Chapter 1
Section
1.16

Ministry of Attorney General

Criminal Court System

Follow-Up on VFM Volume 3 Chapter 3, *2019 Annual Report*

RECOMMENDATION STATUS OVERVIEW						
		Status of Actions Recommended				
	# of Actions Recommended	Fully Implemented	In the Process of Being Implemented	Little or No Progress	Will Not Be Implemented	No Longer Applicable
Recommendation 1	4		1		3	
Recommendation 2	3			3		
Recommendation 3	1				1	
Recommendation 4	3			3		
Recommendation 5	2	1		1		
Recommendation 6	3		2	1		
Recommendation 7	1		1			
Recommendation 8	2		1		1	
Recommendation 9	3			3		
Recommendation 10	1			1		
Total	**23**	**1**	**5**	**12**	**5**	**0**
%	**100**	**4**	**22**	**52**	**22**	**0**

Overall Conclusion

The Ministry of the Attorney General's (Ministry) Criminal Law Division (Division), as of August 31, 2021, had fully implemented only 4% of the actions we recommended in our *2019 Annual Report*. A further 22% of the actions were in the process of implementation, and little or no progress has been made on another 52% of actions. The Division determined that it will not implement the remaining 22%, or five, of our recommended actions.

Since our 2019 audit, the Division had fully implemented our recommendation to complete the evaluation of the Embedded Crown initiative that aims to reduce the proportion of cases starting in bail court. However, despite the results of the initiative having shown some positive outcomes, the Division has made little to no progress on creating an execution plan to expedite its implementation across the province. The Division indicated that it will revisit the analysis of the Embedded Crown initiative once the backlog of court cases created by the COVID-19 pandemic has been addressed.

The Division was in the process of implementing our recommendation to allocate resources as needed and work with the judiciary to improve the court scheduling process. In December 2020, the Division received approval from the Ministry for 31 temporary full-time-equivalent staff. Since then, the Division has added 20 summer and articling students and 34 additional temporary legal and business professional positions. All these temporary positions have been approved until at least March 31, 2022, to assist with addressing the backlog of cases created during the pandemic. The Division plans to complete its work on resource allocation as well as prioritizing case scheduling with the judiciary, who are responsible for court scheduling, to improve the court scheduling process by September 30, 2022.

The Division informed us that due to the COVID-19 pandemic, it was focused on backlog recovery and had implemented a number of initiatives with the judiciary to maintain access to justice during the pandemic. These initiatives included implementing remote technologies to allow for a virtual space to operate courts in a safe and accessible fashion, and creating an internal use-only document, called the COVID-19 Recovery Dashboard. The dashboard contains information about upcoming trials and preliminary inquiries scheduled in the Ontario Court of Justice and provides an overview of case trends prior to and during COVID-19.

However, the Division has determined that it will not implement recommendations such as to analyze the reasons for delays in cases pending disposition and capture the reasons for cases being stayed by judges, including distinguishing the reasons under the control of the Division and the courts from those caused by the defence, on an aggregate basis for each court location, by region and province. It has also determined that it will not capture the breakdown of reasons for cases being withdrawn before trial, on an aggregate basis for each court location, by region and province. The Division currently captures this data on a case-by-case basis and believes that capturing this data on an aggregate level will not provide additional practical and relevant information to support operational decisions that it does not already have.

The position of the Office of the Auditor General is that the Division should monitor criminal cases that have been pending for more than eight months by court location and region for senior management to highlight areas of concern that have a systemic impact on the criminal court system. Such higher-level analysis can help to distinguish the reasons for the delays so that the Division can proactively manage the progress of criminal cases that are within its control and resolve criminal cases in a more timely manner.

Subsequent Event

In October 2021, the Ministry announced new measures to address court backlogs, including the criminal case backlog reduction strategy and an updated COVID-19 Recovery Directive for prosecutors. These new measures may have some impact on some topics covered in this follow-up report. These changes and their impacts are not reflected in this follow-up report because the announcement was released subsequent to our field work, which was substantially completed on August 31, 2021.

Background

The Criminal Code of Canada is the federal legislation that sets out criminal law and procedure in Canada, supplemented by other federal and provincial statutes. Crown attorneys prosecute accused persons under these laws on behalf of the Criminal Law Division (Division) of the Ontario Ministry of the Attorney General (Ministry).

The Ontario Court of Justice (Ontario Court) and the Superior Court of Justice (Superior Court) received approximately 205,000 criminal cases in 2020/21, a decrease of 9% since 2016/17 (approximately 240,000 cases in 2018/19).

The Division operates from its head office in Toronto, six regional offices, four divisional

prosecution and support offices and 54 Crown attorney offices across the province. Between 2016/17 and 2020/21, the Division's operating expenses have increased by 11%, from $263 million to $293 million, mainly because the number of Crown attorneys has increased by 7% (from 977 Crown attorneys in 2016/17 to 1,045 in 2020/21).

In July 2016, a ruling by the Supreme Court of Canada in *R. v. Jordan* required that if a case is not disposed within specific timelines (18 months in the Ontario Court or 30 months in the Superior Court), it is presumed that the delay is unreasonable and Crown attorneys have to prove otherwise or the presiding judge may decide that the charges will be stayed.

