

“Expanding the mix: Introducing staff services – a work in progress”

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I. Introduction

Legal Aid Ontario (LAO) serves over 1 million low income Ontarians every year, primarily in the areas of criminal, family and refugee law. Traditionally, LAO has operated under a judicare model, supplemented with staff and per diem duty counsel, who most often assist clients with their first few court appearances. In recent years however, LAO has expanded the ways in which it delivers services, in order to meet its statutory mandate of “encouraging and facilitating flexibility and innovation in the provision of legal aid services, while recognizing the private bar as the foundation for the provision of legal aid services in the areas of criminal law and family law and clinics as the foundation for the provision of legal aid services in the area of clinic law” , as well as to fill service gaps, address specific needs in various regions and to improve the quality of services to LAO’s clients.

In 2004, LAO opened three Criminal Law Offices in regions that LAO identified as experiencing service gaps and that would benefit from the diversified services that a staff office could provide. LAO recently began operating Duty Counsel Offices (“DCOs”) in two locations, focusing on criminal law services. This initiative was modelled on LAO’s family law expanded duty counsel services, which have been quite successful in filling service gaps and creating links between clients and various community services and organizations.

This paper sets out the process that LAO went through in establishing its

mixed delivery models in the area of criminal law, including needs identification, the consultation process, the service objectives and priorities of the CLOs and DCOs, and the evaluation process and results to date.

II. Context – why the need to consider staff model in criminal law service delivery?

The idea of delivering criminal law services through staff is not a new one. In fact, the debate about service delivery models has been taking place in Ontario for at least 30 years, and has been an active debate internationally. In the 1970s and 1980s, there was frequent debate about whether staff models or judicare models were cheaper and of higher quality. While the issues continue to be debated, it is safe to say that there is a general consensus that a mixed delivery system offers the advantages of both methods. Judicare reduces the need for infrastructure, and provides a large pool of service providers. Staff services are a way of ensuring that underserved regions, and clients with special needs receive the legal services they need, and a staff model provides opportunities for innovation and connection with community services that are not as workable in an exclusively judicare model.

In Ontario, although staff duty counsel have been in existence in some form for 25 years, there had been no experiment with alternative criminal certificate services in the history of the Ontario Legal Aid Plan (“OLAP”), LAO’s

predecessor, and LAO. In the 1990s, the debate shifted in Ontario, as funding was more limited, and demand for services increased. The Ontario Legal Aid Plan was an open ended, demand driven program administered by the Law Society of Upper Canada (“LSUC”). Under the *Legal Aid Act*, the plan was statutorily required to provide certificates to all applicants who met the qualifying criteria. Service therefore was determined by the number of people requiring assistance. By early 1994, costs were escalating dramatically. In response to the financial pressures, the government and the LSUC negotiated a fixed budget and a commitment from the government to stable multi-year funding.

Between 1993 and 1997 the number of certificates issued dropped by 65%, from more than 220,000 to 80,000, as a result of the new budget and the need to fulfil commitments to outstanding certificates. In 1998, Legal Aid Ontario was created under the *Legal Aid Services Act*. LAO is structured as a non-profit corporation, independent from the Law Society, governed by a Board of Directors and funded by government. The new legal agency increased the number of certificate significantly in its first year but later, through a rigorous certificate management program, stabilized issuance at an affordable 105,000 by 2003. This was accomplished in a fixed budget environment and ever increasing demand. In addition, there had been an increasing erosion of certificate panels, difficulty providing service in certain areas of the province, a large increase in duty counsel assists and a large expansion of the clinic system. It became increasingly pressing to find complementary means of delivering legal services.

In 1997, a study entitled “Report of the Ontario Legal Aid Review, 1997”, prepared under the leadership of Professor John McCamus, recognized that a fundamental restructuring was needed in order to meet service demands and create a sustainable system. While OLAP had considered alternative service delivery models prior to the study, the report criticized OLAP

for not actively experimenting with alternative service delivery methods. The study came to the conclusion that new delivery models were necessary in the climate of increasing demand, increasingly complex client needs and a new emphasis on planning, cost control, accountability, quality control and dealing with the difficulty in competing for lawyers given the low tariff. The question therefore was no longer whether judicare or staff services were better, but what was best in each circumstance in consideration of client need, accessibility, quality, client choice of counsel and sustainability. It became necessary to explore introducing more of a mix of service delivery options.

