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LEGAL AID ONTARIO'S SUBMISSIONS ON BILL C-75

TO THE

STANDING COMMITTEE ON JUSTICE AND HUMAN RIGHTS

August 31, 2018

Legal Aid Ontario (LAO) welcomes the opportunity to make submissions on Bill C-75 and its proposed amendments to the *Criminal Code* and the *Youth Criminal Justice Act*.

LAO supports the government's steps to address delay in the criminal trial process, and to modernize bail practices and procedure. LAO supports amendments to the *Criminal Code* and *Youth Criminal Justice Act* that will make the justice system operate in a more efficient and equitable manner. At the same time, LAO must consider the consequences of proposed amendments that will negatively impact the vulnerable individuals that LAO serves.

Our submissions are focused on those aspects of the Bill that, in our view, are most relevant to the needs of low-income accused who use our services, as well as aspects that pertain to our role as the major funder of criminal defence legal services in Ontario.

1. LAO supports Bail Reform and Guilty Plea Inquiry Amendments in Bill C-75

A. Bail Reform

LAO welcomes the federal government's bail reform initiatives in Bill C-75. In particular, LAO supports:

(i) The codification of restraint in the bail process;

(ii) New mandated consideration that must be given to individuals who are disadvantaged in obtaining bail because they are Aboriginal and/or part of a vulnerable population that is overrepresented in the justice system; and

iii) The creation of judicial referral hearings for non-violent administration of justice offences.

The federal government's bail amendments in Bill C-75 represent, in LAO's view, the proper and welcomed culmination of recent efforts from a variety of sources, including the Supreme Court, provincial prosecutorial and court initiatives, access to justice reports, the private bar, and LAO's own work, to address the crisis in bail. Throughout the country the majority of persons in provincial jails have yet to be convicted of an offence but are instead are awaiting trial, unable to access their *Charter* right to a "reasonable bail". It is equally well documented that the inequities in bail decision making fall hardest on Indigenous, Black, racialized and other vulnerable accused persons, who are disproportionately represented in jail and remand populations. As the government's bail court amendments recognize, the remand population is not made up of violent offenders who pose a risk to public safety but instead consists largely of persons who have been detained as a result of being unable to comply with excessive

conditions on a bail release, and are now detained with an additional administration of justice charge.

The government's three proposals for bail court reform will address important aspects of the bail and remand crisis in this country. The codification of restraint follows on the Supreme Court of Canada's own unanimous reaffirmation of this principle in *R. v. Antic*. LAO developed best practices and training material for legal aid lawyers following *Antic* to ensure that the "principle of restraint" finds its way into day to day practice and procedure in bail court. This explicit recognition in statute will greatly assist in this work, along with the initiatives of others in the justice system who are working to address the bail and remand crisis.

Similarly, Bill C-75's requirement that particular consideration be given to vulnerable communities, such as Black and Indigenous persons, who have difficulty obtaining bail, is consistent with LAO's views and programs, as well as those of other criminal justice stakeholders. Finally, LAO looks forward to working with other justice participants on the implementation of the judicial referral hearing process. This new process has the potential to significantly reduce the remand population by giving the police and prosecution the discretion not to proceed with an administration of justice charge where public safety is not at issue.

Overall, LAO believes that the government's legislative amendments in the area of bail provide the basis for a legal culture shift in bail court similar to the change that was initiated by the introduction of the *Youth Criminal Justice Act*, which resulted in a dramatic reduction in the incarceration of young people. The bail reforms in Bill C-75 are also directly related to the government's objective in reducing justice system delay.

B. Amending the Plea Inquiry

Bill C-75 requires a court, before accepting a guilty plea, to be explicitly satisfied that the plea is supported by the facts, and to be satisfied that the accused is making the plea voluntarily and understands the consequences of the plea.

Ensuring that these requirements are met is already a central task for all LAO duty counsel who act for low income accused persons in courtrooms across Ontario. Before assisting an accused on a guilty plea, all duty counsel are required to complete a "plea comprehension form" which, like the government's proposed amendment, seeks to ensure that the accused has been properly advised of their rights and understands the consequences of the plea.

LAO supports the government's proposed amendment requiring the justice to be satisfied that the facts support the charge when accepting a guilty plea. This is critical to avoiding improper and false guilty pleas from accused persons, particularly from those who are already disadvantaged and vulnerable. It also provides a more streamlined process for guilty pleas and avoids subsequent challenges on appeal to pleas of guilt entered at trial.