Our 2019 audit found that the backlog of criminal cases we noted in our audits of Court Services in 2003 and 2008 continued to grow. Between 2014/15 and 2018/19, the number of criminal cases waiting to be disposed by the Ontario Court increased by 27% to about 114,000 cases.

During our 2019 audit, we experienced significant scope limitations in our access to key information related to court scheduling. As a result, we were unable to assess whether public resources, such as courtrooms, are scheduled and used optimally to help reduce delays in resolving criminal cases. We were refused full access to 175 sampled case files maintained by Crown attorneys. The Division cited various privileges such as litigation privilege (referring to files containing information regarding prosecution strategy and publication bans, for example), and confidential informer privilege (referring to files containing names of confidential informants, whose identity prosecutors have a legal duty to protect by ensuring no disclosure occurs that might tend to reveal the identity of an informer or their status as an informer). Instead, the Ministry's Criminal Law Division staff summarized some of the details of these case files, including reasons for delays, for our review.

Our significant audit findings included:

- Criminal cases awaiting disposition were taking longer to resolve. The Ontario Court of Justice received about 237,000 cases in 2018/19, a 10% increase over 2014/15. The 8% increase in full-time-equivalent Crown attorneys resulted in only a 2% increase in total cases disposed, resulting in a 27% increase in cases waiting to be disposed—about 114,000 as of March 2019 compared to about 90,000 in March 2015. Between 2014/15 and 2018/19, the average number of days needed to dispose a criminal case increased by 9% (from 133 to 145 days), while the average appearances in court before disposition increased by 17% (from 6.5 to 7.6 appearances).
- Reasons for aging cases require formal and regular analysis to be done centrally. The Division had not done formal and regular analysis of aging cases at an aggregate level (the level of court location, region or the province). This includes, for example, categorizing the reasons why cases are pending disposition or are stayed, and distinguishing whether delays were caused by the defence or by the prosecution or were "institutional"—related to court scheduling, for example.
- The Criminal Law Division and police services lacked formally agreed-upon roles and responsibilities for the timely disclosure of evidence. In 1999, the Criminal Justice Review Committee recommended a directive to be developed that comprehensively sets out the disclosure responsibilities of the police and prosecutors. In November 2016, the Division began to engage police services to sign a framework memorandum of understanding (MOU) for the disclosure of evidence. The Division revised the MOU in June 2019. However, at the time of our audit, not all police services had signed the MOU.
- About 85% of bed days were used by inmates who were in remand for more than one month, and some for over a year. Two factors contribute to the size of the remand population: the number of accused entering remand custody and the length of time inmates spend in remand custody. We found the main reasons were that the inmates were dealing with other charges; they remained by their own choice; they were having ongoing plea discussions with the prosecution; or they

could not produce a surety (guarantor) to supervise them while out on bail.

- Twenty-nine of Ontario's specialized courts heard cases for accused persons with mental health conditions. Mental health courts have been in operation since 1997 with the aim of dealing with issues of fitness to stand trial and, wherever possible, limiting repeated returns to court by these accused, through diversion programs and other appropriate types of treatment. Our audit found that the benefits of Ontario's mental health courts were unknown. Procedures were not clearly outlined, proper data was lacking on their operations, and definitions of these courts' objectives and intended outcomes were imprecise.

We made 10 recommendations, consisting of 23 action items, to address our findings. At the completion of our audit, we had received commitment from the Ministry of the Attorney General that it would take action to address all of our recommendations.

Status of Actions Taken on Recommendations

We conducted assurance work between April 2021 and August 2021. We obtained written representation from the Ministry of the Attorney General that effective November 15, 2021, it has provided us with a complete update of the status of the recommendations we made in the original audit two years ago.

Number of Criminal Cases Awaiting Disposition Continues to Increase

Recommendation 1

To proactively manage the progress of criminal cases through the court system and resolve them in a timely manner, we recommend that the Ministry of the Attorney General (Criminal Law Division):

- *monitor all criminal cases that have been pending disposition for more than eight months by court location and region and analyze the reasons for the delays;*
- *capture all reasons for cases being stayed by judges;*
- *distinguish the reasons under the control of the Division (such as availability of Crown attorneys and disclosure of evidence) and the courts (such as scheduling of courtrooms and judges) from those caused by the defence; and*

Status: Will not be implemented. The position of the Office of the Auditor General is that the Division should monitor criminal cases that have been pending for more than eight months by court location and region for senior management to highlight areas of concern that have a systemic impact on the criminal court system. Such higher-level analysis can help to distinguish the reasons for the delays so that the Division can proactively manage the progress of criminal cases that are within its control and resolve criminal cases in a more timely manner.

Details

Our 2019 audit found that the backlog of criminal cases we noted in our previous audits of court services continued to grow. This backlog and systemic delay in resolving criminal cases negatively impacts the Charter right of accused persons to be tried within a reasonable time.

The Ontario Court received 236,883 cases in 2018/19, a 10% increase over 2014/15. Yet the number of cases disposed increased by only 2% over the same period. The result was a 27% increase in criminal cases waiting to be disposed —about 114,000 cases as of March 2019 compared to about 90,000 in March 2015.

