



THE CANADIAN
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Moving Forward on Legal Aid

Research on Needs and Innovative Approaches

Aide juridique – La voie du progrès

Recherche sur les besoins actuels et les
approches innovatrices

Melina Buckley, LL.B., Ph.D.

Report for the Canadian Bar Association
Rapport pour l'Association du Barreau canadien
Juin 2010/June 2010

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EXECUTIVE SUMMARY¹

I. Introduction

This is a summary of an extensive research paper prepared by Melina Buckley, LL.B., Ph.D., for the Canadian Bar Association.

Moving Forward on Legal Aid: Research on Needs and Innovative Approaches presents new research findings, profiles innovations in legal aid service delivery in Canada and elsewhere and suggests future directions to improve legal aid and access to justice generally.

This summary highlights key elements of the Dr. Buckley's research and analysis. Please refer to the paper for the details.

II. The Rough Road to Here

Publicly-funded legal aid programs started in Canada almost 40 years ago. Their purpose was to provide the poorest residents with access to a lawyer and the justice system. It was generally recognized that Canada could not claim to be a fair and just society if some of its members were denied an opportunity to seek justice.

Early ideals have, however, given way to ever tightening budget realities. Legal aid programs do not enjoy the same public profile as government-run health care or education programs. As a result, shrinking government support for legal aid has been largely a "silent crisis." The people most deeply affected by the shrinkage in legal aid services are low-income and disadvantaged people who have no political clout. And only those within the justice system are seeing the negative effects of the growing number of unrepresented litigants in civil and criminal courts.

The Canadian Bar Association (CBA) has a long history of unwavering support for a legal aid system that provides publicly-funded legal services for essential criminal and civil matters. It has directed resources to advocacy work but has seen little positive change from these sustained national and local efforts.

Canada is not alone among more economically developed countries struggling to balance the financing of legal services for low-income people with ensuring fairness in a justice system that is supposed to be accessible to everyone. In some jurisdictions a renewed emphasis on social policy goals, such as combating social exclusion and increasing social equality, is driving a regeneration of legal aid policy. Innovative approaches to service delivery and strategies to expand efforts beyond direct legal services are also being put in place. The following sections profile this work.

¹ Prepared by Vicki Schmolka, LLB, for the Canadian Bar Association.

III. The Justice Gap: Identifying the Gap Between the Need for and the Availability of Legal Services for Low-Income People

1. Civil law problems

Several jurisdictions have undertaken studies to find out more about low-income citizens who have legal problems related to civil law matters. The studies all come to remarkably similar conclusions. A majority of low-income people experience one or more serious legal problems that make their day-to-day lives more difficult.

These legal problems usually exist in context with related social problems: economic vulnerability, mental health, physical health, safety and security issues, discrimination, and language barriers. As a result, unresolved legal issues can have a cascading negative effect in people's lives, causing significant economic, social, and health consequences, particularly additional stress. Physical and mental illnesses have been directly attributed to unresolved legal problems among low-income people.²

Members of vulnerable groups, such as, for example, aboriginal people, immigrants, and people with less than a high school education, may have difficulty identifying the legal issue in their situation. Furthermore, they may fail to take action to resolve their legal problems because of a perceived or actual barrier to getting assistance. Having a legal problem often generates a negative attitude to the law and the justice system, regardless of the outcome.

British studies have also documented "referral fatigue." People are exhausted by the required "Herculean efforts to be seen by an advisor." This is unfortunate as a major study found that people who get legal advice fare substantially better than those who try to get advice and do not.³

Finally, there is often a recognizable pattern to the legal problems experienced by low-income people and a direct consequence – social exclusion. When legal problems related to, for example, poor housing, family breakdown, and unemployment remain unresolved there is a perpetuation of disadvantage and a greater likelihood of increased detachment from the mainstream. Rather than categorize social exclusion as a "condition", it is now be seen as a "dynamic process" exacerbated by a lack of access to needed legal services.

2. Criminal law problems

Legal aid advice, usually provided through duty counsel, must be made available to a person who cannot afford a lawyer at the time of arrest, as a result of the Supreme Court of Canada's 1990 decision in the *Brydges* case. After that initial contact, however, regardless of the accused's low-income level, legal aid is often limited to situations in which a conviction would result in a loss of livelihood or incarceration.

² See, Dr. Ab Currie, "Legal Problems of Everyday Life", published in Rebecca Sanderfur, ed., *Access to Justice, The Sociology of Crime, Law and Deviance* (Bingley, UK: Emerald Group Publishing, 2009).
www.justiceinitiative.org/db/resource2?res_id=103868

³ Hazel G. Genn, *Paths to Justice: What People Do and Think About Going to Law* (Oxford: Hart Publishing, 1999).

The coverage criteria currently in place generally deny legal representation to low-income accused who have been charged with minor offences even though the impact of a criminal record would be extremely serious for them.

As well, basing eligibility for legal aid on the consequences of conviction fails to address the real needs of many accused. Studies show that unrepresented accused are often vulnerable and disadvantaged due to their personal characteristics, low levels of education and literacy, and higher rates of drug and alcohol addiction. Regardless of the seriousness of the charges against them, these individuals cannot adequately advocate for themselves. Many of them end up in prison as a result.

Given these findings, Canadian studies have recommended that legal aid policy take a more client-centred approach when determining eligibility for legal aid in criminal matters. This would mean looking to the accused's personal circumstances such as any disabilities; linguistic, social and cultural characteristics; overlapping legal problems; and needs related to systemic social factors.

3. Unmet needs for legal services

A major United States study looked at the civil legal needs of low-income individuals and families and concluded that there is a significant "Justice Gap."⁴

In British Columbia and Alberta, mapping projects have correlated the presence of legal services – information, advice, and representation – with an assessment of the legal needs of low-income citizens. The biggest gaps are in rural and remote areas, in delays in accessing services, and in the ways services are provided. People with low levels of education, for example, prefer face-to-face assistance and find using the telephone or Internet to access services a frustrating barrier.

In Canada, legal aid funding has dropped by 10%, although, overall, funding for health care and education has risen. For example, between 1996 and 2006, Ontario saw an increase of 33% in health spending and 20% in education spending.

The gap between the need for and the availability of legal aid services continues to grow not only because of the general decline in funding for legal aid programs but also because of factors such as the increasing number of working poor and changing government policies leading to, for example, more criminal charges and increasingly complex income support programs. The Legal Services Commission in England and Wales has recommended that when government policies can be expected to result in an increased need for legal aid services, there should be an accompanying increase in the legal aid budget.

In its 2006-07 *Business Plan*, Legal Aid Ontario quantified some of the ways in which legal aid services can reduce the costs of other government programs, particularly in the social services sector. Dr. Buckley concludes that more research to identify the complete social and economic costs of inadequate legal aid programs and to support the business case for adequate legal aid services would be useful.

⁴ *Documenting the Justice Gap in America: The Current Unmet Civil Legal Needs of Low-Income Americans* (Washington, DC: Legal Services Corporation, 2005).
www.lsc.gov/justicegap.pdf

IV. Policy objectives: evolving legal aid services

1. In the beginning ... 40 years ago

Canadian legal aid programs began during the 1960s, an era of strong public commitment to social justice and a shared belief in the benefits of equal access to justice. Funding for legal aid programs, delivered by the provinces and territories, came from both the federal and provincial governments, with the federal government setting policy goals in its funding agreements. These policy goals focused on the types of situations (case coverage) and the financial needs (thresholds for eligibility) that legal aid programs should address.

Today, federal funding for provincially-delivered civil legal aid is part of a general social services transfer payment with no strings attached. A national policy perspective has been lost and, as a result, access to civil legal aid varies widely across the country. In some provinces, for example, legal assistance is available for child protection cases where a parent risks losing custody of a child but not for most family law matters. The very limited access to legal assistance and the disparities in the availability of legal aid services experienced across the country point to the need to re-think and re-establish a national policy for legal aid services.

2. A shift in policy objectives

Some provinces have identified new policy objectives as they work to address unmet legal service needs and assist clients. British Columbia has re-oriented its legal aid policy to a needs-based problem-solving approach from one based on statutory entitlement. In 2007, the *Legal Services Society Act* broadened the mandate of the Legal Services Society beyond providing an effective and efficient legal aid program to helping people to solve their legal problems and facilitating access to justice. More is being done to integrate legal aid services with other social services and to help clients to reach positive, long-lasting solutions to their legal problems.

A report commissioned for Legal Aid Ontario⁵ proposed a similar approach – focusing on prevention and early resolution of legal problems and promoting a greater integration of legal aid services with other social services.

In the criminal justice field, policy papers are looking past the strictly legal issues of the right to counsel when liberty is in jeopardy to social objectives. Some American legal aid programs have “preventing crime” as part of their mandate.

Recognizing the links between poor health, poverty, and inadequate access to justice at least one author has suggested that to measure the success of legal aid services one should ask “have lives and life chances been improved?”⁶

In the United Kingdom, the lack of access to legal assistance is identified as a factor in social exclusion. *An Action Plan on Social Exclusion*, overseen by a Cabinet Minister for Social Exclusion, is guided by five principles: early intervention; systematic identification of what works; better co-

⁵ Professor Michael Trebilcock, *Report of the Legal Aid Review 2008* – report submitted to the Honourable Chris Bentley, Attorney General of Ontario (Toronto: AG Ontario, 2008).
www.attorneygeneral.jus.gov.on.ca/english/about/pubs/trebilcock/legal_aid_report_2008_EN.pdf

⁶ Dianne Martin, *A Seamless Approach to Service Delivery in Legal Aid: Fulfilling a Promise or Maintaining a Myth?* (Ottawa: Justice Canada, 2003).
www.justice.gc.ca/eng/pi/rs/rep-rap/2001/rr01_la20-rr01_aj20/rr01_la20.pdf

ordination of the many separate agencies; personal rights and responsibilities; and intolerance of poor performance. The Plan emphasizes the need for legal aid service delivery approaches that respect the dynamics of social exclusion.⁷

Australia's National Legal Aid organization, which links the country's eight legal aid commissions, has proposed a new legal aid policy grounded in a human rights framework and providing service based on priority areas of need rather than jurisdictional sources of laws. Three of the six priority areas are tied to social exclusion. The policy objective is "to ensure that all disadvantaged Australians are able to have recourse to the law for the preservation and enforcement of their legal rights."⁸

3. Thresholds for eligibility

Increases in the cost of living without a parallel increase in the minimum wage or social assistance benefits and pensions mean that more people are living in poverty or on the edge of poverty. For the most part, eligibility levels for legal aid have not changed leaving more people without access to legal services.

Quebec and Manitoba have expanded eligibility for legal aid by having clients whose incomes are just above the eligibility threshold pay for some of the services provided.

In the United Kingdom and Australia work is underway to develop national means tests to establish a national eligibility standard.

4. Legal arguments for legal aid services

Frustrations over the deficiencies in legal aid services and governments' refusals to increase funding to improve the situation have led to court actions.

The CBA published a set of legal opinions on the constitutional right to civil legal aid in 2002⁹ and then launched a public interest test case on the issue. However, the case was dismissed at the pre-trial stage and appeals, up to the Supreme Court of Canada, were unsuccessful.¹⁰

In the United States, a 1981 Supreme Court decision¹¹ held that there is a presumption against appointing counsel in civil cases where no threat of incarceration exists and that the presumption

⁷ Cabinet Minister for Social Exclusion, *Reaching Out: An Action Plan on Social Exclusion* (London: Government of U.K., 2007).
www.cabinetoffice.gov.uk/media/cabinetoffice/social_exclusion_task_force/assets/reaching_out/reaching_out_full.pdf, at 49.

⁸ *New National Policy for Legal Aid in Australia* (Hobart, Tas.: National Legal Aid, 2007).
www.lsc.sa.gov.au/cb_pages/images/A%20New%20National%20Legal%20Aid%20Policy.pdf, at 3.

⁹ *Making the Case: The Right to Publicly-Funded Representation in Canada* (Ottawa: Canadian Bar Association, 2002).
www.cba.org/CBA/pdf/2002-02-15_case.pdf.

¹⁰ *Canadian Bar Association v. British Columbia et al.*, [2006] B.C.J. No. 2015, 1 W.W.R. 331; appeal denied [2008] B.C.J. No. 350, 290 D.L.R. (4th) 617 (B.C.C.A.); leave to appeal to the Supreme Court of Canada denied [2008] S.C.C.A. No. 185 (S.C.C.).

¹¹ *Lassiter v. Dept. of Social Services*, 452 U.S. 18 (1981).

can only be overcome in exceptional circumstances. This has led the National Coalition for a Civil Right to Counsel¹² to bring right to council cases in several states.

In 2006, the American Bar Association passed a resolution that federal, state, and territorial governments provide “legal counsel as a matter of right at public expense to low-income persons in those categories of adversarial proceedings where basic human needs are at stake, such as those involving shelter, sustenance, safety, health or child custody.”¹³

Model laws are designed to provide a starting point for a state considering legislating a right to counsel. To encourage progress, the California Model Statute Task Force drafted a *State Equal Justice Act* and a *State Basic Access to Justice Act*, which provides a right to counsel for certain high priority basic needs such as shelter, sustenance, safety, health, and child custody.¹⁴

Despite lobbying and litigation efforts, there have been no significant systemic improvements in access to justice in Canada during the last four decades.

V. Innovations: improving elements of legal aid services

Historically, Canadian provinces have used one of three ways to provide legal aid representation to eligible clients – through staff legal aid lawyers, lawyers practicing in the community and paid by legal aid, and a mixed system that offers both.

Over the years, tight budget constraints and narrowly-focused government agendas have not provided many opportunities for creative programming strategies and innovation. Instead, legal aid services have become desperate to find more efficient ways to provide services to more people within their limited budgets.

The main trend in service delivery has been to shift the onus onto individuals to navigate the justice system on their own. Legal aid services have been unbundled. By offering legal information, advice, and representation at different stages, legal aid providers are able to assist more people. Under the new self-help model, clients do not usually benefit from on-going representation – an all-inclusive service relationship with a lawyer – but must figure out how the legal information they have received applies to them and advocate for themselves much of the time.

Some developments in legal aid service delivery have become the subject of research and evaluations.

1. Mechanisms for providing legal information and advice

Legal information was traditionally provided in pamphlets or small booklets. Today, legal information is increasingly available through many different multi-lingual media including:

- Web sites
- Touch-screen services available at kiosks in shopping malls and public places (for example, to file Earned Income Tax Credits in the United States)

¹² www.civilrighttocounsel.org

¹³ Resolution 112A.
www.abanet.org/legal/services/sclaid/downloads/06A112A.pdf

¹⁴ Both model statutes are available at www.brennancenter.org

- Telephone messages (for example, dial-a-law programs which offer recorded scripts on legal topics)
- Videos
- Video conferencing

In the United Kingdom, free, case-specific, legal advice is now available from a lawyer through community-based telephone help lines and “ask us” web sites.¹⁵

In Canada, lawyer referral services run by the law societies give the name of a lawyer who will provide a free half-hour consultation.

2. The role of paralegals and other legal aid personnel

The expansion of the team of legal aid personnel to include more non-lawyers is another innovation. Legal information outreach workers, family resource facilitators, and counsellors do not replace lawyers but can assist clients by taking time to discuss information with them and helping them to access other services.

3. Outreach programs

Outreach programs, usually connected to a hub office, bring legal aid services to communities that are too far from the legal aid office and to people who may not otherwise visit the office.

In the United Kingdom, outreach advice sessions are held at neighbourhood centres, day centres, residential homes, youth centres, doctors’ offices, hospitals, community colleges, and community centres. The Citizens Advice Bureaux offers outreach information or advice in over 1000 health settings, giving people access to legal services in a place with which they are familiar and are likely to feel comfortable.

A 2002 analysis of poverty law services in Canada concluded that to be successful outreach services must be linked to community networks that offer ancillary services and have local credibility.¹⁶

4. Point of entry services

Several access to justice and civil justice reform reports have recommended that services be provided at a single point of entry to the courts so that members of the public can receive assistance directly and easily.¹⁷

British Columbia has, for example, established the Supreme Court Self-Help Information Centre, located in the Vancouver Law Courts, and the Nanaimo Justice Access Centre.

¹⁵ www.clsdirect.org.uk/

¹⁶ Social Planning and Research Council of B.C., *An Analysis of Poverty Law Services in Canada* (Ottawa: Justice Canada, 2002).
www.justice.gc.ca/eng/pi/rs/rep-rap/2003/rr03_la13-rr03_aj13/index.html at 40.

¹⁷ See, for example, Currie, *supra* note 2.
www.justiceinitiative.org/db/resource2?res_id=103868

Ontario has Family Law Information Centres at family courts throughout the province. These centres are stocked with information materials and have staff available to answer questions during designated hours. Lawyers provide advice to legal aid eligible centre visitors.

Concerns have been raised about the usefulness of self-help centres to, for example, people with low literacy skills, people who cannot get to a centre during regular working hours, and people in rural and remote communities. Using a rigid means test to determine service eligibility also results in frustration for centre visitors who do not qualify and may not get legal advice. More flexible financial eligibility criteria have been recommended.¹⁸

5. The expanded role of duty counsel

Duty counsel are the emergency room professionals of the court system.¹⁹ They keep the courts running by providing unrepresented litigants with immediate help. Duty counsel offer legal advice at a critical moment in the legal process but their advice is, of necessity, quick and cursory, and may sometimes be limited by a lack of time to accumulate necessary information.

The last decade has seen an expansion in duty counsel programs. While the service model was originally developed for a small range of criminal matters, duty counsel now assists with more criminal as well as family law matters. In some jurisdictions specialized duty counsel are also available in youth, domestic violence, mental health, aboriginal, and drug treatment courts.

Evaluations of duty counsel programs have found many positive attributes including better working relationships among justice system participants (Crown, court and support services, client, etc.), improved file and lawyer continuity, and increased efficiency due to the duty counsel's knowledge of the law, the system, and support services. There were fewer delays and adjournments, and more matters were resolved without going to trial. Shortcomings were related to workload and scheduling.

In the United Kingdom the duty counsel role has been expanded beyond criminal and family law cases to include other civil law matters, such as housing evictions.

Duty counsel are especially helpful to people who are less likely to access legal advice before coming to court because of alienation from the legal process generally or mental health, literacy, or language challenges.

Duty counsel are not seen as replacing the need for full legal representation at a trial.

6. Legal aid offices

In some jurisdictions, staffed legal aid offices have been part of legal aid service delivery since the beginning. Other jurisdictions have chosen to give legal aid certificates to clients who can then ask a private practice lawyer to take on the work at the legal aid rate. Some jurisdictions offer a combination of both systems.

Manitoba recently reviewed its mixed legal aid approach to assess cost differences. The Manitoba research concluded that a complete staff system would cost more than a mixed system but noted

¹⁸ Trebilcock, *supra* note 5 at 110.

¹⁹ Legal Aid Ontario, *Business Plan 2006-2007* (Toronto: LAO, 2006) at 4.
www.legalaid.on.ca/en/publications/PDF/Public_Business_Plan_April_2006.pdf

that the conclusion is a function of the tariff paid to private bar lawyers, the cost of staff, and the productivity of staff and that these factors all vary over time.²⁰

Ontario and Alberta have piloted and evaluated staff offices for criminal and family law matters. Research on the pilot Criminal Law Offices in Ontario found that they provided a valuable service to address a significant previously-unmet need. Cost comparisons between staff and private bar legal aid services were considered misleading because of the different work realities including: the private bar does not receive a fixed salary, staff lawyers do; the private bar can take on or refuse any type of case, staff lawyers are restricted and must handle more difficult cases without additional compensation or assistance; the private bar can hire or layoff staff depending on workload, staff offices cannot.²¹

7. Community-based legal clinics

The community clinic model is multi-disciplinary, and includes a mandate for community education and development, and law reform. These community-based clinics were established to provide poverty law services not only to alleviate an individual's legal problem but also with the goal of eliminating the systemic causes of poverty. In practice, however, community clinics are often overwhelmed by individual casework and the strategic, long-term actions and test cases to shape law and protect rights may not take place.

A few community-based legal clinics are managing to fulfil their original mandate. For example, the Manitoba Public Interest Law Centre, a division of Legal Aid Manitoba, focuses on strategic litigation on behalf of disadvantaged groups. Calgary Legal Guidance enjoys grassroots and legal community support, is free of government interference, and operates with staff (lawyers and social workers) and volunteers, including law students. Legal Aid Ontario funds 17 speciality legal aid clinics for, for example, people with disabilities, the elderly, injured workers, and African-Canadians.

The 2002 analysis of Canadian poverty law services found that the capacity to launch *Charter of Rights and Freedoms* litigation is crucial to poverty law lawyers but requires more funding than is currently provided to public interest advocacy organizations. The report also recommended that one constitutional law specialist be part of any group of poverty law lawyers, providing some capacity for test case litigation and being available as a resource for others seeking to understand the application of the *Charter* to administrative regulations.²²

8. Law school legal aid programs

Law school clinic programs have been an important component of legal aid services to low-income people over the last decades. In the 2006-07 fiscal year almost 1000 Ontario law students – 25% of the enrolment in the six Ontario law faculties – participated in the Student Legal Aid Service Societies program. A significant number of students are doing work that is currently not integrated with other legal aid services.

²⁰ *A Review of Manitoba Legal Aid* (Winnipeg: Government of Manitoba, 2004).
www.gov.mb.ca/justice/publications/pdf/legalaidreviewfinal.pdf

²¹ Robert Hann, Fred Zemans and Joan Nuffield for Legal Aid Ontario, *Evaluation of Criminal Law Offices, Third Year Report* (Toronto: Robert Hann & Associates Limited, 2008).
www.legalaid.on.ca/en/publications/downloads/clo_evaluation_08apr.pdf

²² Social Planning and Research Council of B.C., *supra* note 16 at 83.

A study of American law school clinics²³ found that although there has been a steady increase in the number of law school clinics there has been a narrowing of service goals and a reduction in the number of clients served. The study compares law school legal aid clinics to teaching hospitals and suggests that the clinics should become research sites developing and testing service delivery models, providing access to researchers interested in the relationship between law and legal services to conditions of poverty and disadvantage, and making comparative assessments of differing methods for teaching about the practice of law.

9. A more holistic approach to legal aid service delivery

A few jurisdictions have gone beyond small legal aid innovations and have taken a bigger step “out of the box” towards comprehensive and integrated legal aid service delivery. There are three main approaches.

- i. **Multidisciplinary practices** bring together legal, social, and health services giving clients the ability to access the services they need in one place and eliminating referral fatigue. Being part of an integrated service means that lawyers can smoothly transfer clients needing counselling to other professionals and can focus on legal issues. Other professionals may give legal staff a useful perspective on a client’s circumstances. “Well-planned inter-professional collaboration that leads to seamless client services has no downside” concludes one report,²⁴ although it does require sensitivity to professional obligations such as solicitor-client privilege.

Community Legal Advice Centres, piloted by the United Kingdom Legal Services Commission, are one-stop-shop services delivering combined social and welfare legal services, including community care, debt counselling, housing support, employment assistance, and welfare advice. The Centres are designed to serve clients from initial diagnosis and information provision to advice, support, and legal representation in court.

- ii. **Increased coordination among agencies serving the low-income community** yields advantages for both clients and service providers. In the United Kingdom the emphasis has been on “joined up” work between government agencies as a means to assist disadvantaged individuals and communities and to combat social exclusion. Community Legal Service is a key partner.
- iii. **A holistic approach to criminal legal aid services** has only been discussed in Canada²⁵ but has been put in practice in a handful of American projects. The objectives of these projects go beyond high quality defence services for accused clients. Holistic advocacy means providing broad client-focused services that address underlying problems such as poverty, mental illness, alcoholism, substance abuse, post-traumatic stress disorder, and family dysfunction with a view to

²³ Jeanne Charn and Jeff Selbin, *Poverty Law and Law Schools - What's Working How and Why? Legal Aid, Law School Clinics and the Opportunity for Joint Gain* (Boston: Management Information Exchange Journal, 2007).

²⁴ Social Planning and Research Council of B.C., *supra* note 16 at 70.

²⁵ Dr. Ab Currie, *Unmet Need for Criminal Legal Aid: A Summary of Research Results* (Ottawa: Justice Canada, 2003).
http://canada.justice.gc.ca/eng/pi/rs/rep-rap/2003/rr03_la9-rr03_aj9/index.html, at 30.

preventing future crimes. The social service orientation is collaborative, intensive, and long-term.²⁶

The Bronx Defenders, for example, has social workers, criminal defence lawyers, civil lawyers specializing in child welfare, housing and immigration workers, and youth and community outreach staff working together out of the same building.²⁷

Inter-disciplinary working groups reflect the interconnectedness of the issues facing low-income clients and can best meet their overall needs. Instead of solving a legal problem and often seeing the client continue in the situation that gave rise to the problem, a holistic approach holds the promise of a more fundamental and permanent change in circumstances.

Services for underserved communities

Various reports have stressed that the legal aid system fails to adequately address the needs of specific disadvantaged communities. Projects are underway in some jurisdictions to better meet the unique needs of, for example:

- Aboriginal communities
- inmates in federal institutions, and
- single young mothers who find themselves in trouble with the law.

All these innovative strategies may improve some element of a legal aid service or service delivery generally. None of them have yet become entrenched in legal aid programs across Canada as part of a national access to justice vision.

VI. Enhancements: putting in place mechanisms to increase access to legal services

Dr. Buckley's paper presents two mechanisms for enhancing access to legal services that are related to but separate from legal aid reform: access to justice communities and *pro bono* work.

1. Access to justice communities

In the United States access to civil justice communities are in place in most states to create a comprehensive, integrated, and state-wide legal assistance service. Organized under Access to Justice Commissions, these communities bring together the federally-funded Legal Services Corporation and non-Legal Services Corporation providers, other service providers, including social

²⁶ Robin G. Steinberg, "Beyond Lawyering: How holistic representation makes for good policy, better lawyers and more satisfied clients" (Paper prepared for the 2nd European Forum on Access to Justice, February 24-26, 2005). Steinberg is the Executive Director of The Bronx Defenders. www.bronxdefenders.org/index.php?page=publication&id=18¶m=publications_and_media

²⁷ Examples of holistic criminal legal aid services include:

The Bronx Defenders, www.bronxdefenders.org/;

Knox County Public Defender Community Law Office, www.pdknox.org/800main.htm;

The Neighbourhood Defender Service of Harlem, www.ndsny.org/;

Georgia Justice Project, www.gjp.org/

service providers, *pro bono* programs, initiatives supporting unrepresented litigants, law school clinics, and key private bar and state judicial system elements.

The main goals of access to justice communities are to:

- create a single point of entry to legal assistance for low-income clients
- integrate all institutional and individual providers and partners
- allocate resources among providers to ensure that representation can occur in all forums for all low-income persons, and
- provide access to a range of services for all eligible clients no matter where they live, what language they speak, or the ethnic or cultural group to which they belong.

Although Canadian legal aid programs have experimented with elements of this approach, no jurisdiction has set up a permanent collaborative structure similar to the American Access to Justice Commissions. A recent review of legal aid in New Brunswick did propose approaching the other Atlantic Provinces to explore the benefits of a joint delivery model for legal aid services²⁸, which could perhaps lead to an Atlantic Access to Justice Commission.

2. *Pro bono* work

Lawyers have always taken on a few clients at greatly reduced rates or for free. Cutbacks in government support for legal aid programs has led to a substantial increase in *pro bono* activity in many countries and a move toward greater organization and integration of *pro bono* efforts within legal aid programs and the court system itself. There has also been a move to quantify the amount of *pro bono* work being done with some American states making it mandatory for attorneys to report on *pro bono* activities.

A roundtable discussion on the relationship between legal aid and *pro bono* legal services by the Victoria Law Foundation, Australia²⁹ raises the concern that *pro bono* work is being substituted for adequate government-funding of legal aid services. Participants noted that the private legal profession has subsidized and supported legal aid since legal aid began but worried that *pro bono* work is now being required to handle legal aid overflow cases, civil cases that were previously funded. Unlike legal aid which is a matter of right, lawyers take on *pro bono* cases as a matter of charity and professionalism and there is no entitlement to receive it. It was recognized that a significant amount of unmet need for legal services cannot be filled by *pro bono* efforts.

In Canada, lawyers continue to offer *pro bono* services although the tensions at the juncture between legal aid and *pro bono* services still need to be resolved. It has been suggested that the bar use a formal commitment to *pro bono* work as a *quid pro quo* for governments to reinvest in legal aid systems.³⁰

²⁸ Dr. J. Hughes and E.L. MacKinnon, *If there were legal aid in New Brunswick...A Review of Legal Aid Services in New Brunswick* (Fredericton: Province of NB, 2007). See recommendation #40 at 39. www.gnb.ca/0062/pdf/5071%20eng%20report.pdf

²⁹ Victoria Law Foundation, *Future of Pro Bono in Victoria* (Report from the Round Table Series, 2001). www.victorialaw.org.au/pdfbook/Future_of_Pro_Bono_in_Victoria_126kb.pdf

³⁰ Richard Devlin, "Breach of Contract?: The New Economy and the Ethical Obligations of the Legal Profession" (2002) 25 *Dalhousie Law Journal* 335.

In addition to access to justice communities and *pro bono* work, the paper mentions a few other mechanisms that could make legal services more widely accessible to middle and lower income Canadians. These include:

- prepaid legal services plans (legal expense insurance)
- contingency legal aid funds (successful legal aid litigants must reimburse a portion of their settlement)
- contingency fees (where lawyers are paid depending on the success of their efforts)
- tax deductions for legal expenses, and
- low-cost information and summary advice services.

VII. Suggestions for Action: fulfilling the CBA's role as an advocate for equal justice

The CBA has consistently maintained that governments must accept the primary responsibility to ensure equal access to justice through the provision of legal aid services. The CBA has also promoted the legal profession's responsibility to contribute to access to justice by assisting in the delivery of government-funded legal aid and by providing *pro bono* services.

CBA members have adopted numerous resolutions on legal aid improvements, supported lobbying campaigns across Canada, and contributed to a national public relations campaign to raise public awareness about the inadequacies of the Canadian legal aid system. The CBA has been the only consistent advocate for legal aid reform at the national level, although there are important allies in the anti-poverty and social justice movements.

The CBA has a five-point platform on legal aid reform:

- Legal aid should be recognized as an essential public service, like health care.
- Public funding should be confirmed as necessary to ensure access to justice for low-income people.
- Public funding for legal aid must be increased.
- National standards for criminal and civil legal aid coverage and eligibility criteria are required.
- The federal government should revitalize its commitment to legal aid.

Dr. Buckley notes that despite all its efforts to improve legal aid funding and services, the CBA's advocacy efforts to date have not been successful. The paper suggests several possible approaches for the CBA to refresh its commitment to improved civil and criminal legal aid services in Canada. Justice demands it.

SOMMAIRE EXÉCUTIF¹

I. Introduction

Ce qui suit est un sommaire du volumineux rapport de recherche rédigé par Melina Buckley, LL.B., Ph.D., pour l'Association du Barreau canadien.

Le rapport, intitulé « Aide juridique – La voie du progrès : Recherche sur les besoins actuels et les approches innovatrices » (*Moving Forward on Legal Aid: Research on Needs and Innovative Approaches*), présente de nouveaux résultats de recherche, décrit des innovations en matière de prestation de services d'aide juridique au Canada et ailleurs, et suggère des orientations futures en vue d'améliorer l'aide juridique et, de façon générale, l'accès à la justice.

Ce sommaire présente des points saillants de la recherche et de l'analyse de Dre Buckley. Pour plus amples renseignements, veuillez consulter le texte intégral du rapport.

II. Le difficile chemin parcouru

Les programmes d'aide juridique subventionnés par les fonds publics ont débuté au Canada il y a presque 40 ans. Ils visaient à assurer aux résidents les plus démunis l'accès à un avocat et au système de justice. Il était généralement reconnu que le Canada ne pouvait pas se poser en société juste et équitable si certains de ses membres étaient privés de la possibilité de demander justice.

Les idéaux initiaux ont toutefois cédé le pas à des réalités budgétaires de plus en plus difficiles. Les programmes d'aide juridique ne jouissent pas de la même perception publique que les programmes gouvernementaux de soins de santé ou d'enseignement. En conséquence, la diminution du financement gouvernemental de l'aide juridique a été largement une « crise silencieuse ». Les personnes les plus touchées par la réduction des services d'aide juridique sont des personnes à faible revenu et autres personnes désavantagées qui n'ont guère de poids politique. Du reste, seuls les intervenants à l'intérieur du système de justice constatent les effets négatifs du nombre croissant de parties non représentées par un avocat qui comparaissent devant les tribunaux civils et criminels.

L'Association du Barreau canadien (ABC) soutient fermement et depuis longtemps un système d'aide juridique qui assure des services juridiques subventionnés dans les affaires criminelles et civiles de nature essentielle. Elle a consacré des ressources à la promotion d'un tel système, mais n'a constaté que peu de changements positifs à la suite de ces efforts nationaux et locaux.

Le Canada n'est pas le seul pays développé qui peine à financer les services juridiques pour les personnes à faible revenu tout en assurant l'équité d'un système de justice censé être accessible à tous. Dans certains ressorts, l'intérêt renouvelé accordé aux buts sociaux tels que la lutte à l'exclusion sociale et la promotion de l'égalité sociale a relancé l'action en matière d'aide juridique. Des approches innovatrices de la prestation de services et des stratégies visant à dépasser les seuls services juridiques directs sont aussi en voie d'être adoptées. Les sections suivantes décrivent cette évolution.

¹ Préparé par Vicki Schmolka, LL.B., pour l'Association du Barreau canadien.

III. Le déficit de justice : Analyse de l'écart entre besoin et disponibilité de services juridiques pour les personnes à faible revenu

1. Problèmes en justice civile

De nombreux ressorts ont entrepris des études sur les citoyens à faible revenu qui ont des problèmes juridiques liés à des affaires de justice civile. Les études arrivent toutes à des conclusions remarquablement semblables. Une majorité des personnes à faible revenu connaissent au moins un problème juridique grave qui complique leur existence quotidienne.

Ces problèmes juridiques sont habituellement reliés à des problèmes sociaux : vulnérabilité économique, problèmes de santé mentale ou physique, problèmes de sécurité, discrimination et obstacles linguistiques. En conséquence, des problèmes juridiques non résolus peuvent avoir un effet d'entraînement dans la vie des gens et engendrer d'importantes conséquences économiques et sociales ou des conséquences pour la santé, notamment un surcroît de stress. Chez les personnes à faible revenu, des maladies physiques et mentales ont été directement attribuées à des problèmes juridiques non résolus².

Les membres de groupes vulnérables, comme les Autochtones, les immigrants et les personnes n'ayant pas fait d'études secondaires, peuvent avoir de la difficulté à situer les problèmes juridiques dans leur contexte. En outre, ils peuvent renoncer à prendre des mesures pour régler leurs problèmes juridiques en raison d'un obstacle perçu ou réel à l'obtention d'une aide juridique. Le fait d'avoir un problème juridique engendre souvent une attitude négative envers la loi et le système de justice quelle qu'en soit l'issue.

Des études britanniques ont aussi constaté une lassitude face au renvoi d'un service à l'autre. Les gens sont épuisés par les efforts « herculéens » requis pour être vus par un conseiller. Cette situation est malheureuse puisqu'une étude majeure a conclu que les personnes qui obtiennent des conseils juridiques s'en tirent sensiblement mieux que celles qui tentent d'obtenir des conseils mais n'en obtiennent pas³.

Enfin, on constate souvent que les problèmes juridiques vécus par des personnes à faible revenu suivent une évolution semblable et produisent une conséquence directe : l'exclusion sociale. Lorsque les problèmes juridiques ayant trait, par exemple, à des mauvaises conditions de logement, à la dislocation de la famille ou au chômage ne sont pas réglés, il y a perpétuation d'un désavantage et une plus grande probabilité d'isolement accru des grands courants de la société. L'exclusion sociale ne doit plus être considérée comme un état, mais comme un « processus dynamique » exacerbé par une absence d'accès à des services juridiques nécessaires.

2. Problèmes en droit criminel

En conséquence de la décision que la Cour suprême a rendue en 1990 dans l'affaire *Brydges*, une personne qui n'a pas les moyens d'engager un avocat au moment de son arrestation doit avoir accès aux conseils de l'aide juridique, habituellement fournis par un avocat de service. Après le premier

² Voir Dr Ab Currie, « Legal Problems in Everyday Life », dans Rebecca Sanderfur, dir., *Access to Justice, The Sociology of Crime, Law and Deviance* (Bingley, Royaume-Uni : Emerald Group Publishing, 2009).
www.justiceinitiative.org/db/resource2?res_id=103868

³ Hazel G. Genn, *Paths to Justice: What People Do and Think About Going to Law* (Oxford : Hart Publishing, 1999).

contact cependant, quel que soit le niveau de revenu de l'accusé, l'aide juridique est souvent limitée aux situations où une déclaration de culpabilité entraînerait la perte du gagne-pain ou l'incarcération.

Les critères actuels de l'offre de service refusent en général la représentation d'un avocat à un accusé à faible revenu lorsqu'il s'agit d'infractions mineures, même si les répercussions d'un casier juridique seraient extrêmement graves pour lui.

En outre, le fait de déterminer l'admissibilité à l'aide juridique selon les conséquences d'une déclaration de culpabilité ne tient pas compte des besoins réels de nombreux accusés. Des études ont démontré que les accusés non représentés par un avocat sont souvent vulnérables et désavantagés en raison de leurs caractéristiques personnelles, de leur faible niveau de scolarisation et d'alphabétisation, ainsi que de leurs taux supérieurs de toxicomanie et d'alcoolisme. Quelle que soit la gravité des accusations, ces personnes ne peuvent pas se défendre efficacement par leurs propres moyens. C'est pourquoi nombre d'entre elles aboutissent en prison.

Compte tenu de ces éléments, des études canadiennes ont recommandé que la politique en matière d'aide juridique tienne davantage compte du client pour déterminer l'admissibilité à une aide juridique dans les affaires criminelles. Il s'agirait de considérer la situation personnelle de l'accusé, par exemple l'incapacité qu'il peut avoir, ses caractéristiques linguistiques, sociales et culturelles, le fait qu'il soit aux prises avec des problèmes juridiques multiples et les besoins liés à des facteurs sociaux systémiques.

3. Besoins non comblés en matière de services juridiques

Une vaste étude américaine a examiné les besoins des personnes et des familles à faible revenu face à des problèmes relevant du justice civile. Elle a conclu à l'existence d'un important « déficit de justice »⁴.

En Colombie-Britannique et en Alberta, des projets de recherche ont établi une corrélation entre la présence de services juridiques – information, conseils et représentation – et les besoins juridiques des citoyens à faible revenu. Les plus grands manquements se constatent dans les régions rurales et isolées, et se situent dans les délais requis pour obtenir des services et dans la façon dont les services sont fournis. Les Autochtones et les personnes ayant une faible scolarisation, par exemple, préfèrent une interaction en personne, et trouvent que la nécessité de recourir au téléphone ou à Internet pour obtenir des services est un obstacle.

