



# **THE ASSOCIATION OF LEGAL AID PLANS OF CANADA**

Submission to the Consultation on a Criminal  
Case Review Commission for Canada

**August 31, 2021**

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# **The ALAP Submission to the Consultation on a Criminal Case Review Commission for Canada**

## **1. Introduction**

The Association of Legal Aid Plans of Canada (ALAP) is a voice for Canada's legal aid plans and a national expert on legal aid and access to justice issues. The ALAP is comprised of the thirteen recognized legal aid plans across Canada, and its objectives are to:

- Undertake, support and facilitate research concerning access to justice issues
- Improve public awareness of access to justice issues
- Undertake such activities, on its own or with others, as may be in the interest of access to justice in Canada.

The ALAP appreciates the invitation to provide input with respect to a proposed independent Criminal Case Review Commission for Canada to investigate and respond to wrongful convictions and miscarriages of justice in this country. The introduction of such a commission is long overdue.

## **2. Background**

### **A. Aspiration vs. Reality in the Criminal Justice System**

In many respects, the criminal justice system in Canada operates as a model to other jurisdictions in the world. Criminal prosecutions are governed by the rule of the law. Trials are held in public where the state bears a strict onus to establish the guilt of the accused who is presumed innocent. There are clear rules governing and limiting how evidence may be obtained by the police, introduced by the Crown, and assessed by the trier of fact, before the presumption of innocence can be set aside and the accused found guilty. There are statutory provisions and common law principles that govern the imposition of an appropriate and fit sentence. Following on sentence, there are further avenues of appeal set out in statute.

The availability of legally aided counsel for accused persons who cannot afford to retain their own counsel plays a critical role in protecting the rule of law in all these aspects. Certainly, across the country, there are different eligibility requirements, and service models, for the delivery of legal aid to persons charged with criminal offences. However, at their core, all legal aid plans recognize the importance to the fairness of the criminal process of providing legal representation, including on appeal, to low-income accused persons.

Perhaps it goes without saying that this is a simplified view of the fairness of the criminal justice system. As has been well documented, there are profound inequities in how the criminal justice system actually operates in this country. Indigenous and African-Canadian communities, and particularly young men from those communities,

are over-policed, profiled and too often subject to criminal prosecution simply because of their race and Indigeneity.<sup>1</sup> It is not surprising that Indigenous and Black inmates, are markedly overrepresented in Canada's inmate population.<sup>2</sup> Persons with serious mental health issues are too often treated as a criminal law problem rather than being provided with the supports that they require to maintain their health. As result, the prevalence of inmates with serious mental health problems far exceeds that found in the community as a whole.<sup>3</sup>

It must be acknowledged, as well, that Canada's legal aid plans do not have the resources to fully address, and overcome these inequities, on their own. Because of budget restraints, legal aid financial eligibility requirements may limit legal services to only the financially destitute accused, rather than providing legal services to all persons who cannot retain privately their own counsel. For the same reason, legal eligibility requirements may mean that full service representation can only be provided to persons who have been charged with serious offences, or charges that would result in a loss of liberty if convicted, rather than providing full representation for all criminal charges. The right to a publicly funded appeal may be similarly limited by merit considerations, and, in certain jurisdictions, to circumstances where an appellant's liberty is still at issue.<sup>4</sup>

## **B. The Reality of Wrongful Convictions**

The history of wrongful convictions in this country provides another example of the failure of the criminal justice system to live up to its rule of law aspirations. The introduction of an independent, robust, and properly funded Commission to address wrongful convictions provides an opportunity to remedy individual miscarriages of justice. In addition, this kind of Commission can also, and perhaps more importantly, serve to address the ongoing systemic inequities from which these miscarriages of justice have been shown to arise. A properly funded legal aid program for representation in these wrongful conviction cases can assist both aspects of the Commission's work.

## **3. Wrongful Convictions Reveal Systemic Problems in the Justice System**

For the purposes of this submission, "wrongful convictions" is understood as those cases where a miscarriage of justice is only identified after the trial has been completed and any rights of appeal have been exhausted.