Our 2019 audit also found that the number of cases pending disposition up to eight months increased by more than 30%, from 59,000 as of March 2015 to 77,000 as of March 2019. Further, since the July 2016 Jordan decision, according to information provided by the Division at the time of our 2019 audit, 191 provincially prosecuted cases had been stayed at the request of the defence by judges who ruled that the prosecution, police and/or court

system had been responsible for unreasonable delay. In these cases, justice was denied for the victims.

However, we found that the Division had not done formal and regular analysis of aging cases at an aggregate level, that is, at the level of court location, region or province, such as the following:

- categorizing the reasons why cases were pending disposition;
- categorizing the reasons why cases were stayed; or
- distinguishing whether delays were caused by the defence or by the prosecution or were "institutional," for example, related to court scheduling.

These higher-level analyses can be used to generate regular reports for senior management to highlight areas of concern that have a systemic impact on the criminal court system. As well, such analysis can help to inform the Division so that Crown resources can potentially be allocated and reallocated proactively.

During our follow-up, we noted that the Ontario Court received 203,104 cases in 2020/21, an 8% decrease over 2016/17. Yet the number of cases disposed decreased by 28% over the same period. The result is a 71% increase in criminal cases waiting to be disposed—about 165,000 cases as of March 2021 compared to about 97,000 in March 2017. In addition, we noted that the number of cases pending over 18 months has increased by 109% from 6,196 as of March 2017 to 12,972 as of March 2021. The Division's staff indicated that this increase in criminal cases waiting to be disposed was largely attributable to the effect that pandemic-related court scheduling had on the administration of justice. Court scheduling during the pandemic reduced court capacity and limited the types of criminal matters that could be heard in court. The Division's staff further stated that these scheduling practices are outside the scope of their Division and that court scheduling is the exclusive domains of the Ontario Court and Superior Court.

We noted (in our follow-up as well as in the 2019 audit) that the Division distributes a list of cases pending each month to all Crown managers. This list provides a break down in time categories, for example, 0–8 months, 8–12 months, 12–15 months, 15–18 months and +18 months.

Our follow-up also noted that the Division categorizes the number of cases stayed due to the Jordan decision, cases stayed due to other reasons and, a new category was added since our last audit that categorizes the number of cases stayed due to COVID-19 challenges. However, similar to what we found in our 2019 audit, any further analysis of reasons why the cases were delayed or what caused a stay are done by local managers and Crown attorneys on a case-by-case basis.

The Division informed us that it will not implement our recommended actions. It indicated and believed that there is no further need to act on our recommendation because all the necessary information is available to assess the reasons for delay through a combination of tools at a divisional, regional and local level. The Division said these tools include "judicial decisions, detailed Crown notes, 11b reports, SCOPE, and a Heads-Up Display case analysis tool." The Division determined that the actions it took on this recommendation are sufficient to understand and assess operational pressures on the time leading up to trial.

However, the Division was unable to provide us with information on reasons for pending cases more than eight months and the stayed cases, or to distinguish the reasons (for delay) that are under the control of the Division (such as availability of Crown attorneys and disclosure of evidence) and the courts (such as scheduling of courtrooms and judges) from those caused by the defence at an aggregate level, that is, at the level of court location, region and province.

- *take timely action, including allocating resources as needed and working with the judiciary to improve the court scheduling process.*

  Status: In the process of being implemented by September 30, 2022.

After our 2019 audit, since July 2020, the Division has been focusing on efforts to bring

about a phased recovery of courts due to the COVID-19 pandemic. Other efforts have focused on:

- retrofitting each court location across the province with enhanced safety precautions to allow for a safe return of in-person matters where required;
- allowing for a virtual space to operate courts in a safe and accessible fashion through remote technologies;
- commencing Virtual Case Management (Remand) Courts across the province in a staged process; and
- a new process for scheduling out of custody trials.

The Attorney General released a COVID-19 Recovery Directive that instructed prosecutors to review all existing and incoming cases to take into account the impact of lengthy delays caused by COVID-19 in determining whether there is a reasonable prospect of conviction.

On March 28, 2020, the Division's Assistant Deputy Attorney General issued a memo to all Crown Offices advising local Crowns to work on prioritizing case scheduling with the judicary, who are responsible for court scheduling.

In addition, in December 2020, the Division added 31 temporary full-time-equivalent staff. Since then, the Division has added 20 summer and articling students and 34 additional temporary legal and business professional positions. All these temporary positions have been approved until at least March 31, 2022, to assist with addressing the backlog of cases created during the pandemic. The Division plans to complete its work on resource allocation, as well as prioritizing case scheduling with the judiciary to improve the court scheduling process, by September 30, 2022.

Criminal Law Division Efforts Have Had Little Effect on Delays in Disposing Criminal Cases

Recommendation 2

To allocate, assign and reassign Crown attorneys efficiently and appropriately based on case complexity and the need to achieve a reasonable balance in their workloads across the province, we recommend that the Ministry of the Attorney General (Criminal Law Division):

- *set a targeted timeline to complete the implementation of the Crown Information Management System;*
- *allocate Crown resources to cases as needed by criteria including age, complexity and type of case; and*
- *continuously reassess case status to be able to reallocate cases where needed.*

Status: Little or no progress.

