

Legal Aid Review

What We Heard: A Summary of Consultation Input

2017

Version 1.1 (May 8, 2017)

INTRODUCTION

The Government of Alberta's review of the province's legal aid program was announced in late 2015. The goal of the review is to determine what changes could be made to the program to make it more efficient, effective and financially sustainable. To date, the review has included stakeholder consultations, client interviews, cross-jurisdictional research and an assessment of Legal Aid Alberta's (LAA) finances and operations.

As part of the review, stakeholder consultation sessions were held across the province during the spring and summer of 2016. These sessions included legal aid clients, members of Alberta's legal community, service providers, the judiciary, the Law Society of Alberta (LSA) and LAA staff and executives. Participants discussed the eligibility for legal aid, how services are delivered, governance and accountability, and the overall affordability and sustainability of legal aid delivery.

LAA is an independent, publicly funded, not-for-profit organization that provides legal services within Alberta's court system and to eligible low-income Albertans who would not otherwise be able to obtain legal services. Legal aid services include acting as duty counsel and providing legal advice and representation in adult and youth criminal law, family law and child protection, immigration and refugee law, and some civil matters such as adult guardianship/trusteeship applications.

LAA is incorporated under the *Societies Act* and authorized to deliver the legal aid program under a tri-partite governance agreement with the Government of Alberta, through the Minister of Justice and Solicitor General (JSG), and the Law Society of Alberta (LSA). The current governance agreement expires on March 31, 2019.

Funding for legal aid is a shared responsibility between Alberta and the federal government. About 85 per cent of annual government funding is provided by the province. Budget 2017-18 commits \$81.4 million for legal aid, an increase of nearly \$13 million over the previous year's budget funding.

In addition to government funding, the Alberta Law Foundation has committed \$2.5 million to legal aid for 2017-18. LAA also receives some revenue from client recoveries for repayment of legal services they have received, because not all services are provided free of charge. Over time, LAA's access to other sources of income has diminished, placing greater pressure on government to increase its funding.

The information in this report summarizes the input from the consultations as part of the review of the legal aid program in Alberta.

ELIGIBILITY

Where eligibility for legal aid is required, it is determined by a “means test” that takes into consideration the nature of the applicant’s legal matter, their financial circumstances and, in some instances, the merit of the case.

With respect to eligibility, the review explored the scope of legal matters covered under the current legal aid plan, the financial eligibility requirements of clients and the appeal and discretionary procedures that should be used in relation to mandatory court-ordered counsel criteria.

Financial Eligibility Guidelines

Since 2014-15, the Government of Alberta approved increases to LAA’s financial eligibility guidelines (FEGs) by 21 per cent, which allowed more low-income Albertans to qualify for legal aid. Stakeholders agreed that the FEGs should be reviewed regularly.

The current governance agreement requires that LAA maintain a client repayment policy, except in cases of undue hardship. In 2016-17, approximately four per cent of LAA’s revenues came from client contributions. Even though client contributions represent a small proportion of LAA’s overall revenue, clients indicated they find the repayment policy confusing and overly burdensome as there is no maximum amount and see having an outstanding bill as a barrier to accessing services.

During the course of the review, stakeholders generally agreed that enhancing financial eligibility was an aspirational goal rather than a priority for immediate action. Nevertheless, there was considerable stakeholder interest in ensuring that a regular process for reviewing the appropriateness of current financial eligibility guidelines be put in place. Of note, increases to the minimum wage, or increases in payments under social assistance programs such as AISH, affects client eligibility.

Types of Legal Matters Covered

Alberta’s legal aid program mostly focuses on criminal matters, and LAA provides assistance to both youth and adults. In 2015-16, 79 per cent of representation was for criminal matters, with the remaining for civil/family matters. All provinces provide criminal representation and some form of family representation. Other legal aid services provided vary from jurisdiction to jurisdiction.

Stakeholders said priorities for legal aid services should be based on protecting an accused’s *Charter* rights under s. 7 (life, liberty and security) and s. 11d (fair trial). There was also strong support for duty counsel services in criminal and family courts. Duty counsels are lawyers who provide clients with information and advice onsite at the

court prior to a court appearance. Duty counsel will also appear on behalf of clients in early court appearances. There were no significant objections to the changes made by LAA that reduced informational or brief services, since these services are also provided by a variety of community organizations. Community organizations that participated in the consultations asked that, when changes to the program are being considered, they be consulted as part of the process.

Stakeholders also expressed their support for the ongoing use of duty counsel, indicating it is valuable to clients and the court process. Some stakeholders recommended that duty counsel be enhanced to support early resolution. Clients interviewed requested more access to duty counsel be provided in Remand Centres. While LAA's duty counsel services already provides Albertans with assistance in obtaining an Emergency Protection Order (EPO), there was also a suggestion that LAA's representational services be extended to those receiving Emergency Protection Orders (EPOs) and to those with mental illnesses. Ontario and British Columbia have modified eligibility guidelines to meet these needs.

Appeal Process and Court-Ordered Counsel

Under the legal aid structure, not every Albertan accused of criminal offences is eligible for government-funded legal counsel. However, exceptions exist such as those under the *Youth Criminal Justice Act*, provided by duty counsel, and trial-court ordered legal counsel.

