

February 25, 2020

Mr. Doug Downey, Attorney General
Ministry of the Attorney General
The McMurtry-Scott Building
720 Bay Street, 11th Floor
Toronto, ON
M7A 2S9

Dear Minister Downey,

RE: TLA SUBMISSIONS ON THE SMARTER AND STRONGER JUSTICE ACT

The Toronto Lawyers' Association (TLA) is the voice of its 3,700 members who practise law in all disciplines across the Greater Toronto Area.

The TLA has reviewed the *Smarter and Stronger Justice Act, 2019* omnibus justice bill, introduced on December 9, 2019. The bill proposes many significant reforms to the justice system in Ontario, and will impact on both the delivery of, and access to legal services in the province. Accordingly, it is of significant concern to the TLA, its members, and the public we serve.

On a preliminary note, we applaud the government's desire to improve the efficiency of the justice system and to update the law to better reflect the modern-day reality for Ontarians. Amendments such as removal of the legislative requirement for a jury panel list to include place of residence of each juror, making the definition of "sheriff" consistent across the *Execution Act* and the *Courts of Justice Act*, and allowing the Law Society to regulate entities as had been authorized by Convocation, are commendable. We also note that investing in the justice system is economically prudent. Funding legal aid, pro bono services, as well as other access to justice measures will actually result in economic gains and efficiencies – this fact is well-supported by research. Accordingly, we encourage the government to prioritize investment in access in justice programs.

Given the substantial changes that Bill 161 proposes, before implementing such reforms, the TLA encourages the government to consult broadly with the many affected justice system stakeholders, including lawyer organizations and legal clinics, advocacy organizations, and other special interest groups, all of whom will bring their own unique experiences and valuable viewpoints to bear on the proposed amendments. Broad consultation will ensure that, before the legislation is enacted, the government understands from the end users what the consequences and impacts will be that result from the amendments, and hopefully avoid any unintended adverse effects.

To that end, the TLA provides its comments on two areas of proposed changes: legal aid and virtual commissioning. We will be delivering separate comprehensive comments in the near future regarding the proposed overhaul of the *Class Proceedings Act, 1992*.

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Schedule 15 and 16 - Legal Aid Services Act

The TLA is concerned that the proposed amendments to the *Legal Aid Services Act, 1998* reflect a policy sea-change with respect to this government's commitment to funding basic minimum legal services for destitute and low-income Ontarians.

The fundamental purpose of legal aid is to provide equal access to justice to economically disadvantaged individuals. It is a vital aspect of the Canadian justice system, and is meant to level the adversarial playing field between the highly resourced and powerful Crown offices and the individual. However, it is stating the obvious to say that the current legal aid programming does not meet this estimable goal – it provides the most limited of legal services to only the most disadvantaged.

A robust commitment to legal aid services is critical to ensuring that low-income individuals are fairly and justly dealt with by the justice system. For criminal defendants in particular, the dangers of an anaemic legal aid system are especially acute given the significant resources of the prosecution and the life-altering consequences of a criminal conviction. Fundamental to maintaining the rule of law is a properly functioning criminal justice system that maintains the assumption of innocence until proven guilty beyond a reasonable doubt. Underfunding of the legal aid system undermines this bedrock constitutional norm.

The need for a robust legal aid program is necessary, not only to provide access to justice for marginalized citizens, but also to help keep the judicial system operating smoothly. At the Fall opening of the courts in 2019, the Chief Justice explained that “reducing legal representation for the most vulnerable members of society does not save money.” Without proper representation, the efficiency of the court system is adversely impacted, and fair outcomes are compromised.

Furthermore, legal aid provides much broader societal benefits, that outweigh its costs. As reported by the Canadian Bar Association, a recent report by the [World Bank and International Bar Association](#) provides an in-depth study of the “false economy of not providing legal aid”. The reality is that every dollar spent on legal aid saves many more dollars that would otherwise be expended on social services. Closer to home, the report of the Canadian Forum on Civil Justice's report, [Investing in Justice](#), sets out a comprehensive literature review demonstrating that there is a demonstrable return on investment both in terms of dollars and cents, and social impact for investment in the justice system, including legal aid.

That said, access to justice is the touchstone of Ontario's legal aid system. Section 1 of the *Act* sets out its policy objective is to promote “access to justice throughout Ontario for low income individuals” by, inter alia, “providing consistently high quality legal aid services in a cost-effective and efficient manner” and “identifying, assessing and recognizing the diverse legal needs of low income individuals and of disadvantaged communities in Ontario”. It is the TLA's opinion that these values must be maintained and upheld and should not be undermined by the superimposition of other government interests over these core societal obligations. Maintaining, in particular, a robust legal aid clinic infrastructure is essential to the functioning of our society's disadvantaged communities.