Details

In our 2019 audit, we found while the number of full-time-equivalent Crown attorneys increased by 8% from 951 in 2014/15 to 1,023 in 2018/19, total cases disposed in both the Ontario Court and Superior Court increased by only 2%. The addition of new Crown attorneys did not result in a proportional increase in the total number of cases disposed.

Our 2019 audit noted that, overall, the average number of criminal cases disposed per Crown attorney increased by 2.5% over the five-year period ending March 31, 2019; but also found significant variations in the number of cases disposed (using a five-year average) per Crown attorney across the province, from a low of 160 cases in Toronto region to a high of 354 cases in the West region, compared to a provincial average of 274 cases.

At the time of our 2019 audit, the Division identified the additional need for a system to define the complexity of different criminal cases and assign caseloads to its prosecutors accordingly. However, after seven years since the previous audit in 2012, as of August 2019, the development of this Crown Information Management System was in data analysis stage, with an expected completion date by the end of June 2020.

During our follow-up, we noted that the Division has made little or no progress in implementing this recommendation. As a result, the Division still does not have a data-driven and systematic approach to

assigning Crown attorney resources consistently across the province that could help decision-makers reduce the backlog of cases.

The Division informed us that the COVID-19 backlog recovery will take precedence over a proposed framework, using the Crown Information Management System, for resource allocation. Therefore, the Division plans to establish a timeline for implementation for this recommendation after the COVID-19 backlog is addressed.

Recommendation 3

To help reduce the costs that result from delaying the withdrawal of charges when there is no reasonable prospect of conviction, and to promote timely disposition of criminal cases, we recommend that the Ministry of the Attorney General (Criminal Law Division) collect complete data that includes the breakdown of all reasons for withdrawal before trial, the average number of days from charge to withdrawal for each reason, and the average number of appearances required by the accused in court for each reason, covering all court locations.

Status: Will not be implemented. The position of the Office of the Auditor General is that the Division should collect complete data that includes the major reasons for withdrawn charges. This data will help the Division to promote timely disposition of criminal cases as well as to help reduce the costs that result from delaying the withdrawal of charges when there is no reasonable prospect of conviction.

Details

Our 2019 audit noted that a Crown attorney may withdraw the charges against an accused person before trial (1) when it becomes clear that there is no reasonable prospect of conviction; (2) as part of the resolution, such as plea bargaining; (3) when it is not in the public interest to prosecute; or (4) for other reasons not categorized by the Division.

Our audit found that the Court Services Division's Integrated Court Offences Network (ICON) system does not capture the withdrawn charges by the four major reasons mentioned above.

Although the Crown attorney's case management system (SCOPE) has the capability to capture these reasons, the system had not yet been able to fully cover all locations because, as of August 2019, SCOPE was rolled out across approximately 90% of the province. (SCOPE is a scheduling, case management, file management and disclosure tracking tool that can help with case management by, for example, categorizing active cases by age.) As a result, at the time of our 2019 audit, the Division was unable to fully analyze the growing trend we saw in the number of cases where charges were withdrawn by Crown attorney before trial, the number of days it took to withdraw and the number of appearances an accused had to make in court before charges were withdrawn, at an aggregate level by court location, region or province. This information can be used to assist the Division to distinguish which areas were within or outside of the control of Crown attorneys, and to help them make timely decisions to withdraw charges when there appears to be no reasonable prospect of convicting the accused, or if it is not in the public interest to prosecute or for other uncategorized reasons.

During our follow-up, the Division determined that it will not implement this recommendation citing that: "Tracking timelines and categories to these types of events does not benefit the administration of justice. They risk impacting the judgement of prosecutors, which is meant to be free from partisan considerations, and encroaching on their obligation to assess cases in an unbiased manner at all stages of the prosecution."

The Division further stated that individual prosecutors at each court location are instructed to review all existing and incoming cases to determine if a case is viable for prosecution and if an appropriate sanction could be offered. As mentioned in **Recommendation 1**, the COVID-19 Recovery Directive advises prosecutors to take into account the impact of lengthy delays caused by COVID-19 in determining whether there is a reasonable prospect of conviction.

Recommendation 4

To improve the timeliness and sufficiency of disclosure of evidence to assist Crown attorneys in making their

assessment whether to proceed with the prosecution of their cases, we recommend that the Ministry of the Attorney General (Criminal Law Division):

- *work with the Ministry of the Solicitor General to clearly define the respective roles and responsibilities of police services and Crown attorneys with regard to disclosure of evidence;*
- *revise the memorandum of understanding (MOU) between the Ministry of the Attorney General and police services to incorporate their agreed-upon roles and responsibilities and address any concerns that are preventing the remaining police services from signing the MOU; and*
- *put in place an effective process to regularly monitor and determine if the agreed-upon disclosure timelines have been met by both parties.*

Status: Little or no progress.