The causes of wrongful convictions in this country have been carefully documented by

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<sup>1</sup> See, for example, discussion in *R. v. Le* [2019] 2 SCR 692 [R. v. Le - SCC Cases \(lexum.com\)](#) and *R. v. Theriault*, 2021 ONCA 517 <<https://canlii.ca/t/jh1pm>>.

<sup>2</sup> Indigenous inmates make up 30% of federal inmate population despite only making up only 5% of the population. See [Indigenous People in Federal Custody Surpasses 30% - Correctional Investigator Issues Statement and Challenge - Office of the Correctional Investigator \(oci-bec.gc.ca\)](#). Black inmates make up about 8.6% of the total incarcerated population and about 3% of the population [annrpt20162017-eng.pdf \(oci-bec.gc.ca\)](#).

<sup>3</sup> Rate of serious mental health issues is two or three times higher for inmates than in the community. Over 70% of both federally incarcerated men and woman meet the criteria for one or more current mental disorders, while 12% of federally incarcerated men and 17% of federally incarcerated women meet the criteria for a current major mental illness. See 2020 [Who Experiences Mental Health Problems in the Criminal Justice System? \(mentalhealthcommission.ca\)](#).

<sup>4</sup> Legal Aid Ontario also requires an appellant to be still in jail, or on bail pending appeal, at the time the appeal is heard in order to receive funding for an appeal of conviction or sentence.

seven high profile Commissions of Inquiry over the last 30 plus years.<sup>5</sup> It is clear from the detailed reports and recommendations generated from these inquiries that the reasons for wrongful convictions are not typically, or simply, the result of corrupt individuals intent on doing an accused harm in any particular case. Instead, the causes of wrongful convictions should be seen as the result of what may have been widespread investigatory and prosecutorial practices but whose corrupting impact on the truth-finding function of criminal prosecutions was largely unknown at the time of the trial and on appeal.

The systemic causes of wrongful convictions that have been identified by the work of these seven inquiries include: racial bias and discrimination in the police investigation; inadequate police and Crown disclosure, false confessions derived from improper police interrogations, the use of unreliable scientific evidence, failure to appreciate the unreliability of eye-witness identification, “tunnel vision” police investigations, and inadequate assistance from the defence.<sup>6</sup>

In many instances, the inquiry’s identification of the systemic causes of wrongful conviction has resulted in legislative and policy reforms, as well as improved jurisprudence, to address the improper Crown, police and even defence practices at issue.

#### **4. An Independent Commission to Address Wrongful Convictions**

The consistency by which wrongful convictions have been found to stem from systemic problems requires, in the ALAP’s view, that the administration of criminal justice provide an effective process to review, investigate and remedy allegations of wrongful conviction. More specifically, from the ALAP’s perspective, part of that process must also ensure that it is available to all persons, and not simply for those who have their own resources to fully engage and benefit from the process. Unfortunately, the process set out in s.696.1 of the *Criminal Code* for a Ministerial review of wrongful convictions is inadequate on both these fronts.

The Commissions of Inquiry that have addressed this issue, as well as many commentators, have all recommended that an independent federal Commission, along the lines of the current English Criminal Case Review Commission (CCRC(UK)), replace the current s.696.1 process. This new Commission would operate independently from the government of the day with its own budget and resources, and powers to investigate allegations of wrongful conviction, and with the statutory authority to refer unsafe convictions for further appellent review or direct to a new trial.

The ALAP supports this Commission model as the appropriate mechanism to address wrongful convictions and to further address systemic injustices in the criminal justice system.

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<sup>5</sup> *Royal Commission on the Donald Marshall Jr. Prosecution; The Commission on Proceedings Involving Guy Paul Morin; The Inquiry Regarding Thomas Sophonow; The Lamer Commission of Inquiry Pertaining to the Cases of: Ronald Dalton, Gregory Parsons and Randy Druken; The Commission of Inquiry into Certain Aspects of the Trial and Conviction of James Driskell; Report of the Commission of Inquiry into the Wrongful Conviction of David Milgaard; Inquiry into Pediatric Forensic Pathology in Ontario.*

<sup>6</sup> See above and discussion in Kent Roach, *Wrongful Convictions in Canada*, 80 U. Cin. L. Rev. (2013), Robert Mason, *Wrongful Convictions in Canada*, *Parliamentary Information Service*, September 2020.