The first major projects in this regard were the opening of the Refugee Law Office and three Family Law Offices in the late 1990’s. They were evaluated and were adopted as a permanent part of LAO’s service delivery inventory in 2003. In criminal law, two major initiatives, the Criminal Law Offices (“CLOs”) and criminal Duty Counsel Offices (“DCOs”) were begun in 2004. The CLOs opened after extensive consultation and planning. The DCOs also involved careful planning, but were in large part the “next step” after the development of similar initiatives in family law.

III. Criminal Law Offices

In the fall of 2002, LAO opened its first staff CLO in Ottawa – Canada’s capital, with a population of approximately one million people, and with many neighbouring smaller communities. It was staffed by two lawyers for approximately one year. Unfortunately, the private bar was quite unenthusiastic about having a CLO in Ottawa, and as a result of personal and professional pressures both of those lawyers resigned and returned to private practice. LAO had difficulty finding replacements. Meanwhile, in the spring of 2004, LAO opened two more CLOs. One was in Barrie, a mid sized city with a population of 125,000 and the other in Brampton, a growing city with a population of 325,000, and the largest

court jurisdiction in Ontario. In July 2004, the CLO was re-opened in Ottawa. The opening of the staff offices has been controversial among the private bar. Many private bar criminal lawyers still do not welcome the addition of the offices, fearing that they will take away business from them, and will create a two tiered legal system based on the public defender model.

Clients in need of a criminal lawyer are free to choose whether to engage the services of a staff lawyer or private lawyer. Clients of both staff and private lawyers first obtain a legal aid certificate, and then select a lawyer of his or her choice. Choice of counsel is an important principle in Ontario, and individuals with certificates are not directed to a CLO or to a private lawyer, to ensure that clients make independent decisions.

In addition to taking on clients with legal aid certificates, the CLOs also accept clients who are financially eligible for a certificate, but otherwise do not qualify for one. These clients most often do not receive certificates because their criminal matter does not involve a potential loss of liberty – a “cut-off” standard applied by LAO. These clients however may face serious consequences other than incarceration, such as the loss of a driver’s licence or housing, and CLOs have the discretion to take on these matters. Many of these clients would not, if not for the CLO, be represented by counsel, and would be more likely to simply plead guilty with the assistance of duty counsel rather than face the prospect of going to trial without a lawyer.

The start up environment

Although alternative criminal service delivery models had been contemplated for several years, there was a culmination of events in Ontario that surrounded the start of the criminal staff offices. There was a significant campaign to increase the legal aid tariff in 2001 and 2002 largely based on a strong business case developed by LAO. The lack of government response

to the tariff request resulted in many lawyers opting to stop doing legal aid work. Many judicial decisions that were rendered during the various labour disruptions in 2002 further threatened cost stability and predictability. Judges were ordering legal aid and the government to pay criminal defence lawyers at rates significantly higher than the tariff allowed, or ordering that they should be paid for hours beyond the maximum allowed under a legal aid certificate. Obviously, this created a potential for even less cost certainty, and if these applications were to become more commonplace, the sustainability of the entire certificate system would be called into question.

The private bar, particularly in eastern Ontario, adopted a strategy of launching these types of applications in order to get paid over and above the tariff rates.

The very public and acrimonious tariff debate, and the ensuing work stoppages further highlighted the need to deliver service in a variety of ways, so that clients would continue to receive legal aid services through service interruptions. LAO faced a potential crisis in Ottawa when in the fall of 2002, some private bar lawyers stated that if they didn’t get \$125 to \$140 per hour, they would never return to legal aid work.

