



**Submissions of the Criminal Lawyers'
Association
on Legal Aid Ontario's
Mental Health Strategy Consultation Paper**

THE CRIMINAL LAWYERS' ASSOCIATION

March 2014

1



PREFACE

The Criminal Lawyers' Association ("CLA") is a non-profit organization founded on November 1, 1971. The Association is one of Canada's largest legal specialty organizations, comprised of approximately 1200 criminal defence lawyers, many of whom accept Legal Aid certificates and deal with mentally disordered offenders on a regular basis. One of the objects of the CLA is to educate the membership on issues relating to criminal and constitutional law. To that end, the Association presents educational workshops and seminars throughout the year, culminating in its annual Fall Convention and Education Programme. In addition, the CLA publishes a nationally circulated newsletter five times per year aimed at highlight current developments in criminal and constitutional law. The intersection of criminal law and mental health is a frequent topic of discussion.

The CLA is routinely consulted and invited by House of Commons and Senate committees to share its views on proposed legislation pertaining to issues in criminal and constitutional law. Similarly, the Association is often consulted by the Government of Ontario, and in particular the Attorney General of Ontario, on matters concerning provincial legislation, court management, legal aid assistance and various other concerns that involve the administration of criminal justice in the Province of Ontario.

The CLA has been granted standing to participate in many significant criminal appellate cases and government commissions of inquiry. In relation to the intersection of criminal law and mental health, the CLA has been granted intervenor status in leading appellate cases, including *R. v. Conway*, [2010] 1 S.C.R. 76 and *R. v. Conception* (34930); and has also participated in numerous inquests and inquiries, including the Inquest into the Death of G.A., a mentally disordered youth who committed suicide while in custody awaiting transfer to a treatment facility.

The CLA is privileged and greatly appreciates the opportunity to participate in the discussion concerning how Legal Aid Ontario can expand access to justice for legal aid clients with mental health issues.



1. INTRODUCTION

The CLA and Legal Aid Ontario (“LAO”) share a commitment to providing effective legal representation that protects the liberty and dignity interests of all Ontarians, including accused and offenders who are mentally disordered. Developing a strategy to deliver these legal services in a climate of fiscal constraint and in the context of chronic underfunding by government is difficult and complex task.

The CLA applauds LAO’s effort to engage in a thoughtful discussion and debate on how best to enhance and expand access to justice for legal aid clients with mental health issues. Unfortunately, in the opinion of the CLA, the strategy outlined in consultation paper will not further LAO’s laudable goals. For that reason, the CLA cannot support the strategy in its current form.

In particular, the CLA has the following concerns:

- LAO has neither the financial capacity, nor the expertise, to play a leading role in a systemic, cross-sector reform of the provision of legal, social and clinical services for individuals with mental health and addiction issues.
- The strategy outlined in the consultation paper fails to recognize the primary importance of, and prioritize the accessibility of specialized counsel of choice, particularly for clients who are mentally disordered.
- There is a potential for a fundamental conflict between a “holistic” provision of services to individuals with mental health issues and a client-directed approach to legal advocacy

Below, we explore from the perspective of criminal defence lawyers the problem of over-representation of mentally disordered individuals in the justice system; we explain why – however well intentioned – LAO is not best suited to solve that problem; and we expand on each of the concerns noted above. Finally, we make several recommendations regarding essential points LAO should prioritize in developing a mental health strategy.



2. THE SCOPE AND EXTENT OF THE PROBLEM

The Chief Justice of Canada began a lecture given in October of 2010 with the following anecdote:

A couple of years ago I found myself at a dinner at Rideau Hall in honour of recipients of the Order of Canada. I was seated next to a police officer who was in charge of the police precinct in a downtown area of Toronto where people were poor and crime was high.

“What,” I asked the officer, “is the biggest challenge you face?”

I expected him to reply that his biggest problem was the defense-oriented *Charter* rulings the Supreme Court of Canada kept handing down. But, he surprised me.

“Our biggest problem,” the officer answered, “is mental illness.”

My dinner companion went on to explain that a large proportion of the people arrested and brought into his police station were not “true criminals,” but people who were mentally ill. They were people who had committed some offence, usually minor, occasionally more major, for no other reason than the confusion in their disordered minds.