Details

During the 2019 audit, during our review of notes summarized by Crown attorneys on the case files we selected, we noted problems in obtaining timely and sufficient disclosure of evidence from police. We noted that disclosure of evidence was the main factor in delaying 39% of the 56 cases that we reviewed that were stayed under the Jordan decision.

At the time of our audit, the Division had long been aware of the difficulties in obtaining timely and sufficient evidence for disclosure purposes; however, the delays in delivering timely disclosure were continuing to contribute significantly to case backlogs. Our 2019 audit reported the following:

- In November 2016, the Division began to engage in a framework memorandum of understanding (MOU) with the Ontario Association of Chiefs of Police to standardize the disclosure process. However, we found that not all of the police services signed the MOU with the Division.
- The MOU specifies various timelines to be met in the police delivery of disclosure to the Crown attorney. However, the Division does not have a process, including regular reporting, in place to measure if the police services that have signed the MOU are meeting these agreed-upon timelines.
- In June 2019, the Division revised the MOU and signed it with the Ontario Association of Chiefs of Police. As of August 2019, only three municipal police services had signed the revised MOU. All other 59 police services had yet to sign.
- Three of the police services that we contacted agreed that a clear statement of their own and Crown attorneys' roles and responsibilities is essential for both parties to better allocate their limited resources and provide timely disclosure of evidence.

Our follow-up found that the Division has made little or no progress in implementing this recommendation. The Division indicated that COVID-19 related priorities impacted its progress on this recommendation. On February 25, 2021, the Division's Assistant Deputy Attorney General sent a letter to the Ministry of the Solicitor General's Assistant Deputy Minister of the Public Safety Division about the status of the Framework Memorandum of Understanding and relevant regulation discussions about disclosure of evidence. The Division further indicated that it has recommenced the discussions with the Ministry of the Solicitor General and the Ontario Association of Chiefs of Police, and that it will continue in an effort to determine a plan forward.

Approximately 70% of Inmates in Detention Are in Remand and Have Not Yet Been Convicted on Their Current Charges

Recommendation 5

To help reduce the number of accused persons in detention waiting for their cases to be disposed, and shorten the time inmates on remand must spend in detention, we recommend that the Ministry of the Attorney General (Criminal Law Division):

- *complete the evaluation of its Embedded Crown initiative, specifically its potential for reducing the*

number of accused being remanded in custody; and

Status: Fully implemented.

Details

An accused in remand (pretrial detention) has not been convicted on their current charges and under section 11(d) of the Charter is presumed innocent until proven guilty. If an accused person is denied (or does not seek) bail, they will remain in detention. Our 2019 audit on Adult Correctional Institutions found that the remand population in adult correctional institutions in Ontario amounted to 71% of all inmates in 2018/19 (based on average daily count), up from 60% in 2004/05. Ontario's remand population first overtook its sentenced population as the majority of inmates in its correctional institutions on an average day in 2000/01. As of 2018/19, the average daily count of remand inmates in provincial adult correctional institutions exceeded 5,000; this has decreased slightly to 4,918 in 2020/21. However, in 2020/21, the remand population comprised 76.8% of the total inmate population, up from 71% in 2018/19.

At the time of our 2019 audit, the Criminal Law Division had implemented an Embedded Crown initiative that gives Crown attorneys the opportunity to advise the police on bail-related matters, such as whether to release accused persons who promise to appear in court instead of detaining them for a bail hearing. The Crown attorneys work full-time ("embedded") inside the police station. This initiative aims to reduce the proportion of cases starting in bail court. In November 2018, the Division conducted a preliminary assessment of the pilot which found a 2%–10% drop in the percentage of cases where the accused was detained by the police and sent for a bail hearing. The Division planned to decide on the next steps for this pilot once it completed its final evaluation by the end of 2019.

In our follow up, we found that the Division completed the evaluation of the Embedded Crown initiative. The initiative was measured based on one key performance indicator: the percentage of cases that started the court process in bail court, with the target being a decrease from the baseline (i.e., the period prior to the introduction of the Embedded Crown).

This initiative involved the introduction of Embedded Crowns at two police stations in Ontario (Toronto 51 Division and Ottawa) in early 2017 with the objective of providing police with real-time advice and support on detention and release decisions. The results of the performance measurement found that:

- The initiative was successful in Ottawa where it was estimated that the number of cases starting in bail would have been approximately 16% higher had this initiative not been introduced.
- In Toronto 51 division, it was estimated that the number of cases starting in bail would have been 5% higher had this initiative not been introduced.
- The role of the Embedded Crown expanded beyond bail and detention issues. In particular, the Embedded Crown has frequently been assisting with charging decisions and investigative advice.
- Police feedback suggests that the initiative has been well received in both Toronto 51 Division and Ottawa police services.

- *if the initiative is found to be successful, create an execution plan to expedite its implementation across the province.*

  Status: Little or no progress.

Details

In terms of creating an execution plan to implement this Embedded Crown initiative across the province, our follow-up found that the Division has made little or no progress on this recommendation. The Division informed us that as a result of COVID-19 much progress has been made on the reduction of the number of accused persons in detention waiting for their cases to be disposed or on remand.

