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Some Comments on “Legal Aid Modernization” at Legal Aid Ontario
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I: Introduction.

I am a social scientist, not a lawyer. Hence I may approach the issue of the “modernization of Ontario’s legal aid system” from a somewhat different perspective from most of those you might have consulted. The approach that I would suggest you consider is framed or illustrated in terms of LAO’s responsibility in the area of criminal law; however, the principles and approach would work in any area.

A starting point for me might involve a modification of your Consultation Question #3 (“What factors are effective indicators of client success?”). My approach might start one step before this question with the following broad question: “What is the purpose of providing legal aid services to accused people in the criminal justice system?” If you start with the identification of *specific* goals, it will make the job of identifying how to meet those goals more manageable. That said, the problem with this question (as I have reframed it) is that it is too broad to be very useful. Specific (measurable) goals need to be identified.

One could easily break down my reframed question to focus on the various stages of the criminal justice process. (Note that I’m not, in this memo, attempting to provide an exhaustive list. My specific goals (described as “valued functions”) should be seen as illustrations only). These illustrations will be given in Part III of this memorandum.

II: Modernization: Difficult choices vs. broad structural changes?

I would like to start by making a few obvious points. Though I would not necessarily suggest that radical changes in the manner of providing legal services be made immediately, it seems likely that the manner in which LAO provides services is not necessarily ideal or the most efficient for all kinds of cases in all locations in the province. Currently, something may work well in one location and not in another. LAO already knows this, given the vast range of different types of locations in Ontario.

Second there may not be a single ‘ideal’ method of providing services effectively. I assume that the goal of LAO is focused on the providing of services. I would, therefore, start with

an open mind about how various types of delivery (e.g., services provided by legal aid certificates, staff lawyers, part-time lawyers doing ‘duty counsel’ work, paralegals) might be used. We know that we have people in Ontario who could benefit from legal services/advice but can’t afford to purchase these services on their own. And we know that LAO cannot provide adequate services for all of them. Hence solutions are likely to be complex or multi-dimensional.

If these assumptions are correct and are accepted, then it means that difficult decisions need to be made. This will necessarily involve tradeoffs. It may not be ideal to have to choose which improvements should be supported, but it may be necessary.

Imagine, for example, that for a certain fixed sum of money, one – but only one - of the following options (“a” through “d”) could be implemented. Whether the numbers benefitting from each option (N1 through N4) is the same or different does not matter.

- a) Providing legal aid certificates to some number (N1) of people who face almost certain imprisonment if convicted.
- b) Providing some form of legal aid to N2 people who have no criminal records and who are unlikely to be imprisoned, if convicted, but who almost certainly would lose their jobs if they were convicted of a criminal offence.
- c) Providing services to N3 people who are arrested such that the new LAO service improves, by 30%, their likelihood of having favourable pretrial detention decisions made on the first court appearance.
- d) Providing special paralegal services to N4 people who have been convicted but have not yet been sentenced and who had a high likelihood of being imprisoned who, with the services, would have a 25% lower likelihood of being imprisoned.

Choosing from among such alternatives is not something that one would like to do. But my guess is that organizations like LAO do this kind of thing all the time, though not explicitly. They do this by the manner in which they allocate resources but seldom have explicit expectations on improvements or thoughts about alternatives that were not chosen. But in reality, if groups like these four groups exist, allocating to one means not supporting the other three initiatives.

My suggestion to LAO is that it is better to make decisions with one’s eyes wide open to the consequences of decisions than to avoid collecting the information that might inform difficult decisions. The documents distributed by LAO do not seem to recognize, explicitly, that decisions like these are inevitable.

III. Examples of functions to be examined, and then perhaps modified, if LAO were to commit itself to an evidence-based approach to policy.

Rather than having broad goals, I would suggest having a fair number (and perhaps a large number) of very specific intermediate level goals. Examples of these might include the following:

1) *Valued function* (of legal aid funding): Informing those arrested and held for a bail hearing of their immediate legal rights (e.g., the right not to answer police questions).

Current approach: I believe that there is a telephone number that those being detained can call to get instructions/advice from a lawyer. As far as I know, there are no data that bear on the effectiveness of this approach. Though the LAO telephone number may be available to everyone, we don't know whether other approaches might be more effective in helping accused people understand, and exercise, their rights.

Indication of success: That people know, and exercise, their rights (not, simply that someone was available on the phone or told them their rights).

2) *Valued function:* Ensuring that an accused person is adequately prepared for a full (if necessary) bail hearing – or being ready to have bail determined - at the first court appearance.

Current approach: Preparation of cases tends to be left to the period of time between the arrival of the accused in court house and the bail hearing rather than being done in time to get necessary support/witnesses and legal representative at the first bail hearing.