## **A. The Commission Must Be Independent**

The deficiencies in the current process has many dimensions. Some of the identified flaws are directed to the alleged reality, and certainly the perception, that a government minister lacks sufficient independence under s.696.1 to review and remedy errors made by other government decision-makers in the criminal justice system. This shortcoming does not directly impact legal aid concerns.

At the same time, the ALAP suggests that the principle of independence, and even more the perception of independence, should very much inform the kind of relationship that any new Commission has with the federal government with respect to issues such as ongoing and dedicated funding, including legal aid funding, and reporting obligations.

## **B. The Commission Must Be Proactive, Inquisitorial with a Low Threshold for Engagement**

The ALAP's perspective is particularly relevant with respect to some of the other identified flaws in the current s.696.1 process that have directly restricted the ability of legal aid plans to assist and provide funding for representation to persons engaged in the s.696.1 process.

As discussed in detail in the 2008 *The Commission of the Inquiry into the Wrongful Conviction of David Milgaard*, the current review process is too "reactive" and not "proactive" in responding to concerns about wrongful convictions, and consistently takes an "adversarial" rather than an "inquisitorial" approach when addressing those concerns. Similarly, the 696.1 process was found in that Inquiry and others to impose an excessively "high threshold" on applicants to establish the credibility of a wrongful conviction before federal officials will agree to investigate under 696.1.

## **5. Improving the Availability of Legal Aid – the "Catch 22" Problem**

These features of the current s.696.1 process pose particular challenges for providing legal aid funding for wrongful conviction applications. This challenge is exemplified by what has been termed by two Commissions of Inquiry as the "catch 22" of the initial application process.<sup>7</sup> As it currently operates, in order to engage assistance from Department of Justice officials under s.696.1, applicants are required to both bring new evidence to their attention, and to explain in detail how this information reveals the applicant's innocence.

The reality, however, is that the kind of information that is required to even initiate an s.696.1 application is very often difficult, time consuming and expensive to obtain. As noted above, it often requires challenging and critically reassessing existing practices and procedures. The information may be in possession of third parties, such as the police, who are unprepared to disclose it to the applicant without the proper authority

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<sup>7</sup> *The Commission of Inquiry into Certain Aspects of the Trial and Conviction of James Driskell and Inquiry into Pediatric Forensic Pathology in Ontario.*

provided under s.696.1.<sup>8</sup> The new information will very often involve obtaining expert analysis and reports.<sup>9</sup>

The reactive and adversarial nature of the s.696.1 process means that this catch 22 problem, which downloads much of the cost of an s.696.1 review to the applicant, permeates almost the entire review process. To overcome it, requires great expense by the applicant, supporting organizations such as Innocence Canada, and potentially by a Legal Aid plan.

Legal Aid Ontario, which has the most experience in funding s.696.1 applications, advises that the full cost of funding these applications, where they are eventually referred to the Court of Appeal, can commonly exceed several hundred thousand dollars and even close to a million dollars in total expenditures. These expenditures include both the cost of legal representation but also, and just as importantly, the necessary funds to conduct further investigations, and obtain expert reports.

For these reasons, it is not surprising that it is currently the exception, and not the rule, that provincial legal aid plans are able to provide funding to assist wrongfully convicted persons through the s.696.1 process.<sup>10</sup> Across the country, Legal Aid budgets are already struggling to provide legal services for indigent accused persons in trial and appeal proceedings, as well as in other areas of law. Given the costs involved, legal aid plans cannot in large part assist applicants in the s.696.1 process.