Upon review of the results of the initiative, and in light of the COVID-19 pandemic, the Division has determined that resources must be dedicated to priority areas of the prosecution service. The Division indicated to us that it will revisit the analysis of the

Embedded Crown initiative once the backlog of cases created by the COVID-19 pandemic has been addressed.

Time Needed for Bail Decision Has Increased over the Past Five Years

Recommendation 6

To help reduce the average number of days needed in arriving at a bail outcome, we recommend that the Ministry of the Attorney General (Court Services Division and Criminal Law Division) work with the judiciary to:

- *discuss the possibility of expanding court operating hours for bail hearings;*
- *expand the use of teleconferencing and videoconferencing for bail hearings with extended hours seven days a week from morning to late evening, similar to the best practices in place in British Columbia and Alberta; and*

Status: In the process of being implemented by September 30, 2022.

Details

Our 2019 audit found that cases where people charged with crimes went through bail courts in Ontario increased by 4% between 2014/15 and 2018/19, from 91,691 to 95,574. We also noted that the average number of days needed to reach a bail resolution increased for two types of inmates from 2014/15 to 2018/19, as follows:

- Where the accused persons were released after a bail hearing, the decision took on average 3.5 days in 2018/19 before the release order was made, compared to 3.1 days in 2014/15. We estimated that this increase is equivalent to more than 9,400 bed days per year.
- Where the accused persons were ordered to be detained after a bail hearing, the decision took on average 14.1 days in 2018/19 before the detention order was made, compared to 11 days in 2014/15—an increase equivalent to nearly 4,000 bed days per year, based on our estimate.

In Ontario, bail hearings are scheduled from 9:00 a.m. to 5:00 p.m., Monday to Friday, with limited use of teleconferences and videoconferences. Although there are ten weekend and statutory holiday (WASH) courts available for bail hearings in the province, records kept by Crown attorneys in one region showed that the WASH court is often closed by noon.

Our 2019 audit also found that in contrast, British Columbia and Alberta have set up a centralized location where a justice of the peace is available for bail hearings by teleconference and videoconference, with extended hours seven days a week from 8:00 a.m. to 11:00 p.m. or midnight. The extended hours allow accused who were arrested later in the day to still receive a bail hearing and possibly be released the same day.

Our audit further found that the Ministry had implemented a number of initiatives to reduce bail court delays. However, these were limited to certain locations, and despite their success they were unable to reverse the province-wide increase in the number of days needed to reach a bail disposition.

During our follow-up, we found that the Division has taken the following actions to help reduce the average number of days needed in arriving at a bail outcome. For example, we noted that:

- As a result of COVID-19, the Ministry, along with the judiciary, have implemented many new processes and virtual court processes. In several jurisdictions, such as Toronto, York and Peel, presiding judicial officials have, as a matter of routine, decided to keep bail court open later than usual in order to properly address all the scheduled matters on the daily dockets.
- The Division has implemented many strategies such as soft copy consent orders for release, special bail hearing courts that cannot be accommodated in regularly scheduled bail courts, special bail protocols to be considered during the pandemic and hybrid courts (some parties in the courtroom and others are virtual), as well as expanding the use of teleconferencing and videoconferencing for bail hearings.

The Division plans to have further discussions with the Judiciary and Court Services Division, within the Ministry, regarding the continued use of teleconferencing and videoconferencing for bail hearings. In addition, discussions will be held regarding the feasibility of expanding court operating hours by September 30, 2022.

- *complete the evaluation of initiatives aiming to increase speed and certainty in the bail process, such as the Ontario Court of Justice bail pilot project, bail vettors and the Bail Verification and Supervision Program, and expand them if they are shown to have positive outcomes.*

  Status: Little or no progress.

Details

Our follow-up found that the little progress has been made to complete the evaluation of the Ontario Court of Justice bail pilot project. The Division indicated that it will not perform a full evaluation of the bail vettors initiative due to resource limitation, and that the Ministry decided to stop implementing the Bail Verification and Supervision Program in 2021/22. The status update of the three initiatives are described below:

- For the Ontario Court of Justice bail pilot project, the Chief Justices of the Ontario and Superior Court of Justice informed us that the bail project evaluation was interrupted by the pandemic and has not been completed yet. At the same time, the pandemic has resulted in further challenges and significant changes to how bail is conducted, including a whole-scale shift to remote proceedings. In some locations, it has also resulted in an increased reliance (on a more regular basis) on judges to assist, especially in "special bails," although their ability to do so is sometimes hampered by a lack of video capacity to bring accused persons before the court. In addition, the Ontario Court of Justice developed and implemented a bail protocol to streamline proceedings (effective May 11, 2020; revised April 22, 2021) to ensure that bail proceedings are dealt with justly and efficiently.
- For the bail vettors initiative, the performance monitoring for the initiative was completed in March 2021. The bail vettor initiative intends to contribute to the goal of reducing the remand population in Ontario by decreasing case volume and time in remand by staffing locations with a bail vettor to provide timely and well-informed bail decisions. In 2017, 10 dedicated bail vettors were implemented at courts across the province as a part of the bail vettor initiative. In addition, an 11th dedicated bail vettor was introduced in Thunder Bay in July 2020.