However, the proposed amendments to section 1 of the *Act* signal that ensuring access to justice for low-income individuals and disadvantaged communities will no longer anchor the statutory mandate of Ontario's legal aid system. Section 1 of the proposed *Act* identifies its purpose as facilitating "the establishment of a flexible and sustainable legal aid system that provides effective and high quality legal aid services throughout Ontario in a client-focused *and accountable manner while ensuring value for money.*" Gone entirely from this purpose-stating section is any reference to "access to justice" or "low-income individuals". Instead, the focus seems to have turned to guarding the public purse. The TLA is left with the strong impression that the government's concern is not with providing the barest of essential legal services to disadvantaged Ontarians, but rather with limiting its expenditures from Treasury. If this impression is correct, then, as explained above, the objective is misplaced, as funding legal aid provides substantial savings and improves the delivery of justice, as well as providing access to marginalized persons.

The apparent move away from ensuring access to justice for low income Ontarians under the proposed legislation is further reflected in the substance of the proposed *Act*. Section 16(1) of the existing *Act* provides that eligibility to receive legal aid services is to be determined by "the method that the corporation considers appropriate, having regard to its policies and priorities established under s.12". Section 12(2) specifically requires that Legal Aid Ontario "determine the legal needs of low income and of disadvantaged communities in Ontario when establishing its policies and priorities."

However, the statutory mandate to consider the needs of low income and disadvantaged communities in the existing *Act* has been omitted from the proposed legislation. Instead, s. 6 of the proposed *Act* requires the Corporation to consider, when determining what services to provide, "the needs, as determined by the Corporation, of individuals and communities in Ontario for legal aid services, including Indigenous individuals and communities and Francophone individuals and communities. Section 7 of the proposed *Act* also omits reference to "low-income and disadvantaged communities" and states that, "an individual is eligible to receive legal aid services, in a manner the Corporation considers appropriate, if the individual demonstrates in accordance with the rules, that he or she meets any financial and other eligibility requirements that are specified by the rules". The absence of language in the *Act* requiring Legal Aid Ontario to consider the needs of low-income and disadvantaged Ontarians in formulating its policies strongly suggests that this will no longer be one of Legal Aid Ontario's central priorities.

To the same point, the new proposed definition of "poverty law" fails to reflect the complexity and interrelated needs of vulnerable Ontarians. Low income people are often racialized, Indigenous, LGBTQ2S, women, and people with disabilities – both physical and mental. Their legal needs are not limited to housing, shelter, income maintenance and social assistance. Their legal needs cover a broad spectrum, and include also human rights, health law, and employment law to name but a few. These intersecting needs have been met through the legal aid clinics in the past, but their ability to serve their clients could be severely undermined by the new legislation.

The TLA is also concerned that the new *Act* resiles from the original intent behind the creation of an *independent* corporation by implicitly making Legal Aid Ontario accountable to the government (i.e. not independent) for its operational choices. It does so by making the provision of legal

services discretionary and subject to regulation. This suggests that the intent of the new legislation is to limit the Corporation's independence, making it subject to the direction of the government through regulation – again, an objective that is conflict-ridden and inherently at odds with the primary purpose of state funded legal aid programming.

Changes to the qualifications of potential board members under the new legislation also raise concerns for the TLA, and suggest an indifference to ensuring access to justice for low-income and disadvantaged communities. Under s. 5(4) of the current legislation, the Attorney General is required to ensure that the board as a whole has “knowledge, skills and experience” in the areas that the Attorney General considers appropriate, including, among other things, “the special legal needs of and the provision of legal services to low-income individuals and disadvantaged communities” and “the social and economic circumstances associated with the special legal needs of low-income individuals and of disadvantaged communities.” Under the new legislation, the Attorney General is under no such obligation, and this leaves open the possibility of patronage or partisan appointments, rather than ensuring that there is a knowledgeable board with an appropriate skill base to govern the Corporation.