### **A. A Low Threshold for Engaging Commission Resources**

There are many different aspects to how a Commission could remove the restraints of the current review process and introduce a more effective mechanism to address wrongful convictions. From the ALAP's perspective, a key component of any new Commission must be to lessen the existing initial high burden on an applicant to establish the merits of an allegation of a wrongful conviction. A lower burden would address, if not eliminate, the catch-22 problem by allowing early involvement of Commission resources and staff to more fully investigate, research, and assess the allegation and before ultimately determining what further steps may be required.<sup>11</sup>

Establishing a lower burden on applicants in this process may provide opportunities for legal aid plans to assist and support applicants in the Commission's new proactive, and inquisitorial process, for addressing wrongful convictions. Some understanding about the role that legal aid might play with the introduction of a new independent Commission, as well as some of the challenges, can be gleaned from the experiences of the CCRC(UK).

The ALAP's understanding of the CCRC(UK), and the role of legal aid in it, is not offered as particularly new information but to better explain some of the ALAP's

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<sup>8</sup> See Driskell Inquiry.

<sup>9</sup> See Pediatric Forensic Pathology Inquiry.

<sup>10</sup> Only Ontario, Newfoundland and Labrador, Québec, Alberta and Manitoba provide funding. Ontario has provided funding in approximately 30 cases in the last 15 years, while the other provinces who have provided funding have indicated that the case numbers are much lower. It is a matter of public record that Saskatchewan did not provide legal aid funding to David Milgaard in his ultimately successful application to set aside his wrongful conviction.

<sup>11</sup> In developing the precise language for a lower threshold, consideration should be given not only to the existing CCRC(UK) provisions but also to what appears to be the more liberal approach in the Scottish CCRC and the most recent 2020 New Zealand CCRC, as well to the language suggested by the Ontario Criminal Lawyers' Association in their submission.

recommendations that are offered in the final section of this submission.

## **6. Legal Aided Counsel in a Commission Model – The UK experience**

### **A. Role of Legal Aid**

From the ALAP's very high level review of the CCRC(UK), there appear to be three stages in the wrongful conviction review process in which legally aided counsel can provide assistance, and for which modest funding is available.

The first is the initial application stage. It appears that sustained efforts have been made to ensure that the initial application process is simple and straightforward and accessible to all persons, regardless of whether they have legal representation. At the same time, funding for legal representation from the private bar is available to assist in this first stage.

Secondly, under the governing provisions of the CCRC(UK), before the Commission makes a final determination about referring a case to the Court of Appeal, it must advise the applicants of its "provisional conclusion", provide relevant disclosure and allow the applicant to make representations to the Commission. This opportunity for submissions is not mere "window dressing" and may result in the Commission altering its original position.<sup>12</sup> Once again, at this stage, legal aid funding is available to prepare submissions on behalf of the applicant.

Finally, legal aid funding is available in cases where the conviction has been referred to the Court of Appeal.

### **B. Value of Legal Aid Representation**

Importantly, from the ALAP's perspective, there is a consensus among both advocates for the wrongfully convicted, and the CCRC(UK) itself, of the value of legal aid for applicants at all three stages of the process. Academic research has found that "quality legal representation improved an applicant's chance of being granted a new appeal significantly".<sup>13</sup> For its part, the CCRC(UK) has recognized the "considerable benefit in applications submitted by legal representatives" which are in general "well-organised, professionally presented, realistic, candid and focussed" and, as a result, "speed the progress of reviews and reduce the work that is necessary for the CCRC(UK) to undertake".<sup>14</sup>

### **C. Level of Funding for Legal Aid in CCRC Applications**

At the same time, both commentators and the CCRC(UK) have noted the impact of the broad and significant government cuts to the justice system, the CCRC(UK) and Legal

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<sup>12</sup> David Kyle (2003) *Correcting Miscarriages of Justice: The Role of the Criminal Cases Review Commission* Drake Law Review 52 at 671.

<sup>13</sup> As found in the Westminster Commission Report 2021 "An Inquiry into the Criminal Cases Review Commission" at p.31.

