

Written Submissions on behalf of:
The Defence Counsel Association of Ottawa
[190 O'Connor Street, 3rd Floor – Ottawa, ON – K2P
2R3]

Re: Bill 161 – Schedules 15 & 16

Legal Aid Services Act

INTRODUCTION

1. Legal Aid Ontario's ("LAO") past and current model relies upon using, predominantly, members of the private bar to deliver criminal law legal services to low income and marginalized Ontarians. This model makes the most sense. Indeed, it was a model conceptualised and implemented by Conservative governments in the in the 1960's (Premier Robars) and 1970's (Premier Davis). Its concept, which the Defence Counsel Association of Ottawa ("DCAO") supports, should remain as envisioned by its Conservative creators.
2. A review of the proposed changes to the *Legal Aid Services Act* reveals a government plan to rely less on the private bar to provide legal services and shift more responsibility to people and institutions outside the private bar.
3. The DCAO's is of the respectful view that this shift will:
 - (i) Cost the government more money by creating new bureaucratic entities and staffs:
 - (ii) Jeopardize the constitutional rights of low income and marginalized Ontarians by forcing many of them to use an inferior service provider;
 - (iii) Compromise public safety by creating an environment that increases prison populations and recidivism.

SUBMISSIONS

4. The legislated "purpose" of the new Act explicitly removes the recognition that the private bar is the foundation for the provision of legal services. This is deeply concerning to the DCAO and its members.

5. Although the new legislated purpose seeks to ensure “high-quality” legal services, the subtraction of the term “consistent” is very troubling.
6. Sections 3 and 5 of Schedule 16 and s. 72.3 of Schedule 15 make it clear that LAO will seek to move in a direction where the provision of legal services can, and will, be off-loaded onto community clinics, law schools, staff lawyers and possibly paralegals. The DCAO is vehemently opposed to these changes.
7. The DCAO respectfully submits that this government should have **four** major concerns about the inevitable effects of the proposed changes:
 - (i) The proposed changes are inconsistent with this government’s platform of reducing government and government spending;
 - (ii) The proposed changes will not save the government money. In the long run, they will cost the government more money;
 - (iii) The proposed changes compromise access to justice and the constitutional rights of low income and marginalized Ontarians; and
 - (iv) The proposed changes threaten public safety.

Inconsistent Platform (i)

8. Premier Doug Ford and the Conservative Party’s platform was built upon promises to reduce government and government spending. Indeed, after elected, Premier Ford followed through, by administering cuts to many areas of government programming – including Legal Aid.
9. Based on the very high demand for justice services in Ontario and the enormous back-log in the courts, reducing the amount of services provided by members of

the private bar, or reducing our ability to provide services, will necessarily require the creation of significant bureaucratic bodies and staffs.

10. The bureaucratizing of LAO is antithetical to this government's platform. Creating a new model that increases government bodies, staffs and spending is contrary to this government's own vision.

Increased Government and Spending (ii)

11. Bureaucratic bodies and staffs bring inevitable spending pitfalls. New salaried employees, a place to house them and the overhead that comes part-and-parcel with that space. More pensions and benefits for those employees. More unions, or an increase to union memberships. More collective bargaining, disputes, arbitration, wage increases, paid leave, threats of strikes, strikes. The bureaucracy will continue to grow and bloat like bureaucracies tend to do.
12. These concerns do not exist when the private bar is the primary or exclusive service provider. We do not demand salaries, pensions, benefits. We are not part of union. We are more flexible to change.
13. Community clinics, paralegals and law schools do not have the capacity or the ability effectively provide *consistent and high-quality* legal services.
14. Section 39.1(3) of Schedule 15 transfers the payment responsibility for court-ordered services from the AG and onto the LAO corporation. This would add significant financial burdens to the corporation's budget. The DCAO's fear is that this new responsibility foisted onto the corporation will force it to make cuts to other important service areas.