Whatever the reason for these individuals’ actions, the officer told me that the ordinary police processes did not respond well to their situations: how are the police, who are not doctors or nurses, to deal with continuing acts of derangement? How do they read a person their rights when they are not capable of listening to, or comprehending their situation? How do they find them lawyers and arrange appearances before judges? In the end, where the initiating incident is not of great consequence, often all that can be done is to hold the mentally ill person for a few hours and then return him to the street, where the cycle begins all over again.

We do not like to talk about mental illness, but as people like this police officer attest, it is a huge problem.¹

Most people living with mental health problems and illnesses are not violent or dangerous and do not commit criminal offences. In fact, they are more likely to be victims of violence than perpetrators. Nevertheless, these individuals are

¹ Beverley McLaughlin, “The Challenges of Mental Illness,” (2010) 33 Dalhousie L.J. 15 at 15-16.



overrepresented in the criminal justice system.² The reasons for the “huge problem” recounted by the officer to the Chief Justice are complex but they are not the fault of LAO.

Both the over-representation of mentally disordered individuals and the lack of funding to address this issue are manifested in every day in criminal courts.

Public hearings were held in 2002 to review the provisions of Part XX.1 of the *Criminal Code* dealing with mental disorder. Following those hearings the Standing Committee on Justice and Human Rights concluded that the mental health system was “currently strained to the limit” and further that given the lack of adequate resources, “it would be irresponsible and unrealistic [for the Committee] to recommend the implementation of provisions that would place greater burdens on institutions that are the legal and fiscal responsibility of another level of government.”³

The situation has not improved in the last 10 years. The Chief Justice of Canada, Beverley McLachlin, has observed that the lack of adequate forensic treatment facilities for mentally disordered offenders is a persistent problem.⁴ In Ontario, the resource crisis manifests itself in a variety of ways:

- Accused individuals found unfit to stand trial and ordered to submit to involuntary anti-psychotic drug treatment under s. 672.58 of the *Criminal Code* spend days, and even weeks, in jails waiting for a bed in a hospital.⁵
- Similarly, accused often endure lengthy periods in jails and detention centres awaiting court-ordered assessments in relation to issues of fitness and criminal responsibility.⁶
- Individuals found not criminally responsible and ordered detained pending the initial disposition of the Review Board sometimes wait months in detention facilities because of wait lists for beds at the forensic hospitals.⁷

² Mental Health Commission of Canada. “Changing Directions, Changing Lives: The Mental Health Strategy for Canada,” 2012 at 46.

³ Standing committee on Justice and Human Rights, *Review of the Mental Disorder Provisions of the Criminal Code*, June 2002.

⁴ Beverley McLachlin, “The Challenges of Mental Illness,” (2010) 33 Dalhousie L.J. 15 at 24

⁵ *Centre for Addiction and Mental Health v. Ontario*, 2012 ONCA 342, 284 C.C.C. (3d) 359, leave to appeal to S.C.C. granted, [2012] S.C.C.A No. 339 [“Conception”].

⁶ *R. v. Hussein and Dwornik*, [2004] O.J. No. 4594 (S.C.J.); *R. v. Rose*, [2006] O.J. No. 1608 (O.C.J.).

⁷ See, e.g., *R. v. Hneihen*, [2010] O.J. No. 4115 (S.C.J.).



- Forensic hospitals are so short of beds that they find it difficult to implement Review Board dispositions in a timely manner.⁸ Those members of the CLA who conduct hearings before the Review Board have observed that it is not uncommon for NCR accused to wait months before being moved to the hospital or unit ordered by the Review Board following an annual hearing.

Significant litigation has already arisen as a result of what has been described as a “collision course of decreasing resources and increasing numbers of mentally disordered accused”⁹ Courts in Ontario have expressed serious concern about the “the tension that exists where scarce public resources do not meet the needs of mentally ill persons coming into contact with the justice and health care systems.”¹⁰ In relation to the systemic problems affecting inter and intra-hospital transfer of NCR accused subject to review board dispositions, Ontario courts have made clear that that limitations in resources ought not prevent the Review Board’s orders from being implemented within a reasonable time.¹¹ Nevertheless, the problem of timely implementation of Review Board dispositions persists today and there remains a proliferation of *habeas corpus* and other applications to the courts to ensure the government’s legal obligations are met and the *Charter* rights of mentally disordered offenders are protected.¹²

The reforms contained in Bill C-14 (NCR Reform Act), if passed, will only serve to increase the burden on an already strained system. It will likely also lead to increased resistance by mentally disordered offenders to NCR verdicts in cases involving minor and even moderately serious offences. In this context, *complex litigation is unavoidable*. Any mental health strategy adopted by LAO must recognize these realities and be responsive to them by ensuring the provision of experienced, dedicated counsel prepared to advocate for this vulnerable population.