2. LAO Proposes Modest Restrictions on Police Powers to Release with Conditions

LAO supports many of the expanded powers that Bill C-75 gives to police to release accused persons without holding them for a bail hearing. As documented in a number of academic and access to justice reports, including LAO's Bail Strategy[1], one of the reasons for the rising remand population in our provincial jails relates to the reluctance of the police to exercise their authority to release accused persons from the station without detaining them for a bail hearing. LAO also understands that the police often feel that without additional powers, public safety would be at risk if the accused is not brought in for a bail hearing whereas, alternatively, appropriate conditions could be placed on his or her release into the community. The government is to be commended for addressing the need to support the police so that that more accused are released from the station after arrest without being detained for a bail hearing.

That being said, there are two specific instances where LAO believes that the government has provided powers to the police for conditional pre-trial releases that are overly broad and unnecessary. It is LAO's view that, if implemented, these specific provisions put at risk the government's more general objective in Bill C-75 to introduce a principle of restraint in matters of pre-trial release to address the bail remand crisis in this country.

The first example is section 501(3) of Bill C-75 which grants police officers the power to impose conditions to "prevent the continuation or repetition of the offence or the commission of another offence". This amendment permits a police officer to place an accused person on a condition that may not be linked to the purposes of the bail process but instead aims to prevent the future commission of some unnamed other offence. As currently worded, this explicit authority for the police to impose conditions to prevent the commission of future offences would appear to extend beyond the authority granted by the *Criminal Code* to justices who are considering bail conditions. Consistent with the principle of restraint, LAO would urge the government to ensure that the authority provided to the police to impose conditions does not exceed that which is provided to justices who act within a formal bail court process.

Secondly, LAO has concerns with the authority given to police under Bill C-75 to accompany a residential requirement on release with new curfew requirements (effectively "house arrests"), and most problematically, to require a person to present themselves at the entrance of their residence as directed.

It is LAO's experience that these kinds of conditions are now only used sparingly in bail court by justices, usually when an accused person has a criminal record for non-compliance and violent offences. They are also notoriously difficult to comply with, and are too often breached for innocuous reasons, resulting in additional administration of

[1] http://www.legalaid.on.ca/en/publications/paper-legal-aid-strategy-for-bail-2016-11.asp

justice charges and pre-trial detention orders. Extending these kinds of conditions to the police would seem to run contrary to the principle set out in the newly proposed s.498.1 that conditions must be "reasonably practicable to comply with".

Fundamentally, while recognizing the importance of police releasing more people from the station, LAO is concerned that the extension of these powers may serve to undermine the overall restrained approach the government is taking to pre-trial decision-making. We are not alone in that concern. The Ontario Commission on Systemic Racism in the Criminal Justice System noted that because police/accused encounters are the principal locus of discrimination against black persons, the extension of additional powers to the police to release with conditions should be approached with restraint.[2] More academic studies have also been cautious as to whether expanding the power of the police to release with conditions can alleviate pressure on the criminal justice system and not simply result in a net widening of persons who will be brought into that system.[3]

Justice Gary Trotter of the Ontario Court of Appeal in his definitive text on the *Law of Bail* reviews both of these studies on the impact of expanding the power of the police to release on bail conditions, and also urges restraint.

> .. . Along with our own learning about police bail in general, this British research exhorts us to approach this power with restraint.

3. LAO's Critical Views on Bill C-75

A. Retaining Preliminary Inquiries

Currently, preliminary hearings are effectively available as a right for any accused charged with an indictable offence. The proposed amendment in Bill C-75 will restrict the use of preliminary hearings to adults charged with offences punishable by life imprisonment. Section 537 will also be amended to permit a justice overseeing a preliminary inquiry to "regulate" the hearing in any way they deem necessary to promote "a fair and expeditious inquiry".

LAO, through its certificate and senior litigator programs, funds the defence of all stages of a criminal matter, including preliminary inquiries. While LAO supports increased judicial intervention to ensure efficient case management, LAO is not convinced that the proposed amendment to eliminate the preliminary inquiry for all but the most serious crimes will reduce delay or costs in the court system. In fact, this restriction may increase delay and result in higher costs.

