

September 6, 2019

VIA ELECTRONIC MAIL: harnicc@lao.on.ca

Charles Harnick
Board Chair, Legal Aid Ontario
Atrium on Bay
40 Dundas Street West, Suite 200
Toronto, ON M5G 2H1

Dear Mr. Harnick,

Re: Legal Aid Modernization Project

Please accept this submission from the HIV & AIDS Legal Clinic Ontario (HALCO) further to the Ministry of the Attorney General/Legal Aid Ontario (LAO) *Legal Aid Modernization Project* (LAMP).

Rather than repeat what is contained in the submissions of both the Association of Community Legal Clinics Ontario and the group of specialty, ethno-racial and linguistic community legal clinics, which we endorse, I take this opportunity to highlight the vital importance of four key features of the community legal clinic system as well as the manner in which HALCO and other clinics already meet the goals of LAMP.

Clinic system foundational principles

The following principles are the foundation of the community legal clinic system:

- *Community governance*
- *Practice in the areas of poverty law, including areas of specialty clinic practice*
- *Legal responses provided through a broad array of services*
- *Core/presumptive funding*

It is these principles that make the clinic system the envy of those around the globe who are interested in access to justice. With the loss of any of these features comes the loss of the clinic system. But it is not simply the principles that make the system, it is the manner in which clinics operate within this foundational house. Below is an illustration of the manner in which HALCO operates. As you will see, LAMP's goals are at the heart of the approach, which embeds continual improvement through constant evaluation and reflection as well as interaction with people living with HIV, the broader HIV sector, and many other partners.

The current state of HIV

Before getting to operational issues, it is important to remind ourselves of the realities of living with HIV today and the subsequent ongoing need for HALCO's services.

There is some wonderful news. People who have access to sustained treatment and care have more or less the same life expectancy as those who are HIV-negative. In addition, knowledge of prevention strategies is better than ever, and it is much harder to transmit HIV than generally supposed. For example, the risk of transmission is zero if a condom is used properly and remains intact and also when a person living with HIV has a suppressed viral load.

While this reality must not be ignored, many people continue to face significant institutional, social and economic barriers to accessing health care and life-saving medications. Moreover, social attitudes have not nearly kept pace with science; HIV-related stigma and accompanying discrimination remain entrenched and pervasive.

Based on the two most recent attitudinal studies (2012, 2018) commissioned by the Public Health Agency of Canada, it is shameful that:

- 24 per cent of people in Canada feel uncomfortable wearing a sweater once worn by a person living with HIV
- 22 per cent feel uncomfortable shopping at a small neighbourhood grocery store owned by someone living with HIV
- 15 per cent feel afraid of getting HIV when they are near someone with HIV
- 25 per cent believe that individuals may not get tested because they fear people finding out and treating them differently
- 71 per cent believe that someone would hide their HIV status from others because of fear of the stigma associated with HIV

It is clear that stigma is the real disease. And with stigma comes discrimination. As a result, legal issues abound. From being denied services to being refused accommodation in the workplace, human rights concerns are widespread. Privacy is a constant worry for many, whether related to institutional actors, service providers, coworkers or neighbours, and legal recourse may be difficult to impossible to obtain. State surveillance, through public health authorities and the use of the criminal law, remains prevalent and overbroad.

Moreover, it has always been the case that the epidemic has had a disproportionate impact on equity-seeking populations. In Ontario, those most affected are (i) men who have sex with men; (ii) African/Caribbean/Black persons; (iii) people who use intravenous drugs; and (iv) Indigenous individuals.

The need for HALCO

Due to the unique vulnerabilities and pervasive stigma against people living with HIV, many people are reluctant to approach mainstream service providers. Safe and expert places to access services are required. Places where one's HIV status can be disclosed without fear and where the complex reality of living with HIV is understood. AIDS service organizations were established in most communities in Ontario to provide that safe and expert place. HALCO was established to provide such a place but with the necessary legal expertise. Having access to these safe and specialized places is vital to the physical, emotional and mental health of people living with HIV.