<sup>14</sup> Responses of the CCRC(UK) to Call for Evidence in the Independent Review of Legal Aid 2021 at <https://s3-eu-west-2.amazonaws.com/jotwpublic-prod-storage-1cxa1dnrmkg14/uploads/sites/5/2021/07/ICLAR-Consultation-Response-Legal-Aid-11-June-2021.pdf>.



Aid in the United Kingdom over the last twenty years.

These cuts have restricted the financial eligibility requirements for legal aid in CCRC(UK) matters, and limited the coverage and compensation that is available for private counsel in those cases. According to the recent 2021 *Westminster Commission*, which conducted an extensive inquiry into the work of the CCRC(UK), only those with a disposable income of £99 per week or less, and disposable capital of £1,000 or under, are eligible for this assistance. This all-party Commission also reported that the UK Legal Aid Agency provides a fixed amount of £456.25 for CCRC(UK) reviews, and £273.75 for Court of Appeal cases, which amounts to 10 hours of work.

There is now compelling evidence that the funding cuts to Legal Aid in the United Kingdom over the last 20 years has resulted in a dramatic fall in the number of lawyers who are prepared to take on wrongful conviction cases. In 2008, approximately a third of CCRC(UK) applicants were represented, while currently only 10% of applicants are represented.<sup>15</sup>

The *Westminster Commission* devoted an entire section identifying and lamenting the current limits on “resources for legal representation” in its review of the CCRC(UK). To address those limits, it recommended that both the financial eligibility for legal aid in CCRC(UK) reviews be increased, and that the coverage and compensation for lawyers at both the application and the investigation stage, and at the Court Appeal, be increased as well.

It is clear from this admittedly broad overview of the CCRC(UK)’s work that legally aided representation, is a necessary and critical, but now fragile in the UK, component to ensure the effective work of an independent Commission. In order that legal aid is meaningfully and effectively used in any similar future Commission in Canada, the ALAP would make the following recommendations.

## **7. Recommendations**

### **A. Dedicated Budget for Legal Aid Representation**

It is the ALAP’s view that any proposed wrongful conviction Commission must itself be provided with a dedicated budget for legally aided representation. The CCRC(UK) does not have its own budget for legal aid funding and arguably, as a result, has found its ability to meet its mandate undermined over the last 20 years by different government justice priorities and funding decisions about legal aid coverage and eligibility.

The need for a dedicated Commission budget for legal aid funding is particularly acute in the Canadian context where the availability and funding provided for legal aid for these kinds of cases may differ depending on the budget and priorities of the individual Legal Aid plan. It would seem axiomatic, given the recognized importance of a robust independent wrongful conviction review process, that the ability of an individual to even

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<sup>15</sup> *Westminster Commission*.

initiate a complaint about a wrongful conviction should not be dependent on the province or territory in which he or she was convicted.

The final rationale for a dedicated budget for legal aid representation as part of a federal wrongful conviction Commission is quite practical. The budget restraints of many of Canada's legal aid plans do not allow for any additional expenditures for legal representation to support the work of the Commission either by the allocation of staff services, or by funding services from the private bar.

Outside of Ontario, the revenue for provincial legal aid plans range between \$180 million (Québec) and \$2 million (Yukon), with the majority of plans having revenues of less than \$100 million.<sup>16</sup> Legal Aid Ontario, which has the largest budget, had its budget severely cut recently in 2019 by 1/3 (approximately \$130 million) by the provincial government. In addition, it has lost about \$70 million from its other major source of revenue, the Law Foundation of Ontario, as a result of the 2020 pandemic induced fall in interest rates.<sup>17</sup>

It is clear, as well to the ALAP members, that these legal aid budgets will be brought under even greater strain by the current backlog of cases in all areas of law that will soon be seeking legal aid services with the ebbing of the pandemic, and the return to in-court appearances.

In brief, without additional directed funding from the federal government, legal aid plans in Canada are simply unable to commit to providing additional services, or payments, to support the legal representation of persons seeking to set aside wrongful convictions by way of an independent investigatory Commission.