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[2] M. Gittens and D. Cole, *Report of the Commission on Systemic Racism in the Ontario Criminal Justice System* (Toronto, Queen's Printer, 1995) cited in Trotter, *The Law of Bail in Canada*, 3rd edition, (Toronto, Thompson Reuters), at s.2.4 (c), 2-42

[3] See J.W. Raine and M.J. Willson, "Police Bail with Conditions: Perspectives on the Use, Misuse and Consequences of a New Police Power", (1997), 37 *British Journal of Criminology* 593 and J.W. Raine and M.J. Willson, "Just Bail at the Police Station?" (1995) 22 *Journal of Law and Society* 4, cited in the *Law of Bail in Canada* at s. s.2.4 (c) 2-43.

On first reading, restricting preliminary hearings as envisioned by Bill C-75 would appear to be a viable way for LAO to reduce its own costs while reducing overall delay in the criminal justice system. As is often the case, however, in the criminal justice system, the precise impact of preliminary inquiries on delay is more complicated. Firstly, there is no evidence to suggest that preliminary inquiries are a major cause of delay in the criminal justice system, while the available evidence suggests they may be irrelevant to that question. Secondly, there is evidence that preliminary inquiries may serve to change the "trajectory of cases" by screening out cases so that more matters are resolved without the necessity of a trial.

i. Preliminary Inquiries are not creating trial delay

The use of preliminary inquiries across Canada is very low and declining every year: the number of preliminary inquiries has decreased by 37% over the last ten years[4] and preliminary inquiries are estimated to be less than 1% of all court appearances[5]. The data also shows that the vast majority of preliminary inquiries only take two days of court time to complete[6]: despite it being an "extra step", evidence does not support the contention that the process itself causes any delay.

The most in-depth study of the use of preliminary inquiries over a five-year period, involving over two million cases, revealed that even for provinces that held the most preliminary inquiries, the percentage of all court appearances involving a preliminary inquiry did not exceed 2%.[7] In Ontario, for that same period, only 0.3% of all court appearances involved a preliminary inquiry. While, as reported by Statistics Canada, cases with preliminary inquiries may in general take longer[8], there is on closer analysis no direct causation between the use of preliminary inquiries and overall case delay. For example, in Ontario, while the use of preliminary hearings has decreased by 37%, Ontario provincial courts are completing 21% *fewer* cases than they did five years ago[9]. Logically, preliminary inquiries do not seem to be the problem that is causing delay.

Preliminary inquiries are often associated with serious offences that require more preparation and court time than other matters. Despite it being an "extra step", evidence does not support the contention that the process itself causes any delay. Criminologists Cheryl M. Webster and Howard H. Bebbington in their definitive study reached this conclusion when comparing preliminary inquiry rates and overall delay findings between Alberta and Ontario. That study found that the fact that there were more preliminary inquiries held in Alberta did not lead to more trial delay in that province as compared to

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[4] http://www.justice.gc.ca/eng/rp-pr/jr/jf-pf/2017/jun01.html

[5] "Why Re-open the Debate on the Preliminary Inquiry? Some Preliminary Empirical Observations" (2013) 55(4) *Canadian Journal of Criminology and Criminal Justice* 513 (Why Re-open the Debate)

[6] Why Re-open the Debate, supra

[7] Why Re-open the Debate, supra.

[8] https://www150.statcan.gc.ca/n1/pub/85-002-x/2018001/article/54900-eng.htm#n5-refa

[9] https://www.theglobeandmail.com/opinion/preliminary-inquiries-a-debate-that-needs-better-data/article34132434/; https://www150.statcan.gc.ca/n1/pub/85-002-x/2017001/article/14699-eng.htm

Ontario, where preliminary inquiries were held much less often. Overall the study came to the following conclusion on the impact of preliminary inquiries on time to trial:

> "Large variation across Canadian jurisdictions in the use of the preliminary inquiry does not appear to be highly correlated with the variation in the time that a case takes to be processed nor with the number of appearances that it takes to complete a case in provincial court."[10]

ii. Preliminary Inquiries are effective in screening out charges and resolving matters

There is also data that demonstrates preliminary inquiries are effective in screening out charges and resolving matters in provincial court. Webster and Bebbington's analysis revealed that in most jurisdictions, the majority of cases with a preliminary inquiry resolved in provincial court. In Ontario, there were twice as many cases with preliminary inquiries resolved in provincial court as in Superior Court.

Webster and Bebbington's conclusion about the impact of preliminary inquiries on the "trajectory of cases" in the criminal justice system supports the position that preliminary inquiries aid in the simplification and resolution of cases:

> … The preliminary inquiry is having the effect of altering the course of cases destined for the high court. Whether this end result is rooted in discharge at the preliminary inquiry, a plea (or plea to lesser charges), or a re-election to trial in Provincial Court, the preliminary inquiry may be facilitating resolution of matters without an expensive trial in Superior Court"[11].