The TLA is also troubled by section 15 of the proposed new legislation, subsection 3 of which stipulates that “[d]espite any order of a court requiring that the cost of providing services under this section to an individual be borne by the Attorney General of Ontario or the Crown in right of Ontario, the cost of providing the services shall be borne by the Corporation.” This subsection has the pernicious effect of transferring the cost of court appointed counsel from the Ministry of the Attorney General to Legal Aid Ontario and threatens to further erode Legal Aid Ontario's already strained financial position. Those individuals who are awarded legal services by the court are individuals who do not otherwise qualify for legal aid. Thus, s. 15(3) circumvents the very purpose of the independent Corporation and its financial self-determination. Pushing these expenses onto Legal Aid will result in extensive cost overruns for the Corporation. This provision has, in the view of the TLA, the aura of the government refusing to accept fiscal responsibility when the responsibility has been placed upon it by the courts. This, too, undermines the rule of law, as well as creating an unfair financial burden on the Corporation.

The TLA notes that some press reports have suggested that the Ministry of the Attorney General has advised it will not enforce this section of the legislation and that it will continue to pay the cost of court appointed counsel. However, if this is the case, there is no need for this section in the legislation at all, and it should be removed.

The TLA makes the following recommendations regarding the proposed changes to the *Legal Aid Services Act*:

1. Clear language should be included in the *Act* that protects the independence of the Corporation from government interference so as to ensure that the legal aid system can continue to provide access to justice to low-income individuals and disadvantaged communities. This includes removing discretionary powers to provide legal aid services subject to regulation and replacing it with a clear and binding statutory mandate to provide those services.

2. The *Act* should explicitly state its commitment to providing access to justice for low-income and disadvantaged communities in a manner that ensures that the principal mandate of the legal aid system will continue to be fulfilled.
3. The *Act* should continue to require that the Attorney General ensure that the board as a whole has the knowledge, skills and experience that are commensurate with a body tasked with providing access to justice for low-income Ontarians.
4. That the Corporation specifically be required to consider the needs of low income individuals and disadvantaged communities when determining how to distribute the provision of legal aid services.
5. That s. 15(3) of the proposed legislation be deleted and that the Ministry of the Attorney General continue to be bound by court orders requiring it to pay the cost of court appointed counsel.

While not expressly responsive to the proposed amendments, the TLA would also like to take this opportunity to again express its dismay over the drastic funding cut to Legal Aid Ontario in 2019, and to impress upon the government the need for additional and robust funding for the Corporation. It is imperative to a fully and fairly functioning society operating under the rule of law that a robust legal aid system be maintained, and as set out above, every dollar spent on legal aid will save many more dollars that would otherwise be expended in social services.

Schedule 5 and 19 - Commissioners for Taking Affidavits Act and Notaries Act

The TLA supports the proposed amendments providing for virtual commissioning of affidavits and declarations. Permitting virtual commissioning will reduce delays and legal costs for Ontarians, and make legal services more accessible. The amendments reflect the advantages available through technological advancements which ought to be incorporated into the provision of legal services.

However, there are risks to virtual commissioning. It increases the opportunities for fraud, if the circumstances surrounding the remote commissioning are not carefully controlled. Similarly, careful control of the documentation and commissioning process will be essential to avoid confusion as to what document is being commissioned and whether the party attesting to the document is fully cognizant of its contents, and not acting under duress.

The proposed amendments leave all the conditions for virtual commissioning to the regulations. While setting the conditions by regulation may seem expedient as the conditions will likely have to be updated with some frequency to reflect technological changes, the TLA is hesitant to fully endorse the new legislation without having had the opportunity to comment on the regulations, which will be the heart of the process. The content of the regulations will be crucial to the success of the legislation.

The TLA recommends the following conditions be included in the regulation on virtual commissioning:

1. The commissioner must know or be able to confirm the identity the individual who is giving the oath or declaration at the time the oath or declaration is given. This will likely require some form of video conferencing.
2. Both the commissioner and the affiant must be able to identify with certainty what document is being sworn, and the document must be in a form that is not able to be altered after it is sworn. In order to protect the integrity of the document, some form of remote notarizing software must be used.
3. On its face, the document must disclose that it was sworn by virtual commissioning and should identify the location of the affiant and the location of the commissioner.
4. The commissioner must ensure that the affiant is aware that virtually commissioned documents are not acceptable in many jurisdictions and may not be admissible or usable outside Ontario.

It would be advisable to review these regulations after 2-3 years to determine whether any changes need to be made in light of practice.

Thank you for considering these comments. The TLA would be pleased to discuss these comments with the Committee, should you find additional input beneficial.

Yours very truly,



Margaret L. Waddell
President
Toronto Lawyers Association