Community-based governance and practice: the meaningful involvement of people living with HIV

HALCO is the only legal clinic in Canada that provides services for the HIV community, and we take very seriously the meaningful involvement of people living with HIV. For example, the majority of our board of directors must be living with HIV. We are deeply embedded in the HIV community, through involvement with activities such as the education workshops we routinely conduct at AIDS service organizations and through membership in groups such as the HIV Medical Clinic Outpatient Clinic Network, Ontario HIV Treatment Network Data Advisory Group, and Ontario Advisory Committee on HIV/AIDS (which provides advice to the Minister of Health).

Community rootedness, which is led through our board of directors who directly connect us with the different communities of people living with HIV, ensures layers of accountability including that legal services are in touch with what is needed on the ground. And what has always been needed is access to an array of services, from summary advice, brief services, referrals, and representation, to public legal education, law reform and community development.

Array of services

Casework services are essential to respond to day-to-day issues that people face (over the past five years alone we have responded to over 18,600 legal issues), however, to focus solely on individual matters would not at all be in the interests of community and would be incredibly inefficient. As a result, there is the imperative to also engage in other activities, including public legal education (e.g., 440 workshops in the past five years) and systemic work (e.g., numerous submissions to governmental bodies, 29 court interventions, including 11 at the Supreme Court of Canada). But it is only with the knowledge gained through community rootedness and casework that effective education and systemic activities can take place. A perfect feedback loop.

There are countless examples of how above plays out and how the outcomes positively impact people living with HIV and many others. For example, we provided submissions to the Office of the Privacy Commissioner of Canada regarding its draft position on online reputation, which the Commissioner subsequently quoted. We also initiated the world's largest ever legal needs assessment for trans people, which has been extensively referenced including by the Canadian Human Rights Commission. In addition, we intervened in a matter at the Court of Appeal for Ontario that confirmed that physicians who have a religious or conscience objection to

providing a health service must still provide an effective referral. This ruling, which confirms that all patients have the right to equitable, non-discriminatory access to medical services, is particularly important for equity-seeking groups such as people living with HIV, women, and LGBTQ2+ persons.

Our work on issues surrounding the criminal law and HIV is another example. As more and more clients approached us with questions, we scaled up all of our activities on the issue. We convened an expert working group of criminal lawyers, and began supporting lawyers handling such matters. We developed education materials, and conducted hundreds of workshops for people living with HIV, AIDS service organization staff, physicians, social workers, lawyers, students, and others. We worked with academics on research projects, whose findings were used in court cases and in discussions with policy makers. We played a lead role in coalitions engaged in law reform in the area. We intervened in matters before various courts, including the Supreme Court of Canada and Court of Appeal for Ontario. We met with Attorneys Generals and other senior politicians, and appeared at the federal Standing Committee on Justice and Human Rights. We also conducted training with judges. Ultimately, our work resulted in meaningful changes in the prosecutorial approach in Ontario and beyond (with more changes required), and has helped set the stage for potential legislative reform.

A further example lies at the intersection between trusts and social benefits. For many years, clients have been asking us how they can protect their social benefits when they receive an inheritance. The advice is rather complicated, and includes details, among other items, surrounding the use of trusts. After a spate of questions, we expanded our education on the topic (and shared materials with other legal service providers) and firmed up a referral list of lawyers who have expertise in estate planning and social assistance. While complex, we were responding to client need. Years later, we learned of a matter out of British Columbia heading to the Supreme Court that called into question the ability to maintain social benefits while being a beneficiary to a trust. Through our relationships with the private bar, we co-counseled, along with another clinic, with an expert in trust law (we are expert in law surrounding social benefits) and played a meaningful role in assisting the Supreme Court to confirm that the use of an instrument known as a Henson trust is a legitimate way for families to set aside money for persons with disabilities to sustain their long-term well-being while also preserving access to programs that provide income support, medication and housing.