A more recent report from the staff criminal offices of Manitoba Legal Aid also illustrates the power of a properly used preliminary inquiry. Manitoba Legal Aid reported that of the 1% of all criminal cases that had a preliminary inquiry (96 out of 12,397), 72 of those 96 cases did not proceed to trial after the preliminary inquiry.[12]

In its own preliminary analysis, LAO has similar data. Through cases that were funded through LAO's Big Case Management program from 2004 to 2014, LAO learned that preliminary inquiries were held in 491 of 1034 cases that did not carry a life sentence. However, 75% of those certificates (367) did not have trial dates set whereas 25% (124) did, suggesting that 75% resolved after the preliminary inquiry without trial.

This evidence is persuasive and illustrates that used properly, a preliminary inquiry can reduce the number of matters that proceed to trial and reduce the number of cases that proceed to trial in the Superior Court. As a funder, LAO finds this data significant. Funding Superior Court matters is more expensive than funding provincial court

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[10] Webster, Cheryl M. 2005. "A preliminary inquiry into the preliminary inquiry." Department of Justice Canada. (A preliminary inquiry)

[11] Why Re-open the Debate , supra note 6

[12] Cited in CBA position paper: https://www.cba.org/CMSPages/GetFile.aspx?guid=464776c2-346f-487a-a203-6895c8d5edd6

matters. If a matter can be resolved early in provincial court, LAO prefers to invest funds there.

LAO recommends and supports further study and a more detailed examination of the use of preliminary inquiries and the factors that make them useful in some jurisdictions and a symbol of delay in others, before restricting their use. As a number of commentators and studies have also suggested, there are a number of processes and procedures, in addition to those proposed in Bill C-75, that are available to the preliminary inquiry judge that should be examined before eliminating preliminary inquiries for all but the most serious of offences.

LAO would also like to support the positions of the Canadian Bar Association and the submissions of the Criminal Lawyers' Association with respect to the retention of preliminary inquiries.

B. Ensuring that law students and paralegals can provide legal aid services for minor criminal offences to low-income individuals

Section 319 of Bill C-75 increases the maximum sentence for all summary conviction offences to two years less a day. For LAO, the difficulty with this proposed amendment is that there is no concurrent amendment to s.802.1 of the *Criminal Code* which currently allows agents such as paralegals and law students to represent accused persons on summary conviction offences, provided the maximum penalty for the offence is no more than six months' imprisonment. Because Bill C-75 does not amend s. 802.1, its enactment as drafted would mean that all non-lawyers, including LAO-funded law students and paralegals, will cease to have standing to represent low-income clients in criminal court, no matter how minor the charge and how well-trained the non-lawyer may be.

The impact that the proposed amendment to s.319 will have on access to justice cannot be overestimated. While the government has stated that it is committed to addressing the overrepresentation of vulnerable communities, particularly Indigenous communities, in the criminal justice system, section 319, as currently worded, is at odds with this objective.

Many accused persons who currently retain a student or a paralegal to represent them on minor criminal charges are too poor to afford a lawyer but do not qualify for legal aid. These accused are more likely to be Indigenous and racialized, given the overrepresentation of those communities among low-income populations, and within the criminal justice system as a whole. The consequences of a criminal conviction are significant. For people already disadvantaged by poverty and other vulnerabilities, a criminal record can have a devastating impact, affecting their ability to obtain future employment and secure housing. Being represented for a trial ensures the accused person's interests are properly put before the court. When an accused person is

unrepresented, there is always the risk of improperly prepared defences and even of undue pressure to plead guilty.

LAO appreciates that section 802.1 authorizes individual provinces to enact programs to permit agents to represent accused persons on summary conviction matters with sentences that exceed six months. With respect, however, the federal government, having created a gap in access to justice by prohibiting the use of non-lawyers in all summary conviction matters, cannot realistically rely on individual provinces to fill that gap.

There is also no reason to think that the proposed absolute prohibition on agents in all summary conviction matters will result in any more commitment from provincial governments to improve access to justice by authorizing the use of agents in provincial courts, when only Alberta and British Columbia have set up programs since 802.1 came into force in 2002.