In 2014-15, there were an unprecedented number of applications for court-ordered (Rowbotham) funding for legal representation. The increase in applications and court orders occurred after LAA introduced more stringent guidelines to restrict frontline staff's discretion in determining eligibility in February of 2014. Also, at that time, LAA changed its rules to restrict the appeal committee's discretion so that it could only assess cases where policies were not accurately followed and applied. This was done to improve consistency, streamline the process and limit costs.

LAA created the Discretionary Coverage Process (DCP) pilot project in 2015 at the request of the Minister of Justice and Solicitor General. The DCP was developed to reduce Rowbotham applications going through the court and ensure appropriate access. From December 2015 to November 2016, the DCP reduced the number of court-ordered requests for Rowbotham cases by 59 per cent over the previous year. It has improved the efficiency of the court system and is a more seamless and timely response for legal aid applicants. Stakeholders said the process is doing what it needs to and they support continuing the DCP.

SERVICE DELIVERY

The review assessed staff and roster lawyers, and tariff rates for private bar. The compensation model for legal aid services varies by province. Some have a tiered payment schedule based on a lawyer's experience, while one has a fixed fee for legal service. British Columbia's, Alberta's and Ontario's legal aid programs outsource most of the legal work to private lawyers, and all three provinces have the highest costs per case in Canada. Roster lawyer fees account for approximately 58 per cent of the LAA's annual budget.

Stakeholders suggested an increase now to tariff rates and that the rates should be reviewed regularly. The government approved a 10 per cent increase to LAA's tariff rate effective December 2015, from \$84/hour to \$92.40/hour. Some stakeholders also want to put a maximum cap per case (tariff maximums) and per lawyer (similar to Legal Aid Ontario's annual billing limits).

AFFORDABILITY AND SUSTAINABILITY

Over the past 10 years, LAA's expenses have grown at twice the rate of inflation and population growth combined. During this period, LAA's support from non-governmental sources has decreased, which has put greater pressure on government to increase its funding. Budget 2017-18 commits \$81.4 million for legal aid, an increase of nearly \$13 million over the previous year's budget funding. Since taking office, the current government has increased funding to legal aid by over 26 per cent. However, given Alberta's fiscal challenges, this trend is not sustainable.

Generally, legal aid is intended to provide a reasonable level of service that a person of average means could afford. Legal aid financial costs are driven by the number of cases, the number of services offered and the cost of delivering those services. Another key cost driver is the time it takes to set up and resolve a case. Providing the right service, at the right time, at the right cost, is all important to ensuring an efficient legal aid program for clients, the justice system and taxpayers.

As part of the review, LAA's finances and operations were assessed to provide financial input and clarification that could guide recommendations for change. A key finding was that LAA needs to improve its monitoring and managing of direct service hours, work in progress, and estimated work outstanding. An example of work underway to address these areas is LAA's High Cost Case Committee, which seeks to control the cost of complex cases. However, stakeholders and clients indicated that improvements are needed in how cases are screened, assigned, and managed to ensure quality and cost outcomes are achieved.

LAA is pursuing efficiency measures and technology changes which are expected to realize cost savings and improve service delivery. Even after the improvements are fully implemented, further work will be required to ensure the current program is affordable and sustainable in the future, such as determining which services should be considered essential, particularly with respect to upholding the legal rights under the *Charter of Rights and Freedoms*. Stakeholders suggested further work is completed to assess the costs and benefits of legal aid services in Alberta for clients, the justice system and for society.

GOVERNANCE AND ACCOUNTABILITY

The Minister of JSG approves LAA's budget and business plans, but under the current governance agreement, the Minister cannot direct LAA to include certain services in its budget or business plan.

The review has examined governance practices for the legal aid programs in other jurisdictions and found that in Alberta there is a lack of clarity as to who defines the mandate of Alberta's legal aid plan, its scope of services and how it is delivered.

The Government of Alberta continues to discuss with stakeholders how best to prioritize those legal aid services that Government should fund and the role of other stakeholders in the provision of broader legal services.

There is also an opportunity to improve decision-making and oversight through a developed performance framework tied to strategic and business planning processes.

Stakeholders indicated that the arm's-length from government structure needs to stay in place, but the current set-up does not provide the organization with the ability to best serve clients' needs. Clients and stakeholders said that the program as it is now tends to serve the interests of the service providers.

The consultations confirmed that clients, the public, stakeholders and the courts ultimately hold government accountable for ensuring legal aid is effectively delivered. Through the consultations, stakeholders identified the need to:

- clarify the mandate of Alberta's legal aid program;
- improve transparency, accountability and cost-control mechanisms at Legal Aid Alberta; and
- define roles and responsibilities of the governance partners, providers and stakeholders, which will enable legal aid to develop partnerships to improve client and system outcomes.

CONCLUSIONS AND NEXT STEPS

Legal aid is integral to serving the public by providing quality legal services in a cost effective and efficient manner. The path forward must consider both operational independence of LAA to deliver legal aid services and government control over how much it is prepared to pay for legal aid and which services it should pay for.

To ensure a financially sustainable legal aid program that meets the needs of those who qualify, the governance agreement partners, together with stakeholder input—such as that summarized in this report—will develop a longer-term governance and funding framework. In addition, as part of its budget approval process, LAA continues to seek out ways to deliver the program within its funding.