In August 2002, the Ontario government responded to tariff concerns and the consequent job action by certificate lawyers by raising the tariff by 5% and introducing amendments to the *Legal Aid Services Act*, which would have given the government the power to unilaterally decide by which methods LAO would deliver legal aid services. As a result of negotiations however, that amendment was not enacted, the tariff was increased by a further 5% in April 2003. The hourly tariff increased from a range of \$67 to \$84 to a new range of \$74 to \$92. Most lawyers went back to work, and LAO continued planning towards introducing more mixed delivery initiatives in the legal aid system, including the introduction of the CLOs.

The Consultation Process and Choosing the Three CLO Locations

In October 2003 the LAO Board considered and approved the introduction of three criminal staff offices to expand the service mix. Prior to choosing locations for the CLOs, LAO embarked on an extensive consultation process. In fact, it was the most extensive consultation on the subject of criminal legal aid services in the history of OLAP/LAO. The process spanned 7 months, with meetings in at least 12 locations, with more than 100 people representing various groups.

Consultations included meeting with:

- local bar representatives in each identified region
- LAO area directors
- representatives of provincial legal organizations
- individual judges, lawyers, Crowns, and LAO staff in each identified region
- community agencies in mental health, Aboriginal, women's, bail supervision and youth services.

In addition, LAO also invited written submissions from various members of the community, bar and judiciary.

Results of the Consultations

Most community organizations who served populations also served by legal aid, including organizations dealing with domestic violence, immigration/refugee issues and prison issues were very supportive of the CLOs, reporting that clients with special needs, such as those with mental health issues, were underserved.

Many private bar lawyers however opposed the criminal staff offices. They consistently argued that there was no shortage of criminal counsel willing to take certificates, that the offices would be in direct competition with private bar lawyers, which would be inappropriate, and that the CLOs would inevitably lead to a full scale public defender system and that the only real answer to service

was an increased tariff rate. Private bar lawyers were more accepting of CLOs accepting clients who were financially eligible but did not qualify for a certificate because their criminal charge would not potentially result in a custodial sentence, which is a pre-condition to receiving a legal aid certificate.

The general opposition of the bar was expected, and understandable. It was consistent with the bar's initial response to the Family Law Offices, supervisory duty counsel and staff duty counsel in general. From LAO's perspective however, the rationale for the CLOs has been broader than current certificate acknowledgement rates. The focus has been not only on immediate service gaps, but on long-term demands and on innovation. In addition, while LAO values the contributions of certificate lawyers, LAO's mandate is not to protect the financial interests of the private bar, but rather to serve our clients. Lawyers can always walk away from legal aid. LAO cannot walk away from its clients.

In addition to consultations, LAO developed a statistical "matrix", in order to identify the highest need areas, referencing several key indicators. The matrix ranked each legal aid area office across Ontario according to 15 key statistical indicators in three categories, including client demands/needs, the supply of lawyers providing legal aid services, and low income cut-off rates (a measure of poverty published by the federal government).

The matrix examined pre-work stoppage multi-year trends. Also, the matrix included indicators that measured both the percentage and absolute number of unmet client needs, lawyer supply and poverty in an area. This approach acknowledged both the experience of smaller communities where relative percentage of needs may be high but the absolute number of clients is small, while ensuring that all clients needs are counted equally.

The results of the matrix indicated that the highest needs areas were Central East (Brampton), East (Ottawa), Central West (Barrie). The offices were located in larger cities within the highest need regions in order to be accessible to the greatest number of clients within the region. In addition, unlike the situation in urban centres, a CLO in a small town which may only have one or two criminal lawyers, would likely hurt the private bar in that area. LAO chose sites that would result in the best and most accessible client service in a way that complemented, rather than replaced, the private bar.

After completing the matrix analysis, LAO then analyzed each of the highest scoring priority regions against local/regional justice system criteria. The purpose of the qualitative analysis was to provide a deeper understanding of the legal needs and justice system issues in each region to identify specific legal needs, service gaps and current or emerging client or justice system issues. For example, the qualitative analysis identified the nature and extent of special needs populations, whether or not new detention or forensic facilities are being built, or whether LAO had a significant institutional interest in establishing local capacity to advocate for improvements to local criminal justice system practices.