Au Canada, le financement de l'aide juridique a baissé de 10 % bien que, dans l'ensemble, le financement des soins de santé et de l'enseignement ait augmenté. Par exemple entre 1996 et 2006, l'Ontario a accru ses dépenses de 33 % en santé et de 20 % en éducation.

L'écart entre le besoin et la disponibilité de services d'aide juridique continue d'augmenter non seulement en raison de la baisse générale du financement des programmes d'aide juridique, mais aussi à cause de facteurs comme le nombre croissant de travailleurs pauvres. En plus, les politiques gouvernementales changeantes mènent, par exemple, à un plus grand nombre d'accusations criminelles et à des programmes de soutien du revenu de plus en plus complexes. La Commission des services juridiques d'Angleterre et du Pays de Galles a recommandé que quand les politiques

⁴ *Documenting the Justice Gap in America: The Current Unmet Civil Legal Needs of Low-Income Americans* (Washington, DC : Legal Services Corporation, 2005).
www.lsc.gov/justicegap.pdf

gouvernementales semblent devoir entraîner un besoin accru de services d'aide juridique, il devrait y avoir une augmentation correspondante du budget de l'aide juridique.

Dans son plan d'activités, Aide Juridique Ontario a quantifié les moyens dont les services d'aide juridique peuvent réduire les coûts d'autres programmes gouvernementaux, surtout dans le secteur des services sociaux. Dre Buckley conclut que des recherches plus approfondies s'imposent pour cerner l'ensemble des coûts sociaux et économiques de programmes d'aide juridique insuffisants, et pour étayer la nécessité de services d'aide juridique adéquats.

IV. Objectifs politiques : L'évolution des services d'aide juridique

1. Au début... il y a 40 ans

Les programmes canadiens d'aide juridique ont débuté dans les années 1960, à une époque où le public était résolument favorable à la cause de la justice sociale et où les avantages d'un accès égal à la justice faisaient consensus. Le financement des programmes d'aide juridique, qui étaient offerts par les provinces et les territoires, provenait des paliers fédéral et provincial. Le gouvernement fédéral fixait des objectifs en matière de politiques dans ses accords de financement. Ces objectifs déterminaient le genre de situation (étendue de la couverture) et les besoins financiers (seuils d'admissibilité) que les programmes d'aide juridique devaient viser.

Aujourd'hui, le financement fédéral de l'aide juridique en matière de justice civile assurée par les provinces fait partie d'un paiement de transfert général englobant les services sociaux, et il n'est assorti d'aucune condition. Il n'y a ainsi plus de politique nationale et, par conséquent, l'accès à une aide juridique en matière civile varie sensiblement à l'échelle nationale. Dans certaines provinces par exemple, une aide juridique est disponible dans les affaires de protection de l'enfant, lorsqu'un des parents risque de perdre la garde d'un enfant mais pas dans la plupart des affaires de droit de la famille. L'accès très limité à l'aide juridique et les disparités dans cet accès indiquent la nécessité de reconsidérer et rétablir une politique nationale sur les services d'aide juridique.

2. Un changement d'orientation des politiques

Certaines provinces ont fixé de nouveaux objectifs en vue de parer aux besoins non comblés en matière d'aide juridique, et venir en aide aux clients. La Colombie-Britannique a réorienté sa politique d'aide juridique en adoptant une approche fondée sur les besoins et visant à régler les problèmes, plutôt que de s'en remettre uniquement à une question de droit prévu par la loi. En 2007, la *Legal Services Society Act* a élargi le mandat de la *Legal Services Society* : non seulement doit-elle fournir un programme efficace et rentable d'aide juridique, encore doit-elle aider les gens à régler leurs problèmes juridiques et faciliter l'accès à la justice. Des efforts accrus sont aussi déployés en vue d'intégrer les services d'aide juridique à d'autres services sociaux, et d'aider les clients à trouver des solutions positives et durables à leurs problèmes juridiques.

Un rapport commandé par Aide juridique Ontario⁵ a proposé une approche semblable – fondée sur la prévention et le règlement rapide de problèmes juridiques, et la promotion d'une plus grande intégration des services d'aide juridique aux autres services sociaux.

⁵ Michael Trebilcock, professeur, *Rapport 2008 sur l'examen du régime d'aide juridique* – rapport présenté à l'honorable Chris Bentley, procureur général de l'Ontario (Toronto : Procureur général de l'Ontario, 2008). www.attorneygeneral.jus.gov.on.ca/french/about/pubs/trebilcock

Dans le domaine de la justice criminelle, des documents de politique se penchent non seulement sur les questions strictement légales du droit à un avocat quand la liberté est en cause, mais aussi sur des objectifs sociaux. Certains programmes américains d'aide juridique ont un mandat englobant la prévention de la criminalité.

Reconnaissant les liens entre mauvaise santé, pauvreté et accès inadéquat à la justice, au moins un auteur a jugé que pour mesurer le succès de services d'aide juridique, il faut se demander pour combien de personnes on a amélioré la vie et les possibilités qu'elles ont dans la vie⁶.

Au Royaume-Uni, le manque d'accès à une aide juridique est reconnu comme un facteur d'exclusion sociale. Un plan d'action sur l'exclusion sociale relevant d'un ministre expressément chargé de ce dossier s'appuie sur cinq principes : intervention précoce; évaluation systématique des mesures qui sont efficaces; meilleure coordination entre nombreux organismes distincts; droits et responsabilités personnels; et intolérance à l'égard des mauvais résultats. Le plan insiste sur la nécessité de méthodes de prestation d'aide juridique qui tiennent compte de la dynamique de l'exclusion sociale⁷.

L'organisation nationale d'aide juridique de l'Australie, qui réunit les huit commissions d'aide juridique du pays, a proposé une nouvelle politique fondée sur un cadre de droits de la personne et assurant des services en fonction des besoins prioritaires plutôt que des ressorts dont sont issues les lois. Trois des six domaines prioritaires sont liés à l'exclusion sociale. L'objectif de fond consiste à faire en sorte que tous les Australiens désavantagés puissent recourir à la loi pour la préservation et l'application de leurs droits légaux⁸.

3. Seuils d'admissibilité

L'augmentation du coût de la vie, sans augmentation parallèle du salaire minimum ou des prestations d'assistance sociale et de pension, signifie que davantage de personnes vivent dans la pauvreté ou près de la pauvreté. En général, les seuils d'admissibilité à l'aide juridique n'ont pas changé, de sorte qu'un plus grand nombre de personnes sont dépourvues d'accès à des services juridiques.

Le Québec et le Manitoba ont élargi l'admissibilité à l'aide juridique en prévoyant que les clients dont le revenu est légèrement supérieur au seuil d'admissibilité paient une partie des services fournis.

Au Royaume-Uni et en Australie, des travaux sont en cours en vue de fixer des critères nationaux quant aux ressources financières déterminant l'admissibilité.

⁶ Dianne Martin, *Une approche intégrée à la prestation de services en matière d'aide juridique : Réalisation d'une promesse ou perpétuation d'un mythe?* (Ottawa : Justice Canada, 2003).
http://canada.justice.gc.ca/fra/pi/rs/rap-rep/2001/rr01_aj20-rr01_la20/rr01_aj20.pdf

⁷ Cabinet Minister for Social Exclusion, *Reaching Out: An Action Plan on Social Exclusion* (Londres : Gouvernement du Royaume-Uni, 2007), p. 49.
www.cabinetoffice.gov.uk/media/cabinetoffice/social_exclusion_task_force/assets/reaching_out/reaching_out_full.pdf

⁸ New National Policy for Legal Aid in Australia (Hobart, Tas. : National Legal Aid, 2007), p. 3.
www.lsc.sa.gov.au/cb_pages/images/A%20New%20National%20Legal%20Aid%20Policy.pdf

4. Arguments légaux en faveur de services d'aide juridique

Le mécontentement envers les lacunes des services d'aide juridique et le refus des gouvernements d'augmenter le financement afin d'améliorer la situation a mené à des actions en justice.

L'ABC a publié en 2002 un ensemble d'avis juridiques sur le droit à l'aide juridique⁹. Elle a ensuite intenté une cause type en la matière, au nom de l'intérêt public. L'affaire a toutefois été rejetée avant le procès; les appels, jusqu'à la Cour suprême du Canada, n'ont pas abouti¹⁰.

Aux États-Unis, la Cour suprême a rendu en 1981 une décision¹¹ selon laquelle il y a une présomption à l'encontre de la désignation d'un avocat dans les affaires civiles où il n'y a pas de risque d'incarcération; cette présomption peut seulement être vaincue dans des circonstances exceptionnelles. En conséquence, la *National Coalition for a Civil Right to Counsel*¹² a introduit dans plusieurs États des requêtes liées au droit à un avocat.

En 2006, l'*American Bar Association* a adopté une résolution voulant que les gouvernements des États-Unis, des États et des territoires fournissent un avocat payé par les deniers publics, de plein droit, aux personnes à faible revenu dans les procédures contestées mettant en cause des besoins humains fondamentaux comme le logement, l'alimentation, la sécurité, la santé ou la garde d'un enfant¹³.

Des lois modèles ont été prévues comme points de départ pour un État voulant adopter une loi sur le droit à un avocat. Pour encourager les progrès en ce sens, le groupe de travail sur les lois modèles de Californie a rédigé une loi d'État sur l'égalité de la justice et une loi d'État sur l'accès de base à la justice; toutes deux prévoient le droit à un avocat face à certains besoins prioritaires comme le logement, l'alimentation, la sécurité, la santé et la garde d'un enfant¹⁴.

Malgré les efforts qui ont été consacrés au lobbying et à des actions en justice, il n'y a guère eu d'améliorations de fond dans l'accès à la justice au Canada depuis 40 ans.

V. Innovations : Amélioration de certains éléments des services d'aide juridique

Historiquement, les provinces canadiennes ont choisi parmi trois façons d'offrir au titre de l'aide juridique une représentation aux clients admissibles : des avocats salariés à l'emploi du service d'aide juridique; des avocats travaillant dans la communauté, payés par l'aide juridique; ou une combinaison des deux formules.

⁹ *Making the Case: The Right to Publicly-Funded Representation in Canada* (Ottawa: Association du Barreau canadien, 2002).

www.cba.org/CBA/pdf/2002-02-15_case.pdf.

¹⁰ *Canadian Bar Association v. British Columbia et al*, [2006] B.C.J. No. 2015, 1 W.W.R. 331; appel rejeté [2008] B.C.J. No. 350, 290 D.L.R. (4th) 617 (B.C.C.A.); autorisation de pourvoi devant la Cour suprême du Canada refusée [2008] C.S.C.R. n° 185 (C.S.C.).

¹¹ *Lassiter v. Dept. of Social Services*, 452 U.S. 18 (1981).

¹² www.civilrighttocounsel.org

¹³ Résolution 112A.

www.abanet.org/legalservices/sclaid/downloads/06A112A.pdf

¹⁴ Les deux lois modèles se trouvent à www.brennancentre.org.

Au fil des ans, les restrictions budgétaires et des programmes d'action gouvernementale de portée limitée n'ont guère laissé place à des stratégies créatives et à l'innovation en matière de programmes. Au lieu, les services d'aide juridique ont été contraints de trouver davantage de moyens efficaces d'offrir des services à plus de personnes dans le cadre de leurs budgets limités.

La tendance principale en matière de prestation de services a consisté à laisser davantage les personnes naviguer par leurs propres moyens dans le système de justice. Les services d'aide juridique ont été dégroupés. En offrant séparément de l'information, des conseils et de la représentation à différentes étapes, les fournisseurs d'aide juridique peuvent servir davantage de personnes. Dans le nouveau modèle d'auto-assistance, les clients ne bénéficient habituellement pas d'une représentation continue – d'une relation de service globale avec un avocat; ils doivent plutôt se débrouiller pour comprendre comment l'information juridique qu'ils ont reçue s'applique à leur cas, et ils doivent souvent se défendre eux-mêmes.

Certains aspects de l'évolution des services d'aide juridique ont fait l'objet de recherches et d'évaluations.

1. Mécanismes de prestation d'information juridique et de conseils

L'information juridique était dans le passé souvent fournie sous forme de dépliants ou de fascicules. Aujourd'hui, elle est de plus en plus offerte par l'entremise de supports multilingues tels que :

- sites Web;
- kiosques à écran tactile dans des centres commerciaux et autres lieux publics (par exemple, aux États-Unis, pour réclamer des crédits d'impôt);
- messages téléphoniques (par exemple, programmes de « téléphone juridique » offrant des explications enregistrées de sujets juridiques);
- vidéos;
- vidéoconférences.

Au Royaume-Uni, des conseils juridiques peuvent maintenant être obtenus gratuitement d'un avocat grâce à des services téléphoniques communautaires et des sites Web permettant de soumettre des questions précises¹⁵.

Au Canada, des services de recommandation d'avocats offerts par les sociétés du barreau indiquent le nom d'un avocat qui offrira gratuitement une consultation d'une demi-heure.

2. Le rôle des parajuristes et autres membres du personnel de l'aide juridique

Le recours accru à des non-avocats au sein du personnel des services d'aide juridique est une autre innovation. Des travailleurs s'occupant de diffusion d'information juridique, des facilitateurs en matière familiale et autres conseillers ne remplacent pas les avocats, mais peuvent aider les clients en prenant le temps de les renseigner et de les aider à obtenir d'autres services.

¹⁵ www.clsdirect.org.uk

3. Programmes de rayonnement

Les programmes de sensibilisation, qui sont habituellement rattachés à un bureau central, apportent des services d'aide juridique à des collectivités éloignées du bureau et à des personnes qui ne se rendraient pas au bureau.

Au Royaume-Uni, dans le cadre des initiatives de sensibilisation, des séances de prestation d'avis sont organisées dans des centres de quartier, des centres de jour, des centres résidentiels, des maisons des jeunes, des cabinets de médecin, des hôpitaux, des collèges communautaires et autres centres communautaires. Les *Citizens Advice Bureaux* offrent de l'information ou des conseils dans plus de 1000 établissements de santé, donnant à la population accès à des services juridiques dans un lieu qui lui est familier et où les gens sont à l'aise.

En 2002, une analyse des services en droit des pauvres au Canada a conclu que pour être efficaces, des services de rayonnement doivent être reliés à des réseaux communautaires qui offrent d'autres services et jouissent d'une crédibilité locale¹⁶.

4. Services aux points d'entrée

Plusieurs rapports sur l'accès à la justice et la réforme de la justice civile ont recommandé que les services soient offerts par le biais d'un point d'entrée unique aux tribunaux, de sorte que les membres du public puissent recevoir une aide directement et aisément¹⁷.

La Colombie-Britannique, par exemple, a créé le centre d'information et d'aide de la Cour suprême, situé au palais de justice de Vancouver, ainsi que le centre d'accès à la justice de Nanaimo.

L'Ontario a des centres d'information sur le droit de la famille dans des tribunaux de la famille de toutes les régions de la province. Ces centres sont dotés d'une documentation et de personnel à même de répondre aux questions pendant des heures désignées. Des avocats offrent des conseils aux visiteurs des centres qui sont admissibles à l'aide juridique.

Des préoccupations ont été exprimées quant à l'utilité des centres d'auto-assistance par exemple pour les personnes ayant un faible niveau d'alphabétisation, celles qui ne peuvent pas se rendre à un centre pendant les heures de travail normales et celles qui vivent dans des collectivités rurales ou isolées. L'application d'un critère rigide fondé sur les moyens financiers pour déterminer l'admissibilité au service engendre aussi du mécontentement chez les visiteurs des centres qui n'y répondent pas et ne peuvent donc pas obtenir de conseils juridiques. Des conditions d'admissibilité financières plus souples ont été recommandées¹⁸.

¹⁶ Social Planning and Research Council of B.C., *Une analyse des services en matière de droit des pauvres au Canada* (Ottawa : Justice Canada, 2002).
www.justice.gc.ca/fra/pi/rs/rap-rep/2003/rr03_aj13-rr03_Ja13/index.html

¹⁷ Voir par exemple Dr Ab Currie, « Legal Problems in Everyday Life », dans Rebecca Sanderfur, dir., *Access to Justice, The Sociology of Crime, Law and Deviance* (Bingley, Royaume-Uni : Emerald Group Publishing, 2009).
www.justiceinitiative.org/db/resource2?res_id=103868

¹⁸ Michael Trebilcock, *supra* note 5, p. 208.

5. Le rôle élargi de l'avocat de service

Les avocats de service sont dans le système des tribunaux l'équivalent des professionnels dans les salles d'urgence des hôpitaux¹⁹. Ils assurent le bon fonctionnement des tribunaux en apportant une aide immédiate aux parties non représentées par un avocat. Ils offrent des conseils à un moment crucial dans le processus juridique, mais ces conseils sont nécessairement sommaires et superficiels, et ils peuvent parfois être limités faute du temps nécessaire pour réunir toute l'information nécessaire.

Dans la dernière décennie, il y a eu une expansion des programmes d'avocats de service. Alors que le modèle a initialement été conçu dans l'optique d'un éventail limité d'affaires criminelles, les avocats de service interviennent maintenant dans un nombre accru d'affaires criminelles mais aussi d'affaires relevant du droit de la famille. Dans certains ressorts, des avocats de service spécialisés sont aussi disponibles dans les tribunaux traitant des affaires de jeunesse, de violence au foyer, de santé mentale, d'Autochtones et de toxicomanie.

Des évaluations des programmes d'avocats de service ont constaté de nombreux aspects positifs, y compris de meilleures relations de travail entre participants du système de justice (procureurs, tribunaux, services de soutien, clients, etc.), une meilleure continuité dans le suivi des dossiers et les services d'un avocat, et une plus grande efficacité grâce à la connaissance qu'a l'avocat de service de la loi, du système et des services de soutien. Il y avait moins de délais et d'ajournements, et davantage d'affaires étaient réglées sans procès. Les aspects négatifs avaient trait à la charge de travail et à la gestion du temps.

Au Royaume-Uni, le rôle d'avocat de service a été élargi au-delà des affaires de droit criminel et de droit de la famille, pour englober d'autres affaires civiles, comme l'éviction d'un logement.

Les avocats de service sont particulièrement utiles pour les personnes qui sont moins susceptibles d'avoir eu accès à des conseils juridiques avant d'arriver au tribunal, que ce soit en raison d'une aliénation générale par rapport au processus juridique, de problèmes de santé mentale ou d'alphabétisation, ou d'obstacles linguistiques.

Les avocats de service ne sont pas considérés comme un substitut à une représentation en bonne et due forme par un avocat lors d'un procès.

6. Bureaux d'aide juridique

Dans certains ressorts, des bureaux d'aide juridique dotés d'un personnel ont dès le début fait partie de la prestation de services d'aide juridique. D'autres ressorts ont choisi de donner des certificats d'aide juridique aux clients qui peuvent ensuite demander à un avocat en pratique privée de se charger de leur dossier au tarif de l'aide juridique. Certains ressorts offrent les deux possibilités à la fois.

Le Manitoba a récemment examiné son approche mixte de l'aide juridique afin d'évaluer des différences de coûts. L'étude a conclu qu'un système entièrement axé sur du personnel coûterait davantage qu'un système mixte, en précisant toutefois que la conclusion peut varier selon le tarif

¹⁹ Legal Aid Ontario, *Business Plan 2006-2007* (Toronto: LAO, 2006), p. 4.
www.legalaid.on.ca/en/publications/PDF/Public_Business_Plan_April_2006.pdf

payé aux avocats privés, le coût du personnel et la productivité du personnel, facteurs qui peuvent eux-mêmes varier avec le temps²⁰.

L'Ontario et l'Alberta ont créé à titre de projets pilotes des bureaux dotés de personnel pour les affaires de droit criminel et de droit de la famille, et les ont évalués. La recherche sur le projet pilote de Bureaux du droit criminel, en Ontario, a constaté que ces bureaux fournissent un service précieux face à un important besoin jusque-là non comblé. Les comparaisons des coûts des services d'aide juridique assurés par du personnel et par des avocats privés ont été considérées comme étant trompeuses en raison des différentes réalités du contexte du travail : les avocats privés ne reçoivent pas un salaire fixe, alors que c'est le cas des avocats membres du personnel; les avocats privés peuvent accepter ou refuser tout type de dossier, alors que les avocats membres du personnel sont limités et doivent s'occuper d'affaires plus difficiles sans rémunération ou aide supplémentaire; les avocats privés peuvent engager ou mettre à pied des employés selon la charge de travail alors que les bureaux dotés de personnel ne le peuvent pas²¹.

7. Cliniques juridiques communautaires

Le modèle de la clinique communautaire est multidisciplinaire et comprend un volet d'éducation publique ainsi qu'un volet de réforme du droit. Les cliniques communautaires ont été créées afin de fournir des services en droit des pauvres non seulement pour régler les problèmes juridiques de particuliers, mais aussi pour s'attaquer aux causes profondes de la pauvreté. Dans la pratique toutefois, les cliniques communautaires sont souvent surchargées de dossiers individuels, et les actions stratégiques à long terme ainsi que les causes types pouvant faire évoluer la loi et protéger les droits ne sont pas nécessairement entreprises.

Certaines cliniques juridiques communautaires parviennent à s'acquitter de leur mandat. Par exemple le Centre de droit d'intérêt public, relevant d'Aide juridique Manitoba, concentre ses efforts sur des litiges stratégiques au service de groupes désavantagés. L'organisme *Calgary Legal Guidance* jouit de l'appui de la population et du milieu juridique, est à l'abri d'ingérence gouvernementale et fonctionne avec du personnel (avocats et travailleurs sociaux) ainsi qu'avec des bénévoles – y compris des étudiants en droit. Aide juridique Ontario finance 17 cliniques d'aide juridique spécialisées, par exemple pour les personnes handicapées, les personnes âgées, les accidentés du travail et les Afro-Canadiens.

En 2002, une analyse des services en matière de droit des pauvres a conclu que la capacité d'intenter des recours fondés sur la *Charte canadienne des droits et libertés* est vitale, mais exige davantage de financement qu'il n'en est actuellement assuré aux organismes de défense de l'intérêt public. Le rapport recommandait également qu'un spécialiste du droit constitutionnel fasse partie de tout groupe d'avocats en droit des pauvres, afin d'assurer une capacité d'intenter des causes types et d'aider les autres à comprendre l'application de la Charte à des règlements administratifs²².

²⁰ *A Review of Manitoba Legal Aid* (Winnipeg: Government of Manitoba, 2004).
www.gov.mb.ca/justice/publications/pdf/legalaidreviewfinal.pdf

²¹ Robert Hann, Fred Zemans et Joan Nuffield, pour Aide juridique Ontario, *Evaluation of Criminal Law Offices, Third Year Report* (Toronto : Robert Hann & Associates Limited, 2008).
www.legalaid.on.ca/en/publications/reports/doc/CLO_EVAL_3rdYearReport_FINAL.pdf

²² Social Planning and Research Council of B.C. *supra* note 16.

8. Programmes d'aide juridique des écoles de droit

Dans les dernières décennies, les programmes de cliniques des écoles de droit ont constitué un élément important des services d'aide juridique pour les personnes à faible revenu. En 2006-2007, presque 1000 étudiants en droit ontariens – 25 % des étudiants inscrits aux six facultés de droit de l'Ontario – ont participé au programme des sociétés d'aide juridique étudiantes. Un grand nombre d'étudiants effectuent ainsi du travail qui n'est actuellement pas intégré aux autres services d'aide juridique.

Aux États-Unis, une étude des cliniques des écoles de droit²³ a constaté que malgré une augmentation constante du nombre de ces cliniques, il y a eu une réduction dans la portée des services et dans le nombre de clients desservis. L'étude comparait les cliniques d'aide juridique des écoles de droit aux hôpitaux universitaires, et les auteurs ont suggéré que les cliniques deviennent des projets de recherche élaborant et éprouvant des modèles de prestation de services, donnant aux chercheurs des moyens d'étudier la relation entre droit, services juridiques et situation de pauvreté ou autre désavantage, et permettant de procéder à des évaluations comparatives de différentes méthodes d'enseignement de l'exercice du droit.

9. Une approche plus holistique de la prestation de services d'aide juridique

Un petit nombre de juridictions ont dépassé le stade des modestes innovations en aide juridique et ont adopté une démarche plus radicale visant une prestation de services complets et intégrés. On peut distinguer trois grandes approches.

- i. **Des pratiques multidisciplinaires** réunissant services juridiques, services sociaux et services de santé de façon à ce que les clients puissent trouver ce dont ils ont besoin en un seul endroit et échapper aux renvois d'un service à l'autre. En faisant partie d'un service intégré, les avocats peuvent aisément transférer les clients ayant besoin de counselling à d'autres professionnels, et ainsi se concentrer sur les problèmes juridiques. D'autres professionnels peuvent apporter au personnel juridique des points de vue utiles sur la situation d'un client. Selon un rapport²⁴, une collaboration interprofessionnelle soigneusement planifiée et menant à l'intégration des services aux clients ne présente aucun inconvénient. Elle exige toutefois une sensibilité aux devoirs professionnels, comme la confidentialité des communications entre avocat et client.

Les *Community Legal Advice Centres*, lancés comme projets pilotes par la *United Kingdom Legal Services Commission*, sont des établissements à guichet unique offrant à la fois des services sociaux et des services juridiques, visant entre autres les soins communautaires, la gestion des dettes, le logement, l'emploi et le bien-être social. Les centres sont conçus en vue de servir les clients à partir d'un même diagnostic initial et d'une même collecte de renseignements, offrant conseils, soutien et représentation par un avocat devant les tribunaux.

- ii. **Une collaboration accrue entre organismes au service des personnes à faible revenu** apporte des avantages à la fois aux clients et aux fournisseurs de services. Au Royaume-Uni, l'accent a été mis sur la combinaison du travail de différents organismes gouvernementaux

²³ Jeanne Charn et Jeff Selbin, *Poverty Law and Law Schools – What's Working How and Why? Legal Aid, Law School Clinics and the Opportunity for Joint Gain* (Boston : Management Information Exchange Journal, 2007).

²⁴ Social Planning and Research Council of B.C., *supra* note 16.

afin d'aider les personnes et les communautés désavantagées à combattre l'exclusion sociale. Le réseau *Community Legal Service* est un partenaire clé.

- iii. **Une approche holistique des services d'aide juridique en matière criminelle** a seulement fait l'objet de discussions au Canada²⁵, mais a été mise en œuvre dans quelques projets américains. Les objectifs de ces projets ne se limitent pas à offrir des services de défense de grande qualité à des clients accusés. L'approche holistique suppose l'offre d'un éventail de services axés sur le client et portant sur des problèmes sous-jacents comme la pauvreté, la maladie mentale, l'alcoolisme, la toxicomanie, le trouble de stress post-traumatique et le dysfonctionnement familial, de façon à prévenir les crimes futurs. L'orientation de service social suppose une intervention collaborative, intense et durable²⁶.

Par exemple, le projet Bronx Defenders compte sur des travailleurs sociaux, des avocats criminalistes, des avocats civilistes spécialisés dans le bien-être de l'enfant, le logement et le travail des immigrants, ainsi que des travailleurs auprès des jeunes et de la communauté, tous travaillant ensemble à partir des mêmes locaux²⁷.

Les groupes de travail interdisciplinaires font écho à l'imbrication des problèmes auxquels sont confrontés les clients à faible revenu, et constituent le meilleur moyen de combler leurs besoins globaux. Au lieu de régler un problème juridique puis, comme c'est souvent le cas, voir le client retourner à la situation qui a donné lieu au problème, une approche holistique laisse entrevoir un changement plus profond et permanent de la situation.

10. Services pour les communautés mal desservies

Divers rapports ont insisté sur ce que le système d'aide juridique ne répond pas adéquatement aux besoins de communautés désavantagées précises. Des projets ont été lancés dans certains ressorts pour mieux combler les besoins, par exemple, des groupes suivants :

- communautés autochtones;
- détenus d'établissement fédéraux;
- jeunes mères célibataires ayant des démêlés avec la loi.

Toutes ces stratégies innovatrices peuvent améliorer un certain aspect d'un service d'aide juridique, ou la prestation de services de façon générale. Aucune d'elles n'a encore été enracinée

²⁵ Dr Ab Currie, *Nature et ampleur des besoins non satisfaits dans le domaine de l'aide juridique en matière pénale au Canada* (Ottawa : Justice Canada, 2003).

www.justice.gc.ca/fra/pi/rs/rap-rep/2003/rr03_aj9-rr03_la9/tdm-toc.html

²⁶ Robin G. Steinberg, « Beyond Lawyering: How holistic representation makes for good policy, better lawyers and more satisfied clients », document préparé pour le 2^e Forum européen sur l'accès à la justice, du 24 au 26 février 2005. M^{me} Steinberg est directrice exécutive de l'organisme Bronx Defenders.

www.bronxdefenders.org/index.php?page=publication&id=18¶m=publications_and_media

²⁷ Exemples de services holistiques d'aide juridique en matière criminelle :

The Bronx Defenders, www.bronxdefenders.org;

Knox County Public Defender Community Law Office, www.pdknox.org/800main.htm;

The Neighbourhood Defender Service of Harlem, www.ndsny.org;

Georgia Justice Project, www.gjp.org.

dans des programmes d'aide juridique à l'échelle canadienne dans le cadre d'une vision nationale de l'accès à la justice.

VI. Améliorations : La mise en place de mécanismes afin d'augmenter l'accès à des services juridiques

Le rapport de Dre Buckley présente deux mécanismes – reliés à une réforme de l'aide juridique, mais distincts d'elle – en vue de rehausser l'accès à des services juridiques : les communautés d'accès à la justice et le travail *pro bono*.

1. Communautés d'accès à la justice

Aux États-Unis, des communautés d'accès à la justice civile sont en place dans la plupart des États et créent un service d'aide juridique qui est complet, intégré et offert à la grandeur de l'État. Organisées sous l'égide de commissions d'accès à la justice, ces communautés réunissent la *Legal Services Corporation* financée par le gouvernement fédéral et d'autres fournisseurs de services juridiques, des fournisseurs d'autres services dont des services sociaux, des programmes de travail *pro bono*, des initiatives appuyant les parties à un procès qui ne sont pas représentées par un avocat, les cliniques des écoles de droit et des éléments clés du barreau privé et du système de justice de l'État.

Les buts principaux des communautés d'accès à la justice sont les suivants :

- créer un point de départ unique d'aide juridique pour les clients à faible revenu;
- intégrer tous les fournisseurs de services et partenaires institutionnels et individuels;
- affecter des ressources aux fournisseurs pour assurer la possibilité d'une représentation à tous les niveaux pour les personnes à faible revenu;
- donner l'accès à un éventail de services à tous les clients admissibles où qu'ils habitent, quelle que soit la langue qu'ils parlent et quel que soit le groupe ethnique ou culturel auquel ils appartiennent.

Des programmes canadiens d'aide juridique ont mené des expériences avec des éléments de cette approche, mais aucun ressort n'a créé une structure collaborative permanente semblable aux commissions d'accès à la justice des États-Unis. Un examen récent de l'aide juridique au Nouveau-Brunswick a toutefois proposé d'étudier avec les autres provinces de l'Atlantique les avantages d'un modèle de prestation en commun des services d'aide juridique²⁸, ce qui pourrait éventuellement mener à une commission de l'accès à la justice dans la région de l'Atlantique.

2. Travail *pro bono*

Les avocats ont toujours servi un petit nombre de clients à un tarif fortement réduit, voire gratuitement. Dans de nombreux pays, les réductions de l'appui gouvernemental aux programmes d'aide juridique ont engendré une forte augmentation de l'activité *pro bono* ainsi qu'une plus grande organisation et intégration des services *pro bono* au sein des programmes d'aide juridique

²⁸ J. Hughes et E.L. MacKinnon, *Si l'aide juridique existait au Nouveau-Brunswick : Examen des services d'aide juridique au Nouveau-Brunswick* (Fredericton : Province du Nouveau-Brunswick, 2007). Voir la recommandation n° 40, p. 44.
www.gnb.ca/0062/pdf/5071%20fr%20report.pdf

et du système des tribunaux lui-même. Il y a aussi eu une tendance à quantifier le travail bénévole effectué; certains États américains obligent d'ailleurs les avocats à déclarer ce travail.

Une table ronde sur la relation entre l'aide juridique et services juridiques bénévoles organisée par la *Victoria Law Foundation*, en Australie²⁹, a soulevé la préoccupation que le travail bénévole se substitue à des services d'aide juridique convenablement financés par le gouvernement. Les participants ont fait remarquer que les juristes privés ont dès le début subventionné et soutenu l'aide juridique, mais ont exprimé une inquiétude du fait que du travail bénévole soit maintenant exigé pour s'occuper des dossiers excédentaires de l'aide juridique, des affaires juridiques qui étaient auparavant subventionnés. Au contraire de l'aide juridique, qui est une question de droit, les services bénévoles des avocats sont une question de bienfaisance et de conscience professionnelle, et il n'existe nul droit d'en recevoir. Il a été reconnu qu'une importante proportion des besoins d'aide juridique qui ne sont pas comblés ne peuvent pas l'être par du travail *pro bono*.

Au Canada, les avocats continuent d'offrir des services bénévoles même si les tensions entre aide juridique et services bénévoles restent à être réglées. Il a été suggéré que le barreau prenne un engagement ferme en matière de travail bénévole, à titre de monnaie d'échange pour obtenir des gouvernements qu'ils réinvestissent dans les systèmes d'aide juridique³⁰.

En plus des communautés d'accès à la justice et du travail bénévole, le rapport évoque quelques autres mécanismes qui pourraient rendre les services juridiques plus largement accessibles aux Canadiens à revenu moyen ou faible. En font partie :

- des programmes de services juridiques prépayés (assurances frais juridiques);
- un fonds de prévoyance de l'aide juridique (où les clients de l'aide juridique obtenant gain de cause versent une partie des montants obtenus);
- des honoraires conditionnels (où les avocats sont payés en fonction du succès de leur action);
- déductions fiscales pour les frais juridiques;
- services d'information et de conseils sommaires à faible coût.

VII. Place à l'action : Remplir le rôle de l'ABC comme défenseur d'une justice égale

L'ABC a constamment soutenu que les gouvernements doivent accepter la responsabilité première d'assurer un accès égal à la justice par le truchement de services d'aide juridique. Elle a aussi fait valoir la responsabilité de la profession juridique de contribuer à l'accès à la justice en aidant à la prestation de services d'aide juridique financés par le gouvernement et en fournissant des services *pro bono*.

Les membres de l'ABC ont adopté de nombreuses résolutions sur l'amélioration de l'aide juridique, appuyé des campagnes de lobbying partout au Canada et contribué à une campagne nationale de relations publiques visant à sensibiliser le public aux lacunes du système canadien d'aide juridique. L'ABC a été le seul intervenant à constamment militer pour une réforme de l'aide juridique à

²⁹ Victoria Law Foundation, *Future of Pro Bono in Victoria*, rapport d'une série de tables rondes de 2001. www.victorialaw.org.au/pdfbook/Future_of_Pro_Bono_in_Victoria_126kb.pdf

³⁰ Richard Devlin, « Breach of Contract?: The New Economy and the Ethical Obligations of the Legal Profession » (2002) 25 *Dalhousie Law Journal* 335.

l'échelle nationale, bien qu'elle compte d'importants alliés parmi les mouvements de lutte contre la pauvreté et de promotion de la justice sociale.

L'ABC propose un programme de réformes en cinq points :

- la reconnaissance de l'aide juridique comme service essentiel, au même titre que les soins de santé;
- la confirmation de la nécessité d'un financement public pour assurer l'accès à la justice aux personnes à faible revenu;
- une augmentation des fonds publics affectés à l'aide juridique;
- l'adoption de normes nationales de couverture (criminelle et civile) pour l'aide juridique et l'adoption de critères d'admissibilité;
- un renouvellement de l'engagement fédéral en matière d'aide juridique.

Dre Buckley note que malgré tous les efforts que l'ABC a déployés pour améliorer le financement et les services de l'aide juridique, ses initiatives n'ont pas encore été couronnées de succès. Son rapport suggère différentes démarches possibles qui permettraient à l'ABC de renouveler son engagement en faveur de meilleurs services d'aide juridique en matière civile et en matière criminelle au Canada. C'est une question de justice.

MOVING FORWARD ON LEGAL AID

Research on Needs and Innovative Approaches

by Melina Buckley, LL.B., Ph.D.

I. INTRODUCTION

A Canadian publicly-funded legal aid system was established almost four decades ago. From its early inception, the legal aid system was designed to further three goals: to serve the interests of justice, assist in improving the situation of low-income persons, and reaffirm faith in a government of laws.¹ The legal aid system thus plays a central role in the smooth functioning of our system of justice and in particular our courts, combating social inequality and enhancing access to justice. Today, legal aid is understood to be an essential component of our justice system – as integral as judges and court rooms are to the maintenance of the rule of law. At the same time, this central component is in crisis due to a number of factors including underfunding and greater complexities in our legal system that give rise to increased demand for services.

One of the Canadian Bar Association's (CBA) primary objectives is to ensure equal access to justice. The central pillar of the Association's work in this regard is its consistent and unstinting support for a legal aid system that provides essential public legal services of reasonable quality across Canada. Since the 1960s, the Association, both at the branch and national level, has actively advocated for improved legal aid systems. During the 1980s, the CBA's Legal Aid Liaison Committee carried out groundbreaking research into legal aid delivery models, which remains the basis of CBA policy today. In the early 1990s, the CBA identified the critical state of legal aid and redoubled its advocacy efforts. At the national level, the focus of advocacy efforts has primarily been on the need for additional funding and for the federal government to take on greater responsibility for ensuring adequate legal aid across Canada in both civil and criminal matters.