⁸ See, e.g., *Beauchamp v. Penetanguishene Mental Health Centre* [1999] O.J. No. 3156 (Ont. C.A.), *Orru v. Penetanguishene*, [2004] O.J. No. 5203 (S.C.J.) and *Pinet v. Penetanguishene* (2006), 206 C.C.C. (3d) 116 (Ont. S.C.J.)

⁹ Hy Bloom, Brian Butler and Richard Schneider, “The Criminal Code of Canada: The Mental Health Act of Last Resort” (The Cambridge Lectures, Centre for Advanced Legal Education, Queens College, Cambridge University, July 11-21, 1999) cited in Janet Leiper, “The Resort to *Habeas Corpus* to Enforce Part XX.1 of the *Criminal Code*” (2009) 55 *Crim. L.Q.* 134 at 169.

¹⁰ *Conception*, *surpa* note 22 at para 1.

¹¹ See, e.g., *Beauchamp v. Penetanguishene Mental Health Centre* [1999] O.J. No. 3156 (Ont. C.A.), *Orru v. Penetanguishene*, [2004] O.J. No. 5203 (S.C.J.) and *Pinet v. Penetanguishene* (2006), 206 C.C.C. (3d) 116 (Ont. S.C.J.)

¹² *Pinet v. Penetanguishene* (2006), 206 C.C.C. (3d) 116 (Ont. S.C.J.) at para. 70



3. A Holistic Solution is Necessary but not within the Scope of LAO's Mandate

In its strategy document, *Changing Directions, Changing Lives*, the Mental Health Commission states that over-representation in the criminal justice system “has increased as the process of de-institutionalization of people with living with mental health problems and illnesses, coupled with inadequate re-investment in community-based services, has unfolded.”¹³ The Ontario Government Select Committee on Mental Health and Addictions reached the same conclusion, quoting the words of former Senator Michael Kirby who testified before the Committee that “we have made the streets and prisons the asylums of the 21st century.”¹⁴

Both the Mental Health Commission and the Select Committee recommend that efforts to reduce the over-representation must focus on preventing mental health illnesses and providing timely access to services, treatments and supports in the community when problems to arise. Early intervention improves the quality of life for the individual living with mental health issues and reduces the tragic toll that mental illness can have on the patient's family and friends, and on society at large by reducing the burden and cost on our health-care, criminal justice and social service systems.¹⁵

It seems clear then that programs aimed at preventing mental health issues and providing access to housing, social and clinical services for individuals who are mentally disordered are of critical importance. These programs, however, are not the responsibility of LAO.

It is the position of the CLA that LAO has neither the expertise nor the financial capacity to play a lead role in a systemic, cross-sector reform of the provision of legal, social and clinical services for individuals with mental health and addiction issues. Moreover, in the absence of increased funding from the provincial government, an increased role for LAO in non-legal, cross-sector mental health programs and services will necessarily divert already scarce resources away

¹³ Mental Health Commission of Canada. “Changing Directions, Changing Lives: The Mental Health Strategy for Canada,” 2012 at 46. See also Canada, Parliament, Senate. (2006). Standing Senate Committee on Social Affairs, Science and Technology. M.J.L. Kirby (Chair) & W.J. Keon (Deputy Chair). *Out of the shadows at last: Transforming mental health, mental illness and addiction services in Canada*. 38th Parl., 1st sess., p. 301 [“Out of the Shadows”].

¹⁴ Select Committee on Mental Health and Addictions, “Final Report – Navigating the Journey to Wellness: The Comprehensive Mental Health and Addictions Action Plan for Ontarians” (2010) at p. 13.

¹⁵ M. Wilson & T. Tony Boeckh “Network helps mentally ill teens” *The Gazette*, 3 December 2012, online: <http://www.montrealgazette.com/health/Opinion+Network+helps+mentally+teens/7644038/story.html#ixzz2V8gDR5a4>



from those programs directly aimed at fulfilling LAO's mandated role of providing legal representation to low-income Ontarians.