Holistic approach

Another hallmark of HALCO and the community legal system is the holistic manner in which work is approached. We know that people who are marginalized, whether by health status, poverty, sexuality, gender, gender identity, race, or more likely a combination of said, are at heightened risk of unwanted and negative contact with legal and other systems, and that barriers such as lack of access to justice tend to compound problems and multiply legal issues. Rather than traditional lawyering that tends to compartmentalize issues and to some extent lives, a holistic approach embraces the porous and interlapping nature of legal compartments and leads to services better in tune with clients' living realities.

This means remaining ever alert to the intersection of needs and issues in people's lives and providing services in relation to the full scope of legal issues facing clients. For example, if a client is seeking redress in relation to the termination of employment, we proactively flag and provide services in relation to issues surrounding access to medications, housing, income maintenance and other cascading issues that flow from loss of employment. The array of services provided include referrals, self-help, summary advice, brief services, and representation, depending on factors including a gap analysis, jeopardy, vulnerability and resources. Such an approach, which has been employed since the inception of legal clinics and is now known as the "unbundling of legal services" or the provision of "targeted legal services," is important not simply as a response to overwhelming demand but because different people and different situations warrant different legal services.¹

Early resolution and addressing gaps in continuum of services

In providing service to clients, we often facilitate early resolution by calling a social assistance worker or landlord or by putting together a demand letter on the spot. In addition, we address gaps in the continuum of services by closely working with other legal service providers, LAO and private bar. In addition to routinely consulting with defence counsel and refugee lawyers on HIV-related issues, we also assist clients to obtain criminal law advice when social benefit matters intersect with potential criminal liability. Although we are not criminal lawyers, when a client presents with an issue at the intersection of criminal and social benefits law, we arrange a meeting with a private bar criminal lawyer (we have a team of lawyers who assist pro bono – this is imperfect and presents an opportunity, as noted below, for clinics and LAO to work together). This way, the client can obtain fully rounded advice without facing the sometimes difficult and confusing bump and grind of the referral process.

Importance of partnerships

The importance of partnerships in the provision of services cannot be overstated, and we have a wide ranging group of partners. In addition to working with private bar and LAO lawyers, as well as Pro Bono Ontario, we have long-standing connections with many others, including civil society organizations and academics. Such connections allow us to effectively leverage resources to meet community needs. We also have intimate ties with all manner of service providers who work with people living with HIV. Successful relationships with such trusted intermediaries is essential in order to build trust and provide effective and efficient services to communities, who for good reasons, are wary of engaging with legal and other systems.

¹ Please note that I am in no way suggesting that representation is not important. While the reality is that resources are not limitless, HALCO and other clinics provide plenty of representation services. It is absolutely crucial that such services remain available to low-income communities due to the myriad of complex legal interactions they face. While tax and *Charter* litigation is often thought of as complex, navigating opaque social assistance laws, regulations and policies, for example, is also exceedingly difficult.

Suggestion for improvement

In the LAMP consultation thus far, a number of ideas have been discussed that could meaningfully modernize the system, including (i) improved reporting and communications structures between LAO and clinics; (ii) improved relationships and better information sharing between all legal aid service providers; and (iii) and options for using technology in ways that meet our client's needs.

In relation to the second point above, a more effective relationship between clinics and LAO lawyers would greatly benefit clients. It is not unusual for clinic clients to present with overlapping criminal and clinic law issues. For example, a client might require assistance in relation to (i) the non-reporting of income/assets to social assistance authorities; (ii) a housing matter involving an illegal act; or (iii) a potential loss of housing subsidy due to an upcoming sentencing. In all such examples, clinics and LAO lawyers ought to be able to work together in a seamless fashion to assist clients.

Conclusion

The approach and work of HALCO and other clinics meet the key goals of LAMP. Whether considering issues of accountability, integration, nimbleness, or the addressing of gaps, we deliver high quality legal services in a manner that provides value for money.

Thank you for the opportunity to provide comments, and we look forward to engaging in further important dialogue through LAMP.

Sincerely,

HIV & AIDS Legal Clinic Ontario

per:



Ryan Peck

Barrister & Solicitor

Executive Director

cc David Field, President & CEO, Legal Aid Ontario
Rod Strain, Vice President, Central Operations, Legal Aid Ontario