The CBA has long decried the "silent crisis" of the failure of the legal aid system in Canada. Silent because despite the devastation experienced by many individuals and the havoc wreaked on the justice system by this crises, those most deeply affected, low-income and disadvantaged persons, have little political clout. Silent also because issues related to the administration of justice and social assistance do not have the broad base of support underpinning the health care and education

¹ Organized *pro bono* services grew throughout the early 20th century and expanded exponentially in the 1950s and 1960s culminating in the precursor to the legal aid plan in Ontario in 1951. The first legal aid act in Canada was adopted in Ontario in 1967. Most provinces followed suit in the early 1970s (Saskatchewan criminal plan began in 1967, community clinics in early '70s and legislation adopted in 1983; Newfoundland and Labrador plan in 1968, legislation in 1975; British Columbia 1970 and legislation in 1979; Manitoba, New Brunswick and Nova Scotia legislation in 1971 and operational in 1972; Quebec 1972; Alberta operational in 1970 and formalized in 1973, no legislation; Prince Edward Island, no legislation; Northwest Territories, Yukon and Nunavut services available since the early 1970s and legislation in 1976 (Yukon) 1988 (Northwest Territories and 1999 (Nunavut)). The Federal Government began to provide funding for criminal legal aid services across Canada in 1972 and for civil legal aid matters in the late 1970s. Thus, it is accurate to say that we have had a national legal aid system since approximately 1972.

portfolios. The silence is sporadically broken by high profile public figures, most prominently; Chief Justice Beverly McLachlin², but these lone voices do not find an echoing chorus. Although a recent article making the case for universal legal care suggests that the increasing inaccessibility of the justice system to average Canadians “has finally begun to tug at the edges of the public conscience.”³ At a minimum, public opinion polls conducted in Ontario, Alberta and British Columbia have demonstrated that there is very strong and growing support for publicly funded legal services, despite relatively low levels of knowledge of what legal aid does.⁴ Public support was largely based on the view that legal aid for low-income people is required to ensure fairness in the justice system.

Access to justice is enhanced by a number of government policies and programs and by a range of services provided by non-governmental organizations and individuals. Access to justice initiatives include: programs to reduce cost and delay in various dispute resolution processes including adjudication by the courts, public legal education, community mediation services, and so on. Legal aid plays a central and indispensable role within this broad array of initiatives. Legal aid refers specifically to publicly-funded legal services. Over time, legal aid programs have recognized the importance of providing a continuum of services, from information and advice to assistance and representation. However, legal aid should be distinguished from other avenues to increase access to legal information and services including: general public legal education and information, privately funded legal clinics, and *pro bono* legal services whether provided on an *ad hoc* or organized basis.

One of the marked changes in the last decade has been the rise in the number of unrepresented litigants coupled with the growing acceptance that they are now a standard feature in the courts. This development is reflected in the broad adoption of the term “self-represented litigants” (SRLs). Traditionally the term self-represented litigant was used to describe litigants who made a positive choice to represent themselves in court because they were confident in their ability to do so. Unrepresented litigants are individuals who would choose to have legal assistance but are unable to access it. Diminished funding for legal aid is one of the causes of the growth in the number of unrepresented litigants and accused as well as to the growing phenomena of “under-represented” litigants and accused. Under-representation occurs when the quality of representation is lower than standard due to limits placed on representation (such as providing representation for only some of the legal issues experienced by an individual, only part of the legal process or the placing of time limits on the services provided) or due to other factors such as poor cross-cultural communication. The blurring of the line between self-representation and un- or under-representation is troubling because it obscures and neutralizes the root problem of inadequate legal aid.

To some degree, those of us working within the justice system have become habituated to this state of crisis. We have become adept at adaptation, but perhaps at the expense of regeneration. This

² Tracey Tyler, “Access to Justice a ‘Basic Right’ ” *The Toronto Star* (12 August 2007).
www.thestar.com/article/245548

³ Alex Hutchison, “The People’s Court” *The Walrus* (September 2008).
www.walrusmagazine.com/articles/2008.09-law-the-peoples-court-universal-legal-care-alex-hutchinson

⁴ For full results see:
www.legalaid.ab.ca/media/Documents/2006/LegalAidAlberta_NewsReleaseNov2006.pdf;
www.lss.bc.ca/assets/aboutUs/reports/legalAid/legalAidPollReport08.pdf;
www.legalaid.on.ca/en/news/june-2006b.asp

paper examines recent developments in legal aid research, policy and service delivery.⁵ It addresses both civil and criminal legal aid, however greater attention is placed on the civil side reflecting the emphasis found in recent literature and practice developments. Like any public service, the legal aid system must always aim to serve the public better – that is why regeneration or renewal is continually required. The purpose of this paper is to set the foundation for a discussion about the potential role and possible contribution of the CBA in this ongoing evolution.

⁵ The author's more extensive original background document is on file at the CBA national office. There is a tremendous amount of legal aid research and development activity ongoing at this time world-wide. Note that the background document is current until January 2009, and this discussion paper is current to April 2009. Both include hyperlinks to the full texts of various reports available online.

II. OVERVIEW

There is considerable variation in legal aid programs across Canada. This paper does not attempt to provide a complete picture of this complex landscape which is in a constant state of flux. Rather, the objective is to highlight important developments and findings in legal aid research policy and service delivery both in Canada and abroad.

The paper is divided into four substantive thematic discussions, followed by a conclusion containing suggestions for future CBA action to improve legal aid. The first detailed discussion provides an overview and summary of recent research into legal needs and in particular the unmet legal needs of individuals with low to modest income. Much of this research is empirical and provides an important background for the development of legal aid policy and service delivery.

The second section reviews developments in legal aid policy. Over the last two decades Canadian legal aid policy has been largely dictated by purely fiscal policy, rather than substantive policy objectives. However, the regeneration of legal aid policy is being promoted in some jurisdictions through a renewed emphasis on social policy goals such as combating social exclusion and increasing social equality. In some instances, these developments are being led by non-governmental actors such as Australian National Legal Aid (which represents the Directors of the eight Australian State and Territory Legal Aid Commissions) and the American Bar Association (ABA) and other organizations in the United States.

The third part of this paper discusses innovative approaches to service delivery. Legal aid providers everywhere, in Canada and around the world, are experimenting with innovative ways to deliver legal information, advice and representation to civil and family litigants, and to criminal accused in financially strained circumstances. A discussion paper published by the CBA in 2000 reported that both within Canada and internationally there was “a new focus on identifying and experimenting with a wide variety of legal aid delivery options.”⁶ It identified four trends in legal aid service delivery: (1) a more client-centered approach to service delivery, (2) a more flexible approach to service delivery; (3) a more complex mixed model of service delivery, and (4) a commitment to new approaches.⁷ This paper reports on recent experience with these innovations and discusses newly emerging trends.

The final section briefly reviews other mechanisms to enhance access to legal services that are closely related to discussions on the future of legal aid. Governments and legal aid agencies are not alone in addressing these questions; the bar, the judiciary, and community-based advocacy organizations across the country are assessing the principles, practices and resource implications of changing the ways in which people who cannot afford, or otherwise do not have legal representation, can find some assistance. The evolution of legal aid programs does not and cannot take place in isolation, but rather in this broader access to justice context.

⁶ Dr. Melina Buckley, *The Legal Aid Crisis: A Time for Action* (Ottawa: Canadian Bar Association, 2000) at 71. While the paper is not official CBA policy, it has assisted in the formulation of CBA advocacy efforts. www.cba.org/CBA/Advocacy/pdf/Paper.pdf

⁷ *Ibid.* at 72-76.

III. RESEARCH ON LEGAL AID NEEDS

A deeper and more nuanced understanding about legal aid needs is key to well-thought out legal aid policy and effective service delivery mechanisms.⁸ Research carried out over the past decade has made a substantial contribution to our empirical knowledge and increased understanding about legal aid needs. This part contains a summary of these findings.

There are three major approaches to measuring and understanding legal aid needs: (1) from the perspective of the individual requiring assistance, that is “demand”; (2) from the perspective of the provision of legal services, the “supply”; and (3) extraneous factors that affect legal aid needs and the availability of services.

The central mechanism for measuring civil legal needs is surveys of large numbers of individuals concerning their experience of problems that have a potential legal solution. These surveys provide us with important insight into the prevalence of legal problems and dispute resolving behaviour. While the focus continues to be on civil matters, research has also been conducted into unmet criminal legal needs focusing on the actual experience of unrepresented and under-represented accused persons within the criminal justice system.

Another major avenue of research is the analysis of the impact of legal aid services and the lack thereof. A wide variety of both qualitative and quantitative methods have been employed, ranging from interviews with both clients and justice system personnel (e.g. lawyers, community advocates, judges, administrators) to counting the number of clients who are refused legal aid due to budgetary restraints. One novel approach in this regard are “mapping” projects that identify and map out the availability of legal services in a geographic region as one way to identify gaps in service provision.

Less work has been carried out to date on the other environmental factors that affect legal aid needs and whether or not they are met. However, there is growing recognition that this is an important part of the legal aid landscape. Preliminary work has been carried out in identifying these factors and developing methodologies to examine their impact on legal aid needs. One specific focus has been on measuring the costs of unresolved legal problems and empirical measures to quantify legal aid funding requirements.

Despite the important progress made, important gaps remain and an increased capacity to measure and understand legal aid needs is required to provide the necessary evidential basis for innovations in legal aid policy and service provision. A recently released study on civil legal needs prepared for the Law Foundation of British Columbia does an excellent job of pulling together the insights gained through general civil legal needs surveys, targeted needs assessments, mapping projects and an analysis of demographic trends.⁹ This synthesis of existing studies provides a powerful snapshot of the gaps in legal aid service provision in British Columbia, underscoring the value of multiple research avenues to achieve a fuller understanding of the complex phenomenon of unmet legal needs.

⁸ Ontario Legal Aid Review, *A Blueprint for Publicly-Funded Legal Services* (Toronto: Ministry of the Attorney General, 1997) (OLAR).

www.attorneygeneral.jus.gov.on.ca/english/about/pubs/olar/toc.asp

⁹ Carol McEown, *Civil Legal Needs Research* (Vancouver: Law Foundation of British Columbia, 2008).

www.lawfoundationbc.org/files/Civil%20Legal%20Needs%20Research%20FINAL.pdf

A. General Findings about Civil Legal Needs

One of the key approaches to understanding the parameters of access to justice is the study of unmet legal needs. While these efforts date back at least to the 1930s, the first generation of empirical studies into unmet legal needs was carried out by the ABA in the mid-1990s.¹⁰ A second wave of these surveys has recently been completed in numerous countries including: England and Wales¹¹, Scotland¹², Northern Ireland,¹³ the Netherlands,¹⁴ Canada¹⁵ and New Zealand¹⁶. The Legal Services Society of B.C. (LSS) completed a similar survey in 2008 and those results have just recently been published.¹⁷ The results of these studies are remarkably similar across jurisdictions.¹⁸

¹⁰ ABA Consortium on Legal Services and the Public, *Report of the Legal Needs of the Low-Income Public, Findings of the Comprehensive Legal Needs Study* (Chicago: American Bar Association, 1994) and ABA Consortium on Legal Services and the Public, *Report of the Legal Needs of the Moderate - Income Public, Findings of the Comprehensive Legal Needs Study* (Chicago: American Bar Association, 1994).
www.abanet.org/legalservices/downloads/sclaid/legalneedstudy.pdf

See also the work carried out on a much smaller scale in Canada: CBA, *Report of the Systems of Civil Justice Task Force* (Ottawa: Canadian Bar Association, 1996).

www.cba.org/cba/pubs/pdf/systemscivil_tfreport.pdf

See also OLAR, *supra* note 8. More recent U.S. state legal needs studies are discussed, *infra* at 45, under “Quantifying Unmet Legal Aid Needs.”

¹¹ Hazel G. Genn, *Paths to Justice: What People Do and Think About Going to Law* (Oxford: Hart Publishing, 1999); Pascoe Pleasence, Alexy Buck, Nigel Balmer, Aoife O’Grady, Hazel G. Genn and Marisol Smith, *Causes of Action: Civil Law and Social Justice* (London: Legal Services Commission, 2004); Pascoe Pleasence et al, *Causes of Action: Civil Law and Social Justice*, 2nd edition (London: Legal Services Commission, 2006).

www.lsrc.org.uk/publications/cofa2006.pdf

Pascoe Pleasence, Nigel Balmer, Tania Tam, Alexy Buck and Marisol Smith, *Civil Justice in England and Wales: Report of the 2007 English and Welsh Legal Needs Study* (London: Legal Services Commission, 2008).

www.lsrc.org.uk/publications/2007CSJS.pdf

¹² Hazel G. Genn and Alan Paterson, *Paths to Justice; Scotland: What People in Scotland Do and Think About Going to Law* (Oxford: Hart Publishing, 2001).

¹³ Tony Dignan, “The Northern Ireland Legal Needs Survey” (Paper presented at the Sixth International Legal Services Research Conference, Belfast, 2006.)

¹⁴ B.C.J. van Velthoven and M. ter Voert, “Paths to Justice in the Netherlands” (Paper presented at the Fifth International Legal Services Research Conference, Cambridge, 2004.)

¹⁵ Dr. Ab Currie, *National Civil Legal Needs Studies 2004 and 2006* (Ottawa: Justice Canada, 2006). See also Dr. Ab Currie, “A National Survey of the Civil Justice Problems of Low and Moderate Income Canadians: Incidence and Patterns” (2006) 13:3 *International Journal of the Legal Profession* and other papers prepared by Currie and cited *infra*. A further survey was carried out in 2008 but results of that survey were not published at the time of writing (2009).

¹⁶ Legal Services Agency, *Report on the 2006 National Survey of Unmet Legal Needs and Access to Services* (Wellington, New Zealand: Legal Services Agency, 2006).

www.lsa.govt.nz/documents/2006NationalSurveyofUnmetLegalNeedsandAccessToServices.pdf

¹⁷ Ipsos Reid for the Legal Services Society (LSS), *Legal Problems Faced in Everyday Lives of British Columbians* (Vancouver: LSS, 2008).

www.lss.bc.ca/assets/aboutUs/reports/legalAid/IPSOS_Reid_Poll_Dec08.pdf

¹⁸ See Table 1: International Comparison of the Incidence of Justiciable Problems, in Dr. Ab Currie, “Legal Problems of Everyday Life”, published in Rebecca Sanderfur, ed., *Access to Justice, The Sociology of Crime, Law and Deviance* (Bingley, UK: Emerald Group Publishing, 2009).

www.justiceinitiative.org/db/resource2?res_id=103868

The U.K. Legal Services Commission has led the way in utilizing studies to inform itself about the need for, provision of, and quality of legal aid services. The English and Welsh Civil Social Justice Survey were conducted in 2001 and 2004. Since 2006, it has been being conducted on a continuous basis; meaning that fieldwork is now conducted every month of every year. These surveys are central to the empirical base upon which broad civil justice policy develops. Many other countries, including Canada, have modeled their empirical work on the English approach. Analysis of the Canadian national surveys results has not been as well-integrated into legal aid planning to date.¹⁹

Across every jurisdiction, the surveys have found that a majority of people experience one or more justiciable problems that are serious or difficult to resolve and these problems make their day to day lives somewhat to extremely difficult. This finding should surprise no one given the degree to which the civil law regulates most spheres of activity and hence the unavoidable impact of law in everyday life.²⁰

Five important findings from this survey research are critical to evidence-based legal aid policy making and the design of legal aid service delivery models:²¹

- Serious economic, social and health consequences, particularly in terms of additional stress and physical and mental illness are directly attributed to unresolved legal problems;
- Many people experience multiple legal problems and these tend to cluster into recognizable patterns of problems;
- There is a strong link between multiple unresolved legal problems and social exclusion, poverty and disadvantage;
- Vulnerable groups²² are likely to fail to respond to problems because of some perceived or actual barrier to accessibility of assistance;
- Merely experiencing a justiciable problem is associated with an unfavourable attitude toward the law and the justice system regardless of subsequent negative or positive experience dealing with the problem. This is true even though the vast majority of people have no contact whatever with the formal justice system in the course of dealing with their problems.

These survey findings are corroborated by qualitative data gathered through interviews which also found that individuals dealing with legal problems experienced six types of related social problems:

¹⁹ Dr. Ab Currie is Principal Researcher: Access to Justice Research and Statistics Division Justice Canada Canada and the leading Canadian authority and scholar on legal aid matters. Most of his published work, including the many works cited in this discussion paper, represent Currie's personal views and not those of Justice Canada, do not express Canadian government policy, nor has his work been integrated into formal policy by any of the provincial legal aid agencies.

²⁰ Pascoe Pleasence, Alexy Buck and Nigel J. Balmer, eds., "Civil Justice Problems and the Health and Disability Status of Canadians" in *Transforming Lives: Law and Social Process* (London: Legal Services Commission, 2007) at 46.

²¹ Currie, "Legal Problems of Everyday Life", *supra* note 18.

²² In the Canadian 2006 Survey, *supra* note 15, these were immigrants, Aboriginal people, people with less than high school education and people with incomes of less than \$25,000.

economic, mental health, physical health, safety and security, discrimination and language barriers.²³

The evidence gathered through these surveys is extremely useful for legal aid programs. For example, the British surveys have contributed to a much better understanding of the phenomenon of *referral fatigue* - whereby people become increasingly unlikely to obtain advice on referral as the number of advisers they use increases suggests a degree of exhaustion among members of the public as a result of being pushed from adviser to adviser.²⁴ This is consistent with the vivid descriptions of respondents having sometimes to make ‘Herculean’ efforts to be seen by an adviser reported in *Paths to Justice*.²⁵

This British survey found that respondents eligible for legal aid more often did nothing to resolve their problems and more often tried and failed to obtain advice than respondents in general. Legal aid eligible respondents who did seek advice were more likely than respondents in general to go to see advisers face-to-face. This is consistent with the hypothesis that the problems reported by legal aid eligible respondents were more severe. It is also consistent with the greater likelihood that people for whom other forms of advice may be less appropriate (such as persons with disabilities or who experience language problems, and so on) will be eligible for legal aid. The English and Welsh Survey also make it evident that those who obtain advice fare substantially better than those who try, but fail, to obtain advice.

Two other very important insights with important implications for legal aid policy and service delivery have been gained through the examination and analysis of these responses to the civil legal needs surveys. First, low-income individuals have a strong tendency to experience multiple legal problems rather than individual ones, and these problems can be grouped into recognizable patterns or clusters.²⁶ This recent empirical work has identified a number of “triggers” that can lead to cascading legal and social problems supporting early intervention by legal aid and other support services.

Second, there is a strong link between unresolved legal problems and social exclusion. Social exclusion is “shorthand for what can happen when people suffer from a combination of linked problems such as unemployment, poor skills, low-incomes, poor housing, high crime, bad health and family breakdown.”²⁷ This idea of multiple and linked problems conveyed by the idea of social exclusion is useful because it connotes not only a condition, but also a dynamic process.²⁸ Exclusion is about inequality and about mechanisms that act to “detach people from the mainstream.”²⁹ While people subject to social exclusion experience a higher incidence of justiciable problems, the inability to deal effectively with justiciable problems contributes to further exclusion. The data across the jurisdictions exemplifies the “Gordian knot” of unresolved legal problems, inadequate

²³ Mary Stratton and Travis Anderson, *The Social, Economic and Health Consequences Associated with a Lack of Access to the Courts* (Edmonton: Canadian Forum on Civil Justice, 2006) (commissioned by Justice Canada). <http://cfcj-fcjc.org/docs/2008/cjsp-socialproblems-en.pdf>

²⁴ *Supra* note 11 at 58.

²⁵ Genn, *Paths to Justice*, *supra* note 11.

²⁶ In their interviews, Stratton and Anderson, *supra* note 23, found that people in all socio-economic brackets experienced multiple problems and related social, economic and health problems.

²⁷ This is the U.K. Social Exclusion Office definition, cited in Currie, *supra* note 18 at 46.

²⁸ *Ibid.* at 47.

²⁹ *Ibid.* at 104, citing Anthony Giddens, *The Third Way* (Cambridge: Polity Press, 1998).

access to legal advice and assistance and the perpetuation of disadvantage. Similar findings were made on a global scale by the United Nations Development Program's Commission on Legal Empowerment of the Poor in its recent report entitled *Making the Law Work for Everyone*.³⁰

B. Unmet Criminal Legal Aid Needs

Far less empirical work has been carried out in the area of criminal legal needs by comparison with the explosion of civil legal needs research in the last decade.³¹ In 2001-2002, the federal Justice Canada in collaboration with the provinces and territories carried out a legal aid renewal research program aimed at filling this gap in our knowledge. The criminal legal aid component of the research program included eight separate studies. These included four studies of a general nature: a study of unrepresented accused in nine courts across the country;³² a study of legal advice provided to persons arrested and detained by the police;³³ a study of financial eligibility guidelines for receiving legal aid;³⁴ and a study of legal aid needs in rural and remote areas of the provinces.³⁵ In addition; four studies focused on particular segments of the legal aid clientele who have experienced difficulty in accessing criminal legal aid or are likely to have unique needs: Aboriginal people;³⁶ speakers of either of the two official languages (English or French) in minority situations;³⁷ women;³⁸ and immigrants, refugees and visible minorities.³⁹

³⁰ www.undp.org/legalempowerment/report/index.html.

³¹ Dr. Ab Currie, *Unmet Need for Criminal Legal Aid: A Summary of Research Results* (Ottawa: Justice Canada, 2003).

http://canada.justice.gc.ca/eng/pi/rs/rep-rap/2003/rr03_la9-rr03_aj9/index.html

The author refers to earlier studies on criminal legal aid needs including, Rush Social Research and John Walker Consulting Services, *Legal Assistance Needs Phase I: Estimation of a Basic Needs-Based Planning Model* (Australia: Legal Aid and Family Services Division - Attorney General, 1996); Paul Robertshaw, *Rethinking Legal Aid: The Case of Criminal Justice* (Aldershot: Dartmouth, 1991).

³² Robert Hann, Joan Nuffield, Colin Meredith and Mira Svoboda, *Court Site Study of Adult Un-Represented Accused, Part I: Overview Report and Part II: Site Reports* (Toronto: Robert Hann & Associates, 2002) and (Ottawa: ARC Research Consultants, 2002).

http://canada.justice.gc.ca/eng/pi/rs/rep-rap/2003/rr03_la2-rr03_aj2/rr03_la2-rr03_aj2/index.html and http://canada.justice.gc.ca/eng/pi/rs/rep-rap/2003/rr03_la3-rr03_aj3/index.html

³³ Simon Verdon-Jones and Adanira Tijirino, *A Review of Brydges Duty Counsel Service in Canada* (Vancouver: Simon Fraser University, 2002).

www.justice.gc.ca/eng/pi/rs/rep-rap/2003/rr03_la4-rr03_aj4/rr03_la4.pdf

³⁴ Spyridoula Tsoukalas and Paul Roberts, *Legal Aid Eligibility and Coverage in Canada* (Ottawa: Canadian Council on Social Development, 2002).

http://canada.justice.gc.ca/eng/pi/rs/rep-rap/2003/rr03_la5-rr03_aj5/index.html

³⁵ Joan Nuffield, *Représentation juridique dans les cause pénales des régions rurales et éloignées des provinces du Canada* (Ottawa : Justice Canada, 2002).

³⁶ Mark Dockstator and Don Auger, *Study of the Legal Aid Needs of Aboriginal Men, Women and Youth* (Ottawa: Aboriginal Research Institute, 2002) (unpublished).

³⁷ Prairie Research Associates Inc, *A Study on Legal Aid and Official Languages in Canada* (Ottawa: Justice Canada, 2002).

www.justice.gc.ca/eng/pi/rs/rep-rap/2003/rr03_la1-rr03_aj1/index.html

³⁸ Lisa Addario, *Six Degrees From Liberation: Legal Aid Needs of Women in Criminal and Other Matters* (Ottawa: Justice Canada, 2002).

http://canada.justice.gc.ca/eng/pi/rs/rep-rap/2003/rr03_la20-rr03_aj20/index.html

An overview and analysis of these studies was prepared by Dr. Ab Currie.⁴⁰ Following in the footsteps of earlier researchers, Currie rejects the simple presence or absence of legal representation as the measure of legal need. He instead develops a framework based on the points in the criminal justice system process from which legal aid needs flow: the operation of legal aid plans; legal aid intake; arrest and detention; and from the adversarial court process.

a) Operation of Plans

Some unmet needs flow from the operations of legal aid plans, that is limitations created by the legal aid providers through rationing mechanisms such as financial eligibility guidelines governing who can access legal aid and restricting coverage that determine the situations in which legal aid will be granted (i.e. the range of legal matters, the seriousness of the legal issue). The study on eligibility requirements showed that “in none of the ten provinces are the financial eligibility guidelines sufficiently generous to include all of the low-income population.”⁴¹ Similarly, most legal aid plans only provide criminal legal aid where there is a risk of imprisonment, although some include loss of means of livelihood in some circumstances. This standard excludes many accused charged with minor offences, especially first-time accused, despite the serious impact a criminal record may have for them. The court site study found that restrictive coverage provisions are an important factor contributing to the numbers of un-represented accused they observed in the courts.⁴²

Most of the studies commissioned by Justice Canada concluded that coverage should be expanded and that the criteria should shift away from narrow primarily legal considerations, such as the seriousness of the offence and the risk of imprisonment. “Legal aid coverage ought to reflect a broader set of considerations. These include disadvantages that may be faced by accused and, in their view, risks that relate to wider impacts on the lives of accused.”⁴³ Many of the studies describe the ways in which the unrepresented criminal accused population is vulnerable and disadvantaged due to personal characteristics and/or low levels of education and literacy and higher rates of drug and alcohol addiction.⁴⁴ These individuals are likely to require representation regardless of the seriousness of the offence.⁴⁵

b) Legal Aid intake

Unmet criminal legal aid needs also flow from the legal aid intake process. Difficulties in accessing legal aid are experienced at various points that include approaching legal aid offices, completing the application process and keeping subsequent appointments. Barriers at the intake stage relate to the types of disadvantage disproportionately experienced by the criminal accused population. They

³⁹ Spyridoula Tsoukalas, Ekuwa Smith and Laura Buckland, *A Study of the Barriers to Criminal Legal Aid Access for Immigrants, Refugees and Visible Minorities* (Ottawa: Canadian Council For Social Development, 2002) (unpublished).

⁴⁰ Currie, *Unmet Need for Criminal Legal Aid*, *supra* note 31.
http://canada.justice.gc.ca/eng/pi/rs/rep-rap/2003/rr03_la9-rr03_aj9/index.html

⁴¹ *Supra* note 34 at 3-4. See Table 1 – Proportion of Poor Who Qualify for Non-Contributory Legal Aid.

⁴² *Supra* note 32 at 4.

⁴³ *Supra* note 31 at 5.

⁴⁴ *Ibid.* See also John Malcolmson and Gayla Reid, *Un-Represented Accused Assistance Project, Project Report and Evaluation* (Vancouver: 2002).

⁴⁵ *Ibid.* at 5.

were reported to be particularly severe for certain groups including Aboriginal persons, recent immigrants and members of some visible minority groups.⁴⁶

Unmet legal aid needs were also identified in the ways in which legal advice is provided to persons upon their arrest and detention through what is commonly referred to as *Brydges* duty counsel.⁴⁷ The study concluded that the constitutionally-mandated minimum service was not always available in a timely manner due to long call back times. In some instances, there were difficulties in contacting a lawyer at all (in the roster systems). More fundamentally the study concluded that there were serious problems with the ability of many accused to comprehend advice provide over the phone due to language barriers or comprehension barriers because of various impairments affecting the accused (mental or intellectual disabilities, the effects of drugs or alcohol.) These barriers are exacerbated in the stressful context of an arrest. The *Brydges* study argues that legal advice provided over the telephone that is poorly understood or not understood at all may be more damaging to the legal position of the detained person than no advice at all.⁴⁸

The court site study explored the consequences of the lack of representation in all stages criminal justice process. While the focus is often on the imperative of representation for the trial, only a small number of criminal matters actually go to trial because most are disposed of earlier in the process. Even for cases that proceed to trial, early steps in the criminal justice system are important. Decisions made at the early stages when individuals are less likely to be represented can have important consequences for the outcome of the case. As Currie notes, “The right to legal representation based on the need to assure fairness that exists in law applies to representation at trial. It has been pointed out that most of what occurs in court happens before the trial stage.”⁴⁹ The court site study’s major findings were that *fairly large percentages of accused are convicted without benefit of counsel and particularly troubling is the fact that up to 27% of these unrepresented accused receive jail sentences.*⁵⁰ [Emphasis added] In four of the nine courts studied, more than 60% of unrepresented accused at final appearance were convicted without the benefit of representation. At least 16% of unrepresented accused at final appearance received jail sentences, again, without legal representation.

In addition to these disturbing statistical findings, the court site study also presents qualitative data based on interviews with judges and lawyers on the errors that unrepresented accused make in court and how these errors may place accused at a disadvantage.⁵¹

In his analysis of the results of the entire research program, Currie concludes that unmet criminal legal aid needs give rise to a strong concern:

The qualitative evidence suggests that the level of expertise required to avoid disadvantage is well beyond the capacities of virtually all unrepresented accused, and this applies to all stages of the criminal justice process. In view of the qualitative evidence about the lack of advocacy skills of accused and the inability to assess appropriate courses of action and consequences, it is very difficult to conclude that fairness in any basic and intuitive sense could characterize the

⁴⁶ *Ibid.* at 6.

⁴⁷ See, *R. v. Brydges*, [1990] 1 SCR 190.

⁴⁸ Verdon-Jones and Tijirino, *supra* note 33.

⁴⁹ Currie, *supra* note 31 at 11.

⁵⁰ *Ibid.*

⁵¹ *Ibid.* at 14.

appearance of any unrepresented person in criminal court. *It is arguable that all accused should receive some level of legal representation.*⁵² [Emphasis added]

The eight studies also provide strong support for pursuing a client-centered approach as opposed to the traditional system-centered one. This would involve considering the disabilities and disadvantages of the accused to a much greater extent in legal aid policy and service delivery. Rather than seeing the accused persons' needs as flowing from arrest, the offence and the court process and as isolated legal issues, the client-centered approach sees needs as arising from the individual's situation of disadvantage and the bundle of legal and non-legal issues related to the offence. This could extend to employing reparative or preventative strategies that address individual or systemic factors linked to the offence either as cause or consequence.⁵³ Currie warns though that the client-centered and system-centered approaches should not become a "false dichotomy" and that criminal legal aid needs are inevitably driven by the criminal justice process.⁵⁴ He suggests that it is more useful to see client-centered approaches as adding an important dimension to the court-centered approach, which may require and taking into account the special needs of clients in the provision of legal aid services.

The research studies identify four main types of special needs that support a more client-centered approach to identifying and meeting criminal legal aid needs: (1) needs that relate to the disabilities of legal aid clients; (2) needs that relate to linguistic, social and cultural characteristics; (3) needs that relate to overlapping legal problems experienced by legal aid clients (e.g. criminal law, family law, refugee law); and (4) needs related to systemic social factors (including addressing the underlying causes and contributors to crime and other factors such as mistrust of the justice system).⁵⁵ While the studies make a strong case for a client-centered approach which seems "sensible on intuitive grounds", in Currie's view:

There is no careful observational evidence describing how a client-centered might work as a dimension of a delivery model, nor is there empirical evidence about the benefits.⁵⁶

In the conclusion to his review, Currie notes that the cumulative outcome of the studies' recommendations would effectively make criminal legal aid "a universal service."⁵⁷ The empirical findings make a strong case for making legal representation available as early as possible in the criminal justice process and expanded duty counsel services through which early intervention might be achieved.⁵⁸ The unmet need for special forms of assistance for those accused persons who suffer from language or cultural barriers or who suffer from various forms of disadvantage and disabilities is very clear.

The Canadian research findings are magnified in a recent study on unmet criminal legal aid needs in the United States. The ABA's Standing Committee on Legal Aid and Indigent Defendants held a series of public hearings into criminal legal aid needs in 2003. This project marked the 40th

⁵² *Ibid.* at 15.

⁵³ *Ibid.* at 17. See, in particular, Addario, *supra* note 38.

⁵⁴ *Ibid.*

⁵⁵ *Ibid.* at 18-19.

⁵⁶ *Ibid.* at 21.

⁵⁷ *Ibid.* at 23.

⁵⁸ *Ibid.*

anniversary year of the U.S. Supreme Court's decision in *Gideon v. Wainwright*⁵⁹ establishing the right to counsel in state court proceedings for indigents accused of serious crimes. The Committee received testimony from 32 expert witnesses familiar with the delivery of indigent defense services in their respective jurisdictions. These witnesses were from all parts of the U.S. and were familiar with different legal aid delivery systems. Their comments were recorded in hundreds of pages of transcripts and then analyzed.⁶⁰

This Committee's report entitled, *Gideon's Broken Promise*, contains the major findings based on the hearings and recommendations for change. The results raise similar themes to those found in the Canadian research into unmet criminal legal aid needs, cited above, although the level of crisis appears to be even higher in the US.⁶¹

C. Quantifying Unmet Legal Aid Needs

The American Legal Services Corporation (LSC) has employed a variety of approaches to document the civil legal needs of low-income individuals and families and to quantify *necessary access to civil legal assistance*—that is, the level of assistance that would be required to respond appropriately to those needs across the United States.⁶² The *Documenting the Justice Gap* report defines civil legal needs of low-income people as involving “essential human needs, such as protection from abusive relationships, safe and habitable housing, access to necessary health care, disability payments to help lead independent lives, family law issues including child support and custody actions, and relief from financial exploitation.”⁶³ The difference between the current level of legal assistance and the level necessary to meet the needs of low-income Americans is referred to as the “Justice Gap.”

Rather than repeating the survey of unmet civil legal needs carried out in the early 1990s,⁶⁴ the *Documenting the Justice Gap* Committee elected to employ three approaches: a national count of people seeking legal aid who were denied service because programs lacked sufficient resources; an analysis and comparison of nine recent state legal needs studies; and a comparison of the ratio of legal aid attorneys to the low-income population with the ratio of private attorneys serving the general population. This Report confirms the existence of a major gap between the legal needs of low-income people and the help they receive. The principal findings were:

- For every client served by an LSC-funded program, at least one person who sought help was turned down because of insufficient resources.
- Only a very small percentage of the legal problems experienced by low-income people (one in five or less) are addressed with the assistance of either a private attorney (*pro bono* or paid) or a legal aid lawyer.

⁵⁹ *Gideon v. Wainwright*, 372 U.S. 335 (1963).

⁶⁰ Standing Committee on Legal Aid and Indigent Defense, *Gideon's Broken Promise: America's Continuing Quest for Equal Justice* (Chicago: American Bar Association, 2004).
www.abanet.org/legal/services/sclaid/defender/brokenpromise/

⁶¹ *Ibid.* See, Executive Summary at 4.

⁶² *Documenting the Justice Gap in America: The Current Unmet Civil Legal Needs of Low-Income Americans* (Washington, D.C.: Legal Services Corporation, 2005).
www.lsc.gov/justicegap.pdf

⁶³ *Ibid.* at 1.

⁶⁴ This is at least in part due to the high cost of carrying out and analyzing these national surveys.

- Despite the changes in legal aid delivery over the last decade, a majority of legal aid lawyers still work in LSC-funded programs. The *per capita* ratio of legal aid attorneys funded by all sources to the low-income population is a tiny fraction of the ratio of private attorneys providing personal civil legal services to the general population.⁶⁵

Given the enormity of the justice gap documented, the Report concludes that eliminating the gap will require a sustained, long-term effort involving a partnership of federal and state governments, the private bar, and concerned public and private parties. A key first step is to quantify what it would take to provide necessary access to civil legal assistance. This Report estimates that doing so will require increasing the nation's capacity to provide civil legal assistance to *five times* the current capacity.

Canadian legal aid providers can also provide some information about the extent of unmet needs by reporting on refusal rates. For example, in its latest *Business Plan*, Legal Aid Ontario (LAO) stated that the number of people with family law problems refused legal aid climbed by 26% in just over a year, with over one third of applicants, many of whom are financially eligible for services, turned away because the services they needed were not covered by LAO. The overall rate of refusals had climbed by 31% during the period reported on.⁶⁶

D. Mapping the Availability of Legal Services

One of the most innovative approaches to identifying the need for legal services and the adequacy of existing methods for providing legal aid (and other services) are projects that seek to create a "map" of these services and the degree to which they match the population's needs. This approach has been utilized by U.S. State Justice Communities and by the Community Legal Services in the U.K. which is in the process of mapping out government legal aid services with a view to identifying gaps or duplications from the customer perspective.⁶⁷

The mapping methodology has already been used successfully in four British Columbia projects.⁶⁸ The report of the mapping project that examined civil and family justice needs in rural and remote areas of B.C. and explored possible options for providing access to self-help services on these issues

⁶⁵ *Supra* note 62 at 4.

⁶⁶ Legal Aid Ontario, *Business Plan, 2006-2007*.
www.legalaid.on.ca/en/publications/PDF/Public_Business_Plan_April_2006.pdf

⁶⁷ The British Department for Constitutional Affairs is currently facilitating an Inter-Departmental Working Group for this purpose. This project may extend to the services provided by the local government and independent advice sector.

⁶⁸ Gayla Reid, Donna Senniw and John Malcomson, *Developing Models for Coordinated Services For Self-Representing Litigants* (2004).
http://justiceeducation.ca/themes/framework/documents/srl_services_vis.pdf.
Gayle Reid and John Malcomson, *Civil Hub Research Project Needs Mapping* (2007)
www.ag.gov.bc.ca/justice-reform-initiatives/publications/pdf/CivilJusticeHub.pdf
See also, Gayla Reid and John Malcomson, *Voices from the Field: Needs Mapping Self Help Services* (2008).
www.lces.ca/documents/Research/SRL_Mapping_Repo.pdf
A mapping process was also undertaken to develop a framework that facilitates a closer alignment of the three main *pro bono* services – see, Gayla Reid, *Pro bono Coordination & Cross-Referral Project: Strategies for a More Seamless Service* (Vancouver: B.C. Law Foundation, 2008).
www.lawfoundationbc.org/itoolkit.asp?pg=2007_SUMMER

is particularly revealing.⁶⁹ The report details the realities of unmet legal needs of individuals living in rural and remote areas. The findings include:

- the total lack of legal services in many of their communities;
- increased difficulties attributable to delay in accessing services;
- frustrations and barriers to using the telephone or Internet to access help;
- changing economic bases in rural communities and lack of affordable housing are significant big issues affecting the communities' and peoples' ability to manage their lives;
- proportionately more Aboriginal people, and more people with lower levels of education and lower income levels in rural and remote areas than in urban centres leads to an increased need for hands-on help;
- there are almost no lawyers willing to do legal aid in many parts of the north;
- for many citizens with low or moderately low-incomes, their link to justice services is a community advocate or other service provider in their community;
- family law is the leading issue in all regions, but lack of service in all areas of civil law was also identified. It is noted that family law problems are often intertwined with poverty law issues;
- Specific poverty needs not being met are support for CPP and WCB issues, housing, employment and most Aboriginal issues.⁷⁰

This research and consultation process led to a very clear delineation of priorities for the future, ideas for service models and recommendations.⁷¹

Mapping projects assist in achieving two key overall needs of legal aid reform: integrating services and working from a client-focused perspective. Carol McEown reviewed these three mapping projects in her recent synthesis paper on civil legal needs.⁷² She emphasizes the importance of establishing and maintaining an ongoing formal collaborative process both in project development and service provision. In her view, the mapping methodology employed in these three projects is an effective mechanism for the collaborative assessment of legal needs. She stresses the importance of involving all community members, including users or clients, and continuing this collaboration on an ongoing basis.⁷³ Mapping must be an ongoing not a one-off process, at a minimum because the "map" needs to be kept current. She recommends that in order to be successful these initiatives should include the following elements:

- buy-in and commitment of all partners with a clear understanding of the time and resources that will be required.
- a common client-focused vision with clear purpose and protocols established.
- trust and respect among the partners to foster honest open discussions and build support for a coordinated approach:

⁶⁹ Reid and Malcomson, *Voices from the Field*, *ibid.*

⁷⁰ *Ibid.* at 11-12.