  The performance monitoring report noted that at the initial bail vettor locations (such as Old City Hall, College Park and Barrie), the majority of the key performance indicators (KPIs) did not achieve the desired results. However, these trends were often also seen at comparison sites (the sites without a bail vettor), indicating that there are likely other factors contributing to these trends. Results at new bail vettor sites (such as Brantford and Windsor) were mixed. For some KPIs, the trends showed that the desired results were being achieved, while for other KPIs, the desired results were not achieved. Due to the timing of implementation and the start of COVID, the effects of the bail vettor and the effects of COVID cannot be distinguished in this analysis. The report concluded that to fully understand the effectiveness of the dedicated bail vettors separate from other factors, a full evaluation would be required.

  As of August 2021, staff from the Division informed us that they have no intention of requesting a full evaluation of the Bail Vettor initiative from the Ministry's Analytics Branch for a number of reasons. Any analysis of the impact this initiative is having will be impacted by the pandemic and may have skewed results. In addition, a more fulsome evaluation will require resources from both within the Division and from the Ministry's Analytics Branch. Given the enormous backlog caused by the pandemic, all limited resources

are being dedicated to addressing the backlog as quickly as possible.

- For the Bail Verification and Supervision Program, there is a transfer payment program administered by the Policy Division within the Ministry. The Ministry is currently focused on supporting existing transfer payment recipients in delivering the program during the COVID-19 pandemic. Treasury Board Secretariat's Ontario Internal Audit Division plans to conduct a review of the program in 2021/22. This review will help inform the Policy Division whether the program could benefit from synergies with other programs related to releasing low-risked accused or convicted persons into the community, and therefore achieve better outcomes for the client, as well as reduce the remand population. Therefore, the Ministry decided to stop implementing this program in 2021/22.

Administration of Justice Cases Increasingly Consume Criminal Justice System Resources

Recommendation 7

To help make better use of Crown attorney resources to prosecute more serious criminal cases, we recommend that the Ministry of the Attorney General (Criminal Law Division) set a targeted timeline to expand the Administration of Justice initiative across the province, if this initiative is shown to be successful after evaluation.

Status: In the process of being implemented by March 31, 2022.

Details

Administration of justice offences include Criminal Code violations such as failure to comply with bail conditions, failure to appear in court and breach of probation. In our 2019 audit, we found that administration of justice offences were sometimes seen as the "revolving door" of the justice system, as most were committed when a person disobeys a pretrial condition or order imposed by a judge relating to a previous offence.

Our 2019 audit found that 31% of the criminal caseload in Ontario consists of administration of justice offences, which had increased by 25% (57,834 versus 72,176) from 2014/15 to 2018/19. Of those, cases pending disposition had increased by 52% (15,772 versus 23,953), as the number of these cases disposed had not kept up with the increase in cases received.

Also, our audit found that it took an average of 90 days for the Crown attorney to withdraw one of these cases, with the accused appearing in court an average of 6.1 times.

At the time of our 2019 audit, the Division had explored ways to limit the number of these charges that are laid. They implemented pilots in seven court locations—London, Brantford, Peterborough, Kitchener, Ottawa, Brockville and Sudbury. The objective of these pilots was that both the police and the prosecution agree to make efforts to limit the conditions of release imposed at bail hearings; and the police agree to use greater discretion when laying two specific administration of justice charges (called section 145 charges).

In our follow-up, we found that the Division evaluated the pilot's success in five of the seven locations mentioned above. The evaluation noted that there were declining trends in the administration of justice cases received, and that the trends have continued in London, and to a certain extent in the Brockville location. The evaluation shows mixed results in Brantford and Peterborough locations and fairly stable results in Ottawa location.

The Division indicated that it had not analyzed the results for the two remaining locations in Kitchener and Sudbury because more time is needed to conduct meaningful analysis. The Division further stated that it will continue to analyze the results of the initiative in Kitchener and Sudbury by March 31, 2022, and consider the final analysis in future decision-making.

Lack of Specific Mandate, Standard Procedures and Goals Limit Potential Benefits of Mental Health Courts

Recommendation 8

To assess whether the mandates and objectives of mental health courts are being met, we recommend that the Ministry of the Attorney General (Criminal Law Division) work with the Ontario Court of Justice to:

- *establish specific and measurable goals and outcomes for mental health courts; and*

Status: In the process of being implemented by September 30, 2022.

Details

In our 2019 audit of Adult Correctional Institutions, we noted that, in 2018/19, 33% of about 51,000 inmates admitted to provincial adult correctional institutions had a mental health alert on their file indicating possible mental health concerns, compared to 7% of inmates admitted in 1998/99.

Our 2019 audit on the Criminal Court System found that the mandate and objectives set for mental health courts are broad and general. Without specific measurable outcomes set, neither the Ministry nor the Ontario Court is able to measure the courts' success in achieving the mandate and objectives.

In our follow-up, we noted that, since our 2019 audit, the Division engaged with key stakeholders in Therapeutic Courts (including Drug Treatment and Mental Health Courts) across Canada, in early 2021, to inform the development of a report to be presented to the Justice Efficiency Subcommittee on Therapeutic Courts for consideration. The members of the sub-committee included representatives from the Division, the judiciary and the police services.