There is no mention of increased funding from the government to support the initiatives discussed in the consultation paper. To be clear, the CLA strongly supports increasing the capacity of organizations aimed at supporting individuals with mental health issues. *What we oppose is funding social work and clinical services through the LAO budget, thereby diminishing the certificate system.*

The CLA recognizes the need for, and would support the creation of an integrated, multidisciplinary access point for individuals struggling with mental illness who are seeking assessment, housing, treatment, support, legal advice, etc. Such a "centre of excellence" should not, however, be funded or spearheaded by LAO. LAO enjoys an expertise in delivering effective and economically efficient legal services to low-income individuals. Neither LAO, nor the lawyers it supports, are best suited to upfront assessment of holistic client needs that are several and independent.

Other organizations, including the Canadian Mental Health Association, have expertise in providing integrated access points to various services. The CLA takes the position that rather than "re-inventing the wheel" in an attempt to address the widespread, complex and multifaceted problem that is the delivery of comprehensive social and health programming for individuals with mental health issues, LAO should instead focus on spending its limited dollars to best fulfilling its statutory mandate.

In terms of playing a role in achieving broader justice system objectives and promoting a holistic, rights-based approach to dealing with mental illness issues, this could take the shape of:

- investigating how LAO – and the lawyers it supports – can best coordinate with organizations already dedicated to providing holistic, client-directed support services;
- joining with like-minded groups and organizations in lobbying efforts directed at: 1) increasing funding from the Ministries of Health and Community and Social Services for the provision of holistic services aimed at prevention and recovery; and 2) increasing funding for LAO itself; and
- providing flexible and adequate funding to lawyers representing mentally disordered clients in both routine and test-case litigation



The CLA does not deny that “equitable access to justice is good health, and good social policy.”¹⁶ Equally, or perhaps even more critically, we note that it is only through significant investments by government in health and social spending that the need for “operating room”-style legal representation will decrease by any significant measure.

4. The Most Important Legal Aid Service is a Really Good Lawyer

The CLA agrees with the LAO’s stated assumption in the consultation paper that the most important legal aid service is access to a good lawyer. We are concerned though, that the strategy outlined in the paper is not adequately guided by that fundamental principle.

Developing a relationship of trust between a lawyer and a mentally disordered client is a unique, challenging and often delicate and lengthy process. For clients living with mental health issues, many of whom have significant trust issues, the availability of independent counsel of choice is of the utmost importance.

The CLA submits that to increase access to justice, LAO must work to function in a way that instills in its clients confidence in the legal system and the individuals who work within that system. One way of gaining that confidence is to respect, support and affirm the agency of individuals – often robbed of their autonomy and self-determination in many aspects of their lives – to freely choose their own counsel.

In this regard, the CLA adopts the guiding principles of independent advocacy articulated by the Psychiatric Patient Advocate Office (“PPAO”):

Advocacy should be, and be seen to be, independent. In order to avoid any potential or perceived problems with conflict of interest, advocates should be *independent both from the psychiatric facilities where and service providers from whom their clients receive care and treatment.*¹⁷

¹⁶ Ryan Fritsch, “Access to justice and the need for a mental health strategy,” Legal Aid Ontario Blog, May 28, 2013.

¹⁷ Psychiatric Patient Advocate Office, “Mental Health Advocacy at the PPAO,” Online: http://www.sse.gov.on.ca/mohltc/ppao/en/Pages/AboutthePPAO/OurServices_A.aspx?openMenu=smenu_OurServices [emphasis added].



As the LAO consultation paper notes, a “very high percentage” of LAO clients have some form of mental illness. The only viable way of effectively serving this huge proportion of clients is by supporting a vibrant, well-trained private bar able to provide specialized services targeting each client’s particular needs.

Clients with mental health issues are a heterogeneous group with varying and various legal needs and issues. Mental disorder is not the sole or defining feature of any client. CLA members are retained by clients who need advocates in the criminal courts and related administrative tribunals. A particular knowledge and expertise in representing a mentally disordered client in a criminal court does not qualify a lawyer to provide immigration advice or civil litigation services to the same client.