⁷¹ *Ibid.*

⁷² McEown, *supra* note 9.

⁷³ *Ibid.* at 16.

- the people with power have to give up some of it to keep the other partners at the table; and
- the people with less power need to be realistic about how much authority will be shared.
- Resources need to be dedicated to support the life and work of the committee.
- Partners have to see progress.⁷⁴

The most ambitious mapping project is the Alberta Legal Services Mapping Project which is co-ordinated by the Canadian Civil Justice Forum (CCJF/FCJC).⁷⁵ The Mapping Project is a collaborative action research initiative⁷⁶ undertaken by the CCJC/FCJC in association with a broad partnership of justice community representatives. The research will lead to the creation of a province-wide “map” of legal services that are provided to the Alberta public - information, education, legal advice, legal representation and/or other support or assistance related to legal problems. The map will include the central services provided by *pro bono* initiatives, clinics, public legal education services, courts, legal aid, the private Bar and social services relevant to the needs of users of the justice system, and will extend to civil, family, criminal and administrative justice programs.

The Alberta Legal Services Mapping Project has already completed one study, the “Self-Represented Litigants Access to Justice Mapping Project.”⁷⁷ This aspect of the project was designed to document the range of government and non-government services and supports currently available to SRLs in Alberta. The mapping process also reveals issues surrounding current service delivery including gaps in present services and possible ways of bringing existing services more closely in-line with the needs of SRLs.

The Mapping Project was conducted between July and November 2006. Legal services currently available to SRLs involved in criminal, civil and family matters heard in the Provincial Court of Alberta, the Court of Queen’s Bench of Alberta, and the Court of Appeal of Alberta were mapped in three regions of Alberta. Key social services likely to have involvement with SRLs were also asked to take part in the mapping process. The Mapping Project gathered the following kinds of information for inclusion in the regional maps:

- Details of current services provided to SRLs in each region.
- Areas of law where needs and services are concentrated.

⁷⁴ *Ibid.* at 34.

⁷⁵ This “Brief Overview” and more detailed information about the project are available at the Canadian Civil Justice Forum’s website: www.cfcj-fcjc.org.

⁷⁶ The Canadian Civil Justice Forum defines collaborative research in this way:

A collaborative approach is taken with the expectation that each representative will participate as they are able to as the project develops. In this regard, we have adopted a definition of collaboration developed and applied in previous projects: Working together in a cooperative, equitable and dynamic relationship, in which knowledge and resources are shared in order to attain goals and take action that is educational, meaningful and beneficial to all. It is understood that this definition entails that research is conducted with, and not on, the community; and that all collaborators have different but equally important knowledge and resources to share and gain from each other.

⁷⁷ Mary Stratton, *Alberta Self-Represented Litigants Mapping Project - Final Report* (Edmonton: Canadian Forum for Civil Justice, 2007).
<http://cfcj-fcjc.org/docs/2007/mapping-en.pdf>

- The ability of SRLs to access these services.
- Levels of demand for SRL-related services.
- Identified needs of SRLs not met by present services.
- Characteristics and needs of SRLs in each region.
- Viable service options to address unmet SRL needs.⁷⁸

Team members found the process of information collection about relevant services to be difficult, time consuming, often confusing and seldom straightforward. The Report notes “that the researchers found the search for information on SRL services so challenging must be considered a major finding concerning the availability and accessibility of current services for SRLs.”⁷⁹ The Report details many specific findings about the services mapped and recommendations for change. The Report recommends the establishment of Self-Help Centres. Its comments on the advantages and limitations of a Self-Help Centre are discussed further *infra* under “The Movement Towards Comprehensive and Integrated Service Delivery” dealing with innovative service delivery models.

E. Other Approaches to Identifying and Measuring Specific Legal Aid Needs

Governments, legal aid providers and other entities have employed a number of other approaches to identifying and measuring specific legal aid needs. These include:

- The development of predictive models of legal aid needs in England and Scotland;⁸⁰
- Needs assessments carried out by legal aid providers⁸¹ as well as needs assessments in particular areas of law such as poverty law;⁸² and

⁷⁸ *Ibid.* at 7.

⁷⁹ *Ibid.* at 18.

⁸⁰ See: James Law, Deborah Baker, Steve Barrow, Gareth Barton, Sinead Assenti, Kirsty McKissock and Dan Cookson, *Community Legal Service: Assessing Need for Legal Advice in Scotland: Overview Report* (Edinburgh: Social Research, Scottish Executive, 2004).

www.scotland.gov.uk/Publications/2004/05/19407/37780;

James Law, Deborah Baker, Steve Barrow, Gareth Barton, Kirsty McKissock, and Sinead Assenti, *Community Legal Service: Assessing Need for Legal Advice in Scotland: Technical and Geographic Report* (Edinburgh: Social Research, Scottish Executive, 2004).

www.scotland.gov.uk/Publications/2004/05/19406/37676;

G. Bevan, G. Davis, and J. Pearce, “Piloting a quasi-market for family mediation amongst clients eligible for legal aid” (1999) *Civil Justice Quarterly* 239 at 239.

⁸¹ Prairie Research Associates, *Legal Aid Needs Assessment - Final Report* (Edmonton: Legal Aid Alberta, 2007). www.legalaid.ab.ca/about/Documents/2007%20needs%20assessment_FULL%20REPORT.pdf

⁸² Denice Barrie, *Poverty Law Needs Assessment and Gap/Overlap Analysis* (Vancouver: Law Foundation of British Columbia, 2005).

www.lawfoundationbc.org/files/PovertyLawNeedsAssessment_NOV05.pdf

- Studies on the specific legal aid needs of particular groups, by region or in particular areas of law including: prisoners;⁸³ legal aid needs in Northern Canada;⁸⁴ and immigration legal aid needs.⁸⁵

There are relatively few studies that measure the positive impact of legal aid services. Two exceptions are the outcome-based evaluation of family law services in British Columbia⁸⁶ and a series of studies on the impact of debt advice in the United Kingdom.⁸⁷ These evaluations are an important component of furthering our understanding about how legal aid services work and the benefits that accrue from meeting legal needs. There have also been some targeted evaluations of specific legal aid services and these are analyzed later in this paper in the context of innovative service delivery models.

Similarly, few studies have measured the impact of inadequate legal aid in a systemic fashion. Two recent reports have tried to grapple with this difficult subject. The Law Council of Australia (which represents the legal profession) working with other organizations measured the impact of the erosion of legal representation.⁸⁸ A study called *Delivering Poverty Law Services: Lessons from B.C. and Abroad* (SPARC report) into potential models for the delivery of poverty law services in British Columbia also made some important findings about the impact of the elimination of community legal clinics.⁸⁹

F. Trends Affecting Legal Aid Need

Several reports have recognized that there are other trends that affect legal aid needs, but no real progress has been made to systematically track and measure these trends. Some of the broad categories that require further consideration include:

⁸³ Therese Lajeunesse, *The Legal Services Needs of Prisoners in Federal Penitentiaries in Canada* (Ottawa: Justice Canada, 2002).

http://canada.justice.gc.ca/eng/pi/rs/rep-rap/2003/rr03_la19-rr03_aj19/rr03_la19.pdf;

Prairie Research Associates, *Study of the Legal Services Provided to Penitentiary Inmates by Legal Aid Plans and Clinics in Canada* (Ottawa: Justice Canada, 2002).

http://canada.justice.gc.ca/eng/pi/rs/rep-rap/2003/rr03_la10-rr03_aj10/rr03_la10.pdf

⁸⁴ Pauline de Jong, *Legal Service Provision in Northern Canada: Summary of Research in the Northwest Territories, Nunavut, and the Yukon* (Ottawa: Justice Canada, 2000)

http://canada.justice.gc.ca/eng/pi/rs/rep-rap/2003/rr03_la15-rr03_aj15/rr03_la15.pdf

⁸⁵ Austin Lawrence and Pauline de Jong, *A Synthesis of the Issues and Implications Raised by the Immigration and Refugee Legal Aid Research* (Ottawa: Justice Canada, 2003).

http://canada.justice.gc.ca/eng/pi/rs/rep-rap/2003/rr03_la7-rr03_aj7/rr03_la7.pdf

⁸⁶ Focus Consultants, *An Evaluation of Family Services of the Legal Services Society - Final Report*. (Vancouver: LSS, 2006).

www.lss.bc.ca/assets/aboutUs/reports/familyServices/evaluationofFamilyServicesReport.pdf

⁸⁷ Pascoe Pleasence, Alexy Buck, Nigel J. Balmer, and Kim Williams, *A Helping Hand: The Impact of Debt Advice on People's Lives* (London: Legal Services Research Centre, 2007).

www.lsrc.org.uk/publications/Impact.pdf

⁸⁸ *Erosion of Representation in the Australian Justice System* (Canberra: Law Society of Australia, 2004).

www.lawcouncil.asn.au/shadomx/apps/fms/fmsdownload.cfm?file_uuid=0BE36E9F-1C23-CACD-229A-FD8C640D2F44&siteName=lca

⁸⁹ Andrea Long and Anne Beveridge, *Delivering Poverty Law Services: Lessons from B.C. and Abroad* (Vancouver: Social Planning and Research Council, 2004).

www.sparc.bc.ca/resources-and-publications/doc/60/raw

- Changes in client needs, particularly as social programs evolve, legal entitlements are modified or eliminated;
- Demographic changes in the client population – for example, the larger number of working poor, more clients with limited proficiency in English or French, and so on;⁹⁰
- Additional barriers to the courts, including “gate keeping doctrines”;⁹¹
- The erosion of other protections and procedures which can magnify the need for legal aid;⁹²
- B.C.’s LSS has identified the recent downturn in the economy as increasing the need for legal aid;⁹³ and
- Changes to the justice system including legislative and policy changes, government-initiated projects and court decisions, have a significant impact on the demand for legal aid.

These and many other developments related to the legal aid system are helping shape the civil legal aid system today and for the future.

In its 2006-2007 *Business Plan*, LAO provides a snapshot of demographic trends and their impact on legal aid needs. LAO is turning away more people than ever before – the number of people refused service has increased by 42 per cent in less than two years.⁹⁴ The Plan identifies a number of changes to Ontario’s population which will result in increased demand for legal aid services.⁹⁵ LAO also identified a number of other factors giving rise to increased legal aid needs: (1) increased demand for child protection legal assistance due to legislative and policy changes; (2) rising demand for poverty law services due to systemic issues in administration of income support programs; and (3) increased number of criminal charges due to increased policing.⁹⁶ Other cost drivers include: defending multiple accused people in large-scale prosecutions and increased business costs such as for office space and utilities.

The Legal Services Commission in England and Wales has recommended that the government should recognize the effect of legislative reform and policies on the demand for legal aid and compensate the legal aid budget accordingly.⁹⁷ However, this recommendation has yet to be fully implemented.

⁹⁰ See Alan W. Houseman, “Who are our Clients? What are the Emerging Legal Problems? What Do These Implicate for State Justice Communities?” (Paper prepared for the LSC Client Conference, April 2001, reprinted in (2001) *Management Information Exchange Journal*.)

⁹¹ See Gill Deford, Jane Perkins, Gary Smith and Matthew Diller, “Federal Court Access Issues in the U.S. Supreme Court’s 2003-2004 Term” (2004) 38 *Clearinghouse Review* 464; Jane Perkins, “Using Section 1983 to Enforce Federal Laws” 38 *Clearinghouse Review* 720.

⁹² Both the Australian study on erosion of representation and the SPARC report on poverty law delivery models note the interconnection between the two.

⁹³ See LSS Website, “News Releases”, January 2009.

⁹⁴ *Supra* note 66.

⁹⁵ *Ibid.*

⁹⁶ *Ibid.*

⁹⁷ Legal Services Commission, *Making Rights a Reality – The Legal Services Commission’s Strategy for Community Legal Service 2006-2011* (London: LSC, 2006).

G. Understanding the Cost of Inadequate Legal Aid and Measuring Funding Requirements

Over the past two decades, public funding for legal aid programs has declined across Canada, the United States and many other countries. In Ontario, the province with the highest *per capita* spending on legal aid, funding declined by 9% between 1996 and 2006.⁹⁸ Budget cuts have an uneven impact on different types of legal aid services. In many jurisdictions rising costs of criminal legal aid, to which there is some constitutional entitlement, has put additional strain on civil legal aid services.

Another important empirical avenue for research is to quantify the social and economic costs of inadequate legal aid. This would assist proponents of legal aid programs to make the business case for investing in legal aid. While we are able to identify in general terms the types of costs of unmet legal aid needs on other public programs such as health and social assistance, few hard figures are available to refine this analysis.

The U.K. government has estimated that unresolved disputes and serious legal problems cost the economy to be £3.5 billion each year. This represents £1.5 billion in costs to public services and £2 billion in lost income through loss of employment, although the true figure is likely to be significantly higher.⁹⁹

LAO has quantified some of the ways in which legal aid “saves money for justice.”¹⁰⁰ LAO saves money because it addresses problems at the front end, so that problems do not escalate and become more costly. LAO’s *Business Plan* provides several concrete examples showing how legal aid can reduce costs elsewhere in the justice and social services sector.¹⁰¹

In the U.S., the Legal Services Corporation (LSC) has noted that the federal contribution has lagged badly over the past two decades. The 2005 budget allocation represented only 49 percent of the high water mark allocation in 1981.¹⁰² The contributions from state government, the private bar and other partners to LSC-funded programs have increased approximately three and half times over the same period. The *Documenting the Gap* report concluded that “... the federal baseline share must be at least five times greater than it is now, or \$1.6 billion.”¹⁰³

One American study made recommendations on funding mechanisms for a poverty law system that would achieve “access for low-income people, everywhere, to the level of legal help one needs to

⁹⁸ *Per capita* spending on legal aid has declined in real (inflation-adjusted) terms from \$30.76 to \$27.77 during this decade.

⁹⁹ See Department for Constitutional Affairs, *Getting Earlier, Better Advice to Vulnerable People* (London: DCA, 2006).
www.justice.gov.uk/news/docs/betteradvice.pdf

¹⁰⁰ *Supra* note 66.

¹⁰¹ *Ibid.*

¹⁰² In 1981 the appropriation was \$321,300,000 (\$687,063,000 adjusted for inflation), and it was \$330,803,705 in 2005.

¹⁰³ *Supra* note 62 at 18.

function as a responsible member, not a victim, in our society.”¹⁰⁴ This study provides an estimate of the cost of full access based on the number of legal problems *per capita* for each low-income resident, and the cost of delivering needed assistance. The authors calculate that \$69 per eligible person is required, optimally deployed across a mix of service delivery models.¹⁰⁵

In his recent review of LAO, Professor Trebilcock elaborated the link between access to justice, the rule of law and economic prosperity.¹⁰⁶ Effective laws and access to justice are critical to a stable economic environment. While we generally associate arguments of the connection between the rule of law and prosperity with the development context, Trebilcock argues that we should not become complacent about their importance in Canada today given the growing alienation due to the inaccessibility of justice.¹⁰⁷

To underscore these points, Trebilcock compares the *per capita* expenditures on health, education and legal aid from 1996 to 2006. During this decade, spending on health *increased* by 33% and on education by 20% at the same time that spending on legal aid *decreased* by 9.7%.¹⁰⁸ Trebilcock points out that these figures reflect “no minor transitory political challenge” – rather, “it is a trend that has evolved under the watch of successive governments from different positions on the political spectrum.”¹⁰⁹ There is a strong need to put the legal aid system on a more “fiscally adequate and sustainable basis and to reverse what could become a vicious downward spiral for the system in the longer term.”¹¹⁰ Given that the level of financial support has stagnated or declined in real terms, Trebilcock argues that a major fiscal adjustment is required.¹¹¹

The recent review of legal aid services in New Brunswick also made strong arguments for renewal and investment. In an aptly titled report, *If there were legal aid in New Brunswick*, the Review Panel recommends that “the first step in improved legal aid funding be the addition of sufficient resources to adequately fund the current system. This means an increase of \$2-3 million in base funding in year one.”¹¹² The Review Panel further recommends that “a commitment be made for Legal Aid program expansion to chosen priorities from among the options outlined. The level of this commitment would be \$4-6 million and reasonably be spread over a two-to three-year period.”¹¹³

¹⁰⁴ Ken Smith, Martha Bergmark and Wayne Moore, “The Full Access Financial Scorecard for State Access-to-Justice Communities” (Paper included in International Legal Aid Conference Proceedings, 2003).
www.ilagnet.org/conference/general2003/papers.htm

¹⁰⁵ *Ibid.* Information about the methodology employed in this study can be found at 5-7.

¹⁰⁶ Professor Michael Trebilcock, *Report of the Legal Aid Review 2008* (Report submitted to the Honourable Chris Bentley, Attorney General of Ontario) (Toronto: AG Ontario, 2008).
www.attorneygeneral.jus.gov.on.ca/english/about/pubs/trebilcock/legal_aid_report_2008_EN.pdf

¹⁰⁷ *Ibid.* at 70.

¹⁰⁸ *Ibid.* at 74.

¹⁰⁹ *Ibid.*

¹¹⁰ *Ibid.*

¹¹¹ *Ibid.*

¹¹² Dr. J. Hughes and E.L. MacKinnon, *If there were legal aid in New Brunswick...A Review of Legal Aid Services in New Brunswick* (Fredericton: Province of NB, 2007). See recommendation #40 at 39.
www.gnb.ca/0062/pdf/5071%20eng%20report.pdf

¹¹³ *Ibid.* Recommendation #38 at 38.

IV. LEGAL AID POLICY

Canadian legal aid programs were initiated during an era characterized by a strong public commitment to social justice. Legal aid policy enshrined the principle of equal access to justice and was couched in the language of entitlement to social services. There has been a shift over time away from these principled beginnings and the original conception of a right to legal aid and toward budget-driven basis for policy. Current approaches to renewing legal aid policy focus on recapturing this initial vision, a vision strengthened by our greater understanding of legal needs gained from the empirical research discussed above and through evaluations of various service delivery models discussed in the next part. Legal aid policy is the bridge between research and service delivery providing the framework for setting service objectives and the assessment of program outcomes.

The first part of this discussion on recent developments in legal aid policy briefly reviews the evolution of legal aid program objectives in Canada and in selected foreign jurisdictions. One of the major innovations is the conscious adoption of policy that links the provision of legal aid to the achievement of broader societal goals such as combating social exclusion, advancing human rights and crime prevention. Key issues in legal aid renewal are (1) the question of rights or entitlements to certain types of services and (2) the question of whether or not eligibility for legal aid should be expanded.

Once the broad purpose and contours of the policy framework is established the next step is to develop mechanisms to guide and evaluate the operation of legal aid programs and service delivery. Two recent developments in this regard are the elaboration of national legal aid policy through statements of values, principles or best practices that inform the overall structure and operation of programs across the country and quality assurance standards and practices that regulate the service delivery itself in each jurisdiction.

Two further critical issues that must be addressed by legal aid programs to ensure their sustainability are (1) mechanisms to develop and support legal aid lawyers including the renewal of the public-private relationship between legal aid organizations and members of the private Bar and (2) mechanisms that will foster ongoing innovation in legal aid research, policy development and service delivery.

A. Legal Aid Program Objectives

The policy framework of the LSS in B.C. was subject to a fundamental shift in 2002 when the provincial government substantially amended its governing statute and significantly reduced its budget. These changes ushered in the evolution from policy objectives based on statutory entitlement to a more needs-based problem-solving approach. In May 2007, the *Legal Services Society Act* was further amended to broaden the society's mandate to include justice system reforms beyond providing assistance to low-income persons. Under section 9(1) of the Act, the society's mandate is now to:

- help people solve their legal problems and facilitate access to justice,
- establish and administer an effective and efficient system for providing legal aid to people in B.C., and

- provide advice to the Attorney General about legal aid and access to justice for people in B.C..

LSS has decided to found its legal aid renewal strategy on the overall objective of meeting the needs of low-income clients through the integration of legal aid services with other social services. LSS has been involved in a number of collaborative initiatives toward this end, including playing an active partnership role in the planning of the Justice Access Centres and the Vancouver Downtown Community Court project. One of the central shifts envisioned by this new policy framework is for LSS to become a more outcomes-focused organization. This shift requires LSS to define client outcomes and develop ways to assess whether the services provide are achieving those outcomes.

LSS's further proposals in this regard are contained in its submission during the 2007 provincial budgetary consultations.¹¹⁴ LSS's main recommendations were:

1. That the government continue to pursue the development of integrated justice, health and social services by ensuring there is a co-ordinated budgeting process that provides sufficient resources in all ministries to support these innovations.
2. That the provincial government plan for a core funding increase for legal aid by 2010 to sustain successful innovations.

In its submission, LSS expands on the proposed objectives of legal aid renewal. A fully client-based approach would move beyond ensuring that the justice system provides fair process and ensure that legal aid services:

- help clients reach positive, lasting solutions to their legal problems;
- form part of a holistic approach to meeting clients' overall needs in a broad social context;
- encourage clients to constructively participate in solving, or avoiding, legal problems; and
- are available where, and when, clients need them.

The focus is on: integrating legal aid services with other social services to contribute to long-term resolutions that benefit clients and communities; and promoting a shift toward preventing disputes or resolving them quickly. The submission grounds the proposed holistic approach on the legal needs research discussed earlier in this paper and LSS's own experience with integrated service delivery. LSS recognizes that legal aid renewal must take place in the context of the widespread access to justice and other justice reform initiatives ongoing within B.C.. Further, holistic service delivery will require breaking down silos between government ministries and agencies, additional funding, and novel approaches to funding across ministries and agencies.

Professor Trebilcock's recent report contained similar recommendations for LAO, focusing on integrating legal aid into broader justice system reform focused on prevention and early resolution and promoting a much greater integration of legal aid services with other social services.¹¹⁵

¹¹⁴ *Submission to the Select Standing Committee on Finance and Government Services* (Vancouver: LSS, 2007). www.lss.bc.ca/assets/aboutUs/reports/submissions/submissionBudgetConsultations2007.pdf

¹¹⁵ Trebilcock, *supra* note 106 at 99-107.

1. Broadening the Policy Framework

The empirical findings about legal needs and unmet legal aid needs have stimulated a reconsideration of the policy objectives of legal aid programs. For example, at the conclusion of his synthesis report on Canadian studies on unmet criminal legal aid needs, Dr. Ab Currie suggests that the findings require us to ask broad questions about the role that legal aid is expected to play in the criminal justice system, including:

Should legal aid meet the basic standards of providing service for those who are in custody or at risk of imprisonment? Should there be universal access to legal representation at some or all levels before the trial stage? Should legal aid play some role in achieving broader justice system objectives of preventative and reparative strategies for the accused? To what extent do we expect legal aid to mitigate the disabilities and disadvantages of individual accused? It has been pointed out long before this research that “[h]aving a lawyer for a court appearance in a criminal charge is widely thought of not as a right, but a necessity.”¹¹⁶

In posing these broad questions, Currie recognizes that there are possible social objectives for legal aid beyond the strictly legal aspects.¹¹⁷ Some tailored legal aid programs in the U.S. have the stated objective of “preventing crime” as one part of their mandate.¹¹⁸

This search for external measures is also actively being pursued in the context of civil legal aid programs. To some extent this is not a new phenomenon since the community legal clinic movement was from its inception based on broad social justice goals and recognition of the relationship between increased access to legal services and the eradication of poverty.¹¹⁹ A novel aspect of this policy discussion is the deeper understanding of the dynamics of unmet legal need and social exclusion provided by the empirical studies reviewed above. One basic measure of the success of legal aid that has been suggested is: “have lives and life chances been improved?”¹²⁰ The link between poor health, poverty and inadequate access to justice is well understood. As Dianne Martin points out, it was the federal Department of Health and Welfare (precursor to Health Canada) that provided the initial funding for Parkdale Community Legal Services in recognition of that relationship.¹²¹ Health is something that we are good at measuring and given our understanding of the social and health consequences of unresolved legal problems, individual and community health indicators are a useful standard against which we can evaluate legal aid programs.

The development of outcome-based policy objectives requires governments and legal aid providers to consciously adopt a set of standards and expectations linked to broader societal goals and further informed by research and experience. The United Kingdom has led the way in this regard. An innovative policy framework which would base legal aid objectives on human rights standards

¹¹⁶ Currie, *supra* note 31 at 25.

¹¹⁷ *Ibid.*

¹¹⁸ See discussion of holistic defence services, *infra* at 104.

¹¹⁹ Dianne Martin, *A Seamless Approach to Service Delivery in Legal Aid: Fulfilling a Promise or Maintaining a Myth?* (Ottawa: Justice Canada, 2003).
www.justice.gc.ca/eng/pi/rs/rep-rap/2001/rr01_la20-rr01_aj20/rr01_la20.pdf

¹²⁰ *Ibid.* at 16.

¹²¹ *Ibid.*

has also recently been recommended for Australia although it has yet to be adopted there. These two broader policy frameworks for legal aid are described here.

British legal aid policy has explicitly recognized that the lack of access to legal assistance is a factor in bringing about or maintaining social exclusion:

A lack of access to reliable legal advice can be a contributing factor in creating and maintaining social exclusion. Poor access to advice has meant that many people have suffered because they have been unable to enforce their legal rights.¹²²

And conversely, increased access to legal aid is seen an important tool in the fight against social exclusion. The law and the ability of people to use the law to protect their rights and hold others to their responsibilities are, thus, of central importance to bringing about social justice and addressing social exclusion.¹²³

The British government has established an action plan to combat social exclusion overseen by a Cabinet Minister for Social Exclusion – and improved legal aid services are one central policy in this action plan.¹²⁴ The *Action Plan on Social Exclusion* is aimed at a “radical revision of our methods of tackling social exclusion” and is guided by five principles: early intervention; systematically identifying what works; better co-ordination of the many separate agencies; personal rights and responsibilities; and intolerance of poor performance. It proposes a range of systemic reforms aimed at fundamentally changing the way support is provided to the socially excluded.¹²⁵ Great emphasis is placed on designing methods of legal aid service delivery that understand the dynamics of social exclusion.¹²⁶ By contrast, Ontario’s *Poverty Reduction Strategy* does not mention the potential role of legal aid services.¹²⁷

This strong philosophical and evidence-based starting point is translated into innovative policy and service delivery by the British Community Legal Service, which are discussed below. The important starting point is the recognition that often the clients who experience the worst injustices and face the greatest problems are already the most alienated and vulnerable and therefore face many obstacles in accessing legal services. This dynamic is borne out in the English and Welsh Civil Justice surveys which show that people often believe that nothing can be done to solve their

¹²² Lord Chancellor’s Department and Law Centres Federation, *Legal Advice and Services: A Pathway Out of Social Exclusion* (London: Lord Chancellor’s Department, 2001) at 11.
www.lawcentres.org.uk/uploads/Pathway_out_of_Social_Exclusion_2001.doc

¹²³ See, for example, Lord Chancellor’s Department, *Modernising Justice* (London: HMSO, 1998); *Legal and Advice Services, A Pathway out of Social Exclusion*, *ibid.*; Department for Constitutional Affairs and Law Centres Federation, *Legal and Advice Services: A Pathway to Regeneration* (London: Department for Constitutional Affairs, 2004).
www.lawcentres.org.uk/uploads/Pathway_to_Regeneration_2004.pdf

¹²⁴ Government of U.K., *Reaching Out: An Action Plan on Social Exclusion* (2007).
www.cabinetoffice.gov.uk/media/cabinetoffice/social_exclusion_task_force/assets/reaching_out/reaching_out_full.pdf

¹²⁵ *Ibid.* at 4.

¹²⁶ *Ibid.* at 49.

¹²⁷ Deb Matthews, Chair, *Breaking the Cycle* (Toronto: Government of Ontario, 2009).
www.growingstronger.ca/english/vision.asp

problem or are unaware that there may be a legal solution.¹²⁸ Recognizing and lifting these barriers to access is a key to undoing the “Gordian knot” of unresolved legal problems and social exclusion.

Recent developments in Australian legal aid policy make an explicit connection to a human rights framework, focusing particularly on the right to equality. Two senior legal aid researchers and legal clinical practitioners, Liz Curran and Mary Noone, have recommended that Australia adopt the minimum international human rights standards as benchmarks for the provision of legal aid.¹²⁹ Rather than focusing on legal need and the resolution of problems, this approach highlights the importance of developing individual and community capacities and entitlements:

People’s capacity to seek assistance when in legal difficulty, to enforce their entitlements, to seek redress, and to participate and generate change in civil society are also interconnected to a realization of other aspects of well-being including health, housing and employment opportunities.¹³⁰

National Legal Aid is the organization linking all of the Australian legal aid commissions and carries out an important research and policy development function. It has proposed a radical change in approach in a document called “A New Legal Aid Policy”, which identifies the components of a national policy for legal aid.¹³¹ This policy document prioritizes legal aid services by areas of disadvantage rather than type of legal problem and incorporates both a focus on combating social exclusion and grounding in a human rights framework. The fundamental starting point is the right to equality and the objective of equal access to justice worded as “a commitment that all citizens can be assured of protection under the law, of access to justice and the guarantee that legal rights, privileges and protections apply to all.”¹³²

The proposed “New Legal Aid Policy” identifies the following six policy objectives:

1. Supporting Australian families and protecting vulnerable family members;
2. Supporting Australians at risk of social exclusion due to poverty;
3. Supporting Indigenous Australians at risk of social exclusion;
4. Supporting Australians at risk of social exclusion due to special circumstances [youth, older persons, people living in rural areas; people with disabilities; people with language or literacy problems; women];
5. Supporting a fair criminal justice system; and
6. Supporting human rights and equal opportunity [including migrant/refugee matters].

The policy document briefly describes the types of matters that would fall under each of the six objectives and provides costs estimates for each of them. This proposed new national policy for

¹²⁸ See discussion *infra* under “General Findings About Civil Legal Needs” at 38 - 41.

¹²⁹ Liz Curran and Mary Noone, “The Challenge of Defining Unmet Legal Need” (2007) 1 *Journal of Law and Social Policy* 63.

¹³⁰ *Ibid.*

¹³¹ www.lsc.sa.gov.au/cb_pages/images/A%20New%20National%20Legal%20Aid%20Policy.pdf

¹³² *Ibid.* at 3.

Australia calls for additional investment of \$165 million above the current national budget of \$240 million.

2. The Right to Publicly-Funded Legal Aid: Constitutional and Statutory Entitlements

In the last decade, legal aid policy has been characterized by a shift away from a focus on the right or entitlement to publicly-funded legal aid and towards schemes for prioritizing cases based on rationed resources. There are several exceptions to this general trend, including the continued statutory entitlements in Quebec.¹³³ The parlance of “rights” appears to have become somewhat passé in this context. Canadian legal aid providers have generally taken a passive approach, merely acknowledging that the courts may eventually recognize other constitutional rights to public-funded counsel in addition to accused and parents who are subject to child apprehension proceedings in some circumstances.

By contrast, an entitlement-based approach to legal aid policy is still being pursued by the CBA, the ABA and some other American legal organizations. The CBA adopted a policy statement to this effect in its *Charter of Public Legal Services* in 1993, which is set out and discussed in the Conclusion to this paper. The CBA also commissioned a series of legal opinions on the right to civil legal aid from leading constitutional lawyers and scholars which are published in *Making the Case: The Right to Publicly-Funded Representation in Canada*.¹³⁴ The CBA launched a public interest test case on the issue of the constitutional right to civil legal aid in 2005 but the case was dismissed at the pre-trial stage.¹³⁵ The CBA’s decision to litigate was based on the view that establishing minimum constitutional standards for publicly-funded representation through litigation is one important strategy in its overall advocacy efforts to increase the availability of civil legal aid across Canada.

American legal associations are engaged in a number of initiatives aimed at establishing a right to counsel in civil matters. The ABA adopted a policy position on the right to counsel in 2006, similar to the CBA’s earlier resolution, which called for a right of low-income persons to be represented by a publicly funded attorney in adversarial civil legal proceedings in which basic human needs are at stake.¹³⁶

¹³³ *Loi sur l’aide juridique* (L.R.Q., c. A-14).

¹³⁴ Ottawa: Canadian Bar Association, 2002.
www.cba.org/CBA/pdf/2002-02-15_case.pdf.

¹³⁵ The CBA’s case was dismissed on a pre-trial basis on the dual grounds of lack of standing and failure to plead a reasonable cause of action by Chief Justice Brenner of the B.C. Superior Court in September, 2006. In March of 2008, the case on appeal was dismissed on the grounds that the pleadings were too general to give rise to a triable claim and the issue of standing was left open by the Court (per Madam Justice Saunders). Finally, the Supreme Court of Canada denied leave to appeal in July 2008 (McLachlin, C.J., Fish and Rothstein JJ.) *Canadian Bar Association v. British Columbia et al*, [2006] B.C.J. No. 2015, 1 W.W.R. 331; appeal denied [2008] B.C.J. No. 350, 290 D.L.R. (4th) 617 (B.C.C.A.); leave to appeal to the Supreme Court of Canada denied [2008] S.C.C.A. No. 185 (S.C.C.).

The CBA is in the process of determining a renewed litigation strategy.

¹³⁶ Resolution 112A: RESOLVED, That the American Bar Association urges federal, state, and territorial governments to provide legal counsel as a matter of right at public expense to low-income persons in those categories of adversarial proceedings where basic human needs are at stake, such as those involving shelter, sustenance, safety, health or child custody, as determined by each jurisdiction.
www.abanet.org/legalservices/sclaid/downloads/06A112A.pdf

A National Coalition for a Civil Right to Counsel has been formed and is working in a number of states to obtain court rulings and statutory changes to advance the right to counsel in civil cases. Both federal and state developments were significantly stalled by the 1981 Supreme Court decision in *Lassiter v. Dept. of Social Services*¹³⁷ which held that there is a presumption against appointing counsel in civil cases where no threat of incarceration exists and this presumption can only be overcome in exceptional circumstances. The National Coalition has focused primarily on bringing right to counsel cases in state courts including Maryland, Washington State, Wisconsin, New York, and elsewhere. Most of the cases have failed in the first instance, although there was a recent victory in Alaska in a family law case and a number of these cases are still under appeal.¹³⁸ The National Coalition hosts an excellent website which provides information about right to counsel litigation and related developments.¹³⁹ The ABA Section on Litigation in conjunction with the Public Justice Center is sponsoring a Civil Right to Counsel Fellowship to support these efforts. The Fellow will help to develop, lead, and guide right to counsel reform efforts involving litigation and/or public policy advocacy in targeted states across the country.

In addition to these litigation strategies, there are new efforts to create a statutory right to counsel in some civil matters, including through the drafting of model legal aid statutes. The California Model Statute Task Force established by the state Access to Justice Commission¹⁴⁰ has drafted two model statutes that create and define the scope of a statutory entitlement to equal justice, including a right to counsel in appropriate circumstances. The *State Equal Justice Act* released in 2006 is a model statute implementing an across the board right to counsel in civil cases with only narrow exceptions. The *State Basic Access to Justice Act*, distributed in March 2008, is a model for a narrower right to counsel which attaches only to certain high priority basic needs, defined in the Act as shelter, sustenance, safety, health, and child custody. In each case, the Task Force's mission was to think through the numerous questions involved in implementing a right to counsel, including scope of the right, eligibility criteria and issues, service delivery system, and administration of the new right. The drafts represent the Task Force's resolution of these and other issues and is intended as a starting point for use in any state considering implementation or expansion of a statutory right to counsel.¹⁴¹ A similar effort is underway in Massachusetts.¹⁴² These model statutes are similar to the CBA's *Charter of Public Legal Services* but contain much more detailed provisions.

The exercise of drafting the model legislation was viewed by Task Force members as both "difficult and valuable."¹⁴³ The value lies primarily in wrestling with the main issues that need to be addressed to achieve a truly comprehensive right to counsel in civil cases. The Task Force acknowledges that much work remains to be done, "particularly on the critical question of how a statutory right to counsel would mesh with the existing legal services structure."¹⁴⁴

¹³⁷ *Lassiter v. Dept. of Social Services*, 452 U.S. 18 (1981).

¹³⁸ *Frase v. Barnhart*, 379 M.D. 100 (2003).

¹³⁹ www.civilrighttocounsel.org/

¹⁴⁰ Both model statutes are available at www.brennancenter.org/.

¹⁴¹ "The California Model Statute Task Force" (2006) 40 *Clearinghouse Review* 176.

¹⁴² For an update on the status of this initiative see:
www.massacesstojustice.org/

¹⁴³ *Supra* note 140.

¹⁴⁴ *Ibid.*

A very recent and innovative approach is to develop a much more contextualized understanding of the entitlement to counsel based on empirical evidence. The Boston Bar Association has undertaken what it believes to be a very practical approach to defining the right to counsel. Its approach involves establishing “starting points for an expanded right to counsel” through pilot projects that are aimed at identifying “when a civil proceeding involves a basic need or right, and nothing short of representation by counsel will preserve that right” (as opposed to situations when more limited forms of assistance will provide meaningful access to justice or ones that do not involve basic human needs).¹⁴⁵ While this work is still ongoing, committees working in the areas of family law, housing law, immigration law and youth justice have begun to establish refined criteria to assess where counsel is essential to protect basic needs. There are a number of other individuals and projects working in this vein, notably Professor Russell Engler who has written about the potential of developing an expanded right to counsel from a contextual perspective rather than one based on legal doctrinal considerations.¹⁴⁶

Following this same innovative trend, Community Legal Education Ontario (CLEO), one of LAO’s community legal clinics, recently hosted a “Think Tank” to look at Family Law Self-Help through an access to justice lens. The resulting report supports this contextualized approach to refining our understanding of the right to counsel and proposes that “opportunities for improving full access to professional legal and representation need to be explored and should go hand-in-hand with the exploration of self-help and other limited assistance programs.”¹⁴⁷

3. Expanding Eligibility

Many Canadian legal aid providers are actively engaged in increasing the financial eligibility guidelines so that legal aid is available to more low and moderate income persons. Both Legal Aid Alberta (LAA) and the Quebec Commission have been successful in obtaining these increases in successive years.¹⁴⁸ In B.C., LSS implemented its first annual cost of living increase in the spring of 2008 which, while not expanding eligibility, does offer some protection to potential clients from becoming ineligible due to inflation. Other organizations have been less successful to date despite ongoing advocacy efforts. For example, LAO has stated that as the cost of living increases and financial eligibility guidelines remain the same, a growing number of people in Ontario cannot afford legal services, but are not eligible for legal aid.¹⁴⁹

There are a number of other issues related to eligibility guidelines that are on the public policy horizon. One is the potential expansion of eligibility to a much broader group of individuals. Some legal aid programs have achieved this, at least to some extent, by developing contribution schemes whereby individuals who are above the eligibility cut-off can qualify for highly subsidized legal aid

¹⁴⁵ Task Force on Expanding the Civil Right to Counsel, *Gideon’s New Trumpet: Expanding the Civil Right to Counsel* (Boston: Boston Bar Assn., 2008) at 5.
www.bostonbar.org/prs/nr_0809/GideonsNewTrumpet.pdf

¹⁴⁶ See for example the work of Russell Engler, “Towards a Context-Based Civil Gideon Through Access to Justice Initiatives” (2006) 40 *Clearinghouse Review* 196 and “Shaping a Context-Based Civil Gideon from the Dynamics of Social Change” (2006) 15 *Temple Political & Civil Rights Law Review*.