(iii)

A Threat to Access to Justice and the Constitutional Rights for Low Income and Marginalized Ontarians

15. Interestingly, the proposed legislation continues to guarantee that Ontario will deliver “high quality” services (albeit, not consistently). To be blunt, there is simply no way that clinic staff lawyers, paralegals, community legal clinics and law students can provide the level of service and skill that members of the private bar offer. To conclude otherwise, is an insult to the private bar, all the good work we do for Ontarians, and badly misleads the public.
16. By and large, members of the private bar have aspirations of excelling in the legal profession. We are motivated by a strong desire to help people, fight for civil liberties and achieve success and respect in our field. These goals are achieved by the private lawyer through thorough, robust and tireless preparation for legal proceedings and skilled and effective advocacy. This type of hard work and dedication best protects the rights of Ontario’s most vulnerable criminal justice litigants. Consistent with what the *Rule of Law* and the *Charter* demand, it gives low income and marginalized Ontarians the same level of service and access to justice received by the middle and upper class.
17. Members of the private bar have a desire to establish and maintain a positive reputation with clients and justice participants. We seek to achieve those goals through mastering the criminal law and delivery high-quality work. We also have a direct financial interest in doing good work. Positive and just results increase our individual profiles and attract business. This motivation exists in most of but

is secondary to our motivation to ensure that all accused persons *consistently receive high-quality* representation.

18. By and large, non-members of the private bar simply do not, and cannot, have the same motivations. Unsalaries, members of the private consistently agree to work for a rate that is a fraction of our private rates. We consistently agree to work hundreds and thousands of hours per year over and above the prescribed LAO tariffs. This, in of itself, is powerful evidence of our motivations to obtain access to justice for low income Ontarians. Our motivations are what provide clients with the highest level of service.
19. Sometimes, contested litigation is what is required to best protect the rights, liberty and livelihoods of low-income Ontarians. Someone being paid a salary will have little motivation to conduct those important proceedings because to be crystal clear, those proceedings represent **difficult and time-consuming work**. Who, outside the private bar will have the motivation to conduct this important type of work? It will not be salaried employees. It cannot be those unqualified to conduct those proceedings – like paralegals or students. To be clear, this effect will happen. This significantly jeopardizes the legal rights of low-income Ontarians. It is the start of a path leading to a two-tier justice system where only the middle and upper class can afford true justice.
20. If there is a concern that the private bar fighting for justice will result in more litigation and costs, that concern can be comforted in two ways: (1) Those fights are what is right and what protects Ontarians. It is the right thing to do. The private bar is the cornerstone to a fair and equal justice system which respects

the Rule of Law. (2) Those fights will not cost this government more. The combined effect of a money-needy bureaucracy and the money required to incarcerate thousands more people each year – an inevitable consequence of these proposed changes – will far surpass what the private bar model will cost the government.

21. The early resolution of criminal cases is a laudable goal. It should always be encouraged so long as a client's rights and best interests are not overlooked or compromised. Lawyers have a professional duty to act in a client's best interest. Section 17(2)(iii) of Schedule 16 reveals the promotion of "early resolution" to legal cases. The DCAO fears that this principle will create incentives that will operate as further disincentives for a service provider from exploring all legal recourses in the pursuit of a client's best interests. This paves a dangerous path towards the creation of a two-tier justice system. The combined effect of the panoply of changes proposed, singles out low income and marginalized Ontarians. These changes will have the effect of limiting clients' legal rights and options and filtering them into a space where they may feel that they have little choice but to avail themselves of the government designated service provider and "resolve" their case, because the option of fighting seems hopeless.

22. Every Ontarian has a constitutionally protected right to counsel of their choice. The DCAO fears an environment will be created that compromises that important constitutional right. This new model seeks to discourage the private bar from taking cases or outright *prevent* us from taking cases. This constitutes an erosion to fundamental rights. The new system will promote guilty-pleas. And while

theoretically, this may mean less trials, it does not mean a less-cluttered system. This means more people in custody costing the tax payer more to incarcerate them. More accused persons who refuse to plead guilty will have to represent themselves. Self-represented accused persons drag the system to a slow grind – a trial that might take a few hours in the hands of an experienced lawyer may take days with the self-represented accused who does not have the requisite experience or knowledge. Self-represented accused also create burdens for the judge and Crown as the trial must inevitably be run in a very different fashion, with the judge having to tread carefully to remain neutral but at the same time ensure a fair trial. These consequences were powerfully outlined by the Chief Justices Strathy and Maisonneuve at the September 2019 Opening of the Ontario Courts ceremony. The judiciary was highly critical of cuts to legal aid services and the devastating effect they can have on the justice system and democratic ideals.

Threat to Public Safety (iv)

23. With less people willing and/or able to fight for their rights, more people will be sent to jail. More people will amass criminal convictions and records. This leads to less rehabilitation, more recidivism and less access to the job market. It is a scenario where offenders can never get ahead and end up having to resort to crime to get by, often creating intergenerational criminality and other trauma. This strains policing and justice institutions and threatens public safety.

All of which is respectfully submitted by The Defence Counsel Association of Ottawa.

Thank you for your attention to and consideration of our submissions.

June 12, 2020.