Service Objectives and Priorities

In setting the service objectives and priorities for the CLOs, the aim was to provide flexibility so that each CLO, as it evolved, could adapt to the needs in the community, yet ensure that CLOs focus on meeting the needs of underserved clients. The service objective and priorities set out for the CLOs are as follows:

- a) Provide representation of criminal accused who have a legal aid certificate in areas of client need including, but not limited to:
 - i) Persons with mental health issues;

- ii) Aboriginal persons;
- iii) Young persons in the criminal justice system;
- iv) Persons incarcerated in local and regional correctional institutions;
- v) Persons with intersecting legal needs; and,
- vi) Services to persons who otherwise have difficulty accessing counsel.

- b) Provide representation for accused who do not meet LAO's certificate coverage "loss of liberty" threshold but who may face significant consequences such as, among other things, loss of livelihood, loss of government benefits, loss of access to education, etc., or whose matter may raise a viable defence or triable issue, or issues that are in the public interest to litigate. Applicants for these services will be subject to LAO's regular certificate financial eligibility requirements and procedures.
- c) To further provide persons incarcerated in local and regional institutions with advocacy in regards to their treatment and basic human rights.
- d) Develop innovative relationships with the private bar, community agencies and the community in order to improve client services by assessing community programs which will support bail, sentencing and disposition planning.
- e) Provide public legal education, community development and law reform to the community in a number of ways:
 - Access through community groups and community partners forums to present public legal education
 - Liaison with the different community groups and community partners to

improve access to legal aid services to people, particularly those with specialised needs

- Develop community partnerships with organisations such as Elizabeth Fry, Salvation Army, Native Centres, Canadian Mental Health Association, Children's Aid Societies and Organizations for Youth through one on one meetings and the establishment of Advisory Committees
 - In partnership with our community partners to promote and develop projects that assist our client base in bail and sentencing planning
 - Within the legal community to promote continuing legal education for the staff of the CLO, Duty Counsel and the private bar
 - Participate in local advisory committees to advocate on behalf of our client base to promote efficient court management, alternatives in sentencing and the elimination of inequitable practices.
- f) Establish links with local community legal clinics in order to improve coordination and services to clients with intersecting criminal/clinic law needs
- g) Promote and undertake litigation to advance the administration of justice.

CLO Advisory Committees

Important components of the CLOs are the provincial advisory committee and local advisory committees. The committees are comprised of members of the criminal law bar, community service organizations and directors of the CLOs, and exist for the purpose of advising LAO on the development of the

CLOs and reviewing the evaluation as it unfolds. The advisory committees were instrumental in developing the service objectives and priorities, and continue to act as a link between LAO and the private bar.

Each CLO also has a local advisory committee modelled on the provincial committee to work with the office to fine tune service priorities and link the office to its community.

Results so far

At the beginning of March 2005, an external evaluator hired by LAO to evaluate the CLOs over a three year period, completed its first interim report. That report will be available in May 2005 on the LAO website (www.legalaid.on.ca). This initial report was based on collected data, and on interviews with CLO and LAO employees, criminal justice system officials such as Crowns, judges, duty counsel and court officials, and social service organizations, or individuals working with offenders and with the justice and related social systems during the first nine months of the start up. Since the CLOs are still in an early stage, the hard service data available is limited at this stage. However, the interim report did provide some useful information on the types of cases that are being handled by the CLOs in each of the three locations. Among the findings during the first nine months of operation were the following:

- In Barrie, approximately 92% of the cases opened were certificate cases, whereas in Ottawa and Brampton, approximately 20% of cases are certificate cases. Brampton started with a relatively high proportion of cases being on certificate (53%), but the percentage has fallen.
- Approximately 66% of clients at the CLOs are male. The proportions of female clients are higher than expected from general surveys of criminal accused in the courts. This could reflect the developing relationships between the CLOs and

social service organizations such as the Elizabeth Fry Society (an organization that works with women in conflict with the law by providing housing, support and counselling) and other women's and immigrant women' organizations.