¹⁴⁷ *Tapping the Community Voice: Looking at Family Law Self-Help through an Access to Justice Lens - Final Report* (Toronto: CLEO, 2008).

¹⁴⁸ Alberta increased Financial Eligibility Guidelines by 10% in 2007 and instituted a further increase in 2008 granting access to coverage to more Albertans. Quebec has committed to steady increases over a three period ending in 2010 – a fourth increase in three years of legal aid eligibility thresholds came into effect on January 1, 2009.

¹⁴⁹ *Supra* note 66.

by making a modest financial contribution. Quebec and Manitoba have operating successful contributory for many years and Alberta is currently reviewing this policy option.

In his review of LAO, Professor Trebilcock has broadened the parameters of this policy discussion by recommending that eligibility for at least some legal aid services should be substantially broadened to include members of the middle class. Trebilcock is very clear on the priority need to ensure the accessibility of legal aid services to low-income persons including the working poor through realistic and current eligibility criteria. He points out that in the ten years that have elapsed since 1996 when the eligibility rates were cut by 22%:

...inflation has eroded the standard allowances by a further 23 per cent - a 45 per cent cut in real terms from the pre-1996 criteria - rendering the eligibility criteria seriously out of step with current cost of living levels and unrelated to any overarching conception of basic needs or a more general and coherent conception of poverty to which various social programs (including legal aid) might be anchored.¹⁵⁰

In addition to calling for principled eligibility criteria, Trebilcock makes a separate case for a more radical innovative approach to expanding eligibility. He advances this proposal on the basis of two interrelated objectives: (1) providing effective access to justice for the middle-class that they are currently denied; and (2) building a greater awareness and identification of the legal aid system in the middle class in order to enhance public support for this important social program. He situates his proposal in the broader social context that:

Legal aid, in contrast to major universal programs, such as healthcare and education, provides services primarily to low-income Ontarians on a means-tested basis.¹⁵¹

He goes on to say:

In short, the legal aid system, despite the important normative rationales that underpin it, is not a system in which most middle class citizens of Ontario feel they have a material stake. As a percentage of the population, fewer and fewer citizens qualify for legal aid, and many working poor and lower middle-income citizens of Ontario confront a system which they cannot access and which they are expected to support through their tax dollars even though they themselves face major financial problems in accessing the justice system (as witnessed most dramatically in the family law area, but also in various areas of civil litigation).¹⁵²

Based on this analysis, Trebilcock recommends that both LAO and the Ministry of the Attorney General accord "a high priority to rendering the legal aid system more salient to middle-class citizens of Ontario (where, after all, most of the taxable capacity of the province resides)."¹⁵³ In support of this suggestion, he points to the much broader level of public and political support in the U.K. (which has the highest *per capita* spending on legal aid) which can be attributed, at least in part, to the fact that many of the services provided by the U.K. legal aid system are not means-tested, and where they are means-tested, are means tested against much more generous criteria. Some summary forms of assistance are provided without means testing in Ontario and some other provinces, including B.C.. However, Trebilcock proposes that more systematic efforts to enhance

¹⁵⁰ Trebilcock, *supra* note 106 at 72.

¹⁵¹ *Ibid.* at 76.

¹⁵² *Ibid.*

¹⁵³ *Ibid.* at 77.

access to justice for the working poor, lower middle-income and middle class citizens is required. In his view, “Without engaging the latter more fully as beneficiaries of the system, it is probably unrealistic to expect them to be engaged, at least to a greater extent than at present, as financial underwriters of the system.”¹⁵⁴

To date the Canadian legal aid policy agenda has not extended to more thorough reconsiderations of the standard approach to means testing through financial eligibility guidelines that have existed for several decades. At best, there have been fairly desultory calls for linking eligibility to a coherent conception of poverty such as Statistics Canada’s Low-income Cut-Offs (LICOs). This can be contrasted with ongoing initiatives by the Legal Services Research Center in the U.K. to develop options for simple and fair means-testing¹⁵⁵ and in Australia where both the National Legal Aid and the Law Council are actively advocating for a National Means Test.¹⁵⁶ The Australian example is of particular relevance to the Canadian context since it aims to create and adopt a national means test to apply throughout the federation. This national means test would overcome the current patchwork of state eligibility policies that deter equal access to legal aid across Australia in the same way that provincial/territorial policies operate in Canada.

B. Toward a Principled National Legal Aid Policy

Many federal states such as Canada, Australia and the U.S. face challenges in providing legal aid services of reasonable quality to all of its citizens and residents. While some variance can be expected in order to be responsive to local legal aid needs, the striking differences in the availability of services, particularly in civil matters, is a serious concern and makes a mockery of the commitment to equal access to justice. In each of these three countries, the federal government has retreated from being an initial strong supporter and founding partner of legal aid programs at their inception to a much more limited role. This retreat has had an immense impact on the legal aid system across these three countries.

The renewal of the federal role in funding legal aid and in establishing national legal aid policy is the *sine qua non* step to ensure the viability and sustainability of this vital social program. In Canada, provincial/territorial governments, legal aid organizations and non-governmental organizations such as the CBA are actively lobbying the federal government toward this end. In Australia and the U.S., some organizations have coupled advocacy strategies to increase federal funding with projects aimed at developing and refining a national legal aid policy.

At the same time that it adopted a position on the right to counsel in civil cases, the ABA adopted the ABA *Principles of a State System for the Delivery of Civil Legal Aid*. These principles were developed by the ABA’s Commission on Access to Civil Legal Aid to guide state Access to Justice Commissions and similar entities in assessing their state systems, planning to expand and improve

¹⁵⁴ *Ibid.* at 78.

¹⁵⁵ Alexy Buck and Graham Stark, *Means Assessment: Options for Change* (London: Legal Services Commission, 2001) (LSRC Research Paper No.8).
www.lsrc.org.uk/publications/meansassessmentoptionsforchange.pdf

¹⁵⁶ See, Law Council of Australia, *Legal Aid and Access to Justice Policy Principles* (2008) and National Legal Aid, *Policy and Principles Statement* (2008).
www.nla.aust.net.au/res/File/PDFs/NLA-Policy%20&%20Position%20Statement%2007-08.pdf;
www.lawcouncil.asn.au/shadomx/apps/fms/fmsdownload.cfm?file_uid=941F013B-1E4F-17FA-D2EA-E65532A6C60B&siteName=lca

them, and ensuring ongoing oversight of their development.¹⁵⁷ While the ABA continues to press for more funding from the federal government through the Legal Services Commission, it also recognizes that at present the onus is at the state level. The format is similar to the ABA *Ten Principles of a Public Defense Delivery System* adopted in 2002.¹⁵⁸ In addition to the principles and commentary, the Commission also developed a self-assessment tool to help state Access to Justice Commissions and other entities measure and evaluate the progress they are making in achieving the principles, highlight the areas where further work needs to be done, and assist in fulfilling their planning and oversight responsibilities.¹⁵⁹

The three ABA policy statements on the *Right to Counsel in Civil Cases*, *ABA Principles of a State System for the Delivery of Civil Legal Aid* and the *ABA Standards for Providers of Civil Legal Aid to the Poor* (discussed in the next section) are the basis for a national civil legal aid policy. Taken together, the three policy statements:

...create a comprehensive framework for concretely advancing civil legal assistance in each state and territory to all low-income and other vulnerable populations that cannot afford counsel. There would be new standards to promote high quality representation by providers, new initiatives to guarantee civil legal assistance in critical cases where the most basic human needs are at stake, and a clear and all-inclusive framework to guide the ongoing development of state systems for the delivery of civil legal aid.¹⁶⁰

The Australian National Legal Aid (NLA) has developed a series of best practices statements:

- Framework for the Provision of Discrete Legal Services (unbundled services);
- Standards for Legal Information and Advice;
- Standards for Minor Assistance (summary advice);
- Standards for the Use of Technology in the Delivery of Legal Services (Non-Litigation);
- Standards for Community Development;
- Standards for Publications;
- Standards for the Determination of Indictable Charges
- Is an Interpreter Necessary?¹⁶¹

The Australian approach to setting out detailed standards is complementary to the ABA's system-wide statement of principles. Both serve the common objective of standardizing the provision of legal aid services to enhance the equality of access to justice across state jurisdictions within the country.

¹⁵⁷ www.abanet.org/legal/services/sclaid/atjresourcecenter/downloads/tencivilprinciples.pdf

¹⁵⁸ www.abanet.org/legal/services/downloads/sclaid/indigentdefense/tenprinciplesbooklet.pdf

¹⁵⁹ The self-assessment tool is appended to the resolution as Exhibit 1. For a discussion on the utility of the principles see Robert Echols and Alan W. Houseman, "Using the ABA Principles: Why Legal Aid Directors Should Care." www.nlada.org/DMS/Documents/1176145694.58/MIE%20journal%20spring%2007%20aba%20civil%20principles-2.pdf

¹⁶⁰ ABA Resolution 112B Background at 9.

¹⁶¹ All of the documents are available online at: www.nla.aust.net.au/category.php?id=12

C. Quality Assurance

Legal aid programs have always focused on providing quality services to low-income individuals. In the past decade, these efforts have been renewed through initiatives to develop quality standards and quality assistance mechanisms. While the principles and best practice standards discussed in the previous section are meant to address the organization and delivery of services at the systemic level, quality standards address the actual delivery of legal aid by individual lawyers, paralegals and other service providers. Quality assurance mechanisms are key to meeting the objective of “continuous improvement” included in the legal aid policy framework of most legal aid organizations.

The Quebec Commission des services juridiques has adopted a *Declaration of Services to the Public* concerning the quality of their services.¹⁶² This type of public statement that is accessible to clients and potential clients is an important first step in establishing a system for quality assurance.

In Canada, LAO has led the way in moving toward a full, integrated quality assurance program. Maintaining the high quality of legal aid services in the province is a key part of LAO's statutory mandate. Since its establishment in 1999, LAO has developed a number of measures to improve quality that include: a Quality Service Office; client service measures; minimum panel standards; a mentoring program; best practices; a complaints process; and quality assurance controls.¹⁶³

LAO developed a *Common Measurement Tool* (CMT) as the basis for survey work to provide “information to continually improve the quality of services and to serve as a diagnostic tool for LAO and individual managers to promote program efficiency and service improvement.”¹⁶⁴ LSS in B.C. has adopted the CMT¹⁶⁵ and LAO is encouraging other legal aid plans across Canada to participate. The CMT survey is carried out on an annual basis with a sample of legal aid clients.¹⁶⁶

LSS established a *Quality Assurance Initiative* in 2001 with the two main objectives:

- to determine the most effective elements for a quality assurance system that ensures that legal aid services meet professional standards consistent with those provided to private paying clients.
- to determine what initiatives were effective in addressing the needs of clients and how they could be delivered in a way that reflects the circumstances of low-income people.¹⁶⁷

The two main elements of the program are quality improvement, which seeks to promote best practices among all legal aid lawyers through education and other means, and quality control,

¹⁶² www.mtq.gouv.qc.ca/portal/page/portal/ministere_en/ministere/organisation/declaration_services_citoyens

¹⁶³ Trebilcock, *supra* note 106 at 42-44.

¹⁶⁴ The CMT was developed in partnership with the Institute for Citizen-Centred Service. See, *LAO Common Measurement Tool 2007 Results* (Toronto: LAO Quality Service Office, 2008).

¹⁶⁵ Mary Bacica and Julie Winram, *Client Services Survey* (Vancouver: LSS, 2007).
<http://lss.ca/assets/aboutUs/reports/legalAid/lssClientSurveyResults.pdf>

¹⁶⁶ *Client Satisfaction Survey Results* (Toronto: LAO Quality Service Office, 2007).
www.legalaid.on.ca/en/about/documents/CMT2007.pdf

¹⁶⁷ Isis Communications, *Quality Assurance Initiative Final Evaluation* (Vancouver: LSS, 2006).
<http://lss.ca/assets/aboutUs/reports/lawyers/QAFinalEvaluationReport2006.pdf>

which attempts to identify and remedy specific instances of substandard service. This evaluation measures the effect of various quality improvement initiatives initiated to date. As part of this initiative LSS also conducted an assessment of best practice needs of lawyers providing services for cases under the provincial child welfare legislation, the *Child, Family and Community Service Act*.¹⁶⁸

The most extensive quality assurance program is in the United Kingdom. The Quality Mark (QM) (both for the Community Legal Service (CLS) and the Criminal Defence Service) is part of a highly proactive, system-wide peer review of legal aid providers that regulates this sector and gives it a common standard of operation.¹⁶⁹ The QM accreditation indicates to members of the public that they can be confident in receiving an assured standard of service. The QM can be awarded to three levels of service: information, general service; and specialist. It is awarded to a very broad range of organizations providing legal services. The QM standard emphasizes quality, value for money and evidence-based practice.¹⁷⁰

Alan Houseman provides an excellent overview of American developments in the quality assurance field.¹⁷¹ Efforts to ensure the quality of civil legal aid services focus on case management systems, standards and performance criteria, peer review and examinations of the overall effectiveness of programs (based on the standards and performance criteria). Some programs have used a variety of creative techniques to conduct their outcome evaluations, including focus groups, client follow-up interviews, interviews of court and social service agency personnel, courtroom observation, and court case file review. The Management Information Exchange Technology Evaluation Project has developed a tool kit for legal aid programs to evaluate their Web site and use of video conferencing and legal workstations, which serve clients through “virtual law offices.”

The ABA Standing Committee on Legal Aid and Indigent Defendants has adopted quality standards for both criminal¹⁷² and civil legal aid.¹⁷³ These ABA standards are accompanied by commentary designed to assist legal aid providers to improve the quality of service and attainment of the standards. The ABA *Standards for Provision of Civil Legal Aid* were recently revised and adopted in their new format in 2006. The revised standards provide, for the first-time, guidance on limited representation, legal advice, brief service, support for pro se activities, and the provision of legal information. They also include new standards for diversity, cultural competence, and language competency.

While welcome, the recent emphasis on quality assurance in legal aid programs is not problem-free. The SPARC Report on the delivery of poverty law services identifies the following pitfalls:

¹⁶⁸ *Quality Assurance Initiative Determination of Best Practice Needs of CFCSA Lawyers Achieving Best Practices Plan and Budget Final* (Vancouver: Legal, 2004).

www.lss.bc.ca/assets/aboutUs/reports/lawyers/achievingBestPractices2004.pdf

¹⁶⁹ Detailed information on the various levels of the Quality Mark and the types of organisation involved can be found in *A Pathway to Regeneration*, *supra* note 123.

¹⁷⁰ *Ibid.*

¹⁷¹ Alan W. Houseman, *Civil Legal Aid in the United States: An Update for 2007* (Washington: Center for Law and Social Policy, 2007) at 21-23.

www.clasp.org/publications/civil_legal_aid_2007.pdf

¹⁷² American Bar Association, *ABA Standards for Criminal Justice: Providing Defense Services*, 3rd ed. (1992).

www.abanet.org/crimjust/standards/defsvcs_toc.html

¹⁷³ American Bar Association, *ABA Standards for the Provision of Civil Legal Aid* (2006).

www.abanet.org/legalservices/sclaid/downloads/civillegalaidstds2006.pdf

- There is evidence that attempts to standardize quality and competence have depressed rather than improved standards due to a tendency to focus on what is achievable and measurable, prioritize process over product, and to discourage innovation.
- There is also a danger that funders will be attracted to quantity and output, over quality and real outcomes.¹⁷⁴
- As one writer has observed, “the resources devoted to bureaucrats seem out of proportion to those devoted to frontline services. Participants [in planning] can get carried away by the process and lose sight of the goal.”¹⁷⁵

The LSS evaluations suggest that resources to support service providers contribute the most to improved quality of service provision. Voluntary standards play a useful role in assisting legal aid organizations and service providers to continually improve. Given the scarce resources available for legal aid, it is critical that quality assurance mechanisms don't put the cart before the horse. Following in this vein, Trebilcock is supportive of extending even LAO's fairly comprehensive quality assurance program but recommends against LAO following in the UK's "Quality Marking" footsteps with what is in his view a costly system, at least for the time being.¹⁷⁶

D. Developing and Supporting Legal Aid Lawyers

The recruitment and retention of legal aid lawyers is a key issue facing legal aid organizations in most jurisdictions. While the focus is often on the need to renew the public-private partnership to ensure the availability of lawyers for the judicare component of service delivery, staff lawyers also have serious concerns that must be addressed. Young legal aid lawyers in the U.K. have argued that:

The failure to engage with the concerns of the future work force and to ignore their evidenced difficulties in attaining the requisite qualifications necessary to maintain the legal aid system will be disastrous for the future of legal aid.¹⁷⁷

Many Canadian legal aid organizations have identified the diminishing availability of private bar lawyers engaged in legal aid work as a priority issue and several have taken active steps to better understand and address this problem.¹⁷⁸ The Trebilcock Report provides an excellent overview of the history of the tariff renewal process in Ontario and a comparative analysis of the process for determining the tariff in Canadian jurisdictions and abroad.¹⁷⁹

LAA has identified the two interrelated priorities of the recruitment and retention of staff and roster lawyers and training and development of staff and lawyers.¹⁸⁰ It commissioned surveys of

¹⁷⁴ *Delivering Poverty Law Services*, *supra* note 89 at 56.

¹⁷⁵ Citing: Tamara Gorierly, *Planning Legal Services: is it working?* (London: Legal Action Group, 2001) at 1-4.

¹⁷⁶ Trebilcock, *supra* note 106 at 151.

¹⁷⁷ Young Legal Aid Lawyers, *Developing Legal Aid Lawyers* (2007) at 2.

www.younglegalaidlawyers.org/files/Releases_Responses/YLAL_developingnewlawyers_100907.pdf

¹⁷⁸ See annual reports of Legal Services Society B.C., Legal Aid Alberta, Saskatchewan Legal Aid Commission, Legal Aid Manitoba, and Legal Aid Ontario.

¹⁷⁹ Trebilcock, *supra* note 106 at 141-45.

¹⁸⁰ LAA, *2007/2008 Business Plan*.

active roster lawyers, and lawyers who practice in areas covered by legal aid but have not recently handled legal aid certificates.¹⁸¹ The surveys are intended to help LAA understand lawyers' concerns about handling legal aid certificates and how it might improve the legal aid system and encourage lawyers to represent legal aid clients. Survey findings include that there is a general decline in the willingness to do legal aid work.¹⁸²

In the post-2002 legal aid system in B.C., LSS relies even more heavily on private bar lawyers to provide legal aid services. As concerns about lawyer recruitment and retention mounted, LSS initiated a tariff renewal project which reported in 2005.¹⁸³ The objectives of the tariff review were: (1) to establish and maintain tariffs that attract private bar lawyers who will provide quality services to meet the legal needs of LSS clients; (2) to establish and maintain tariffs that promote efficiency and effectiveness within the legal aid system and the larger justice system; and (3) to establish methods and criteria for regular evaluation of the tariffs as an integral part of LSS administration to ensure that the legal aid system is sustainable and responsive to changing needs. The key recommendations were: (1) adopt results-based management for the tariff system; (2) adopt a principled approach to tariff compensation; (3) adjust the tariff structures to remedy problems, improve compensation, and enhance results; and (4) maintain a strategic approach to contracting.¹⁸⁴

LSS has also carried out tariff lawyer satisfaction surveys to measure the degree to which lawyers taking legal aid referrals are satisfied with how LSS supports them in providing services to legal aid clients. Over the past few years satisfaction ratings rose for most items surveyed and overall satisfaction with LSS support increased in the second online tariff survey.¹⁸⁵ Tariff renewal measures have had a positive impact on some lawyers, most found LSS staff courteous and knowledgeable, and lawyers remained enthusiastic about most initiatives designed to provide services electronically. Unsatisfactory service given by the authorizations area remains a significant issue for lawyers, as does the continued and consistent perception by lawyers that LSS does not value their services. Tariff rates and coverage are still the top reasons given for this perception. There is strong connection between tariff lawyers' satisfaction levels and their views on how well LSS is serving the legal needs of low-income people.¹⁸⁶ Other specific initiatives have been undertaken by LSS to increase lawyers' involvement and engagement in the delivery of legal aid.¹⁸⁷ Despite these initiatives, LSS continued to highlight the problem of lawyer retention and recruitment in its 2007-2008 *Annual Report*.

Legal Aid Manitoba (LAM) has also engaged the bar and other justice system stakeholders with a view to identifying ways to address the shortage of criminal and family lawyers. In the past 5 years, LAM reported a 65% decrease in the number of private bar lawyers, especially in the family law area, willing to accept legal aid work. The impact of this change is described in these terms:

¹⁸¹ Prairies Research Associates Inc., *Survey of Roster and Non-Roster Lawyers* (Edmonton: LAA 2008).

¹⁸² *Ibid.* Table 10 at 8.

¹⁸³ LSS, *Managing for Results: LSS Tariff Renewal* (Vancouver: LSS, 2005).

www.lss.bc.ca/assets/aboutUs/reports/lawyers/managingResultsTariffReviewReport2005.pdf

¹⁸⁴ *Ibid.* Executive Summary at 7. See report for specifics outlined under each of these recommendations.

¹⁸⁵ Prospect Management Inc., *Tariff Lawyer Satisfaction Survey Final Report* (Vancouver: LSS, 2007).

www.lss.bc.ca/assets/aboutUs/reports/lawyers/tariffLawyerSurvey2007.pdf

¹⁸⁶ *Ibid.* at 91-93.

¹⁸⁷ *Annual Report 2007-08* (Vancouver: LSS, 2008).

The exodus of private bar and staff lawyers has made it very difficult for LAM to meet existing client demands. This has been shown to be a systemic problem within Manitoba's justice system.¹⁸⁸

One overall goal is to increase the number of lawyers on the active panel list. Special measures are also needed to address the paucity of lawyers doing legal aid work outside of Winnipeg and the lack of both staff and private bar lawyers to do legal aid work in the North. LAM has been actively seeking tariff renewal and has prepared a proposal for government to this effect. Implementation of this proposal is seen as a key step forward. Other strategies currently being developed include:

- Partner with other stakeholders in the justice system to attract lawyers to the practice of family and criminal law;
- Explore and develop incentives for lawyers to practice outside of Winnipeg;
- Provide private bar lawyers with access to legal research;
- Explore and develop incentives for lawyers to practice outside of Winnipeg; and
- Expand mentorship program.

The Saskatchewan Legal Aid Commission (SLAC) relies less on the private bar for legal aid delivery because it has a predominantly staff system. Nevertheless, it too has held focus groups with members of the private bar in order to obtain information, perceptions and recommendations from this group concerning three issues: (1) the SLAC tariff; (2) systemic issues related to policies of the courts; and (3) communication with SLAC. One conclusion derived from this consultation process was that the current hourly rate of \$60 is very inadequate and does not begin to meet overhead costs to private bar lawyers.¹⁸⁹ A related issue is that the growing complexity of cases means that lawyers need more preparation time than is allowed under the tariff. Members of the private bar indicated "they are not going to do less for the client just because they are getting paid less. They need to spend considerable time ensuring the case is valid and sound and in explaining the situation to the client."¹⁹⁰

LAO considers that it operates as "one of the most successful and effective public-private partnerships."¹⁹¹ At the same time, it too has growing concerns about the recruitment and retention of lawyers and in particular, the capacity to serve the legal aid needs in the North.¹⁹² Professor Trebilcock echoed these concerns in his recent review of LAO noting that in his consultation with stakeholder groups "no issue engaged more attention and provoked more criticism than the management of the legal aid tariff, and more specifically, the hourly rates payable under the tariff and, to a lesser extent, the maximum time allocation for particular proceedings and maximum allocations for disbursements and travel time."¹⁹³ In his view, the certificate system is in

¹⁸⁸ *Annual Report 2007-08* (Winnipeg: LAM, 2008).
www.legalaid.mb.ca/pdf/2008_annual_report.pdf

¹⁸⁹ Darlene Bassey, *Report on Responses from Private Bar Focus Groups* (Saskatoon: SLAC, 2006) at 2.
<http://legalaid.sk.ca/assets/pdf/Final%20Report%20Focus%20Groups%20May%202006.pdf>

¹⁹⁰ *Ibid.* at 9.

¹⁹¹ *Business Plan 2006-07*, *supra* note 66 at 3.

¹⁹² *Annual Report 2006* (Toronto: LAO, 2006) at 8-9.

¹⁹³ Trebilcock, *supra* note 106 at 115.

“tenuous condition” given the diminishing commitment of the private bar and its alienation from the legal aid system which challenge its sustainability in a fundamental way.

Trebilcock’s terms of reference required him to examine “alternatives to the current tariff process, including methods of ensuring regular reviews to set and adjust the hourly rate paid to lawyers doing legal aid work.”¹⁹⁴ He divides the issues into three broad categories: (a) who should determine the tariff (including hourly rates and hourly time and related allocations); (b) how should these determinations be made; and (c) how can the certificate system be put in some state of initial equilibrium so that future adjustments are incremental and tractable. He proposed that the administration of the tariff be vested solely in LAO which should be free to change hourly rates and related allocations as it deems appropriate within its budgetary envelope. He also recommended tariff should be reviewed every three years and that staff lawyer salaries should also be fairly addressed. The new tariff management system should take effect based on a modest starting point of \$110 per hour – based on the 1987 rate as adjusted for inflation, and comparable raises for salaried LAO lawyers.¹⁹⁵

The approach to recruitment and retention adopted by Canadian legal aid organizations is fairly wide-ranging but it focuses on current members of the bar. A long-term strategy should also focus on developing and supporting young lawyers to do legal aid work. The Young Legal Aid Lawyers group in the U.K. argues that more support needs to be given to those intending or contemplating a career in the legal aid sector. It identifies a number of issues that should be addressed including:

- The fundamental imbalance in system between other public service lawyers (i.e. in government, crown counsel) and legal aid lawyers “This causes a fundamental imbalance in the system in which both sides receive public funds and where there should be some parity”;
- the employment of paralegals versus trainee lawyers;
- the shortage of training opportunities; and
- law school debt.¹⁹⁶

Their recommendations include: increasing the number of work opportunities; introducing a commitment to training into Legal Service Commission contracts with law firms; commencing a transparent debate about the future of legal aid advocacy; and instituting a structured programme for dissemination of information for students and in particular set up annual legal aid careers events. Professor Trebilcock also raises the issue of law student debt in his report. He urges all Ontario law schools to re-examine their back-end debt-relief programs to ensure that they are sufficiently generous to render the option of practicing poverty law feasible and that LAO should press the law schools on this issue.¹⁹⁷

E. Fostering Ongoing Innovation

Many Canadian legal aid programs have made a strong commitment to innovation and to building a culture of continuous improvement in their mission statements. However, legal and governmental cultures have a greater orientation toward maintaining the *status quo* than to facilitating change.

¹⁹⁴ *Ibid.* at 1.

¹⁹⁵ *Ibid.* at 126-32.

¹⁹⁶ *Developing legal aid lawyers, supra* note 177.

¹⁹⁷ Trebilcock, *supra* note 106 at 131.

Even LAO, the newest (in terms of its current organizational structure) and the best resourced legal aid programs in Canada, has not been particularly innovative in service delivery despite its many notable achievements.¹⁹⁸ The challenge for all legal aid providers is how to foster ongoing change by moving from a tradition-bound system to one that values and rewards problem-solving and innovation. Continuous improvement requires abandoning a “this is the way we have always done it” mentality and adopting a general openness to redefining tasks, reviewing procedures, streamlining and so on. The right balance must be found between valuing tradition and ensuring that the central pillars of justice remain unchanged, while being open to needed innovations.

A recent British study poses the central question in these terms: given that legal aid service is traditionally a “low innovation” sector, how can we develop policy to support innovation?¹⁹⁹ In “high innovation” sectors, innovation is increasingly ‘part of the day job’ across the whole organization whereas in the legal aid sector innovation is regarded as a marginal activity at odds with the main job of service delivery.²⁰⁰

In many sectors the key to innovation is investments in research and development, but in others it is more a question of absorbing ideas rather than creating new ones. For example, new organizational forms and the use of IT both “draw on a hinterland of ideas from related sectors and is frequently a global process.”²⁰¹ Innovation often involves melding existing technologies and matching those with organizational change to deliver innovative services. Major sources of innovation vary widely across sectors and include:

- Investment in information and communication technology;
- Individual initiative;
- Groups that are outside of the formal sector, e.g. voluntary groups; and
- Collaborative problem-solving with clients.²⁰²

Networks and collaboration are important to innovation because innovation doesn’t move in a linear way from ‘laboratory to marketplace’ within a single business or organization. Indeed, innovation is not synonymous with research; it is more developmental, based around individual projects and conducted in response to particular challenges and problems.²⁰³

The report found that there had been some innovations in the legal aid sector in the U.K. both in the government-financed Community Legal Service and in the voluntary Citizen’s Advice Bureaux, but concluded that overall:

...the legal aid sector has been slow to adopt new working practices, and has not yet embraced the opportunities for innovation presented by technology. To date, narrowly-focused government priorities have tended to reinforce reluctance amongst providers to

¹⁹⁸ *Ibid.* at 83.

¹⁹⁹ NESTA, *Hidden Innovation: How Innovation Happens in Six ‘Low-innovation’ Sectors* (2007). www.nesta.org.uk/library/documents/Nesta%20Report%20HiD%20Innov%20final.pdf

²⁰⁰ *Ibid.* at 14.

²⁰¹ *Ibid.* at 5.

²⁰² *Ibid.* at 15.

²⁰³ *Ibid.*

think more imaginatively. Little funding is allocated to innovation and the sector suffers from the lack of a single body with an explicit mission to promote innovation.²⁰⁴

The study notes that innovation has generally been centrally driven by concerns over costs and efforts to improve access, but is inhibited by conservatism and a lack of incentives. Narrowly-focused government priorities have tended to reinforce a reluctance to think more imaginatively. There have been few incentives for changing practices and providers often perceive a lack of support and encouragement to innovate because of the constraints of existing funding and procurement mechanisms.²⁰⁵

Two British initiatives have begun to promote ongoing change in the legal aid sector. First is the “Partnership Initiative Budget” a short-term funding stream enabling organizations at a local level to develop projects that improve access to advice and information in civil law, in particular for vulnerable groups.²⁰⁶ This initiative funded a number of highly successful strategic partnerships among service providers demonstrating that targeted funding is one important facet of fostering innovation.

Second, the British government has invested in social science research for the legal aid sector. The Department of Constitutional Affairs Research Unit has carried out a number of important research projects. An extensive amount of work is also done by the policy-focused bodies such as the Legal Services Research Centre (the independent research division of the Legal Services Commission with a broad mandate to conduct strategic research in the civil and criminal justice fields),²⁰⁷ and the Scottish Executive Legal Studies Research Team (now the Civil Law Research Team)²⁰⁸ – many of these studies are referenced in this paper. A number of umbrella bodies representing providers, such as Citizens Advice, the Advice Services Alliance and Youth Access are also active in the research field.²⁰⁹

The study points out that while research is essential, research alone will not drive innovation unless it translates into improved service. To support innovation it must be translated into service delivery, and changes must be tracked and evaluated. Innovation could be better measured through tracking investments in developing innovation and outcome performance metrics, including:

- metrics developed around levels of investment in research and development to support innovation, and the extent to which research evidence is used to inform change – measurement of the investment in innovative projects and the funding used to disseminate and evaluate them;
- output and outcome performance metrics should be used to assess the value of innovations (e.g. measuring the extent to which services are delivered to different client groups, particularly hard-to reach, socially excluded groups; the ability of the

²⁰⁴ *Ibid.* at 18.

²⁰⁵ *Ibid.* at 50.

²⁰⁶ See Legal Services Commission, *Innovation in the Community Legal Service* (London: LSC, 2005). www.legalservices.gov.uk/InnovationintheCLSwithcover.pdf

²⁰⁷ *Hidden Innovation*, *supra* note 199 at 50.

²⁰⁸ The Scottish Executive’s Civil Law Research Team has an annual budget of approximately £300,000, which covers a broad range of topics including Family Law, Human Rights, Community Legal Services, Legal Aid, civil courts and civil procedure.

²⁰⁹ *Hidden Innovation*, *supra* note 199 at 51.

CLS to address issues that contribute to social exclusion; the benefits accrued by other parts of the public sector from early interventions by the CLS (for example, the cost of housing repossessions defrayed by early advice on housing debt); and the ability to retain people with problems within the system during the referral process).²¹⁰

Given the publicly-funded but privately-delivered nature (at least in part) of the sector, any government-led reforms will need to be complemented by innovative approaches and practices by service providers. The innovation study concludes that there are three main respects in which such innovative practices might be better encouraged and supported:

1. Strengthening incentives for innovation within the sector with a shift away from focusing primarily on reducing costs and to promoting new practices and approaches;
2. Encouraging new types of providers into the legal aid market which might drive innovation through competition and the transfer of ideas from other sectors; and
3. Greater scanning for innovative practice (domestically and overseas) and the championing of specific innovations – ideally through a single body with an explicit mission to promote innovation and develop a cross-sectoral strategy for investment and support for innovation.²¹¹

The issue of the appropriate role of legal aid programs in research and development is a live issue in Ontario today. In 1996, the Ontario Legal Aid Review recommended that LAO take on a major role as a sponsor of research on access to justice issues.²¹²

In his review of LAO, Trebilcock states given the agency's preoccupation with managing the transition from the old to the current regime, "it is fair to say that the LAO has done little of consequence in the research domain, beyond commissioning evaluations of the Criminal Law Offices."²¹³ However, LAO has recently appointed a Director of Strategic Research signalling its intention to remedy this oversight.²¹⁴ Trebilcock reasserts his support for LAO to undertake a significant research function "with respect to exploring the modalities of alternative service delivery mechanisms" and to sponsor research on aspects of the broader justice system and dysfunctions that impact upon access to justice and legal aid. He concludes that not nearly enough evidence-based research into the functioning of the broader justice system is currently being undertaken, that LAO is well-placed to play a constructive and important role in such research and that this research should be placed in the public domain.²¹⁵ One specific suggestion is that LAO "sponsor or co-sponsor a publicly accessible Access to Justice Working Paper Series, where evidence-based research can be reported and disseminated, so stimulating broader and better informed public discussions and debates relating to the ideals of access to justice and the rule of law in the province."²¹⁶

²¹⁰ *Ibid.* at 51-53.

²¹¹ *Ibid.*

²¹² Summarized by Trebilcock, *supra* note 106 at 160.

²¹³ *Ibid.* at 161.

²¹⁴ *Ibid.*

²¹⁵ *Ibid.* at 162.

²¹⁶ *Ibid.* at 163.

Reform-oriented research on legal aid has grown substantially in the past decade – as reflected in this paper. The Ontario Legal Aid Review²¹⁷ carried out in 1996-1997 ushered in a new era of legal aid research and policy development. The federal Justice Canada and some law foundations have begun to carry out and fund both large scale legal aid research projects and targeted evaluations of specific delivery mechanisms. The Law Foundation of British Columbia has been particularly active in this regard, both in funding LSS to commission surveys and evaluations and by carrying out its own studies and legal aid needs assessments. Evidence-based research has been an integral part of LSS's innovations in legal aid policy service delivery. The Canadian Civil Justice Forum has also made a strong contribution both by acting as a clearing house for access to justice research and through its own ground-breaking collaborative research projects (such as the mapping project described *infra* at 48).

In addition to its broad research program, the federal Justice Canada also established an Investment in Criminal Legal Aid Renewal Fund which funded a range of pilot projects aimed at fostering innovative approaches to service delivery such as expanded duty counsel schemes. The goal of the Investment Fund was “to address unmet needs in criminal legal aid (and civil legal aid in the Territories) through innovation” and to improve access to legal aid services, particularly at the early stages of the criminal justice system.²¹⁸

Significant progress has been made over the past decade in increasing the Canadian capacity for evidence-based legal aid research and our knowledge base about legal needs. Some strategic funding has been made available to foster new approaches to legal aid delivery and, as is discussed later in this paper, many of these innovations again have been evaluated further adding to our understanding of how best to meet the needs of low-income people. However, the research remains diffuse and is not linked to a broader sector-wide strategy to foster innovation. As demonstrated by the U.K. study into innovation, much more can and needs to be done to facilitate continuous improvement in the legal aid system. Additional resources and incentives are key innovations. Almost as important is the removal of disincentives to experimentation. It is well known that innovation and experimentation are not always guaranteed to prove successful in any field. Professor Trebilcock points out that:

If innovation and experimentation are only producing successes, there is not enough of it. Where disappointments or failures occur, these should be frankly acknowledged, not excoriated, and the agency should press on other margins.²¹⁹

One important issue is the role of legal aid programs as agents in the research and innovation agenda. Most Canadian legal aid providers struggle to meet the day-to-day service demands and have insufficient resources to take on these additional tasks. And yet, the participation of service providers is essential to the meaningful research and to the translation of the research into actual improvements in service delivery. This point is reaffirmed by the success of the collaborative research and planning approach utilized in the mapping project, discussed *infra* at 46.

²¹⁷ OLAR, *supra* note 8.

²¹⁸ This is described in Robert Hann, Fred Zemans and Joan Nuffield, *Evaluation of Criminal Law Offices, Third Year Report* (Toronto: LAO, 2008).
www.legalaid.on.ca/en/publications/downloads/clo_evaluation_08apr.pdf

²¹⁹ Trebilcock, *supra* note 106 at 149.