The CLA is committed to ensuring our membership is properly trained to represent clients who are mentally disordered. Our association has hosted numerous continuing legal education programs dedicated to issues involving mental health and criminal law and our education committee is dedicated to incorporating mental health issues into all aspects of our future programming.

5. Conflict between the “Holistic” Approach and Client-Directed Legal Representation

In 2006, the Standing Senate Committee on Social Affairs, Science and Technology declared: “It is people living with mental illness themselves who should be, to the maximum extent possible, the final arbiters of the services that are made available within the overall mental health system and of the ways in which they are delivered.”¹⁸

The CLA agrees and applauds LAO for seeking to adopt an approach that empowers mentally disordered clients and is driven by client self-determination. We are concerned however that this rights-based approach to mental health advocacy will often be at odds with the “holistic assessment of needs” and “access to health and social supports” model LAO seeks to develop.

We understand the term “holistic,” as it is used in the consultation paper, to refer to an approach that views problems that might otherwise be seen as distinct legal, social and health matters as an interdependent set of issues affecting the client’s life and to provide services accordingly.

¹⁸ Out of the Shadows, *supra* note 13 at pp. 57-58.



In it our view, a workable holistic model – *i.e.*, one which respects the autonomy of LAO's clients – assumes that all stakeholders and service providers involved in addressing the interrelated needs and issues will adopt a client-directed approach. That assumption does not accord with the experience of CLA members or the mentally disordered clients we serve.

Again the advocacy principles articulated by the PPAO are instructive. The PPAO defines client-directed advocacy as follows:

Unless the client is incapable of instructing an advocate, advocacy is client directed. That is, the actions of the advocate are guided by the instructions of the client. The advocate serves the client on a voluntary and consensual basis. The advocate does not substitute for the client's instructions his or her own personal or professional view of what course of action is in the "best interests" of the client. Central to advocacy is the determination of the client's wishes and the servicing of those wishes, unless the client's instructions are illegal or impossible to carry out.¹⁹

In our view, it is unlikely that clinicians, social workers and other service providers involved in a holistic approach will adopt a model of service delivery that does not prioritize the "best interests" of the client.

As legal advocates the job of our membership is to zealously advocate for the legal interests of all our clients, including those with mental health issues. Where clients want non-legal assistance to address those issues, we refer them to the appropriate service providers. As defenders of mentally disordered accused, however, we must also recognize and accept the reality that at times our zealous advocacy will help a client achieve his or her legal goals, but at the same time perpetuate, or at least not assist in alleviating, a client's mental distress.²⁰ That is the necessary result of a client-directed approach to legal representation and, in the CLA's view, cannot and should not be sacrificed in the name of a holistic provision of services.

¹⁹ *Supra* note 17.

²⁰ Hy Bloom & Brian T. Butler, *Defending Mentally Disordered Persons* (Toronto: Carswell, 1995) at 9.



6. Priority Areas for Immediate Improvement

The CLA views the following as important initiatives and first steps in developing a solid foundation for improving and enhancing services for clients with mental illness:

- Promoting accessibility by relaxing eligibility criteria for mentally disordered accused. Most of these clients already meet the financial criteria but are frequently charged with minor offences that typically do not qualify for a legal aid certificate. Being convicted or found NCR in respect of these offences can nevertheless have life-long consequences and ultimately result in further interactions with the justice system and increased costs to LAO.
- Training for duty counsel focused on assessing the legal needs of clients who have mental health issues. Properly trained duty counsel who recognize the signs of serious mental health issues can act in a “triage” capacity, working to have a certificate issued and assisting the client in finding experienced counsel.
- Developing realistic billing, tariffs, disbursement and discretion rules and guidelines that reflect the realities of serving high-needs, mentally disordered clients.
- Creating opportunities for junior members of the private defence bar to work with senior members to build capacity in areas where criminal law and mental health intersect.
- Devoting more resources for bail under the certificate system. The current funding regime for bail hearings is inadequate. Mentally disordered clients are over-incarcerated – because of they are denied bail or choose to plead guilty – at the remand stage of proceedings. The current playing field results in an increase in criminal records and the cycle of over incarceration at the bail stage which is particularly acute for those with mental illness and as a subset of that, aboriginal and youth in crisis. LAO must devote sufficient resources to enable lawyers, under the certificate system, to properly prepare for bail hearings.