Indication of success: That the bail decision is made at the first appearance or delays beyond the first bail appearance in court are not due to the accused or the accused lawyer not being prepared. Bail outcomes could also be examined/monitored.

3) *Valued function:* Appropriate timely resolution of cases. Some work that was done for the Ministry of the Attorney General a few years ago suggests that over 40% of all Ontario provincial court cases are resolved by having all charges stayed, withdrawn, or dismissed. From the accused's perspective, this is, obviously a favourable outcome. That said, many of these cases (over 23 thousand of about 132 thousand in 2013/4) were withdrawn only after there had been 6 or more appearances *and* at least 91 days had elapsed since the first court appearance. One might suggest that a valued function of reasonable representation would be to ensure that these charges are withdrawn at the earliest possible point.

Current approach: My impression is that no particular value is placed on the timely withdrawal of charges. The outcome is all that is seen as being important.

Indication of success: That cases are resolved earlier than they currently are.

4) *Valued function:* Minimizing the collateral consequences of arrest and detaining of accused people. Recent research suggests that there are often many negative collateral consequences of an arrest that could be lessened with appropriate communication and help. A simple "thought experiment" might be used to illustrate this. Imagine that it is three o'clock in the

afternoon right now and you are alone. A police officer appears and informs you that you are being arrested. You are told that you will be held for a bail hearing (not to be held until tomorrow). You are allowed only to call your own lawyer *or* the LAO lawyer on duty. If you call your own lawyer, you find that you are only able to leave a message on his phone: your lawyer is busy at the moment and nobody picks up the phone. If you call the LAO number, you are informed of your rights. Aside from the legal issues, you might want to arrange to have your car moved from its parking place on a city street, so it won't get towed at 3:30 pm. You might want those with whom you have meetings (or employment) scheduled for later in the afternoon to be told you can't make it. You might want your family notified. You might even want someone to walk your dog since the dog has not been out since noon.

Current approach: These collateral issues are not seen to be 'legal' functions. Most notably, notifying a friend or family member is nobody's responsibility including the LAO lawyer on the 'other' end of the telephone line who is there to give you legal advice.

Indication of success: That accused people experience fewer of these kinds of collateral problems. [Note I use this as an example because, in the consultation document, one of the questions that was provided related to the legal aid system meeting clients' needs 'in a holistic way'.]

5) *Valued function:* That the client believes that they were dealt with appropriately and that the outcome was as good as it could reasonably be expected.

Current approach: Though I am confident that few people would argue that this outcome was not relevant, my guess is that no *systematic* evidence is being collected on this. More importantly, it may be assumed by some that only formal *legal* outcomes are relevant.

Indication of success: This is one of those areas in which 'administrative data' are almost certainly not going to be sufficient. Instead, data would have to be systematically collected for assessment of this goal.

6) *Valued function:* Outcome of the legal case. I have already made reference to one aspect of the case outcome – timely resolution of the case. But it is reasonable to look at the impact of changes that might be made as part of the "modernization project" on legal outcomes.

Current approach: I have no idea whether 'legal outcomes' are systematically monitored, but clearly they could be. But it is important to realize that 'improvement' should be valued (e.g., lower likelihood of being held in detention awaiting trial) rather than looking at "total success" (e.g., acquittal, charges being dropped) vs. all other outcomes.

Indication of success: That desired and/or plausible outcomes are *more likely* to be achieved.

IV. The duration of this project.

I would suggest that the goal of concluding the work of the Modernization Project by 31 March 2020 may be optimistic and counterproductive. I would suggest that you might want to view the "modernization" of LAO as a *process* rather than as a short-term *project*. If it were viewed as a process, then specific *measurable* goals would be identified. Then

measures would immediately be developed, with consultation, of how well these goals were being achieved. Changes would be identified and implemented. Over time, new measures might be added. But as changes were made in LAO, the organization would know where it was moving in the right direction and where it was not.

Few of the objectives or goals in an area like this can be met completely or absolutely. And, as I have already pointed out, difficult decisions would have to be made. Quantitative monitoring does not need to be expensive or time consuming for participants or LAO. But it needs to be done systematically and it needs to inform LAO on a continuing basis about which areas or goals are improving on and which are not.

V. Conclusion

I would strongly urge you to develop specific measurable goals. Initial measurements of the degree to which these goals are being achieved should be developed and implemented as quickly as possible. Then changes can be made, even though the same changes need not be universal across all types of clients, courts, or locations in the province. Systematic measurement of the degree to which the providing of services improves as a result of the changes should be ongoing rather than sporadic. By establishing baseline measures now, it should be possible to see if change in the achieving of specific goals is being attained.

Finally, LAO will show its commitment to results-based planning and implementation if it routinely releases information on what has worked and what hasn't worked. In areas in which improvements have not been shown, LAO can show its commitment to the effective and efficient providing of legal services by changing its approach when it is clear that certain approaches are not working adequately.