V. INNOVATIONS IN SERVICE PROVISION

Today most Canadian legal aid organizations provide a spectrum of services on a continuum from providing legal information to advice, assistance and representation. The Ontario Legal Aid Review identified the need for legal aid organizations to be willing to explore and experiment with a wide variety of delivery models and made the case for greater diversity and creativity in the delivery models of legal aid services. Obtaining the maximum benefit from the finite resources available requires taking into account the specific needs of individual clients, the types of legal services being provided, and the geographic locations being served. The Review identified several principles to guide the design of the new system, including:

- provide a greater mix of legal services to help reduce the divide between full legal representation and no legal representation, and thereby assist a greater percentage of the public with their legal problems;
- delivery models should reflect the legal, geographic and client context;
- it can be beneficial for the delivery models to be in competition with one another;
- quality considerations must always be kept in mind; and
- independent evaluations of these programs should be conducted intermittently.²²⁰

Recent innovations have focused on expanding access to legal information through new media and delivery strategies and provide limited forms of legal assistance through new service delivery models. The first two sections of this part provide an overview of these recent developments focusing on the newest approaches and other initiatives that have been subject to evaluation. The section on developments in the provision of legal information and advice includes discussions on the use of technology; the increased use and specialization of paralegals; outreach programs; and enhanced points of entry such as self-help centres. The next section reviews recent experience with various delivery models for legal representation including: expanded duty counsel programs; staff offices; lessons from the community-based clinic model and law school legal aid programs.

The main trend in service delivery is clearly toward providing limited assistance and representation services which place a substantial onus on the individual litigant (or, in a growing number of cases, accused) to navigate the justice system on their own. These developments are important because they help to bridge the gap between no assistance and full representation and allow legal aid programs to assist a greater number of people facing a greater variety of legal problems. There is great social value in ensuring that the legal aid system is not predicated “on an all-or-nothing basis.”²²¹

Notwithstanding the benefits of the “unbundled” provision of services, in most circumstances legal aid is available for only a part of an individual’s legal problem. Even in the situations where legal representation at trial is constitutionally guaranteed, that is in serious criminal matters and child protection proceedings, in most provinces and territories legal aid does not meet the full legal needs of low-income persons. While most of the innovative strategies have proven beneficial, they have had a tendency to shift the energy and focus away from the need for actual legal representation as part of the legal aid spectrum.²²² This is an international phenomenon. Many

²²⁰ *Ibid.* at 12.

²²¹ *Ibid.* at 80.

²²² See McEown, *supra* note 9.

researchers and policy analysts in Canada and abroad have concluded that “the major problem in achieving meaningful access to a full range of high quality legal assistance providers is the lack of providers with sufficient funding to provide the extended representation necessary to meet the need.”²²³

Furthermore, to the extent that legal aid innovations come from fixed legal aid budgets, they run the risk of taking services away from the most disadvantaged persons whose needs cannot be met through the “self-help” methodology. As discussed in the section on expanding eligibility, there is a growing recognition that individuals with moderate means also face serious barriers to the justice system and there are strong and valid policy reasons to find sound and efficient ways to meet these needs. However, it is critical that the needs of the most deprived members of our communities remain the focus of legal aid programs. Thus, it is essential that we pay attention to who can effectively benefit from innovative service delivery, for example, internet-based resources, and who cannot.

At the same time, there is a growing awareness that many low-income and socially disadvantaged litigants and accused require a broad range of support and assistance to address their legal and interconnected problems. Both the civil and criminal legal aid needs studies reviewed earlier in this paper provide solid evidence of the interrelated and clustered phenomenon of legal problems, the significant difficulties experienced by many when faced with complex, unsupported intake and referral procedures, and the importance of early intervention to avoid triggering cascading problems. In contrast, to the primary emphasis on fragmented and restricted service, this opposing trend is reflected in a proposed move toward more comprehensive and integrated services. The three approaches to comprehensive and integrated legal aid service delivery outlined are: multi-disciplinary practices; increased coordination between agencies serving low-income communities; and a holistic approach to criminal legal aid services.

The final trend in service delivery discussed here is the development of specific strategies to meet the legal aid needs of communities that are underserved by existing programs. This section provides a brief overview of ongoing initiatives to better serve Aboriginal communities and contains a short discussion on approaches to serving other disadvantaged communities with particular legal aid needs that are difficult to meet through existing service delivery models.

A. Developments in the Provision of Legal Information and Advice

1. Use of Technology

This section provides an overview of recent innovations in employing technology to provide legal information and advice in the U.S., the U.K., Australia and Canada. The two major developments are online and telephone legal information and education and legal advice hotlines. These technologies provide individuals with access to information about legal rights and responsibilities and about the options and services available to solve their legal problems, protect their legal rights, and promote their legal interests. This section also sets out the findings of three evaluations and surveys about the effectiveness of web-based resources.

Over the last 10 years, many legal aid programs have utilized innovations in technology to improve and expand access to justice. American civil legal assistance providers are at the forefront of this

²²³ See for example, Alan W. Houseman, *The Future of Civil Legal Aid in the United States* (Washington: Center for Law and Social Policy, 2005).

movement. According to a recent review of civil legal aid in the United States,²²⁴ the vast majority of states reported having state-wide web sites most of which contain information useful both to advocates and clients. The highlighted innovations include:

- Dozens of national sites provide substantive legal information to advocates; other national sites support delivery, management, and technology functions;
- Enhanced information hotlines are operating across most of the US. There are 54 state wide hotlines in 38 states, 14 regional hotlines, and 10 local hotlines;
- Many program, state wide, and national Web sites are using cutting-edge software and offering extensive functionality;
- “I-CAN” projects in several states offer kiosks with touch-screen computers that provide clients with pleadings and access to other services, such as help with filing for the Earned Income Tax Credit; and
- Video conferencing is being used in Montana and other states to connect clients in remote locations with local courthouses and legal services attorneys.²²⁵

Several similar efforts have been recognized as “best practices” in the British legal aid context. These are:

- **Advicenow:** The Advice Services Alliance initiated the Advicenow project, which aims to develop learning resources on legal rights and responsibilities on the internet. Law Centre employment workers have contributed both their legal experience and training skills to create informative and interesting materials to encourage users to find out more about their own rights and to be downloaded by advisers for use as a training resource with other groups in the community. A wide range of topics affecting the working public is covered, such as holiday pay and contracts of employment. While the project is co-ordinated from London, its electronic nature has enabled advice workers across the country to participate.²²⁶
- **“Just Ask” website:** The award winning multilingual website www.justask.org.uk, [now <http://www.clsdirect.org.uk/>] which allows users to search for information about legal rights provided by around 300 carefully selected advice and information websites, as well as giving on line versions of CLS leaflets and a directory of legal aid lawyers and advice agencies.²²⁷
- **Legal Information Website:** Coventry Law Centre's website, the first legal information site to receive the Legal Services Commission 'Quality Mark for Websites', is fully accessible to blind, partially sighted and other visually impaired users. It uses speaking browsers and specialist adjustments to enable them to access the site and view its contents. It contains information on contacting the Law Centre, how to get advice and details the full range of the Law Centre's leaflets. The Law Centre reports that use of the internet continues to grow, with the site demonstrating the role of technology in

²²⁴ *Ibid.*

²²⁵ *Ibid.* at 3.

²²⁶ *A Pathway to Regeneration*, *supra* note 123 at 46.

²²⁷ *Ibid.* at 23.

- expanding the services and help necessary to overcome the barriers that disabled people face in accessing legal advice.²²⁸
- **Telephone Helplines:** In 2001 Avon and Bristol Law Centre set up their telephone helpline to enable people to make direct contact with specialist advisers. There are help lines for each of their specialist areas of work and they provide a first point of contact for individuals needing legal advice. This service ensures that an ever-increasing number of people are able to receive assistance from advisers, something that would not have happened if only drop-in or appointment sessions were offered. It has proved to be a very effective use of the Law Centres' resources.²²⁹
 - Video link services where there is a lack of accessible advice services, such as within rural communities.²³⁰
 - Virtual Plea and Directions Hearings pilots for Crown Court cases, allowing barristers, solicitors and other professions to submit information electronically to the court rather than attending for oral presentations (saving up to £12,000 a day).²³¹

While the British government is of the view that information and communication technology is an important means through which governments can combat social exclusion, it is also highly aware that levels of access to the internet depend strongly on income. According to the government's Expenditure and Food Survey, over the period January to March 2002 around 10.7 million households in the U.K. (42%) could access the internet from home. The survey also showed that people in the three lowest income groups had the lowest household access - between 11-15%.²³² This finding illustrates that:

internet provision alone is not enough to address legal need for those most in need, so the CLS uses a range of other methods to promote its message, including one-to-one telephone advice lines and information leaflets.²³³

There is great disparity in the extent to which Canadian legal aid organizations employ technological innovation to provide information and advice services. Some legal aid programs do not have their own websites while another already employs sophisticated interactive kiosks.²³⁴ There are many other public legal education and information providers, both governmental and non-governmental, many of which have made web-based materials, videos and so on available to the public. Many bar associations and/or law societies also operate lawyer referral services through a dedicated telephone line.

The following specific examples of technological innovations are highlighted in recent annual reports and other documents prepared by legal aid organizations:

²²⁸ *Ibid.* at 18.

²²⁹ *Ibid.* at 24.

²³⁰ *Hidden Innovation*, *supra* note 199 at 50.

²³¹ *Ibid.*

²³² *A Pathway to Regeneration*, *supra* note 123 at 23.

²³³ *Ibid.*

²³⁴ P.E.I., NB, Nfld and N.S. do not have websites, although brief descriptions of service and contact information are available on the provincial government websites. LSS operates LawLink described below.

- LSS operates the LawLINE – a call centre that enables intake staff to assess and direct phone clients to the most appropriate legal aid service and in some instances provide advice. British Columbia's LawLINE provides legal advice to individuals whose family net income is under \$36,000. LawLINE's lawyers and paralegals provide assistance with most legal issues, including family law, criminal law, debt, housing, welfare, or contract/consumer matters. If a client requires service in a language other than English, the LawLINE staff member who answers the phone will arrange immediate access to a telephone interpreter. Interpreters are available for more than 100 languages. Most callers who qualify for legal advice can receive up to three hours of help, depending on the circumstances of the case. Information and referrals are provided to the general public.
- In the summer of 2008, LSS implemented a triage model for LawLINE in order to increase efficiency and further reduce wait times for callers (an identified area of low satisfaction for clients).
- LSS has also established LawLINK, which helps people facing legal problems find legal information on the Internet. In order to facilitate access to the service, B.C.'s LSS set up LawLINK computer kiosks in a variety of locations, including all LSS regional centres, some local agent offices, and some courthouses and community agencies. The locations also provide direct telephone access to LawLINE. Legal Information Outreach Workers help people use LawLINK to find legal information and self-help kits on the Internet; give people printed legal information; refer people to other LSS services such as LawLINE and the Family Advice Lawyer Project, and other related community services; and collect feedback from community workers and the public about LSS programs.
- Alberta has a “Dial-A-Law” service, which provides recorded legal information on more than 100 legal topics. Similar services are offered in Newfoundland and Nova Scotia.
- LSS partnered with the Native Courtworker and Counselling Association of B.C. to test the viability of using electronic legal aid applications in circuit court locations to reduce barriers faced by Aboriginal clients applying for legal aid. Project results should be available in early 2008/2009 and will help LSS determine whether to expand the service to other locations and client groups.
- LSS anticipates playing a role in bail reform initiatives proposed for 2008/2009. These may include developing province-wide telephone and video duty counsel services that would allow counsel to provide advice to clients and to participate in video bail hearings outside of normal business hours.
- The Alberta Law Line was established in 2004, and has a staff of 20 lawyers, legal resource officers and students. The Law Line uses the same financial eligibility criteria as LAA. Staff Lawyers at Alberta Law Line provide legal advice over the telephone to eligible individuals, but do not attend court or meet with callers in person. Legal information and referrals are provided to the general public.
- LAA is currently exploring the feasibility of providing representation to persons at first instance bail hearings before Justices of the Peace. The Bail Representation Pilot Project will run until the spring of 2009. It has three main elements: “representation-by-phone” or “telebail” services provided through the Youth Criminal Defence Office and on a pilot basis through the Alberta Law Line; consideration of an in-person representation pilot in one test location; and discussions with Alberta Justice and other stakeholders around the value, sustainability and design of models of bail representation services.

- The Commission des services juridiques has tested a system for appearances by telephone across the province of Quebec.
- In 2005, Saskatchewan Legal Aid Commission developed a multi-media campaign to raise awareness and provide information about legal issues facing clients accused of crimes. The Telling Our Story Campaign employs first-person storytelling as a culturally relevant way of providing information in response to client satisfaction surveys that conveyed the message that the Commission should “write less and talk more.” The campaign focused on six key issues: Plea bargaining, conditional sentencing, sentencing circles, quality of Legal Aid services, child protection and bail. Misunderstandings about these issues are prevalent among Legal Aid clients, their families and communities. The Saskatchewan Native Theatre Company’s Circle of Voices youth program was a partner.
- LAO has also introduced the use of video technology to take legal aid applications from clients who are in custody. As a result, clients can retain and instruct a lawyer immediately and get the matter before the courts faster. Ninety-eight per cent of clients have expressed satisfaction with this service. Video technology is now used in 12 locations across the province. It has provided faster access to LAO services, improved services and reduced costs.
- Most recently, LAO has begun a pilot project to dramatically expand the locations where an individual may apply for a legal aid certificate. LAO has assessed its financial and legal requirements for certificates and developed a profile of the applications that are very likely to be approved. For example, individuals who participate in Ontario Works or the Ontario Disability Support Program are always financially eligible; clients whose case involves a child protection matter, a refugee claim or a criminal charge with a likelihood of jail time are always legally eligible. Based on this profile, LAO restructured and simplified its online application to enable people other than LAO’s applications assessment officers to complete the process. The goal of the Simplified Online Application Portal pilot is to enable lawyers and community agency staff to complete a client’s application over the Internet. If the client meets the clear requirements in the simplified application, they will be provided with an immediate online confirmation of eligibility for a legal aid certificate. This will allow their lawyer to start work on their case as soon as they receive this confirmation, without the client ever having to attend in person at a legal aid office. LAO estimates that 40 per cent of its clients benefit from this simplified process.
- Community Legal Education Ontario (CLEO) is one of the LAO specialty clinics with the sole mandate of producing and delivering public legal education to communities in Ontario that are low-income or who otherwise face barriers to full participation in the justice system. Most of the resources developed are available on the web in French and English. CLEO has recently initiated a Six Languages Text and Audio Project, in collaboration with community advisors that will produce legal information in Chinese, Arabic, Tamil, Urdu, Spanish and Somali.
- LAO is currently exploring proposals to develop capacity for internet-based legal aid services and is in the early stages of developing a legal aid hotline. Trebilcock recommends that LAO, PBLO and CLEO work together to consider developing a toll-free telephone legal information line that could deliver multi-lingual legal information in the most needed areas of law, such as family, domestic violence, criminal, immigration/refugee, landlord/tenant, and human rights.²³⁵

²³⁵ *Ibid.* at 96.

LSS commissioned a multi-year evaluation of the usage of LawLink (described above) in the public access pilot locations.²³⁶ The evaluation does not report on the LawLINK program as a whole or on the overall level of use of LawLINK by independent users (e.g. from home-based computers or offices). The most striking and fundamental finding was that only a small percentage of users conducted their legal information search completely on their own. The vast majority of users at the terminal need significant assistance to make effective use of LawLINK.

The SPARC Report on delivery models for poverty law legal services in B.C. undertook a more general survey of service providers to get their views on the context within which general legal information would best be delivered.²³⁷ Many respondents were concerned that the current focus on the growth of online and telephone based services at the expense of options for in-person contact is an area of concern, arguing that there are a variety of accessibility problems with these new services. Many clients do not have access to a phone and/or computer, are not computer literate, or lack adequate general literacy skills to use any information they do access. This is particularly problematic for clients whose first language is not English. Respondents also indicate that poverty law clients need to access services in a comfortable environment, and that they may find legal venues intimidating (e.g. private law firms; court buildings; RCMP offices).²³⁸

National Legal Aid in Australia has developed best practice standards for the use of technology in the delivery of legal services (non-litigation) that recognize some of the impediments to accessing technologies and assist legal aid organizations in the planning and evaluation of technology in the delivery of legal aid services.²³⁹

2. Increased Use and Specialization of Paralegals and Other Legal Aid Personnel

A second important development in legal aid service delivery models is the increased use and specialisation of paralegals and other legal aid personnel. With proper training and supervision, paralegals are essential members of the team of legal service providers. Although, there has been no thorough analysis of the potential role for paralegals in this field, it appears clear that this is a trend that will grow exponentially given the focus on finding cost-effective ways to deliver legal assistance to low-income individuals and communities. In his report on legal aid financing in the U.K., Lord Carter noted that under his proposals in order for legal aid firms to profit they will need to work to economies of scale with one partner to every ten solicitors and 40 paralegals.²⁴⁰

Community legal advocates have been part of the legal aid delivery system in all jurisdictions that provide community-based clinics since these programs were originally founded. Similarly, native

²³⁶ Focus Consultants, *Evaluation of the LawLINK Project – Final Report* (Vancouver: LSS, 2005) at iv. www.lss.bc.ca/assets/aboutUs/reports/LawLINK/evaluationLawLINK2005.pdf

²³⁷ *Delivering Poverty Law Services*, *supra* note 89.

²³⁸ *Ibid.* at 21.

²³⁹ National Legal Aid Best Practice Standards, *Standards for the Use of Technology in the Delivery of Legal Services* (Non-litigation) (Hobart: NLA, 2007). www.nla.aust.net.au/res/File/PDFs/BPS-tech-nonlitservs.pdf

²⁴⁰ Lord Carter, *Legal Aid – A Market-Based Approach to Reform* (London: Lord Carter’s Review of Legal Aid Procurement, 2006). www.legalaidprocurementreview.gov.uk/docs/carter-review-p1.pdf and www.legalaidprocurementreview.gov.uk/docs/carter-review-p2.pdf

court workers and native counsellors have a long history of effective service. Some of the more recent innovations in specialized legal aid personnel include Legal Information Outreach Workers and Family Resource Facilitators. The expansion of the team of service providers and the increasing specialization of the non-lawyer members of these teams is tied in with other developments such as legal aid outreach programs and court-based point of entry advice centres. The 2003 Justice Canada Study into Immigration and Refugee Legal aid needs includes two specific potential innovations for providing legal aid to refugees through the increased use of supervised paralegals and by NGOs.²⁴¹

Paralegals will not necessarily reduce the legal aid services provided by lawyers. In most cases, they provide a complementary service and expand access to legal information and assistance to individuals who would not qualify for legal services. The SPARC Report on the delivery of poverty law legal aid makes it clear that while community advocates carry out many important functions they cannot replace the work done by lawyers.²⁴² In addition, community advocates require regular training by lawyers, access to lawyers to discuss issues and adequate supervision by lawyers. It is likely that these education and regulatory issues will come to the fore as paralegals take on a greater proportion of legal aid service delivery. For example, the Law Society of Upper Canada recently denied courtroom status to an unfunded group of volunteers running the Ticket Defense Program which has provided free representation for tickets related to panhandling, sleeping outside and other street-related non-criminal charges in Ottawa since 2003.²⁴³ This decision raises many important issues concerning the rights of socially excluded and vulnerable people whose legal aid needs are not being met, including whether “second class justice” is better than no access to justice.

3. Outreach Programs

Outreach programs are designed to bring legal aid services to communities that cannot access services at the fixed locations, either due to distance or for other reasons. The Commission des services juridiques in Quebec has placed great emphasis on geographic accessibility with 115 service points across the province including 89 permanent offices. Physical access has also been key in the Netherlands where recent developments have led to the creation of “legal services counters” throughout the country.²⁴⁴ There are 30 physical Counters (most in a shopping street or near a railway station, with opening hours adapted to the location); a virtual counter; and a hotline counter. The standard is that there should be a Counter for all citizens in the Netherlands within an hour’s travelling distance.

Decentralized service delivery models which make legal aid services accessible within many communities contribute to access to justice in many ways, especially where the services provided are well-integrated into the local community. The visibility and friendliness of the office is key. However, not all individuals with legal aid needs can be adequately served through on-site services. Therefore services must be taken to the client. Outreach services are being developed as an

²⁴¹ (Ottawa: Justice Canada, 2003) at 5.

²⁴² *Delivering Poverty Law Services*, *supra* note 89.

²⁴³ The position of the Ticket Defence Program on this issue is set out in their media release, “Law Society Denies Access to Justice for Ottawa’s Homeless” (November 2008).
www.flora.org/legal/tickets/TDP_Press_Release_2008-11-17.pdf

²⁴⁴ Peter J.M. van den Biggelaar, “The Legal Services Counter: Lessons Learned in The Netherlands”, in Pleasence et al. eds., *supra* note 20.

alternative method of delivering legal advice and support to hard-to-reach and vulnerable populations that may not ordinarily be able to access mainstream advice services.

Outreach may be defined as a system that takes a service to where the client is situated. The different types of outreach include:

- geographic outreach (regular service away from a main office);
- outreach to targeted groups (for example, asylum seekers and battered women);
- outreach to specific locations where there are likely to be clients seeking legal assistance (for example, courthouses); and
- outreach to clients' homes (for example, for the elderly or persons with disabilities).²⁴⁵

Outreach may also take many forms with the common factor being a proactive attempt by service providers to contact clients or potential clients to relay information or assistance. Many of the outreach formats have already been discussed in the previous section on use of technology (legal hotlines, interactive internet services placed in strategic locations, virtual law office, services via video conferencing). Other outreach services, including traveling advocates and satellite offices offering one-on-one advice and representation, are discussed here. Very few outreach programs are stand-alone – most are connected to a hub office that offers a broader range of services.

In the U.K., several initiatives are taking place to improve access by having advice providers going out into the community to provide help. Specialist outreach advice sessions are held at neighbourhood centres, day centres, residential homes, youth centres, doctors' offices, hospitals, community colleges and community centres. Citizens Advice Bureaux currently provide more than 2,000 outreach services in England and Wales, some in partnership with Health Authorities in General Practitioners' surgeries. This has been shown to increase access to advice for people who would otherwise be effectively excluded because of age, poor health, poverty or lack of transport. The Legal Services Commission is also currently conducting pilot studies for money advice outreach services, targeting areas of high financial exclusion.

Improving the connection between delivery of health and legal aid services has been a priority in the last decade. A U.K. study explored the current scale of involvement by doctors and other health professionals in providing advice about problems involving rights.²⁴⁶ It concludes that health professionals provided advice in relation to 6 per cent of problems about which advice about rights was obtained. When compared to other sources of advice, only solicitors (16 per cent of problems) and local authorities (11 per cent of problems) provided advice for a markedly higher proportion of problems. These findings highlight the importance of forging partnerships between health and legal services to ensure a 'seamless service for patients'.

The U.K. study found that the provision of an increasing number of 'outreach' rights advice services in primary healthcare settings provides a constructive mechanism to impart advice on health related problems involving rights. The evidence linking social and health problems suggests that providing in-house advice services could be expected to lead to better health as well as justice outcomes. Rights advice services have consequently been located in some primary healthcare

²⁴⁵ *Delivering Poverty Law Services*, *supra* note 89 at 66.

²⁴⁶ Pascoe Pleasence, Nigel Balmer and Alexy Buck, *Health Professionals as Rights Advisers: Rights Advice and Primary Healthcare Services* (UK: Legal Services Research Centre, Legal Services Commission, 2007). www.lsrc.org.uk/publications/doctors.pdf

settings.²⁴⁷ More generally, Citizens Advice Bureaux now provide outreach information or advice services in 1,054 health settings.²⁴⁸ Many people do not think to obtain advice, or are unsure where to go to when faced with social problems involving their rights. Placing rights advice services in settings that people are familiar and confident with, and already use for advice seeking purposes, can only improve access to justice.

In the SPARC Report, survey respondents were asked to rank three options for expanding the accessibility of poverty law services in B.C. the most favoured options were piggybacking poverty law services onto existing community organizations and creating mobile poverty law services.²⁴⁹ This study also carried out extensive cross-jurisdictional research into effective outreach programs. In all of the jurisdictions examined, outreach is viewed as a necessary part of poverty law service delivery. The central question is how to incorporate such services in an effective and affordable way. This section outlines strategies employed in various countries. The study describes three main models and their strengths and weaknesses: permanent satellite offices, nonpermanent satellite offices, and mobile offices.²⁵⁰ On the basis of its survey and extensive research, the SPARC Report came to the following conclusion about outreach:

In summary, good outreach services require careful planning, proper resources, and need to fit with existing community resources and needs. They should offer more than just an initial short contact, and staff must be knowledgeable and well trained. Venues for outreach services must be linked to community networks that offer ancillary services and have local credibility.²⁵¹

4. Enhanced Points of Entry

Many access to justice and civil justice reform reports have highlighted the importance of courts establishing a single, highly accessible point entry. For example, the CBA 1996 *Systems of Civil Justice Task Force Report* recommended that every court provide point-of-entry advice to members of the public on dispute resolution options within the civil justice system and available community services.²⁵² The same conclusion has been reached through investigations into legal needs. For example, Dr. Ab Currie has concluded that the continuum of service approach requires “citizen friendly, accessible places to seek assistance, places that are the point of entry and the hub for referrals to a seamless network of access to justice services and to related social and health care services.”²⁵³

Two of the important design features of these centres are whether they provide legal aid services and/or how they connect to legal aid providers. Some point-of-entry advice centres provide limited forms of legal aid directly while others are hubs that make referrals to legal aid providers and other

²⁴⁷ *Ibid.* at 3.

²⁴⁸ *Ibid.* at 4.

²⁴⁹ *Supra* note 89 at 29.

²⁵⁰ Jane Steele and John Seargeant, *Access to Justice: The Contribution of Alternative Approaches* (London: Policy Institute, 1999).

²⁵¹ *Supra* note 89 at 70.

²⁵² *CBA Systems of Civil Justice Task Force Report*, *supra* note 10, Recommendation 27. See also Civil Justice Working Group Report, *Effective and Affordable Civil Justice* (Vancouver: B.C. Justice Review, 2006). www.bcjusticereview.org/working_groups/civil_justice/cjrwg_report_11_06.pdf

²⁵³ Currie, *supra* note 18 at 36.

legal services. Within Canada, British Columbia has taken the lead in implementing court-based enhanced points of entry advice through the establishment of the Supreme Court Self-Help Information Centre (BCSC SHIC),²⁵⁴ located in the Vancouver Law Courts, the Nanaimo Justice Access Centre (formerly the Nanaimo Family Justice Services Centre)²⁵⁵ and the planning for two other pilot justice access centres (originally civil justice hubs).²⁵⁶ Unlike the Self-Help Centre, the Justice Access Centre does, in some circumstance, provide legal advice and can help with negotiations, review agreements, prepare court forms and other documents, and explain to unrepresented litigants how to represent themselves in court.²⁵⁷

In her recent review of civil legal needs in B.C., McEown suggests that the concept of self-help centres needs to be reviewed. She lists the following unresolved issues:

- Has there been sufficient buy-in from all service providers? Many have full plates and will need to be shown that their clients will benefit from any realignment of services. Clients currently being assisted by community advocates have different needs and are likely to be more comfortable with services available in their own community.
- Do most administrative law matters belong in a court-based service centre?
- How would one make the necessary expertise available to effectively respond to the array of issues encompassed in administrative, civil, and family law? Responses to this question appear to be reactive and individual rather than coordinated or well thought-out.
- What level of training would be required to provide an appropriate level of service for the triage function? The BCSC SHIC works because several services are provided in a timely and coordinated manner. Staff has the expertise to help users find the right documents, fill out the forms, and get to duty counsel or to appointments made with family justice workers or *pro bono* lawyers. A theme from the interviews was that paralegal or community advocate participation would be necessary to avoid what one informant called circular referral.
- What Public Legal Education and Information resources are required? Which are being used? One piece of research that has not been done is an evaluation of the self-help materials developed for the BCSC SHIC or the family law website. An evaluation of self-help materials in Australia suggests that they are not used for family matters. However, it appears that potential users were able to obtain representation for the particular issue which would be a more appropriate service given the issue dealt with restraining orders.

²⁵⁴ For information about the Centre see:

www.supremecourtselfhelp.bc.ca/

See also John Malcolmson and Gayla Reid, *B.C. Supreme Court Self-Help Information Centre Final Evaluation Report* (2006).

²⁵⁵ For more information see: www.justiceaccesscentre.bc.ca/

²⁵⁶ Gayla Reid and John Malcolmson, *Civil Justice Hub Research Project: Needs Mapping* (Vancouver: LSS, 2007) at 3.

www.ag.gov.bc.ca/justice-reform-initiatives/publications/pdf/CivilJusticeHub.pdf

²⁵⁷ LSS, *Legal Aid Fax* (2008).

www.lss.bc.ca/assets/lawyers/legalAidFax/2008/LAF_Oct2008.pdf

²⁵⁷ www.justiceaccesscentre.bc.ca

- There are unresolved issues relating to the governance model for the hub – much more collaborative relationships are needed and new ways of actively coordinating service delivery must be developed.²⁵⁸

She concludes:

The civil hub vision and goals are ambitious and broad. While British Columbians may share the need for integrated delivery of civil justice services, the capacity to meet those needs varies widely throughout the province. Success in improving access for people living in rural and remote communities is dependent on developing new ways of thinking about service delivery and partnerships.²⁵⁹

The Alberta Self-Represented Litigants Services Mapping Project recommended the establishment of Self-Help Centres (SHC). In making this recommendation the report noted a number of advantages and limitations of this approach to providing legal information to SRLs. In the view of Project participants, the most important benefit of SHC is that it would contribute to meet SRL needs by providing a centralized place for information that can coordinate referrals to existing services. In order to perform this function well, an SHC would need in-person service provided by staff with the following exceptional skills:

- A friendly and helpful manner that makes people feel at ease.
- Knowledge of step-by-step court processes for criminal, civil and family matters and within all three courts.
- A very high degree of cultural and social sensitivity that includes an understanding of Aboriginal, ethnic, disability and poverty issues.
- Ability to locate and convey accurate and appropriate referrals to other services, including assistance in making appointments if necessary.²⁶⁰

The report contains the following qualitative description: “An SHC must also be easily accessible, welcoming and non-intimidating, have hours that work for clients, provide outreach to those who cannot come to the centre, and be adequately resourced to meet client demand with quality service.”²⁶¹ The Mapping Project participants voiced a very real practical concern that it would be difficult to meet the service criteria it had set out. Some of the other limitations identified were:

- An SHC will only be able to help those people with sufficient skills to help themselves.
- An SHC in a regional centre does nothing to meet the critical access needs of people in rural communities.
- If the SHC is located within a courthouse it will not be sufficiently accessible because it will not have extended hours and will still be intimidating to approach.²⁶²

²⁵⁸ McEown, *supra* note 9 at 33-34.

²⁵⁹ *Ibid.* at 35.

²⁶⁰ Stratton, *supra* note 77 at 46-47.

²⁶¹ *Ibid.* at 47.

²⁶² *Ibid.* at 48.

Despite these cautions, Mapping Project participants were overwhelmingly supportive of the possibilities SHCs offered for improving services to SRLs, as long as they are tailored to the communities they are designed to serve.

The recent *Mamo Report* examined service delivery, court operations, and court-connected mediation and information services of the Family Court Branch of the Superior Court of Justice in Ontario.²⁶³ The Report highlighted the issue of SRLs in the family court system, and recommended that the Family Law Information Centres (FLICs) should be the entry point into the family justice system for the vast majority of cases, in order to ensure that litigants are made aware of the range of services and dispute resolution processes available in the court and the community.²⁶⁴ The FLIC is an area in each family courthouse where the public can receive free information about divorce, separation and related family law issues (child custody, access, support, and property division) and information about alternative dispute resolution processes. Each FLIC has a variety of government and community publications and audiovisual materials available addressing these issues, as well as guides to court procedures. Court staff provide service during designated hours. Advice lawyers provided by LAO are also available in most locations to provide legal assistance and advice to those who qualify. In many locations, advice lawyers are managed by a supervisory duty counsel present in family court.

The *Mamo Report* found that FLICs fill “an obvious need in the justice system for a clear entry point and access to information ... [and] one-stop shopping for service”, and that the “personal nature of the centre allows for greater access by those individuals who face barriers related to culture, language, literacy, and poverty.”²⁶⁵ The Report identified a number of existing challenges and barriers that are hindering the FLICs effectiveness, including insufficient staff, physical space constraints, and the inability of litigants who fall above the financial eligibility cut-off to receive legal advice, which results in them becoming “frustrated and uninformed ... [which is] further compounded as they move through the system.”²⁶⁶

In his review of LAO, Trebilcock reported that the FLIC services were seen “as effective and beneficial but are quite limited in some jurisdictions, and insufficient to meet the demand.”²⁶⁷ He concluded that the value of the FLICs could be significantly enhanced were LAO to explore the possibility of advice lawyers providing summary legal advice and assistance to a broader range of clients, either on a non-means tested basis or in accordance with much more generous financial eligibility criteria.²⁶⁸

²⁶³ Alfred Mamo, Peter Jaffe, and Debbie Chiodo, *Recapturing and Renewing the Vision of the Family Court* (2008).
www.crvawc.ca/documents/Family%20Court%20Study%202007.pdf

²⁶⁴ *Ibid.* See recommendation #19 at 61.

²⁶⁵ *Ibid.* at 58.

²⁶⁶ *Ibid.* at 59.

²⁶⁷ Trebilcock, *supra* note 106 at 110.

²⁶⁸ *Ibid.*

B. A Review of Recent Experience with Various Delivery Models

1. Expanded Duty Counsel

Duty counsel are lawyers who are available at court to quickly assess a person's legal problems and provide immediate help. The duty counsel service represents the "emergency room" of the court system, they, in effect, "keep the courts running."²⁶⁹ They provide legal advice, representation, and other legal assistance to unrepresented litigants during court appearances. Over the past decade, one of the main innovations in the delivery of legal assistance and representation is the expansion of duty counsel programs. Duty counsel services have expanded in many Canadian jurisdictions both because assistance by duty counsel costs less than granting legal aid certificates and because clients are assisted more quickly. While this service delivery model was originally developed for a small range of criminal matters, duty counsel services have expanded to provide a wider range of legal services in both criminal and family law matters. Some jurisdictions also have specialized duty counsel, for example, LAA operates a Youth Duty counsel scheme and LAO has also developed specialized duty counsel for Domestic Violence, Mental Health, *Gladue* and Drug Treatment Courts.

Duty counsel schemes have been the subject of several evaluations. The common findings is that duty counsel are a cost-effective mechanism to fill certain types of legal aid needs and identifies several program design elements that contribute to effective client service.

The Saskatchewan Duty Counsel Pilot Project ran from 2001 to 2005. The purpose of the Duty Counsel pilot project was to "ensure that accused adult persons detained in custody would have the benefit of legal advice and assistance at the earliest possible time." A grant from the federal Justice Canada Investment Fund was used to hire additional staff.²⁷⁰ The evaluation identified the following strengths: consistency of lawyers (both Legal Aid and Crown) leads to greater level of preparedness leading to better service and representation and the increased ability to build *good working relationships* with the Client, Crown, Court and Support service staff; greater efficiencies since duty counsel need less preparation time; duty counsel have greater familiarity with support services; and more matters are resolved without going to trial. The weaknesses identified related mainly to workload and scheduling difficulties although discontinuity of service was also a concern.

LSS introduced a Family Duty Counsel Project at 44 court locations in B.C. in 2003. An evaluation was carried out at six of these sites through interviews with judges, registry supervisor or clerk, and two duty counsel from most of the sites, and 300 client interviews drawn randomly from the six sites.²⁷¹ The project was highly successful with collaboration between duty counsel and Family Justice Counsellors seen as a significant feature that enhanced service delivery. Several counsel identified a resolution oriented, collaborative approach (involving the other party) in their dealings with clients as a key to success. Several counsel advocated for one or more combinations of services (e.g. legal aid, Family Justice Counsellor, LINKS kiosks) to be housed in the court complex as a way of facilitating cross-referrals, triage and supplementary information for clients.

²⁶⁹ *Supra* note 66 at 4.

²⁷⁰ Yelland Research & Evaluation, *Investment Fund Evaluation Report: Duty Counsel Project* (Saskatoon: SLAC, 2006).
http://legalaid.sk.ca/assets/pdf/IF%20-%20DC%20Report%20_Final%20Aug%2024%202006.pdf

²⁷¹ Focus Consultants, *Evaluation of the Family Duty Counsel Project in Six Provincial Sites – Final Report* (Vancouver: LSS, 2004).
www.lss.bc.ca/assets/aboutUs/reports/familyServices/evaluationFDCSixProvSites.pdf

LSS also carried out an Expanded Family Duty Counsel Project (EFDCP) at the Robson Street Court House Location in 2004.²⁷² The primary objective of the EFDCP was to help self-represented individuals achieve a resolution to their cases, and can be distinguished from traditional duty counsel service in that clients are provided with additional assistance and advice and counsel can help clients to draft documents and prepare for their cases over several meetings.

An evaluation of the EFDCP was carried out through interviews with clients where cases have closed and with key informants both in the project (counsel, intake assistant) and external to it (court personnel, Family Justice Counsellors, counsel for various Ministries). Key respondents felt the project had helped to reduce delays and the need for adjournments in family court, reduced anxiety of parties, saved registry staff time, increased litigants understanding of issues and procedures, and resulted in a higher frequency of consent orders.²⁷³

The 1997 Ontario Law Review recommended that the role of duty counsel in both criminal and family courts be expanded. LAO has quadrupled the complement of staff duty counsel over an eight year period. In 1999, LAO implemented Family Law Expanded Duty Counsel (EDC) pilot projects in London, Hamilton and Oshawa. The EDC offices use a mix of private and staff lawyers, including full-time supervisory duty counsel, to provide continuous services to clients, including representation in court, maintaining files, drafting documents, and developing strategies to resolve cases early without court hearings. These offices allow duty counsel to focus their time on clients' cases while support staff provides extensive service assisting with client documents and files. Criminal EDCs were also established in Brampton and Newmarket. The early success of these pilots resulted in the expansion of full-time supervisory duty counsel and Duty Counsel Offices to a total of 65 locations (including both family and criminal law sites). Supervisory duty counsel supervise and co-ordinate the services and training of *per diem* duty counsel, act as a liaison between the court and LAO, and fulfill the normal functions of a duty counsel in court. This initiative has led to the development of a more organized and efficient duty counsel infrastructure and has enhanced the quality of services provided to clients.²⁷⁴

LAO also evaluated its Family Law Expanded Duty Counsel Pilot Projects.²⁷⁵ The report found that there is a strong need and high level of support for expanded duty counsel service. The key features of this model – file and lawyer continuity; improved organization, accountability, and consistency of advice through the Coordinator role; and a new emphasis on resolution – were seen to result in a more expeditious court process and a better quality of client service compared to the traditional model.

Professor Trebilcock concurs that duty counsel services, and especially expanded duty counsel services, have been shown to be high quality and cost-effective, particularly where staff duty counsel are utilized.²⁷⁶ He notes that since duty counsel services focus on a more limited set of

²⁷² Focus Consultants, *Evaluation of the Expanded Family Duty Counsel Project (Robson Street Court House) - Final Report* (Vancouver: LSS, 2004).
www.lss.bc.ca/assets/aboutUs/reports/familyServices/evaluationFDCProject.pdf

²⁷³ *Ibid.* at 18.