## **B. Direct Federal Funding of Criminal Legal Aid Cases**

An additional open question is how precisely federal funding for legal aid for a wrongful conviction review might work in practice. Legal aid plans have different service delivery models, and eligibility requirements, and there is no standard legal aid hourly rate, or rules about coverage for the private bar, that apply across the country. However, the ALAP suggests that it would be open to any newly formed Commission, after we have discussions with the ALAP and others, to set the hourly rate and hours covered for counsel representing clients in wrongful conviction reviews.

There is a precedent for this kind of federally funded legal aid program for criminal law matters. The department of justice currently provides funding to legal aid plans for the defence of federal prosecutions that are not eligible for legal aid but are subject to a *Rowbotham* order. It also provides funding for low-income accused for the defence of federal terrorism-related charges. Legal aid plans are responsible for managing these cases but are reimbursed for both the cost of the defence, as well as for administrative costs.

## **C. Funding Should Follow General Legal Aid Eligibility Rules**

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<sup>16</sup> See 2019/2020 *Department of Justice Report on Legal Aid Plans in Canada*, Table 1: <https://www.justice.gc.ca/eng/rp-pr/jr/aid-aide/1920/p1.html#1>, Table 13: <https://www.justice.gc.ca/eng/rp-pr/jr/aid-aide/1920/p1.html#13>, Table 17: <https://www.justice.gc.ca/eng/rp-pr/jr/aid-aide/1920/p1.html#17>.

<sup>17</sup> Law Foundation provides funding from the interest collected on lawyers' trust accounts.

It is the ALAP's view that the eligibility requirements for legal aid for wrongful conviction reviews should, as a general matter, be restricted to low-income applicants. It should also be restricted to only wrongful convictions that involve serious charges, and not sentences. Families of deceased persons would not be eligible for funding under this program.

These requirements reflect, in large part, the existing eligibility rules and policies for legal services that are already in place in different Canadian legal aid plans. In the past, concerns have been raised in the public sphere when legal aid plans provide or fund representation for accused who would otherwise not be eligible for legal aid services. These concerns have been raised even though Legal Aid did not pay for those services.

In addition, these eligibility requirements may serve as a bulwark to prevent both the Commission and legal aid plans from being, at least initially, overwhelmed with applications to review historically dated convictions and sentences. It is the view of the ALAP that it is preferable that legal representation be properly funded to assist low income persons to set aside allegations of wrongful convictions on serious charges, rather than have limited resources spread too thin by providing funding to all cases, including sentences, regardless of financial eligibility, seriousness of the charge and impact on the accused person.<sup>18</sup>

No doubt, if the committee is interested in this proposal, further work and discussion will be required to specify in more detail the financial and legal eligibility restrictions that might apply to legal representation in these matters. The ALAP is certainly open to discussions that might allow these requirements to be waived in exceptional circumstances involving perhaps cases that show either egregious evidence of misconduct, or complexity that requires the contribution of significant time by counsel to the case.

#### **D. Restricted Panel of Wrongful Conviction Defence Lawyers**

The ALAP sees the value of utilizing a pre-selected list of lawyers who alone would be authorized to represent applicants on wrongful conviction reviews. It is clear to the ALAP, for many of the reasons already canvassed, that representing clients on these kinds of reviews requires highly skilled and experienced defence counsel. As noted by the CCRC(UK), providing quality legal representation can only assist the work of the Commission and not hinder it.

It might be advisable that the Commission not be directly involved in developing and maintaining the list of approved defence counsel. It may be necessary to avoid even the appearance of a conflict between a lawyer's duty to a client, and their professional interest to remain in good standing with the Commission. As evidenced by the UK experience, there are occasions where defence counsel will be invited to respond and challenge a provisional decision of the Commission not to refer their client's case to the Court of Appeal.

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<sup>18</sup> The UK 2021 Westminster Commission, however, specifically declined, as a mechanism to address the CCRC's funding shortfall, to recommend that the Commission no longer investigate non-serious offences, or sentences, that may amount to miscarriages of justice.

