February 14, 2024

VIA EMAIL: scjp@ola.org

Ms. Goldie Ghamari, M.P.P., Chair
Standing Committee on Justice Policy
c/o Thushitha Kobikrishna, Committee Clerk
Whitney Block, Room 1405
99 Wellesley Street West
Toronto, Ontario M7A 1A2

Dear Ms. Ghamari:

RE: Bill 157, *Enhancing Access to Justice Act, 2023*

The Advocates' Society writes to the Standing Committee on Justice Policy to offer our brief comments on some of the amendments proposed by Bill 157, the *Enhancing Access to Justice Act, 2023*, to the *Courts of Justice Act*.

Established in 1963, The Advocates' Society is a not-for-profit organization representing approximately 5,500 diverse lawyers and students across the country—unified in their calling as advocates. As the leading national association of litigation counsel in Canada, The Advocates' Society and its members are dedicated to promoting a fair and accessible system of justice, excellence in advocacy, and a strong, independent, and courageous bar. A core part of our mission is to provide policymakers with the views of legal advocates on matters that affect access to justice, the administration of justice, the independence of the bar and the judiciary, the practice of law by advocates, and equity, diversity, inclusion, and reconciliation with Indigenous peoples in the justice system and legal profession.

I. Statutory Requirements for Judicial Appointments Advisory Committee's Annual Report

Ontario's *Courts of Justice Act* establishes a Judicial Appointments Advisory Committee ("JAAC"), composed of members of the judiciary, the bar, and the public, to recommend candidates to the Attorney General for appointment as provincial judges and to advise the Attorney General on the process for appointing provincial judges.[1] The JAAC therefore performs crucial functions in Ontario's judicial system.

In keeping with the importance of its role, the JAAC is required by the *Courts of Justice Act* to prepare an annual report that includes (among other things) demographic statistics about candidates for appointment as provincial judges. Bill 157 proposes to amend the statistics the JAAC is required to report by removing 'cultural identity' as a metric the JAAC must report on, as follows:[2]

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[1] *Courts of Justice Act*, R.S.O. 1990, c. C.43, ss. 43-43.1.
[2] Bill 157, Schedule 6, Clause 1, amending s. 43(9)(a) of the *Courts of Justice Act*.

43. […]

Annual report
(8) The Committee shall prepare an annual report, provide it to the Attorney General and make it available to the public.

Same
(9) The annual report must include,

> (a) statistics about the sex, gender, gender identity, sexual orientation, race, ethnicity, ~~cultural identity,~~ disability status and ability to speak French of candidates who volunteer that information, including whether the candidates identify as Indigenous or as a member of a Francophone community, at each stage of the process, as specified by the Attorney General; […].

The Advocates' Society understands that the 'cultural identity' metric is being removed because the term is outdated and not in compliance with Ontario's data standards. We therefore take no issue with its deletion.

However, The Advocates' Society wishes to take this opportunity to emphasize the importance of having a diverse provincial judiciary that reflects the population it serves. A diverse bench strengthens the judicial system and facilitates access to justice. A bench that incorporates a wide variety of perspectives improves the quality of decision-making. In addition, a bench that is representative of the community promotes public confidence in the fairness and impartiality of the judicial system. Given the vital role that a diverse judiciary plays in the justice system, the consistent collection and publication of aggregate data on the diversity of candidates for and appointments to the provincial bench is critical to achieving the goal of diversity. This data can help the government, the JAAC, and other stakeholders evaluate whether diverse candidates are applying and being appointed to the provincial bench and, if not, develop targeted measures.

We encourage the Ontario Government to continue to prioritize transparency in its judicial appointment process and the composition of its provincial judiciary.

II. Proposed Amendments to Regime for Vexatious Proceedings

The *Courts of Justice Act* currently sets out a procedure for an application to be made to a judge of the Superior Court of Justice to have a person designated as a 'vexatious litigant', meaning that the person must apply to the Superior Court for leave to institute or continue proceedings in any court.[3]

Bill 157 proposes to amend the vexatious proceedings regime in the *Courts of Justice Act* to make the following key changes:[4]

- To expressly allow a judge of the Superior Court of Justice *or* the Court of Appeal to make a vexatious litigant order;
- To allow a judge to make the order on their own initiative – that is to say, without an application being made by another person or party before the court;
- To expressly set out a mechanism for a vexatious litigant to appeal the order that requires them to seek leave before instituting or continuing any proceedings.

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[3] *Courts of Justice Act*, *supra*, s. 140.
[4] Bill 157, Schedule 6, Clause 7, amending s. 140 of the *Courts of Justice Act*.

Designating someone as a vexatious litigant is a significant measure. It has the impact of strictly limiting their access to the courts to enforce their rights. As such, the authority to make a vexatious litigant order should be exercised cautiously, and such caution should inform the above amendments.

The key principles to balance in a regime governing vexatious proceedings are (i) access to justice and (ii) the efficiency of the court system. The Advocates' Society supports granting judges of the Superior Court of Justice and the Court of Appeal the power to make vexatious litigant orders on their own motion.[5] The courts must have the tools to control their processes and protect the courts from abuse of process and the squandering of their resources by litigants who persistently institute or conduct proceedings in a vexatious manner. The courts should not have to rely on receiving an application from another person to do so. Only those individual applicants who can afford the substantial costs will bring such an application. In some instances, the cost burden may deter a meritorious application.

The proposed amendments appropriately state that a vexatious litigant order requires notice to the person who is the subject of the order. The person will, therefore, have an opportunity to be heard and make submissions on why their access to the courts ought not to be limited.[6] In addition, the amendments helpfully set out as-of-right appeal mechanisms for vexatious litigant orders, so there is an opportunity for an appeal panel to review such an order for correctness.[7]

In The Advocates' Society's view, Bill 157's proposed amendments to the vexatious proceedings regime in section 140 of the *Courts of Justice Act* appropriately balance efficiency and access to justice.

Thank you for the opportunity to make these submissions. I invite you to contact The Advocates' Society should you have any questions.

Yours sincerely,

Dominique T. Hussey
President

CC: The Honourable Doug Downey, K.C., M.P.P., Attorney General of Ontario
Vicki White, Chief Executive Officer, The Advocates' Society

The Advocates Society's Task Force on Bill 157

Cathy Guirguis, *Olthuis Kleer Townshend LLP*
Aly Háji, *Ricketts Harris LLP*
Lara Jackson, *Cassels Brock & Blackwell LLP*
Najma Jamaldin, *Barrister & Solicitor* (chair)

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[5] For example, the Alberta Courts have this power under the *Judicature Act*, R.S.A. 2000, c. J-2, s. 23.1.
[6] Proposed s. 140(2.1) of the *Courts of Justice Act*.
[7] Proposed s. 140(2.3) of the *Courts of Justice Act*.