²⁷⁴ Trebilcock, *supra* note 106 at 36.

²⁷⁵ Prairie Research Associates, *Evaluation of the Family Law Extended Duty Counsel Pilot Projects – Final Report* (Toronto: Legal Aid Ontario, 2002).
<http://cfcj-fcjc.org/inventory/reform.php?id=59>

²⁷⁶ Trebilcock, *supra* note 106 at 84.

functions than the private bar, duty counsel have developed a very high level of expertise and specialization. He recommends that:

LAO should continue to pursue opportunities to use staff duty counsel where feasible, in both criminal and family courts. In particular, LAO should explore the potential for duty counsel to provide more, and more varied, pre-litigation services, especially in family law. I encourage LAO to think more innovatively and creatively about the services that could be provided by this valuable resource.²⁷⁷

However, he does not recommend that duty counsel functions should be broadly expanded to include conducting trials.²⁷⁸ In very limited circumstances (i.e. where there is a demonstrated shortage of private lawyers willing to take cases on certificate) it may be appropriate for staff duty counsel to take on trials in those court locations where there are supervisory duty counsel and file continuity. He suggests that “the greatest potential for such expansion is likely to be in short criminal matters, which should therefore be the first area of exploration for LAO.”²⁷⁹

While the Canadian focus remains on duty counsel for criminal and family law matters, the U.K. has begun to expand this approach to other civil law matters. For example, a number of law centres are taking part in a pilot project instigated by the Legal Services Commission to run duty solicitor schemes in County Courts to cover all housing possession actions. The Law Centre's housing team provides emergency advice and representation at the court for those without representation and facing a possession action by their landlord. The advantages of the duty counsel scheme in this context are that it is model well suited to clients who have particular difficulties, such as mental health, literacy and language problems or who suffer alienation from the legal process, that prevent them from accessing advice at an earlier stage. These clients often have other related problems, such as changes in circumstances, housing benefit problems, unclaimed disability benefits, and multiple debts, that can affect the court's decision. The Law Centre is able to identify these issues and gain time to address the causes. Since the scheme began there has been a marked reduction in the number of suspended possession orders resulting in more clients being able to remain in their homes, a key requirement if other problems are to be resolved.²⁸⁰

2. Staff Offices

Staff offices are not a novel development. Many legal aid programs have utilized staff offices for the delivery of legal aid services since their inception and in several provinces, this is the main vehicle for service delivery. However, both Ontario and Alberta have piloted staff offices for the provision of criminal and family law services in the last decade. These pilot projects have been monitored and evaluated and these reviews provide insights into the role and value of this model of service delivery.

In addition, Legal Aid Manitoba undertook research focused specifically on this issue with a view to providing the Attorney General with advice and recommendations on the future delivery of legal

²⁷⁷ *Ibid.*

²⁷⁸ *Ibid.* at 85.

²⁷⁹ *Ibid.*

²⁸⁰ *A Pathway to Regeneration*, *supra* note 123. Citing to:
www.covlaw.org.uk/housing/duty_possession.html

aid services to indigent persons in Manitoba.²⁸¹ Advice was sought on the issue of “what was the best way to move towards greater reliance on staff lawyers.” The reviewer focused solely on the issue of service delivery and did not engage in an analysis of what legal aid should be or what services should be offered. He was mandated to pursue the goal of cost neutrality, whatever the results, the costs should not be greater than current costs. Based on the research carried out, the report’s overall conclusion was that Manitoba should maintain a mixed service delivery model unless there are compelling financial or other reasons to change.²⁸² The report further found that the percentage of services delivered by staff or the private bar in the mixed model may vary over time and that decision is a function of the tariff paid to the private bar, the cost of staff, and the productivity of staff. The analysis concluded that a complete staff system would cost more than the current mixed system. Other reasons in support of maintaining a mixed system were the sustainability of any one model, cost, availability of counsel, conflicts, and variations over time in productivity and the tariff.²⁸³

LAO established several staff offices providing refugee law, family law and criminal law services beginning in 1994. These offices have all been subject to full evaluations. This section provides an overview and excerpts from these evaluation reports. The common conclusions were: (1) that staff offices provide a cost-effective service that is distinct from and complementary to judicare services; and (2) that there are many design elements that can be tailored to ensure efficient services that are responsive to distinct legal aid needs.

A review of the Refugee Law Office (RLO) carried out in 2000 confirmed that a mixed model of delivery was most cost-effective.²⁸⁴ The RLO was found to be cost-effective in handling cases from countries that produced few refugee claimants or in handling cases with novel issues or “test” claims. The RLO was more cost-effective than the private bar in providing services to clients from low-volume refugee producing countries, but less cost-effective in other cases. The overall conclusion is that there is an important niche for the RLO and that the staff office provides other benefits including defining standards for quality service and setting standards for the amount of time required per case.

Three family law staff offices were piloted in Toronto, Ottawa and Thunder Bay in 1999. An evaluation of these pilot offices was completed last year.²⁸⁵ The major findings were:

- From the clients’ perspective, the quality of services provided by the pilot FLOs was at least as high as that provided by the private bar on certificate.
- Among lawyers familiar with FLO staff as opposing counsel, most reported perceiving no difference in service quality or competence of counsel.
- Service cost contrasts across the three offices were stark. They ranged from well above private bar certificate costs to somewhat below these costs.

²⁸¹ Government of Manitoba, *A Review of Manitoba Legal Aid*, 2004.
www.gov.mb.ca/justice/publications/pdf/legalaidreviewfinal.pdf

²⁸² *Ibid.* at 2.

²⁸³ *Ibid.* at 3.

²⁸⁴ Durhane Wong-Rieger, *Review of the Refugee Law Office - Mandate and Role within a Mixed Environment of Refugee Legal Aid* (Toronto: LAO, 2000).
www.legalaid.on.ca/en/publications/downloads/report_RLOreview_00nov.pdf

²⁸⁵ Colin Meredith Ph.D. and Peggy Malpass B.A., LL.B., *Evaluation of the Legal Aid Ontario Pilot Staff Family Law Offices - Final Report* (Toronto: LAO, 2002).
www.legalaid.on.ca/en/publications/downloads/report_FLOevaluation_02aug.pdf

- Completing family law cases at lower average cost than the current tariff dictates represents a significant achievement, given the current discontent with the tariff.
- In order for the FLOs to be consistently cost-competitive with the private bar on certificates, high levels of staff utilization and restricting the range of services provided to those typical of the private bar on certificate will be required.

More recently, LAO has established three Criminal Law Offices (CLOs) with funding assistance from the federal government. The CLOs are staff offices with a mandate to supplement the *judicare* (certificate) service delivered by the private bar. They provide criminal representation to financially eligible accused in Barrie, Brampton and Ottawa. The scope of services depends on the specific needs of each of the three local communities, but in general may include:

- representation of accused who have a legal aid certificate;
- representation for accused who do meet the financial eligibility requirements for legal aid, but do not meet the “loss of liberty” threshold for coverage, and “may face significant consequences such as loss of livelihood, loss of government benefits, loss of access to education, etc.”; and
- representation for accused who do not meet the “loss of liberty” threshold for coverage, but do meet the financial eligibility requirements for legal aid, and “have a viable defence on a triable issue, or where the case presents an issue that is in the public interest to litigate.”

The mandate of the CLOs is to provide certificate services in areas of “greatest client need, including - but not limited to - particularly vulnerable clients, including youth, the mentally disabled, Aboriginal accused, or accused who otherwise have difficulty accessing counsel.” The establishment of the offices was controversial and generated some opposition within the criminal bar in Ontario.

The CLOs have been closely monitored and evaluated over a three year period and the final evaluation report was published in the spring of 2008.²⁸⁶ The evaluation report contains a broad range of conclusions and recommendations including:

- The CLOs provided valuable service for a significant previously unmet need for legal services and was effective in providing legal and enhanced legal-support services particularly to persons with special needs including Aboriginal accused and accused with mental health issues;
- The CLOs should be provided with the mandate and resources to deal with systemic law reform issues and carry out a community outreach and education program;
- The CLOs have demonstrated that it would be extremely difficult under the existing tariff for a public or private office dedicated solely to providing the above four types of services to this clientele to be able to “break even” (i.e., “to earn” enough tariff fees to cover costs) supporting the contention that the tariff rate is not high enough to cover normal overheads;

²⁸⁶ Robert Hann, Fred Zemans and Joan Nuffield, *Evaluation of Criminal Law Offices, Third Year Report* (Toronto: LAO, 2008).

www.legalaid.on.ca/en/publications/downloads/clo_evaluation_08apr.pdf

- Direct comparisons between CLOs and Private Bar require caution and can be misleading since there are a number of ways in which either the CLOs or private bar have advantages or handicaps;²⁸⁷
- The CLO model is a promising approach to improving access to justice for financially needy persons. However, there is considerable variation with respect to how different parts of the model have been designed and implemented in each site. Important lessons have been learned, but considerable design and development work remains to be done.

In his review, Professor Trebilcock discussed the evaluations of the refugee law, family law and criminal law offices. He notes that while the staff offices do not appear to provide services as cost-effectively as the bar this conclusion should be regarded with caution.²⁸⁸ He concludes that while the existing CLOs fill a niche in servicing the needs of especially vulnerable clients, “on balance, the case has not been made for extending the criminal staff office concept, at least as currently constituted more broadly through the legal aid system.”²⁸⁹

While the evaluations of staff offices are similar on the family law side, Trebilcock concludes that there may be a strong argument for expanding the number of family law offices in light of the frequent commentary as to the serious difficulty family law litigants face in finding lawyers to accept legal aid certificates (particularly for child protection matters or in rural communities). The family law bar is supportive of the FLOs and views the staff offices as a complementary service rather than a competing one. In addition, he notes that FLOs have strong potential to provide integrated, holistic services to clients. He notes that in order to be cost effective, and depending on the size of the community in which they are based, the additional offices may need to be smaller and have more flexible and innovative staffing arrangements.²⁹⁰

3. Lessons from the Experience of Community-Based Legal Clinics

The community legal clinic movement grew out of a commitment to provide poverty law services in a manner intended to eliminate, not merely alleviate poverty.²⁹¹ The model was intended to take a different approach to the legal problems of the poor, one that was based on an understanding of their unique legal needs. Rather than the “case by case” approach still used for many family law and most criminal cases, the community clinic model incorporated community education and development, law reform, and locally elected boards of directors and non-lawyer “community legal workers” into a lawyer-based practice.²⁹² This model has been most successful when it was implemented as intended, “which in practice means when it has actually been multi-disciplinary and community-based.”²⁹³

In a 2002 study of poverty law services available in Canada, respondents emphasized the underdeveloped nature of available poverty law services and the limited assistance available in

²⁸⁷ For example: the private bar do not have fixed salaries; the CLOs cannot as readily hire or fire staff to optimize returns on investment; the private bar can take on any type of family, civil or criminal case; the CLOs must focus on certain types of cases that are difficult to handle within the tariff.

²⁸⁸ Trebilcock, *supra* note 106 at 85-86.

²⁸⁹ *Ibid.* at 86.

²⁹⁰ *Ibid.*

²⁹¹ Martin, *supra* note 119.

²⁹² *Ibid.* at 1.

²⁹³ *Ibid.*

many parts of Canada.²⁹⁴ This contrasts with Australia and the U.K. where there are nation-wide government-funded community-based legal aid clinic systems, the Australian Community Legal Clinics and the British Community Legal Service.²⁹⁵ In Ontario, most community-based clinics are funded through LAO and are an integral part of the legal aid system. In many other provinces, community-based clinics are funded separately mainly through non-governmental sources. Some law schools also run community-based clinics including the Dalhousie Legal Aid Service in Halifax and Osgoode Hall's Parkdale Community Legal Services Program in Toronto. Law school legal aid clinics are discussed in the next section.

This section provides an overview of lessons learned through the experience of community-based clinics. It is based on recent reports and evaluations of clinics in Canada and abroad.

The SPARC Report carried out a thorough analysis of different models for the delivery of poverty law services.²⁹⁶ The Report summarizes the strengths and weakness of the four main service delivery models: advice centres; stand alone law centres; integrated service; and outreach services. Three of the key conclusions reached were:

- Clinics should ensure delivery of a full range of services including: class, group and individual representation; law reform, PLE. A delivery system that only provides advice and brief legal services cannot meet this goal.²⁹⁷
- The Calgary Legal Guidance clinic was identified as an excellent model because it operates a type of cluster model that has stable and loyal grass roots support; it is completely free of government interference; it has strong support from the judiciary and the legal profession; it integrates volunteer and paid staff services; and it operates within and outside of normal business hours. By employing students, CLG also maintains a pool of lawyers aware of the circumstances surrounding poverty law problems and likely to continue serving after graduation. CLG incorporates the services of social workers.
- In Australia, community legal clinics have played an important part in fostering innovation since several ideas were developed and trialed in these centres (including telephone advice, after hours services, community legal education) have been taken on as core functions of commissions.

Recent reviews of the Australian CLCs have been very positive. They have concluded that CLCs are a very cost effective method of service delivery. The CLC service is seen as unique and complementary to other forms of legal aid delivery.²⁹⁸ In particular it was found that the CLC method of service delivery "is a sophisticated approach which acts in the long-term to change individual legal problems into solutions which wider groups can access."²⁹⁹ In continuing to provide and develop quality services and innovative responses to identified need, CLCs are working on these issues: strategic planning; data (collection, management and use); the need for increased

²⁹⁴ *Supra* note 16.

²⁹⁵ Public funding is in some cases supplemented by funding from other sources and by the work of volunteers.

²⁹⁶ *Delivering Poverty Law Services*, *supra* note 89 at 74-79.

²⁹⁷ *Ibid.* at 58. Cite to: "Conference on the Delivery of Legal Services to Low-income Persons – Professional and Ethical Issues" (1999) 67 *Fordham Law Review* 1778.

²⁹⁸ Access to Justice Advisory Committee, *Access to Justice - An Action Plan* (1994) at 235.

²⁹⁹ The Wright Consultancy, *Report of the Review of Community Legal Centre Funding* [Queensland] (1997) at 1.

funding for all legal services; standards and quality measures; relationships with fellow services providers including legal aid commissions and the private profession; the use of information technology and enhanced communication strategies.

One of the key cross-jurisdictional findings is that despite the systemic goals set by community-based clinics, there is a tendency for individual casework to overwhelm more strategic long-term legal work. There is an important but under-exploited dynamic between individual and systemic work. Individual casework highlights instances where local policies and practices are breaking down or failing on the ground. The British Legal Service Commission has pointed out that “[T]his knowledge can be used by CLS partners to work with central and local government and the private sector to help target policies and make them work, ensuring that rights intended by Government are reaching those most in need.”³⁰⁰ In the Commission’s view Community Legal Service Partnerships have a role to play in bringing patterns of problems or backlogs to the attention of the relevant government authority, particularly in the areas of access to housing, healthcare and education, and the eradication of child poverty. The continued development of legal and advice services “is vital to keeping services relevant and able to respond to new and emerging needs in the community.”³⁰¹

Several strategies have been recommended to overcome this tendency. Clinics must consciously adopt standards based on these broader systemic goals and measure their work against these outcome-based standards.³⁰² This is the same point made above in relation to legal aid in general, that is the need to measure outcomes against long-term policy objectives such as ameliorating social inclusion or eliminating inequality. In addition, clinics must develop “seamless services” that is deliver legal aid services in a manner that is integrated into overall legal strategic initiatives that incorporate community development, development of strategic alliances with more influential groups; media work; lobbying; law reform and systemic litigation.³⁰³

The LAO community-based clinics take this strategic aspect seriously and have the funding and support to do so. These initiatives are further supported by LAO’s Clinical Resource Office and the group and test case certificate funding. In its most recent Annual Report, LAO highlights two recent court cases brought through the clinic system that have had an important role in shaping law and protecting rights.³⁰⁴ Similarly, the Manitoba Public Interest Law Centre, which is a division LAM, focuses on strategic litigation on behalf of disadvantaged groups.³⁰⁵

In the SPARC Report, respondents noted that without specific, targeted funding for poverty law, there is limited capacity to pursue test case litigation – an essential piece of the poverty law service continuum that must involve lawyers.³⁰⁶ Questions concerning access to, or the adequacy of,

³⁰⁰ *A Pathway to Regeneration*, *supra* note 123 at 38.

³⁰¹ *Ibid.* at.35.

³⁰² Martin, *supra* note 119 at 16.

³⁰³ *Ibid.*

³⁰⁴ The most recent groundbreaking landmark Supreme Court cases in which the appellants were represented by clinics are: the Supreme Court’s rulings in both *Tranchemontagne v. Ontario (Director, Disability Support Program)*, [2006] 1 S.C.R. 513 and *Hilewitz v. Canada (Minister of Citizenship and Immigration)*, *De Jong v. Canada (Minister of Citizenship and Immigration)*, [2005] 2 S.C.R. 706, created greater protection for the human rights of the poor and vulnerable, especially for those with disabilities.

³⁰⁵ <http://publicinterestlawcentre.ca/>

³⁰⁶ *Supra* note 89 at 33.

various state supports or benefits frequently involve constitutional questions. The capacity to launch *Charter* litigation is crucial, but virtually impossible without additional funding given that existing public interest advocacy organizations are already overburdened. In particular they identified the need for one constitutional law specialist in any core group of poverty law lawyers.³⁰⁷ In their view, creating a funded position in this area would provide some public capacity for carrying out test case litigation, as well as a resource for others with respect to understanding the application of the *Charter* to administrative regulations.

4. Law School Legal Aid Programs

Law schools and law school clinical programs have also been an important component of the legal aid system through the decades. In many Canadian and American cities, law school legal aid programs were established at the same time as government-funded legal services were initiated. Many law schools already run legal aid clinics and the recent review of legal aid in New Brunswick reiterated the importance establishing such a program in that province.³⁰⁸ In some cases, law students and law schools are also involved in other *pro bono* legal services projects such as the Family Law Project in Ontario.³⁰⁹

During the 2006-07 fiscal year, 985 of the nearly 3,800 law students enrolled in the six law faculties in Ontario participated in the Student Legal Aid Service Societies (SLASS) program. LAO recognizes, at least to some degree, that the law school based clinics are an important part of the system as a whole. Information about these programs is available on the LAO website and the LAO Quality Standards Office has worked with these programs to establish evaluation and support mechanisms. However, in his report, Trebilcock reports that the six student legal aid clinics in the province believe that their efforts are insufficiently recognized.³¹⁰ Trebilcock recommends that LAO should nurture its relationship with and develop a more strategic appreciation of where SLASS fit into the broader landscape of legal aid services in the province, both at present and in the future.

A recent study carried out on the status of American law school clinics also makes a strong case for greater integration of these clinics with legal aid programs. The study found that virtually every ABA-accredited law school operates a clinical law teaching program some of which are an integral part of the civil legal aid system. Despite the vast range of law school clinical programs, they are a very small component of the delivery system, accounting for less than 2 percent of the clients served.³¹¹

The study also reports on the Association of American Law Schools (AALS) equal justice project—*Pursuing Equal Justice: Law Schools and the Provision of Legal Services* created in 1999 to explore the roles that legal education can play in confronting the lack of legal resources for low-income persons, persons in capital cases, immigrants, and others.³¹² At the same time as it catalogues these

³⁰⁷ *Ibid.* at 83.

³⁰⁸ *Supra* note 112 at 38.

³⁰⁹ All seven law schools, under the auspices of *Pro bono* Students Canada, are participating in the FLP. Although FLPs vary slightly in each jurisdiction, overall the main task of FLP students is to help unrepresented people in family court fill out court forms. The students do not give legal advice, and work under the supervision of duty counsel.

³¹⁰ Trebilcock, *supra* note 106 at 171.

³¹¹ Jeanne Charn and Jeff Selbin, *Poverty Law and Law Schools - What's Working How and Why? Legal Aid, Law School Clinics and the Opportunity for Joint Gain* (Boston: Management Information Exchange Journal, 2007).

³¹² AALS, *Pursuing Equal Justice: Law Schools and the Provision of Legal Services*, 2002.

positive initiatives, the study draws conclusions on the “unfinished clinical agenda” that mirror concerns about the unfinished agenda of community-based clinics discussed in the previous section. Interestingly, the study found that despite the proliferation of clinics there has been a narrowing of service goals over time and clinics appear to be serving fewer clients.³¹³

Furthermore, despite important scholarship carried out by clinicians there remains a substantial knowledge and data gap about the service and learning functions of the clinics themselves. For example, there is no readily accessible, current data on the actual: (1) staffing of clinics; (2) student/supervisor ratios; (3) student caseloads; or (4) numbers and types of cases completed in clinics. There is also no outcome or other data on the casework itself and there has been little empirical research of clinics from a service delivery or outcome effectiveness perspective. The study makes the following recommendations to reinvigorate the law school legal aid clinic movement:

- It is important to re-connect the law school clinics with formal legal aid program – this renewal would assist both.
- Law school clinics should take advantage of their greater freedom to experiment with service approaches and substantive areas of practice.
- Because law school clinics are situated in research universities, they have access to the resources and expertise to produce credible data and study designs.
- Community-based centers are ideal: “we understand these community-based clinical education and service centers as “lab offices” with overlapping educational, service and research missions relevant to the larger legal services community and its efforts to expand and improve access to civil advice and assistance.³¹⁴

The study compares law school legal aid clinics to teaching hospitals. In the authors’ view, like good teaching hospitals in relation to health care for the poor, law school clinics can be sites of research relevant to critical questions confronting the legal services and access to justice community. Three interrelated lines of inquiry are identified: (1) developing and testing service delivery models; (2) providing access to researchers interested in the relationship of law and legal services to conditions of poverty and disadvantage; and (3) making comparative assessments of differing methods for teaching in and about practice.³¹⁵

The study points to developments in evidence-based research³¹⁶ and collaborative ventures between universities and community groups as encouraging trends that can provide assistance to the renewal of law school legal aid clinics. Two initiatives are specifically mentioned:

- Under the auspices of the Association of American Law Schools Section on Clinical Legal Education’s Bellow Scholar Committee and Harvard Law School’s Bellow-Sacks Access to Civil Legal Services Project, a small group of clinicians with a strong interest in legal services have begun working together on this common agenda.

³¹³ Charn and Selbin, *supra* note 311.

³¹⁴ *Ibid.*

³¹⁵ *Ibid.*

³¹⁶ See, e.g., David M. Eddy, “Evidence-Based Medicine: A Unified Approach” (2005) 24(1) *Health Affairs* 9 at 17; and Albert R. Roberts and Kenneth R. Yeager, eds., *Foundations of Evidence-Based Social Work Practice* (Oxford: Oxford University Press, 2006).

- The Center for the Study of Applied Legal Education (CSALE) is “dedicated to the empirical study of applied legal education and the promotion of related scholarship. CSALE’s initial focus is a long-term longitudinal study that will capture significant aspects of the growth and development of applied legal education, its diverse substantive foci, its methodologies, its instructors, and its integration into the American legal academy.”³¹⁷

C. The Movement towards Comprehensive and Integrated Service Delivery

The legal needs empirical research outlined above strongly supports the movement toward more comprehensive and integrated legal aid service delivery. Many community-based clinics have employed a multi-disciplinary team from the beginning and continue to do so today. In some jurisdictions, specialized courts such as family court, drug courts, mental health courts, domestic violence courts, and community courts have been established in response to the same need for integrated service. The brief review of recent legal aid innovations in the previous sections includes a number of service delivery developments that are attuned to this need. For example, some of enhanced points of entry centres and staff offices integrate non-legal support services and many legal aid programs have identified the need to work more collaboratively and coordinate efforts with other organizations. This trend appears to be gaining steam. Both the LSS future vision of legal aid services in B.C. and Professor Trebilcock’s recommendations for LAO are founded on a more robust approach to the integrated services.

It is important to underscore that the current legal aid system in Canada operates far from these ideals and many obstacles lie in the path to their achievement. Funding arrangements, organizational capacities and skills, information deficits and other barriers have been found to impede the provision of a holistic response to a client’s multiple problems in other jurisdictions.³¹⁸ Conflict of interest issues and solicitor-client privilege also pose potential problems in designing integrated delivery services that have a legal component. Still, both the LSS proposals and Trebilcock’s report speak in terms of needing to break the barriers between the “silos” under which legal aid, health and social welfare benefits operate as separate systems.³¹⁹

This section reviews a number of innovations that are part of this greater movement toward comprehensive and integrated legal aid service delivery. These innovations are discussed under three main themes: (1) multidisciplinary practices: integrating legal, social and health services; (2) increased coordination between agencies serving the low-income community; and (3) a holistic approach to criminal legal aid services.

1. Multidisciplinary Practices: Integrating Legal, Social and Health Services

The SPARC cross-jurisdictional study found that in all of the jurisdictions researched, there are some law centres that have legal staff supplemented by employees or volunteers from other ‘helping’ professions, including social workers, counselors, interpreters, and accountants. In other cases, legal services are only one of a number of departments within a multi-service agency. While

³¹⁷ www.csale.org

³¹⁸ Richard Moorehead and Margaret Robinson, *A Trouble Shared: Legal Problems clusters in Solicitors’ and Advice Agencies* (London: Department of Constitutional Affairs, 2006).

³¹⁹ Trebilcock, *supra* note 106 at 103-04.

many legal aid clinics have established relationships with external agencies, it is still exceptional for there to be formal integration of services.

The SPARC Report noted the many advantages of inter-professional collaboration in one agency. These include: effectiveness; allowing clients to “one-stop shop” thereby avoiding referral fatigue; making legal services more time and cost effective by relieving legal staff from lengthy counseling sessions which they may be ill equipped to handle; and providing in-house education for legal staff through regular meetings and *ad hoc* consultations with other staff professionals. The presence of other professionals can also give legal staff a different and useful perspective about client circumstances. In the authors’ view, “well-planned inter-professional collaboration that leads to seamless holistic client services has no downside.”³²⁰ The authors point out that planning and the design of service delivery must take into account the professional obligations, such as solicitor-client privilege, that bind lawyers (and paralegals working under their supervision).

The West Heidelberg Community Legal Partnership (WHCLP) has provided integrated services to the people of West Heidelberg, a disadvantaged suburb of Melbourne, Australia since 1978.³²¹ The purpose of holistic practice is seen to be to marshal the combined resources of a network of professionals for the benefit of the client, as well as to further the public interest.³²² The way the service operates is described in these terms:

To achieve our objective, the Legal Service works with the staff in the Community Centre to provide a multidisciplinary approach to problems facing residents. Lawyers and Community Centre staff work jointly on individual problems to resolve the legal problems as well as the underlying cause that created the legal problem. This close working relationship enables referrals to be made instantly and sensitively. Examples of the multidisciplinary approach include lawyers working with the Financial Counselor on debt matters or with the Social Workers or Community Workers on social security or domestic violence issues.³²³

Unlike many Australian community legal centres which provide mainly advice and referral work, the WHCLP provides significant casework services, including court representation. Because of limited resources, priority is given to public interest matters relevant to the broad community. The co-location of the legal service with other services is a critical feature allowing for seamless service delivery. The key factors that make the integrated service work to the benefit of the clients are: location at the same site; willingness of staff to work together; professional experience of staff; staff understanding of the respective roles of the different disciplines; clear and defined boundaries in casework; clear and prompt attention to referrals; clear and frequent communication on cases; the development of shared expertise, and; a commitment to long-term problem solving.³²⁴ While it is difficult to assess whether the WHCLP has assisted in transforming the broad indicators of social disadvantage in the community, it is absolutely clear that “an integrated approach to the provision

³²⁰ *Delivering Poverty Law Services*, *supra* note 89 at 70.

³²¹ M-A Noone, “They all come in the one door”: the transformative potential of an integrated service model: a study of the West Heidelberg Community Legal Service” in *Transforming lives: Law and social process*, *supra* note 20 at 93-111.

³²² *Ibid.* at 96.

³²³ West Heidelberg Community Legal Service, *Annual Report 1988* at 3-4.

³²⁴ *Ibid.* at 102-103.

of legal services provides a better service for the client that addressed their multiple needs in an efficient and effective manner.”³²⁵

A number of different strategies have been utilized in the U.K. to advance comprehensive and integrated legal aid service delivery. For example, the concept of sharing with other professionals has been put into practice in England, where Law Centre staff provide training on legal matters to municipal staff, including youth workers, social workers, home care staff, and probation officers. This alerts other professionals to the possible existence of legal problems which clients may be unable to articulate or define. This training is also useful for ‘problem noticers’ in health centres.³²⁶

The U.K. Legal Services Commission is currently piloting Community Legal Advice Centres as “one-stop-shop” services, delivered by a consortium of provider organizations to improve access and local responses to individuals experiencing multiple legal problems.³²⁷ These Centres are models for the delivery of combined social and welfare legal services, including community care, debt counseling, housing support, employment assistance and welfare advice. The Centres are designed to provide a service from initial diagnosis and information provision to advice, support and legal representation in court.

A few of Ontario’s community legal clinics already offer more closely integrated legal services with health or social services and/or are willing to offer a broader range of legal services to meet their clients’ needs. Professor Trebilcock sees community legal clinics as the logical basis for more integrated service delivery. He cites three LAO clinics and two other organizations in his report as being good examples of agencies that already employ this approach to some degree. These are: the Centre francophone de Toronto; Student Legal Aid Services Societies; and the Aboriginal Legal Services of Toronto as well as the Barbra Schlifer Clinic and York Community Services.³²⁸

Trebilcock proposes that “one option for moving towards an integrated response to Ontarians’ legal and social problems could be by way of re-conceptualizing the mandate of Ontario’s legal aid clinics.”³²⁹ He acknowledges that there is also considerable potential for integrated service delivery by other staffed components of the legal aid system, including duty counsel and staff offices.³³⁰ LAO’s Simplified Online Application Portal initiative, which directly involves social service agencies in the certificate applications process and is described above, could become an important platform for an integrated referral network.

2. Increased Coordination between Agencies Serving the Low-Income Community

A comprehensive approach to service delivery can also be facilitated through increased coordination between agencies serving the low-income community. Increased coordination yields advantages for both clients and service providers.³³¹ For clients, positive outcomes include greater awareness of available options for assistance, improved capacity for referrals, greater continuity in

³²⁵ *Ibid.* at 107.

³²⁶ *A Pathway to Regeneration*, *supra* note 123.

³²⁷ *Ibid.*

³²⁸ See discussion in Trebilcock, *supra* note 106 at 105-108.

³²⁹ *Ibid.* at 108.

³³⁰ *Ibid.*

³³¹ *Delivering Poverty Law Services*, *supra* note 89 at 30.

service delivery, and a stronger overall voice in defense of client needs (which supports the realization of positive outcomes). For service providers, greater coordination would improve communication among organizations, support the efficient use of resources (notably lawyers' time), minimize repetition and overlap in service delivery, and assist in establishing 'standards' for legal advocacy to help ensure consistent responses to certain problems.

Specific benefits of coordination include:

- Sharing knowledge and experience on appropriate and effective strategies;
- Providing emotional support (particularly given that many advocates are overworked);
- Creating broader partnerships around service delivery; and
- Improving opportunities for education and training.³³²

A holistic approach based on integrating a variety of services and levels of service delivery is integral to the Australian Community Legal Centres, as is a focus on prevention and understanding and addressing the structural causes of legal needs. A recent report of the National Access to Justice Project describes various efforts to improve access to justice in the US. Factors that support successful initiatives are:

- Strong partnerships with the bar, judiciary, and legal aid providers provide a solid foundation. Law Schools can also be key partners, while representatives from outside the legal community can bring new perspectives and help broaden support;
- Institutional commitment is necessary on the part of key partners. Each partner must work to build support within its own institutional base;
- Formal structures which are accountable to more than one partner offer greater security;
- Judicial leadership – especially at the state Supreme Court level – greatly increases effectiveness;
- An effective staff;
- An attitude of openness, inclusiveness, and trust among partners;
- Partners should prioritize promoting cooperation and consensus within their own community and strive to speak with one voice in public.³³³

In the U.K., the emphasis has been on building governmental partnerships and “joined up” work between agencies as a means to assist disadvantaged individuals and communities and combat social exclusion. Foremost of these is linking up the Community Legal Service and other government departments. This strategy is described in this way:

Our vision for the Community Legal Service is founded on partnership. Working with others, we can gain a real understanding of people's needs, develop high quality services, and ensure that funding is used to best effect in tackling social exclusion.³³⁴

³³² *Ibid.* at 31.

³³³ National Association of Community Legal Centres, *Doing Justice: acting together to make a difference* at 5. Quoted by Bill Mitchell, “Building *Pro bono* Partnerships: Opposites Attract, But Can They Last?” (Paper presented at National Association of Community Legal Centres Conference, 2003).

³³⁴ *A Pathway to Regeneration*, *supra* note 123.

Funding has been made available to foster Community Legal Service Partnerships which bring together funders, providers and users of legal advice and information to develop integrated services tailored to the needs of specific communities.³³⁵

3. A Holistic Approach to Criminal Legal Aid Services

The Canadian study on unmet criminal legal aid needs by Dr. Ab Currie concluded that client-centered legal aid delivery would require services to become more integrated. Currie identifies three ways in which this integration could occur: vertical integration (identifying and dealing with all of the clients' needs in the legal aid process), horizontal integration (addressing legal needs in both criminal and civil law) and greater external integration (between legal aid providers and other community supports).³³⁶

Several holistic approaches to the provision of criminal legal aid services are currently operating in the US. These include The Bronx Defenders,³³⁷ Knox County Public Defender Community Law Office,³³⁸ The Neighborhood Defender Service of Harlem,³³⁹ and the Georgia Justice Project.³⁴⁰ The objectives of these programs extend far beyond providing high quality defense to providing broad client-focused services that address underlying problems in a manner that contributes to reducing and preventing crime. In this context, holistic advocacy means housing an array of services in a public defender's office. The goal is to develop a criminal defense practice based on the knowledge that clients come with a host of unaddressed social problems – poverty, mental illness, alcoholism, substance abuse, post-traumatic stress disorder, and family dysfunction. These services are social service oriented, collaborative, intensive, and long-term.³⁴¹ Contact with the criminal justice system provides an ideal time for intervention because:

It is precisely when the client is at his lowest when the potential legal and social service pitfalls are the greatest that clients need a strong legal defense on a number of criminal and civil fronts and a compassionate social service presence in their lives.³⁴²

Supporting the core principle of client-centered practice, holistic models of advocacy have two critical components: (1) advocacy through interdisciplinary groups and (2) a presence in the client community. The Bronx Defenders, for example, houses in a single building social workers, criminal defense lawyers, civil lawyers specializing in child welfare, housing and immigration, and youth and community outreach staff. The office is located in South Bronx where most of its clients live. Beyond the panoply of social services, the office also provides youth programs to local elementary and high schools. Cementing their place in the community, the social work staff at The Bronx

³³⁵ See *ibid* for specific examples.

³³⁶ Currie, *supra* note 31 at 24.

³³⁷ www.bronxdefenders.org/

³³⁸ www.pdknox.org/800main.htm

³³⁹ www.ndsny.org/

³⁴⁰ www.gjp.org/

³⁴¹ Robin G. Steinberg, "Beyond Lawyering: How holistic representation makes for good policy, better lawyers and more satisfied clients" (Paper prepared for the 2nd European Forum on Access to Justice, February 24-26, 2005.) Steinberg is the Executive Director of The Bronx Defenders.
www.bronxdefenders.org/index.php?page=publication&id=18¶m=publications_and_media

³⁴² *Ibid.*

Defenders serves as a clearing-house for a wide variety of social services, having developed relationships with over 300 local service organizations, schools and community groups.

The centerpiece of a holistic office and the primary way to reinforce the interconnectedness of the issues that clients face is through interdisciplinary work groups. Whole client representation can best be accomplished when an office utilizes interdisciplinary teams of lawyers (with different specialties), social workers, investigators and support staff. Depending on the needs of clients there may also be psychologists, job developers, youth program personnel, and community organizers. Providing a team of advocates for clients is described as being both rewarding and challenging. The ability to work collaboratively on behalf of clients with experience from different disciplines provides a unique ability to address both a client's criminal case and human needs.

Steinberg sums up his views in these words:

Taken together, the benefits of holistic advocacy – in terms of client outcomes, lawyer satisfaction, community empowerment, and enhanced public safety, represent a highly rewarding, morally superior, and cost effective approach to legal representation for the poor.³⁴³

The Knoxville Community Law Office (CLO) is another holistic representation model that includes criminal and civil legal services, supplemented by social services, sentencing and business venture components.³⁴⁴ The Knoxville CLO model is designed to achieve five primary goals: (1) to prevent crime; (2) to reduce recidivism; (3) to empower clients to live a fuller, more meaningful, independent life; (4) to increase community involvement in the criminal justice system; and (5) to demonstrate an innovative, effective service model. In achieving those five primary goals, this model envisions producing three secondary cost benefits:

- Reduce judicial administration costs by decreasing the number of people offending and, consequently, decreasing the number of cases initiated in the jurisdiction;
- Reduce institutional costs associated with pre and post trial detention of individuals accused/convicted of criminal violations; and
- Reduce institutional costs associated with crime prevention and detection as the number and frequency of offenders and offenses are reduced.³⁴⁵

The Knoxville CLO has planned an evaluation that focuses on both process and outcome. The process evaluation will address program model, client characteristics, service patterns and utilization, program implementation and barriers to service. The outcome evaluation will focus on success in meeting goals and objectives, especially, whether the program reduces first-time criminal activity and recidivism, cost-benefit analysis and levels of self-sufficiency achieved. The evaluation will address what service strategies were effective with specific clients.

³⁴³ *Ibid.*

³⁴⁴ Mark E. Stephens, Linda P. McLaughlin, MSCJ, R. Scott Carpenter, Rebecca L Lucas, Ph.D., Laura W. Chambers Roger Nooe, Ph.D., *Peace and Justice: Knoxville Community Law Office Concept Paper*. www.pdknox.org/Downloadable/CLOconcept.pdf

³⁴⁵ *Ibid.* at 2.