There are many individuals and organizations in the criminal justice system that could contribute expertise to developing this list of lawyers. Depending on the jurisdiction, individual legal aid plans may also have both the expertise and resources to contribute to that list as well. In any event, the ALAP would want to ensure that part of the qualifications for taking on these cases is that any counsel on that panel also have the qualifications necessary to take on a legal aid case. There are rare instances, although very much the exception, where experienced counsel may have failed to satisfy a legal aid plan's requirements for conducting a legal aid case. The ALAP would not want those lawyers to be provided with the authority to provide legally aided representation in a wrongful conviction challenge.

### **E. Appointment of Counsel**

The ALAP would be quite comfortable with the Commission having the authority to appoint counsel, presumably from a list of qualified lawyers. At the same time, for the reasons cited above, a direct appointment process may create the appearance of a conflict of interest for counsel who has been appointed by the Commission.

It should also be considered that not all legal aid plans have an unfettered authority under their governing statute, rules and policies to simply appoint counsel, nor do they necessarily have the skills and resources to exercise that authority.

A compromise position, which has been followed in other contexts with respect to court ordered counsel, would be for the Commission to provide an applicant with a limited number of names from the pre-approved list, and the client would choose counsel.

Finally, as a practical matter, it appears from the experiences of legal aid plans who have been engaged in the 696.1 process, that in very large measure persons seeking a review of their wrongful conviction have already chosen experienced and highly qualified counsel.

### **F. Remedial Orders of the Commission**

The ALAP very much supports the Commission having the same authority enjoyed by the similar Commissions in other jurisdictions to refer cases to the Court of Appeal.

The ALAP would also like to see the Commission having the power to directly quash a conviction in exceptional circumstances where there is no dispute that the accused is factually innocent of the charge. In this respect, the ALAP agrees with many criminal justice advocacy groups in the UK, as well as the Ontario Criminal Lawyers' Association, that there is no reason in this context to incur further costs and delay by a referral to the Court of Appeal or for a new trial. This delay only magnifies the original injustice to the wrongly convicted individual.

The ALAP acknowledges that this proposal will require careful and, quite frankly, creative legislative drafting to provide the Commission with an authority akin to a judicial body. It is likely that the *Westminster Commission* rejected this proposal for that very reason. At the same time, the ALAP would ask that the feasibility of this proposal be at least explored.

## G. Ancillary Activities of the Commission

These submissions have been quite clear that the current process under s.696.1 has failed to provide an effective and fair process to address wrongful convictions in this country. At the same time, the inadequacies of this process for individuals has resulted in the launching of several major Commissions of Inquiry to investigate and comment on the causes of miscarriages of justice in this country. These inquiries have revealed that the causes of wrongful conviction are not simply the result of individual misconduct. Instead, they are also a reflection of more systemic issues that infect all aspects of the criminal justice system such as racial bias, an uncritical view of scientific evidence and improper or inadequate police techniques.

It would be unfortunate if an improvement in the individual review process resulted in the insights of the large perspectives provided by the inquiry model being lost. The ALAP would ask that the Commission continue to investigate the larger causes of miscarriage in this country. Research and commentary on the larger causes of miscarriage of justice is even more necessary if the Commission adopts the ALAP's suggestion that legal aid representation would be reserved for the more serious cases. A focus on larger issues from a systemic perspective could fill that gap in the Commission's mandate.

Finally, the ALAP has not provided any advice on the level of funding that might be required for legal aid plans to provide representation for applicants to support the work of the Commission. In large part, this is because the level of funding that may be required depends on other aspects of the Commission's work which have yet to be determined. Speaking broadly, it seems to the ALAP, that the more the Commission is able to substantively take on an independent and inquisitorial role, the less funding that will be needed for applicants to retain their own counsel, at least in comparison to the funding that is needed to engage with the existing reactive and adversarial s.696.1 process. The ALAP is, of course, happy to continue to assist by providing more information about what legal aid funding might be required as the details of the Commission take shape in the coming months.

Thank you once again for including the Association of Legal Aid Plans of Canada in your consultations about this very important and much needed initiative.

If you have questions or concerns about this submission, or the work of Canada's legal aid plans in general, please do not hesitate to contact us directly.

With best regards,



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