The precise impact of the proposed amendment to s.319 on Legal Aid services differs somewhat between criminal law services provided by law students and paralegals. The potential impact of these service models is briefly discussed below.

i. The provision of criminal law services by Ontario law students

LAO funds seven law school student clinics, all of which take on criminal matters, in addition to hiring summer and articling students at many duty counsel offices across the province. From a student perspective, section 319 would mean the cessation of all experiential learning in criminal court for students, including those at student legal clinics. Experiential education provides an excellent opportunity for students to learn about the practice of criminal law which has, in LAO's view, proven to make them better lawyers when they take on legal aid cases after graduation.

LAO fully supports the submissions of the Student Legal Aid Services Societies in which they carefully document how the provision of student legal services not only provides unparalleled learning opportunities, but also assists in addressing delay in the criminal courts.

ii. The provision of criminal law services by Ontario licensed paralegals

Paralegals are permitted to provide independent services to clients in summary conviction court in Ontario, pursuant to section 802.1 of the *Criminal Code* and section 6(1) of the Law Society of Ontario's By-Law 4.

LAO currently employs seven paralegals who exercise their licences in criminal duty counsel offices across Ontario, as part of "inter-professional teams". These paralegals represent duty counsel clients at crown pre-trials and for guilty pleas, facilitate specialty courts such as Gladue, mental health court and domestic violence court, and run set-date court.

Recently Justice Annemarie Bonkalo in the *Family Legal Services Review*[13] (also known as the "Bonkalo Report"), emphasized the importance of expanding the use of properly trained and regulated paralegals in appropriate family law matters to address the high number of unrepresented litigants. In particular, Justice Bonkalo referred to LAO's use of paralegals in criminal court as a particularly instructive model for how non-lawyer legal assistance could be provided in family court. We would urge the government to review the conclusions reached by Justice Bonkalo before introducing legislation that would preclude precisely this kind of legal assistance in criminal court.

In the private realm, paralegals can provide criminal law services for a cost that can be significantly lower than the rate charged by a private lawyer. This is essential for lawyers who represent clients on legal aid certificates; LAO pays set amounts for many legal services. Lawyers regularly send agents to attend for time-consuming administrative appearances, allowing counsel to focus on providing substantive services.

iii. LAO's Recommendation

LAO recommends that section 802.1 be amended to ensure that law students and paralegals are permitted to continue to provide legal services to persons who have been charged with minor criminal offences. There are two options for accomplishing this. The Bill could specifically set out the minor offences for which agents could provide service as exceptions to the new general provision that bars representation by agents where the maximum sentence is two years less a day. The other option would be to identify serious summary offences where agents are precluded from providing representation, and permit non-lawyer agents to represent individuals for the remainder of summary conviction offences.

LAO would also like to fully support the Criminal Lawyers' Association in their submission regarding the increase of the maximum sentences to two years less a day for all summary conviction offences.

4. Police affidavit evidence

Stephanie Heyens, a senior litigator with LAO, will be presenting to the Committee on issues arising from the amendments in Bill C-75 that permit certain police evidence by affidavit. LAO fully supports her brief.

5. Summary of LAO's Bill C 75 Recommendations

- Strongly supports bail reform and guilty plea inquiry amendments

[13] https://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/family_legal_services_review/

- Proposes modest amendments to proposed police authority to release with conditions by deleting authority to impose conditions
    - To prevent commission of another offence and
    - To provide curfew times to residential conditions of release, including requiring a person to present themselves at the entrance of their residence as directed.
- Amend section 802.1 to ensure that law students and paralegals continue to be permitted to provide legal services to persons who have been charged with minor criminal offences by
    - Identifying minor offences for which agents could provide service as exceptions to the new general provision that bars representation by agents where the maximum sentence is two years less a day or
    - Identifying serious summary offences where agents are precluded from providing representation, and permit non-lawyer agents to represent individuals for the remainder of summary conviction offences
- Remove from Bill C-75 restrictions that would limit the holding of preliminary inquiries to only the most serious of offences. LAO recommends and supports further study and a more detailed examination of the use of preliminary inquiries and the factors that make them useful in some jurisdictions and a cause of delay in others before restricting their use
- Remove from Bill C-75 provisions that would allow police to provide affidavit evidence rather than being available to testify in routine matters

What is Legal Aid Ontario?

LAO is an independent but publicly funded and publicly accountable non-profit corporation. LAO has a statutory mandate to promote access to justice throughout Ontario for low-income individuals by means of:

- Providing consistently high quality legal aid services in a cost-effective and efficient manner;
- Encouraging and facilitating flexibility and innovation in the provision of legal aid services; and
- Identifying, assessing and recognizing the diverse legal needs of low-income individuals and of disadvantaged communities in Ontario.