unfortunately, the predecessor government allowed it to lapse without a new agreement in place. The future stability of LAO for criminal law services is directly affected by this. The CLA is committed to entering into a new MOU and working with LAO and the AG to accomplish the same.

One of the components of such an agreement can be accomplished through legislative reform including providing for a statutory mechanism for a tariff review by an independent body to ensure that it is sufficient to ensure that there are high quality lawyers undertaking legal aid work and delivering competent services.

Additionally, the current financial eligibility criteria need to be modernized to reflect modern realities. Currently, regardless of where an applicant resides when applying for criminal certificate services, the following eligibility test is applied:

<u># of family members</u>	<u>Step 1, income</u>	<u>Step 2, income</u>	<u>For domestic violence, gross family</u>
1	\$14,453	\$16,728	\$22,270
2	\$25,003	\$30,110	\$32,131
3	\$28,503	\$35,088	\$39,352
4	\$32,207	\$40,307	\$45,440
5+	\$35,749	\$45,446	\$50,803
Single boarders	\$9,501	\$10,973	N/A

This financial eligibility test is too low at present and limits access to justice. A full-time worker earning minimum wage earns \$29,120 annually.¹ So, anyone working full-time earning minimum wage, must have at least a family of 3 to qualify for legal aid. As a result, the CLA believes the financial eligibility test is still too strict, particularly for criminal cases where someone's liberty could be at stake. Many commentators, including former Supreme Court Chief Justice Beverley McLachlin, have noted that an increasing number of litigants are choosing to represent themselves; the inability to afford legal representation, but earning too much to qualify for legal aid, is a significant factor for this increase.² Statutorily prescribing an independent body to review the financial eligibility criteria and to modernize it to reflect regional economic realities, among other things, will improve the overall deliver of legal services to the poor Ontarians who cannot afford a lawyer.

¹ Based on a working 40-hour work week for 52 weeks.

² Remarks of the Right Honourable Beverley McLachlin, P.C., Chief Justice of Canada. Remarks delivered to the Empire Club of Canada at Toronto, Ontario. March 8, 2017.

Concurrent modernization of criminal courts will modernize delivery of legally aided services

Ontario's courts are ripe for red tape reduction. Despite digital and technological advances in society at large, our courts remain largely paper- and fax-dependent institutions, where nearly all procedures have to take place in person, at great cost for all those involved.

The CLA believes an emphasis on user-focused justice, through initiatives like increasing the availability of digitized justice services and streamlining court processes, significantly improves the delivery of the criminal justice system, increasing access to justice and improving the way people interact with the justice system.

Modernized court administration processes mean that there is greater use of real-time, simultaneous audio/visual equipment, rather than in-court appearances, today. These practices have social and fiscal benefits. They require fewer court resources, in terms of the use of courtrooms and the number of hours that court officials have to devote to these standard procedures. This should translate into real savings within the criminal justice system.

A number of efficiency-enhancing initiatives have been introduced in our courts, but almost without exception these have been done on the civil side of the system. For example, people can file all manner of civil claims online and the Province is developing online dispute resolution services in certain areas of the law.³

The CLA calls upon the Government to similarly modernize the administration of criminal law, as they have successfully done in the civil system. Changes like these would also reduce the regulatory burden for those private criminal defence counsel working under a legal aid certificate. Many procedures have capped hours that do not reflect actual time spent. Modernizing administration could help to reduce these small business' regulatory burden and help to make it more attractive for more experienced private criminal counsel to pursue legal aid-funded work.

Conclusion

Legal Aid Ontario must have sufficient independence to ensure that the appearance of and actual fairness exist particularly as it relates to the delivery of criminal law services. At the same time, LAO is accountable for the expenditure of public funds. The private criminal certificate delivery model that has always existed is tried and true. It is the most cost effective and efficient service delivery model based on fees for services. LAOs recent experiment with alternative fee arrangements for criminal work reinforces this conclusion. *LASA* should continue to recognize that the private bar is the foundation of legal services in the area of criminal law. Additionally, the provision of legal services either by lawyers or under the supervision of lawyers ensures quality and competent work and the leveling of the criminal trial playing field, which promotes certainty, finality and just results. The constitutional considerations that are unique to criminal law support

³ See, for example, Ministry of the Attorney General. *Ontario Making It Easier to Access Justice Services Online*. November 29, 2017.

maintaining this requirement. Amending the legislation to circumscribe the ability of LAO to use other service delivery models or experiment with delivery models is fiscally responsible and holds LAO accountable for the manner in which public funds are expended while at the same time providing the necessary independence that is required. Tariff reform must also be part of any legislative reform. The government should also consider statutorily prescribing the means by which financial eligibility is determined. Finally, significant administrative and financial efficiencies can be found by modernizing other aspects of the administration of criminal justice in this Province.

As a significant partner in the administration of criminal justice, we thank you for the opportunity to provide these written submissions. Should you wish to discuss them further, we would be happy to do so.

Sincerely,
CRIMINAL LAWYERS' ASSOCIATION

A handwritten signature in black ink, appearing to read "Michael Lacy". The signature is fluid and cursive, with the first name "Michael" being more prominent than the last name "Lacy".

Michael Lacy
President

cc. Mr. Paul Boniferno
Deputy Attorney General Ontario

Mr. Charles Harnick, Q.C.
Chair – Legal Aid Ontario

Mr. David Field ✓
President – Legal Aid Ontario

Mr. Lenny Abramowicz
Chair – Alliance for Sustainable Legal Aid