- Types of cases: for all three sites, the cases were spread over a large number of case offence categories. In all three sites, the most frequent offences were common assault, sexual offences (other than sexual assault) and property offences. Barrie was the only site that has handled the most serious cases such as homicide and sexual assault. In Ottawa, 17% of the cases were in the category "impaired and dangerous driving". Barrie had only 8% of its cases in that category.
- Consistent with consultations held prior to the opening of the CLOs, members of the private bar remain critical of the CLOs, and believe that they are not needed, and are simply the "thin edge of the wedge", or a stepping stone to a full scale public defender system. Conversely, criminal justice system officials and members of community organizations see the CLOs as necessary and helpful.
- In Barrie, a number of cases are being referred from the private bar. In all 3 sites, the numbers of cases have started to increase over the last few months.

In all 3 sites, clients choose their counsel. There are no referrals from LAO offices. The evaluators will deliver the first year report in the summer of 2005.

IV. Criminal Duty Counsel Offices

LAO's next venture in expanding the range of criminal law services was the development of Duty Counsel Offices (DCOs) in two locations in Ontario. These two models are still in their first six months. In 1999, LAO implemented a similar initiative in the area of family law. The initiative was called "expanded duty counsel". That terminology, and LAO's new terminology – Duty Counsel Office

– describe essentially the same model. The family law pilots, in three cities, were designed to test the effectiveness and efficiency of an alternative to the traditional facilitation approach to duty counsel service. Essentially, per diem and staff duty counsel were coordinated and supervised by a staff duty counsel, and support staff were added to help coordinate files and provide general office administration support. While the traditional role of duty counsel was to help clients to move to the next stage in their legal proceedings, a DCO facilitates advancing cases toward resolution. In the expanded model, duty counsel attempt to bring closure to their matter or major elements of their matter. The expanded duty counsel model has three important features that distinguish it from the traditional model: 1) the capacity to create and carry clients' files; 2) the ability to provide continuity of representation; and 3) the capacity to draft court documents. DCOs still help clients with routine and brief matters. In addition however, they assist clients in bringing closure to their matter or major elements of their matter. Ideally, the same lawyer maintains carriage over the file for subsequent appearances.

In 2002, LAO introduced the Supervisory Duty Counsel ("SDC") program which provides a full time staff duty counsel to coordinate the work of local per diem duty counsel. In Ontario, duty counsel services are largely provided by the private bar – about a 3 to 1 ratio. One of the key objectives of the SDC model was to encourage dispositive services which now are about 15%, increasing about 1% per year. The SDC initiative has been a huge success with the bar, bench and clients. The DCO model builds on that service.

At the 2003 ILAG conference, LAO presented a detailed description of the family law DCO, and its evaluation. In short, in October of 2002, a review was completed of the three pilot family locations by an external evaluator. The review was comprised of document review, an analysis of comprehensive data from the computerized management information system, a

series of key informant interviews and a client feedback survey.

The evaluation of the family DCOs found the following:

- There was a strong need for expanded duty counsel services. The most common clients were single mothers living in rental housing.
- There was a high level of support for the DCO model among clients and stakeholders. There is a strong consensus that the expanded duty counsel model has advantages over the traditional per diem model. File continuity is the most important advantage. This enables a more standardized approach that saves time, results in greater consistency of advice and fewer court delays.
- The presence of a coordinator has resulted in better organization, scheduling, accountability and consistency of advice.
- The DCO approach has led to a high degree of settlement and fewer adjournments and earlier settlements.
- The cost of providing services through the DCO model are comparable to those of the traditional per diem model.
- Continuity of representation achieved by supervisory duty counsel, staff and per diem duty counsel who are organized and managed results in improved service quality.
- Continuity requires co-ordination of staff and per diem counsel.
- File management is essential for continuity of client representation.
- Counsel must use community resources as appropriate.
- Support staff can develop the necessary systems to improve the scheduling and co-ordination of per diem and staff duty counsel and maintain the filing system.

Criminal DCOs in Brampton and Newmarket

Building on the success of the family DCOs and the SDC program, Legal Aid

Ontario decided to implement criminal DCOs in two locations. Both of these locations had been served by the traditional duty counsel model, but had also recently introduced the SDC model.