In May 2021, this report was presented to the subcommittee. At the time of the audit, August 9, 2021, the approval from the subcommittee was pending. However, the Division informed us that the report recommended concrete and specific ways to evaluate mental health courts as well as outlined goals for these courts, but without specifying methods to achieve them. We were also informed that the working group that developed the report gathered all the available evaluations of mental health and drug treatment courts from across Canada, including best practices of these courts across Canada. As this was a national jurisdictional scan, the report did not make recommendations specific to Ontario. The report is intended to be a resource for any jurisdiction, with specific best-practice recommendations to be determined by each jurisdiction, that will take into account that jurisdiction's own unique needs and available resources.

- *collect relevant data on the courts' success in achieving these goals and outcomes, (for example the number of people who have gone through the mental health court process, the number of these cases disposed and pending, time taken to resolve cases, and details of case disposition and relevant outcomes).*

  Status: Will not be implemented. The position of the Office of the Auditor General is that the Ministry should work with the Ontario Court of Justice to collect relevant data; for example, the number of people who have gone through the mental health court process, the number of these cases disposed and pending, time taken to resolve cases, and details of case disposition and relevant outcomes. This data will enable the Ministry and the courts to evaluate the success of mental health courts in achieving their specific goals and outcomes.

Our 2019 audit found that the Ministry's ICON and SCOPE systems do not distinguish between accused persons who go through a mental health court and those who go through a regular court. As a result, neither the Ministry nor the Ontario Court is able to identify and quantify the number of individuals and cases received in mental health courts and their case dispositions, including the number of cases pending disposition, time taken to resolve cases and details of case disposition. This key data is critical to help measure the effectiveness of mental health courts in achieving their intended objectives.

During our follow-up, the Division informed us that this recommendation requires a change to the ICON system which will take time, financial resources and consultation with the Court Services Division and Information Technology group within the Ministry, as well as the judiciary. Changes to ICON will also need to consider the impacts on the Criminal Justice Digital Design initiative, highlighted in our 2019 audit on Court Operations. The Division further noted that it is not the business owner of the ICON system, and therefore, these changes must be requested by the judiciary. However, given the other priorities within the Ministry, the Criminal Law Division will not initiate the changes to ICON, and therefore, will not implement this recommendation.

Recommendation 9

To help guide the operations of the province's mental health courts, we recommend that the Ministry of the Attorney General (Criminal Law Division) work with the Ontario Court of Justice to:

- *review best practices from other jurisdictions (such as Nova Scotia);*
- *assess their applicability to Ontario; and*
- *put in place best-practice guidance for Ontario.*

Status: Little or no progress.

Details

In our 2019 audit, we found that while the Division's Crown Prosecution Manual contains three separate directives about cases involving mentally ill accused, there are no specific and consistent policies and procedures regarding the operations of mental health courts, such as clarifying who should be accepted into a mental health court and in what circumstances; in what circumstance a psychiatric assessment is required; or when a formal community-based program or other plan is needed.

Our 2019 review of the sample summarized notes of 26 case files we selected highlighted inconsistencies in the treatment of accused persons who had gone through a mental health court. In these cases, we found inconsistencies in the operation of the mental health courts and lack of uniform access to the services they provide. With no standard for a formal diagnosis of the accused person's mental health by a qualified professional, a miscarriage of justice may result. Lack of formal treatment plans may mean that accused persons' mental health issues are not addressed, potentially leading to repeated contact with the criminal justice system.

During our follow-up, we found that the Division has made little or no progress on implementing this recommendation. As mentioned in **Recommendation 8**, the Division presented a report to the Justice Efficiency Subcommittee on Therapeutic Courts for consideration.

The Division indicated that any other changes to be implemented to mental health courts, including overarching best practices, would require direction and leadership from the Ontario Court of Justice and participation from the Ministry's divisions, the defence bar and service providers. The Division provided a target date of September 30, 2022 for further assessment of the report and subsequent discussions with other stakeholders.

Recommendation 10

To help increase public awareness and provide better information about the operations and purpose of mental health courts, we recommend that the Ministry of the Attorney General work with the Ontario Court of Justice to make relevant information, such as the number of mental health courts, their locations and available sitting time, and detailed description of the courts and their procedures, widely available to Ontarians.

Status: Little or no progress.

Details

Our 2019 audit noted that the Ministry's and Ontario Court's public websites provide general information on specialized criminal courts, but some basic information specific to mental health courts was difficult to locate. Information on these courts could increase public awareness and understanding of these courts, their uses and their procedures.

In our follow-up, we found that the Division has made little or no progress on implementing this recommendation. The Division informed us that it has plans to engage with Court Services Division and the Ontario Court of Justice to have the appropriate information posted in the appropriate places for the public. As mentioned in **Recommendation 9**, the Division indicated that any changes to be implemented to mental health courts would require direction and leadership from the Ontario Court of Justice and participation from the Ministry's divisions, the defence bar and service providers. The Division provided a target date of March 31, 2022 to move forward with this recommendation.