The service objectives and priorities of the DCOs include the following:

- Provide legal advice and representation to criminal accused prior to trial in adjournments, bail, diversion, pre-trial meetings, extrajudicial measures and guilty pleas
- Provide specialized representation to clients with mental health issues
- Provide specialized representation to young persons in the criminal justice system
- Build the capacity to improve continuity of service to clients through a system of file management and administrative support
- Promote greater continuity of service to clients by creating an environment in which counsel can meet with clients in privacy, review and create documents, provide legal advice and representation to clients both in court and at pre-trial discussions with the Crown
- Establish a youth court model in which duty counsel work in partnership with a community worker or agency to expand the opportunities for pre-trial release and community based dispositions at various stages
- Develop innovative partnerships with the private bar and community agencies in order to improve bail, sentencing and disposition planning for all criminal accused
- Explore ways of improving service to incarcerated clients, including the potential use of video conferencing
- Establish links with local community agencies and other justice system stakeholders to improve coordination and services to clients.

Some of the features of the file management system, designed to promote continuity and consistency, are as follows:

- Files should be opened for all bail, sentencing and plea matters
- Information in the file should be kept simple
- The file should include:
 - A photocopy of the synopsis and criminal record
 - The Crown's position
 - The name of the duty counsel dealing with the file
 - Any action taken
 - Any follow-up action taken
 - Return date and court location.

The administrative support persons relieve duty counsel of tasks that take up time that would otherwise be spent on client service. Support staff maintain a complete file management system including opening and updating files. Paralegal support staff conduct initial interviews with accused, contact sureties and facilitate their appearance in court, and assist bail duty counsel in employment verification.

Clients with specialized needs

The DCOs are also better equipped to provide quality service to clients with specialized needs. DCOs, unlike traditional duty counsel services, can hire community workers to assist these clients. A paralegal or community worker can establish links with other services in the community such as mental health workers, John Howard Society (an organization that works with men in conflict with the law by providing housing, support and counselling) and youth workers to assist duty counsel in bail and disposition planning. DCOs develop a network of external resources regarding housing, health care and employment.

The DCOs include a youth court worker. LAO has had measurable success with its youth diversion program called the Youth Court Action Planning Project (YCAPP). The program was started in 2002 with funding from the federal government. Although the federal funding for the project expired at the end of June 2004, LAO committed to

continue to fund the youth court worker positions until March 31, 2005, and the provincial government has since agreed to continue funding it until June 2005. An independent evaluation of YCAPP was commissioned by the federal Department of Justice. The evaluation found that the project was highly effective in increasing the opportunities for diversion and reducing the use of pre-trial detention and custodial sentences for clients involved in the program at all four pilot sites. In the two years of the program, the program received over 900 referrals and completed approximately 700 plans. Of those 700 completed plans, over 90% were accepted by the court. Approximately 65% of the plans were pre-trial release plans, 25% were extra-judicial measure (or diversion) plans and 10% were sentencing plans which presented the court with a community based alternative to incarceration.

The employment of youth court workers in the DCOs promises to continue the success of the YCAPP program.

The DCOs will be evaluated by the same evaluation team reviewing the CLOs. The DCOs and the CLOs are using the same computer software. The evaluation will include the following types of assessment:

- Do the DCOs increase or decrease client access to duty counsel services?
- Profiles of clients most commonly served by DCOs
- Do clients have consistency in duty counsel representation?
- Does a case file information and management system allow duty counsel to more quickly access client information and reduce unproductive appearances?
- Do the DCOs result in more cases being disposed in fewer appearances and less time?
- What cost efficiencies are achieved through DCOs?

V. Conclusion - Work in Progress

Judicare has and will continue to be the foundation of client service for Legal Aid Ontario. The flexibility and efficiency of providing legal aid services through the private bar is indispensable. However, like many legal aid systems, LAO has found that a mixed service delivery system optimally delivers quality, efficient, reliable service to clients. A mixed delivery system brings the advantages of both the judicare and staff models, and addresses the weaknesses of each. LAO's staff offices have been accompanied by growing pains but early results indicate that they go a long way to providing a broader scope of quality service to clients. Just as the family law and refugee law offices have become part of the fabric of the legal aid system, it is expected that the criminal law offices will find their niche in the service delivery system