D. Strategies to Meet the Needs of Underserved Communities

1. Legal Services for the Aboriginal Community

Several Canadian legal aid programs have developed specific delivery models to meet the needs of members of Aboriginal communities. These include the Siksika Nation Legal Aid Services run by LAA and the Aboriginal Duty Counsel pilot project in New Brunswick. Evaluations of these services have concluded that having Aboriginal lawyers and/or paralegals is a key to success.³⁴⁶

LAO has begun to experiment with innovative service delivery for Aboriginal people, in particular, in recognition of their overrepresentation in the justice system. In the summer of 2007, LAO began consultations on a strategy for improving services to Aboriginal clients. At present, LAO is providing funding for two culturally specific pilot projects which integrate traditional community circles in criminal and child protection proceedings. The *Aboriginal Justice Strategy* is working to create a three to five year plan to achieve measurable improvements in LAO's services to Aboriginal people. The plan will provide specific options and recommendations to enhance legal aid services.³⁴⁷ In June 2008, the Board of Directors approved a Development Paper and 12 immediate initiatives to provide better services to Aboriginal clients. The topics covered in the Development Paper are: barriers to accessing justice; lack of Aboriginal representation within LAO and LAO's advisory systems; lack of Aboriginal legal representation or legal representation that is appropriately informed on the unique needs of Aboriginal clients; improving service on Aboriginal specific legal issues; and, addressing the role of LAO in participating or supporting Aboriginal specific or driven processes.

LSS has also embarked on a three-year project to adapt and expand current programs and pilot projects to meet the unique needs of Aboriginal clients. The starting point for this renewal process was commissioning a report by Ardith Walkem, *Building Bridges, Improving Legal Services for Aboriginal Peoples*.³⁴⁸ LSS is in the process of consulting with Aboriginal communities for the purposes of reviewing and implementing the *Building Bridges* report.

The focus of *Building Bridges* is that solutions to eliminate the gap in providing legal services to Aboriginal peoples require strengthening Aboriginal peoples' ability to respond to their own legal needs. On a practical level, "this requires the involvement of a greater number of Aboriginal people within LSS, and open and dynamic lines of communications between LSS and Aboriginal peoples."³⁴⁹ Addressing the unmet legal needs of Aboriginal people requires acknowledging that solutions must be found within Aboriginal cultures and delivered in partnership with Aboriginal communities.

The Report found that there is currently little active engagement between LSS and Aboriginal communities and Aboriginal persons have many unmet legal needs including a critical lack of representation throughout the province. Providing opportunities for Aboriginal persons to work

³⁴⁶ Fact Sheet, *The Siksika Nation Legal Aid Program* (LAA, 2006); Dr. Ab Currie, *The New Brunswick Aboriginal Duty Counsel Project* (Ottawa: Justice Canada Research Report, 2000).
www.justice.gc.ca/eng/pi/rs/rep-rap/2000/rr00_12/index.html

³⁴⁷ *Update on Aboriginal Justice Strategy* (Toronto: LAO, 2008).
www.legalaid.on.ca/en/publications/report_aboriginalupdate_09sept.asp

³⁴⁸ Ardith Walkem, *Building Bridges, Improving Legal Services for Aboriginal People* (Vancouver: LSS, 2008).
www.lss.bc.ca/assets/aboutUs/reports/legalAid/buildingBridges_en.pdf

³⁴⁹ *Ibid.* at 5.

within the legal aid system is an essential and necessary step. Another central theme is the need to develop more holistic services to meet these needs.

The Report makes four key recommendations which apply to all LSS services and a number of detailed recommendations for specific services and activities. The Report also provides useful implementation strategies and ideas. The four key recommendations are:

1. Increase Aboriginal representation at all levels within LSS, including staff, management, board, tariff bar lawyers, and contractors.
2. Actively work to increase the number of lawyers with training specific to Aboriginal people who take legal aid cases.
3. Improve communications and outreach to Aboriginal governments, communities, and organizations.
4. Ensure Aboriginal participation in LSS policy and program development.

2. Other

Various reports have stressed that the legal aid system fails to adequately address the needs of specific disadvantaged communities. LAO attempts to meet these needs through its specialty clinics some of which are designed to serve specific communities. One of the few novel and specific strategies emanating from the recent studies surveyed in this paper are recommendations for developing accessible and appropriate services for inmates in federal institutions. This study recommended the testing of pilot project on-site staff delivery model in 5 sites.³⁵⁰

There are numerous smaller projects designed to meet the unmet needs of certain groups in a more holistic way. For example, the Family Resource Facilitators in LAA Family Law Office are developing a new program to help single young mothers who find themselves in trouble with the law. FLO has partnered with the Youth Workers at YCDO and with the Elizabeth Fry Society and are putting together a proposal to present to the Provincial Court. The project is called “Just-Us Girls” and the target population will be young mothers (12 – 24 years old) who had their children apprehended due to addictions, neglect, housing issues or family violence. The hope is that those young mothers will be granted an adjournment at their first appearance in Provincial Court to allow for a referral to “Just-Us Girls” to allow the client to make application to obtain counsel through LAA and to be referred to a circle of volunteers who will help the young mother access the resources that she needs so that her children can be returned to her with appropriate conditions (i.e. a Supervision Order or a Concurrent Plan).³⁵¹

³⁵⁰ Lajeunesse, *supra* note 83.

³⁵¹ LAA, *Annual Report 2007*, *supra* note 178.

VI. OTHER MECHANISMS FOR ENHANCING ACCESS TO LEGAL SERVICES

This Report focuses on developments in legal aid research, policy and service delivery in the past decade. This overview demonstrates the ways in which justice system reform, broad access to justice initiatives and legal aid developments are intertwined. For example, innovations such as collaborative research to map the availability of legal services, the establishment of Self-Help Centres, and greater cooperation between service providers all reflect the way these three broad policy avenues join together. Many of these initiatives are aimed at providing better justice services to meet a broader range of unmet legal needs, particularly on behalf of individuals with moderate incomes. Clearly, improving legal aid service delivery must take place in the context of broad justice system reform. These developments are welcomed but, at the same time, give rise to concerns that they could detract from the central role of legal aid in serving low-income individuals and communities.

This part of the discussion paper briefly discusses two mechanisms for enhancing access to legal services closely related to, but separate from, legal aid reform. The first is the development of move toward establishing access to justice communities. Many of the recent innovations involve greater networking and integration between service providers. Access to justice communities take this trend one step further by developing permanent institutional links between justice organizations to facilitate joint work at the policy level on an ongoing rather than on an *ad hoc* or project basis. The U.S. example of State Access to Justice Commissions is highlighted. The second mechanism is the expansion of *pro bono* programs. More and more, legal professionals are volunteering their services to fill the gaps in legal aid service. This section briefly reviews some of the trends in organized *pro bono* efforts.

Finally, there are a number of other potential mechanisms for enhancing access to legal services for moderate income individuals, which are under-explored in Canada. Some of these alternatives are identified with a view to outlining an unfinished agenda on increasing access to legal services.

A. Access to Justice Communities

One of the most effective ways to develop, expand, and institutionalize comprehensive, integrated state systems for the delivery of civil legal aid is through the establishment of access to justice communities. This is one of the most far-reaching changes affecting the U.S. civil legal aid system. The evolving effort to create comprehensive, integrated state-wide delivery systems has resulted in the creation of state justice communities in most states. These “communities” include the federally-funded Legal Services Corporation and non-Legal Services Corporation providers, *pro bono* programs and initiatives, other service providers (including social service providers), *pro se* initiatives, law school clinics, and key elements of the private bar and the state judicial system. The main goals of these state justice communities are to: (1) create a single point of entry for all low-income clients; (2) integrate all institutional and individual providers and partners; (3) allocate resources among providers to ensure that representation can occur in all forums for all low-income persons; and (4) provide access to a range of services for all eligible clients—no matter where they live, the language they speak, or the ethnic or cultural groups of which they are members.³⁵²

³⁵² Houseman, *supra* note 90 at 23.

The main institutional mechanism for forging access to justice communities is the establishment of state Access to Justice Commissions.³⁵³ These commissions are created by state Supreme Court rule or order in response to a petition or request by the state bar, sometimes with formal support from other key stakeholder entities as well. Their members are representative of the courts, the organized bar, civil legal aid providers, law schools, and other key entities and are either appointed directly by these entities or appointed by the state Supreme Court based on nominations by the other entities. They are conceived as having a continuing existence, rather than being blue-ribbon bodies created to issue a report and then sunset. They have a broad charge to engage in ongoing assessment of the civil legal needs of low-income people in the state and to develop, coordinate, and oversee initiatives to respond to those needs.

These Access to Justice Commissions have focused on the following activities:

- Increasing public awareness of the civil legal needs of low-income people and the importance of civil legal assistance—through legal needs studies and other reports, hearings, evaluation reports, and public awareness campaigns;
- Expanding efforts to educate federal legislators about the need for increased LSC funding and state policymakers about the need to augment state-level funding—through state appropriations, filing-fee surcharges, voluntary or mandatory bar-dues contributions, improvements in IOLTA (Interest on Lawyers Trust Accounts), and other means;
- Increasing *pro bono* participation among private attorneys—through *pro bono* initiatives such as mandatory reporting, rule changes, *pro bono* attorney-recruitment campaigns, Web sites, conferences, and state-wide data collection;
- Creating and expanding loan-repayment assistance programs for young attorneys with substantial student-loan debt, which serves as a barrier to taking relatively low-paying jobs in civil legal aid organizations;
- Assisting efforts to bring together the bar, the courts, legal aid providers, and others to make the courts more accessible and user friendly and to address the challenges posed by the self-represented—through comprehensive plans, reports and evaluations, training and education, simplification of rules and forms, courthouse support, Web- and technology-based tools, and other activities; and
- Developing new programs and state-wide collaborations to ensure effective coordination among providers; to implement innovative technology-based systems; and to ensure systemic advocacy and services to special populations, such as immigrants and prisoners.³⁵⁴

Many Canadian legal aid organizations are already intensively involved with justice reform and access to justice initiatives on both the policy and service delivery levels. For example, LAA is involved in the Justice Policy Advisory Committee and the Alberta Legal Services Mapping Project and LSS has been an integral partner in the B.C. Self-Help Information Centre and the Justice Access Centres. The State Access to Justice Commission approach takes this one step further by making these collaborative structures permanent. An interesting original twist on the idea of access to justice communities flows from the recent New Brunswick review of legal aid. This report proposed that the provincial government should consider approaching the other Atlantic or

³⁵³ *Ibid.*

³⁵⁴ *Ibid.*

Maritime Provinces on a joint delivery model for legal aid services.³⁵⁵ While this proposal was made primarily on the basis that cooperation offers potential savings, there are interesting policy implications to taking this one step further and establishing an Atlantic or Maritime Access to Justice Commission.

B. Expanded Pro bono Programs

Lawyers have always played an important role in improving access to justice by providing services on a *pro bono* basis. Cutbacks in government support for legal aid programs has led to a substantial increase in *pro bono* activity in many countries and a move toward greater organization and integration of *pro bono* programs within legal aid programs and/or the court system itself. Two important trends can be discerned:

- Greater integration between legal aid providers and *pro bono* schemes and individual law firms and the formation of multi-tiered ongoing partnerships between these entities; and
- A move toward quantifying the amount of *pro bono* work being carried out including more American states making it mandatory for attorneys to report on *pro bono* activities.³⁵⁶

The SPARC study on the delivery of poverty law issues took an in-depth look at the role of *pro bono* services. This study identified a number of obstacles to *pro bono* work centered on lack of knowledge and expertise in this field and the time commitment required to provide high quality service.³⁵⁷ In order to overcome some of these hurdles, many jurisdictions offer intensive poverty law training for *pro bono* lawyers.³⁵⁸ Several studies point out that a basic level of government-funding is required to adequately train and manage volunteers. People unfamiliar with managing volunteer programs often fail to realize that they do not come free of expense. Lack of management and administration resources tend to lead to the eventual disenchantment of volunteers and the demise of much needed programs. Some of these problems can be overcome by good program design and planning.³⁵⁹ Further research into effective *pro bono* models of service delivery would be useful.

More fundamentally, the SPARC Report and others like it highlight the divergence of views regarding the extent to which volunteers should be included as a core component of service delivery.³⁶⁰ Likely due to the long history and institutional support enjoyed by *pro bono* services, there is limited criticism or concern about their central place in poverty law service delivery in the US. However, despite the long history of community legal clinics working in tandem with *pro bono* lawyers in Australia, the legal profession there is concerned about the increased reliance on it by

³⁵⁵ Recommendation #40: Hughes and MacKinnon, *supra* note 112 at 39.

³⁵⁶ For additional analysis and examples, please see the author's original background document, *supra* note 5.

³⁵⁷ *Supra* note 89 at 37-38.

³⁵⁸ In England, Solicitors *Pro bono* offer services through their LawWorks program.

www.probonogroup.org.uk.

In Australia, the Public Interest Clearing House in Melbourne promotes one of many training programs available to volunteer lawyers.

www.pilch.org.au.

³⁵⁹ *Supra* note 89 at 77-78.

³⁶⁰ *Ibid.* at 59.

governments. For example, a recent submission to the Australian Senate state that “there is a level of cynicism in the profession about recent government interest in *pro bono* and a concern that their *pro bono* contributions may allow current or future State or Commonwealth governments to avoid fully meeting their responsibilities to people in need.”³⁶¹ The submission concludes that without well-resourced legal aid and community legal services, *pro bono* programs would not be effective.

In the context of its access to justice activities, the Victoria Law Foundation sponsored a Round Table on the relationship between legal aid, *pro bono* and legal services.³⁶² The aim of this round table was to examine the extent to which changes in legal aid have affected the provision of *pro bono* services in Victoria, and whether there is a connection between legal aid and *pro bono*. The conveners point out a clear connection between the decline in legal aid funding and the rise in the amount of and interest in *pro bono* work by the private profession. The key point for discussion at the roundtable was how the rise of *pro bono* activity is linked to the decline in legal aid and what the response of the profession should be to that decline.

The roundtable discussion noted that there is “tension at the border of legal aid and *pro bono*.”³⁶³ The private legal profession has effectively subsidized and supported the legal aid system for many years through acting for reduced fees and doing extra unpaid work in legal aid cases. Anecdotal information suggests that in Victoria lawyers are becoming increasingly frustrated with the legal aid system, preferring on occasion to provide services at reduced fee or on a *pro bono* basis.³⁶⁴ Given the links between legal aid and *pro bono* services there is a need for a sounder working relationship between the two.

Participants felt strongly that legal aid and *pro bono* must be recognized as separate activities. However, they acknowledged that there is a certain amount of ambiguity as to where legal aid ends and *pro bono* begins. The discussion grouped cases into three broad types:

- publicly funded legal aid cases – predominantly now crime and family law;
- legal aid ‘overflow’ cases – cases that should be publicly funded, but are not (e.g. civil cases that were funded in the past); and
- public interest (‘test’ cases) or public benefit cases (work done for charitable or community organisations).³⁶⁵

It is in the second category where there is most tension. The discussants recognised that *pro bono* work plays an important role in the justice system and stressed that the profession is committed to *pro bono* work regardless of what is happening with legal aid. Nevertheless, many clients ineligible for legal aid will not be able to find someone to take their case on a *pro bono* basis. There is a significant area of unmet need for legal services that cannot be filled by *pro bono* efforts.³⁶⁶

³⁶¹ National Pro Bono Resource Centre, *Submission to the Senate Legal and Constitutional Inquiry into Legal Aid and Access to Justice* (2003) at 3.

www.nationalprobono.org.au/ssl/CMS/files/cms/senateinquiry.pdf

³⁶² Victoria Law Foundation, *Future of Pro bono in Victoria* (Report from the Round Table Series, 2001).

www.victorialaw.org.au/pdfbook/Future_of_Pro_Bono_in_Victoria_126kb.pdf

³⁶³ *Ibid.* at 7.

³⁶⁴ This is confirmed by a study conducted in 1999 by Griffith University which is referred to by Chris Arup, “*Pro bono* in the post-professional spectrum of legal services” in Chris Arup & Kathy Laster, eds., *For the Public Good: Pro bono and the legal profession in Australia* (Sydney: Federation Press, 2001) at 200.

³⁶⁵ Mark Herron, *Let’s get organised – overview and comment* (2001) 75:1 *Law Institute Journal* 25 (Paper given at first Round Table).

³⁶⁶ *Ibid.*

The discussion also focused on the historical differences between *pro bono* and legal aid. The legal profession has a long tradition of contributing its services to the community at no or reduced fees. The *pro bono* work of the profession pre-dates the rise of the modern, government-funded, organised legal aid system. Although there is clearly some overlap between the work of legal aid and *pro bono*, they have developed out of somewhat different traditions. Early *pro bono* work by private lawyers was largely based on two principles: charity and professionalism. The rise of legal aid, on the other hand, was based on a concept of rights – that is, people are entitled to legal information and assistance. Public funding is an essential part of a government legal aid scheme as, in theory, it removes the need to rely on the ‘charity’ of the profession and it gives the system public accountability. However, a reliance on public funding means that the legal aid budget is limited, particularly in a climate of reduced government spending on services in general. The roundtable report points out that: “Operating a rights-based system within a limited budget is difficult as it involves setting priorities and guidelines.”³⁶⁷

The current situation is more complicated than the historical conception of *pro bono*:

Current *pro bono* practice does not fit into a neat category. It takes many forms. The profession has always subsidized legal aid through reduced payments and volunteering at community legal centres. Furthermore, many law firms have moved away from the idea of *pro bono* as charity work and consider their involvement as based squarely on a commitment to improving access to justice. They do *pro bono* work because they believe lawyers have a moral and professional responsibility to do it, and they expect their lawyers to take on some *pro bono* cases every year. Nevertheless, because of its voluntary nature, *pro bono* work isn’t rights-based in the sense that there is an entitlement to receive it.³⁶⁸

Further work needs to be done to resolve the tension at the border of legal aid and *pro bono* in Canada. Professor Richard Devlin of Dalhousie Law School has made an intriguing proposal that the bar should use a formal commitment to *pro bono* work as a *quid pro quo* for governments to reinvest in legal aid systems.³⁶⁹

C. Underexplored Alternatives

In its 1996 report, the CBA’s Systems of Civil Justice Task Force recognized that access to legal services is integral to access to justice. It highlighted the onus on the legal profession to increase the availability of affordable legal services to people with moderate incomes while at the same time affirming the crucial role of public funding for legal services for people with lower incomes through legal aid.³⁷⁰ The Task Force encouraged both increased provision of *pro bono* legal services³⁷¹ and the development of innovative approaches to funding legal services.

³⁶⁷ *Supra* note 362 at 9.

³⁶⁸ *Ibid.*

³⁶⁹ “Breach of Contract?: The New Economy and the Ethical Obligations of the Legal Profession” (2002) 25 *Dalhousie Law Journal* 335-375.

³⁷⁰ *Supra* note 10 at 69.

³⁷¹ The Task Force made a number of specific recommendations to this effect. The CBA established a *Pro bono* Working Group to continue to work on this subject and this is now a major initiative of the CBA. www.cba.org/CBA/groups/probono/

With respect to the second strategy, the Task Force stated that in order to make legal services broadly accessible to middle and lower-income Canadians, alternative funding arrangements and innovative approaches to the provision of legal services should be developed by governments and the profession.³⁷² The Task Force recommended that the CBA assume a leadership role in developing and promoting alternatives. Four possible options considered by the Task Force as worthy of further investigation were: prepaid legal services plans (also known as legal expense insurance), contingency legal aid funds, contingency fees, and tax deductions for legal expenses.³⁷³ The Task Force also recognized ways in which the economics of the practice of law have made it increasingly difficult for individuals to obtain affordable litigation services and lawyers to engage in a 'personal services' form of litigation practice.

Some progress has been achieved on these initiatives, particularly the unbundling of legal services. The CBA is participating in an Access to Justice Commission established by Chief Justice Beverly McLachlin which may further advance some of these initiatives, as well as other mechanisms to increase access.

Trebilcock's review of LAO placed great emphasis on increasing access of the working poor, lower middle-income and middle-class. The focus of his recommendations was on a much more integrated system for providing low-cost information and summary advice services. However, he also mentions the potential value of legal insurance schemes, particularly as a mechanism to increase access to legal representation services when limited services will simply not suffice.³⁷⁴ While these schemes are not new, they have yet to find their way into the mainstream in Canada. In contrast, legal insurance schemes are in place in Germany and Sweden, usually as an incidence to an automobile license or home-ownership.³⁷⁵ He concludes that legal insurance may be one means to significantly improve access to justice in Ontario, particularly in civil matters, including family law: and the Law Society and LAO should accord a high priority to promoting the role of legal insurance.³⁷⁶

³⁷² *Supra* note 10 at 70.

³⁷³ *Ibid.*

³⁷⁴ Trebilcock, *supra* note 106 at 96.

³⁷⁵ *Ibid.* at 97.

³⁷⁶ *Ibid.*

VII. CONCLUSION

2009 will mark the 10th anniversary of the first Supreme Court of Canada decision concerning civil legal aid³⁷⁷ at the same time that we are nearing entry into a fifth decade of legal aid programming in Canada. This is an auspicious moment to reflect upon the last decades' developments in legal aid research, policy and service delivery, to regroup and to move forward.

The CBA and all members of the profession have a strong commitment to and responsibility to improve access to justice and to legal services including through supporting legal aid programs. Lawyers have a three-fold responsibility vis-à-vis legal aid, to:

- Actively support legal aid programs;
- Speak out against threats to state-funded counsel, including underfunding of legal services and funding cutbacks; and
- Contribute to a positive dialogue on how to improve legal aid service delivery.

This discussion paper is focused on this third objective. The central question is what steps the CBA could consider to stimulate and support improvements in the delivery of legal aid in Canada. In this final part of the paper, the focus is on how CBA's substantive legal aid policy might be renewed to achieve this goal.

This section is divided into three parts: a brief summary of the research and trends discussed in earlier sections of this paper; an overview of existing CBA policy and projects; and a series of proposals for consideration to assist the CBA in the process of policy renewal. While the focus has been on adapting to critical shortages in funding and growing unmet legal aid needs, the purpose of this paper is to stimulate discussion about a true regeneration in Canadian legal aid policy and programs.

A. Summary of Recent Research and Trends

The Canadian legal aid system was established with a view to contributing to a more just society. On the eve of its 40th anniversary, it is fair to say that the system has become somewhat disconnected from this broader social objective. Across Canada, the vast majority of poor and near-poor people continue to have no meaningful access to legal advice and assistance in many civil matters. This reality is seriously at odds with recent research that has clearly demonstrated the strong correlation between unresolved legal problems and social exclusion – a negative dynamic that can be readily interrupted through the provision of early legal assistance coupled with other support.

The greatest strides have been in the area of access to legal information and there have been many important developments in this field both in terms of harnessing technology, be it via telephones or websites, and in terms of creating resources for SRLs. But even here, evaluations show that many individuals find it difficult to access these resources effectively. The least progress has been made with respect to the provision of legal representation. In order to fill this growing “justice gap” or “chasm,”³⁷⁸ the legal profession is becoming more organized and systematic in its provision of *pro*

³⁷⁷ *G.(J.)v. New Brunswick*, [1999] 3 SCR 46 was decided in the fall of 1999.

³⁷⁸ Houseman, *supra* note 90.

bono legal services. However, it is impossible to think, and unfair (both to client and lawyer) to require, that the burden of unmet legal aid needs can be met on a volunteer basis.

The most innovative and important developments with respect to service delivery have been in the move toward more comprehensive and integrated service delivery models through which interdisciplinary teams consisting of lawyers, paralegals, social workers and other professionals assist a client to resolve the often-interconnected legal and non-legal problems she or he faces. This development accords with the insights gained from multi-year research into the legal needs: that poor and vulnerable individuals tend to experience multiple legal problems that aggregate into cluster types which co-occur with other economic, social and health problems. Other important developments have been in the establishment of effective outreach programs as well as some court-based programs such as expanded duty counsel. We still have much to learn about which approaches are most cost-efficient and effective in terms of outcomes for clients.

Just as integration is the key word in effective service delivery, so too is it becoming the mantra in terms of legal aid policy developments. Various mapping projects have employed forward-thinking collaborative methods that assist in establishing an integrated justice community. Many American states have also made strides in integration and coordination through the establishment of state access to justice commissions.

For the most part, the story of the Canadian legal aid system has been one of heroic adaptation on the part of legal aid providers facing constant financial pressure and ever growing demand. This important juncture of its approaching fifth decade of operation is an important opportunity to move away from mere adaptation and to aim for regeneration. Renewal of this critical social program would require a revitalization of purpose and a long-term commitment to innovation linked to evidence-based practices, coupled with a substantial reinvestment.

B. Overview of CBA Policy and Projects on Legal Aid

The CBA has a long and proud history of promoting and supporting the Canadian legal aid system. The historical record clearly shows that members of the legal profession and the organized bar have always been instrumental in providing legal services to individuals who could not afford to pay for them. For many years, legal advice and representation was provided on a completely charitable basis as an incident of professional responsibility. At one time, the coordination of *pro bono* activities was one of the central activities of the CBA as a national organization.

As the demand for legal aid services by poor individuals grew, and laws and procedures became more complex, the bar became unable to meet the demand. By virtue of its advocacy efforts with the federal government, the CBA was instrumental in the establishment of a national legal aid system. CBA resolutions urged the federal and provincial governments to take steps to ensure the provision of adequate legal aid through an effective and uniform system.³⁷⁹ Although the CBA's early focus was on criminal legal aid, the CBA was formally calling for federal funding of legal aid in family matters by 1974.

CBA provincial and territorial Branches have also been active participants in the development and improvement of the legal aid system in each respective jurisdiction. CBA Branches have also adopted policy resolutions about the legal aid system from time to time. The work of CBA national

³⁷⁹ See the following resolutions adopted by the CBA National Council: Resolution 64-10, Resolution 64-11, Resolution 70-6, Resolution 70-8, Resolution 70-8.1, Resolution 74-03, and Resolution 84-01-M.

and its Branches is part of a cohesive Canada-wide effort to promote access to justice. Each CBA Branch works closely with the local legal aid organization(s) and provides information about the local situation to CBA national. At the same time, CBA national supports the work of the Branches by carrying out research and developing substantive policy on legal aid, creating resources to assist the Branches, facilitating information sharing across jurisdictions and by lobbying the federal government.

In its policy statements and activities since the 1960s, the CBA has consistently maintained that governments must accept primary responsibility to ensure equal access to justice through the provision of legal aid services. At the same time, the CBA recognizes that members of the legal profession have a responsibility to contribute to access to justice both by assisting in the delivery of government-funded legal aid and by providing *pro bono* services where there are gaps -- that is in areas outside of essential public legal services where legal aid is not available and/or to individuals and organizations that do not qualify for legal aid but cannot nevertheless afford legal services. Members of the legal profession make a significant contribution to access to justice in both of these ways. The CBA has taken steps to promote *pro bono* activities by its members³⁸⁰ and continues to be very active on this front.

The CBA's substantive legal aid policy is largely based on two major reports prepared by the CBA Legal Aid Liaison Committee in the mid to late 1980s. The first report, entitled *The Provision of Legal Aid Services in Canada* (1985) provides an in-depth review of the different mechanisms for legal aid services in use at that time and makes recommendations for change in order to increase access to equal and effective justice through legal aid. The CBA Council adopted this report's recommendations at its annual meeting in 1985. Pursuant to the recommendations, the CBA resolved that: (1) the provision of "essential" legal services" is a government responsibility and must be provided at public expense; and (2) the CBA should take such steps as may be necessary to ensure that the federal and provincial governments implement the recommendations of the report on legal aid, with respect to eligibility, minimum standards, and financing of legal aid in Canada.³⁸¹ The Legal Aid Liaison's second report, *Legal Aid Delivery Models: A Discussion Paper*, was published in 1987. This report evaluated different models for the delivery of legal aid services. It made ten recommendations with respect to the delivery of legal aid services, which were subsequently adopted by CBA National Council in 1988.³⁸² Of note, is that it affirms that the most effective and efficient legal aid delivery model is a mixed-model of legal aid delivery comprised of provision of legal services through staff lawyers and private lawyers (judicare).

In 1993, the CBA adopted an updated a general policy statement on legal aid entitled the *Charter of Public Legal Services* and urged the federal, provincial and territorial governments to fulfil their responsibilities pursuant to it. These proposed responsibilities include the funding of essential public legal services in order to ensure that legal representation is available to individuals with legal problems which put in jeopardy their or their families' liberty, livelihood, health, safety, sustenance or shelter.³⁸³ This *Charter of Public Legal Services*, largely based on the two earlier reports, remains the core of CBA's substantive legal aid policy today:

³⁸⁰ See for example: Resolution 98-01-A, Resolution 03-04-M and the Report of the *Pro bono* Working Group (2003).

³⁸¹ Resolution 85-04-A.

³⁸² Resolution 88-06-A.

³⁸³ Resolution 93-11-A.

CHARTER OF PUBLIC LEGAL SERVICES

I. PRINCIPLES

1. Every person in Canada should have the ability to retain counsel of choice, without suffering undue financial hardship.
2. Legal representation must be available to individuals with legal problems which put in jeopardy their or their families' liberty, livelihood, health, safety, sustenance, or shelter.
3. The provision of essential public legal services should ensure the preservation of the independence and confidentiality of the solicitor-client relationship.
4. It is the responsibility of the legal profession to ensure access to justice for all persons.
5. It is society's responsibility through its governments to adequately fund the legal system to ensure that the legal profession can fulfil this responsibility.

II. ESSENTIAL PUBLIC LEGAL SERVICES

6. Essential public legal service coverage for qualifying individuals must include:
 - (a) **family law**, including child welfare matters where the state is involved as a party, custody and access, independent representation for children who have an interest apparently separate from the parents or guardian, proceedings to prevent or relieve domestic violence, maintenance proceedings, divorce and nullity proceedings, division of matrimonial property (subject to financial eligibility), paternity and adoption;
 - (b) **criminal law**, including all indictable offences, all summary conviction offences in which conviction is likely to lead to imprisonment or loss of means of earning a livelihood and other summary conviction cases where special circumstances exist which require counsel to ensure the fairness of the adversarial process; and all Crown appeals there from and conviction and sentence appeals by an Accused where there is apparent merit or a miscarriage of justice;
 - (c) **immigration matters**;
 - (d) **administrative law matters** which present real jeopardy to liberty, livelihood, health, safety, sustenance or shelter, including Workers' Compensation, Welfare, Unemployment, Insurance, housing, pension, education, and human rights cases;
 - (e) **other civil matters** presenting real jeopardy to liberty, livelihood, health, safety, sustenance or shelter, such as foreclosures, residential tenant evictions, uninsured motorists, *Charter* proceedings and other proceedings where a person is unable to retain counsel and the matter is not capable of being fairly resolved by other means.
7. It is also essential that public legal education and advice is available for all members of society in order for them to know, respect and exercise their legal responsibilities and rights, to prevent legal problems, and to help themselves to resolve legal problems without or with limited need for lawyers and courts.

III. RESPONSIBILITIES OF GOVERNMENT

8. National standards for all essential public legal services should be embodied in federal and provincial legislation.
9. The responsibility for ensuring that essential public legal services are provided lies with the state. This state responsibility should be shared equally between the federal, provincial and territorial governments.
10. The federal government creates and supports the need for essential public legal services through legislation in the fields of criminal law, the *Young Offenders Act*, the *Charter*, immigration law, divorce law and others. It is reasonable for it to share in the cost of its statutory initiatives. It has responsibility to encourage national standards in essential services and does so through cost-sharing agreements and equalization payments involving housing, social assistance, unemployment insurance, medical and legal services. In so creating rights and responsibilities, it must also ensure that these can be effectively and fairly enforced.
11. The provincial governments have a duty to provide essential public legal services as one aspect of their responsibility for the administration of justice.
12. There should be a single federal/provincial cost sharing agreement to fund essential public legal services.
13. The legislation embodying national standards and the cost-sharing agreement should be sufficiently precise to provide for effective accountability and enforcement.

IV. ELIGIBILITY

14. The test for financial eligibility should be the ability to retain counsel without suffering undue financial hardship.
15. Financial eligibility rules should cover everyone below the national poverty levels and anyone above those levels who is unable to acquire essential public legal services without impoverishing him or herself or his or her family. A reasonable contribution to all or part of the cost of providing the services should be made, where possible.
16. Except for criminal cases, child welfare cases and other cases which involve the state as the opposing party, a secondary test should be applied to ensure that a legal aid case is one with which a prudent litigant would proceed privately.

V. ADMINISTRATION

17. The legal aid agencies should be independent statutory bodies under the direction of Boards which guarantee a balanced representation of the interests of the community, government and the legal profession.
18. No particular delivery model appears to be inherently superior in terms of quality of cost. Whatever delivery model is employed, it must be funded adequately so that any tariffs, salaries or contracts are sufficient to ensure the vigorous, skilled and effective representation of legal aid clients.

19. Special consideration must be given to the legal service needs of Native peoples, children, people in remote areas and small communities and people with unique problems such as mental patients, individuals with disabilities and prisoners.

The CBA's advocacy efforts over the past 15 years have focused on how to actually ensure that essential public legal services are available to those individuals who need them. Efforts have included the adoption and promotion of numerous resolutions³⁸⁴, direct lobbying campaigns across Canada, and a national public relations campaign to raise public awareness about the inadequacies of the Canadian legal aid system. The CBA has a five-point platform on legal aid reform:

- Legal aid should be recognized as an essential public service, like health care.
- Public funding should be confirmed as necessary to ensure access to justice for low-income people.
- Public funding for legal aid must be increased.
- National standards for criminal and civil legal aid coverage and eligibility criteria are required.
- The federal government should revitalize its commitment to legal aid.

With respect to the federal government's role, the focus has been on the implementation of several important safeguards for a sustainable national legal aid system. These safeguards include:

- that funding should be increased and sufficient levels of funding be maintained for civil and criminal legal aid;
- that funding for civil legal aid be "carved out" of the Canada Social Transfer (formerly Canada Health and Social Transfer) into a separate Access to Justice Transfer that would make civil legal aid funding more transparent and provinces more accountable for the funds received;
- that funding and administration of criminal and civil legal aid be combined in the Department of Justice;
- that federal legislation on essential legal service be enacted
- that the federal government should take a leadership role in negotiating national standards for legal aid; and
- a national civil legal aid tariff should be created.

In 1999, the CBA commissioned a position paper on the status of the legal aid system across Canada and potential directions for the future. The paper entitled *The Legal Aid Crisis: A Time for Action* concluded that while clearly the system was severely underfunded, there was also a need to find, better, more cost-effective and efficient ways to delivery legal aid services. It reported that both

³⁸⁴ See Resolutions 88-01-M, 89-16-A, 90-12-M, 92-09-A, 95-02-M (Recommendations 11.3 and 14.3), 96-07-A, 00-06-A, 01-04-A, 02-10-M, 03-02-A, 04-04-A, 05-01-M.

within Canada and internationally there was “a new focus on identifying and experimenting with a wide variety of legal aid delivery options.”³⁸⁵ It reported on four important trends:

- a more client-centered approach to service delivery,
- a more flexible approach to service delivery
- a more complex mixed model of service delivery, and
- a commitment to new approaches.

The CBA supported these trends and encouraged members of the profession to be open to and support these innovative developments. Several of the novel options reported on in *The Legal Aid Crisis: A Time for Action* have been implemented in some jurisdictions and were discussed in earlier sections of this paper. These include: expanded duty counsel schemes, assistance for self-represented clients, and enhanced *pro bono* schemes.

More recently, the CBA has initiated a litigation strategy with the objective of establishing a broader right to civil legal aid under the Canadian *Constitution*.³⁸⁶ This litigation strategy is seen as a complementary approach to the Association’s ongoing advocacy efforts.

C. Policy Renewal Proposals

The Association is the sole consistent advocate for legal aid reform at the national level. Although there are important allies in the anti-poverty and social justice movement, there are no other Canadian national entities such as the Legal Services Commission in the U.K., the Legal Services Corporation in the U.S. or the National Legal Aid in Australia who share this responsibility with the organized bar in those countries. Despite vigorous and consistent advocacy, the CBA’s efforts to renew the Canadian commitment to legal aid have not been fruitful, suggesting that it may be time for a fresh approach to fundamental regeneration of Canada’s legal aid system. This paper concludes with ten suggestions for CBA consideration to advance this initiative.

➤ **Major National Legal Aid Campaign**

The overall proposal based on the findings in this discussion paper is that the CBA could consider a major national campaign for renewal of the Canadian legal aid system. A great deal of concerted energy would be required to shift the plight of low-income Canadians with unmet legal aid needs into the spotlight over the prolonged period of time required to galvanize social and political change. The 40th anniversary of the legal aid system could provide the framework for this endeavour. The purpose of the campaign would be to increase public awareness and support for legal aid and facilitate a wide-ranging debate on how best deliver the most appropriate legal services to those in need of help.

A number of approaches and vehicles could be used in developing and carrying out such a campaign. One key feature would be the establishment of a coalition of organizations committed to enhanced legal aid as a fourth pillar of a just society. Another key feature is the commissioning of

³⁸⁵ Buckley, *supra* note 6 at 71.

³⁸⁶ Discussed *supra* at note 135. For information about this initiative, see the CBA’s website: www.cba.org/cba/.

research into the hard costs of inadequate legal aid. The CBA is well-placed to make many of the social policy, legal policy, constitutional and international human rights arguments in support of enhanced legal aid. The findings of the legal needs research summarized above provide further compelling evidence of the importance of legal aid. However, as noted previously in this discussion paper, there is little hard economic data available to support this campaign. While we are able to identify the types of costs of unmet legal aid needs on other public programs such as health and social assistance in general terms, few hard figures are available to make the business case for investing in legal aid.

The Canadian Forum on Civil Justice is currently seeking funding for a major project on “The Costs of Justice: Weighing the Costs of Fair and Effective Resolution of Legal Problems.”³⁸⁷ This proposed project is extremely important and would contribute a great deal to our understanding of the importance of access to justice. However it will not be completed for some time and will not focus specifically on a cost/benefit analysis of legal aid. Advocates of enhanced legal aid require this more refined data as soon as possible. A tailored study based on methodologies used in other jurisdictions to determine the costs of inadequate justice and put a dollar figure on the requirements of an effective, properly-funded legal aid system would help to fill the most important gap in our current knowledge about the Canadian legal aid system. It would bring an additional solid dimension to any CBA campaign.

Some of the specific creative strategies to be considered as part of this campaign might include:

- Public hearings on the status of the legal aid system and the consequences of inadequate legal aid;³⁸⁸
- A national conference on the legal aid crisis and the future of legal aid;³⁸⁹
- An “Access to Justice Audit” through which members of the public could voice their experiences of the legal aid system (perhaps produced in partnership with major media organizations);³⁹⁰
- Public demonstrations to bring attention to the legal aid crisis;³⁹¹
- Development of a policy brief on key aspects of reform required;³⁹² and
- Hosting a website on important legal aid developments.³⁹³

³⁸⁷ For more information see:
<http://cfcj-fcjc.org/research/costs-en.php>

³⁸⁸ For example, the ABA carried out hearings as part of its review of the status of indigent criminal defense services, discussed *supra* note 172.

³⁸⁹ The ABA regularly holds national conferences on the issue of equal justice. The British Legal Action Group is hosting a conference entitled “Bridging the Justice Gap” in June 2009 in recognition of the 60th anniversary of legal aid in that country.

³⁹⁰ This suggestion is similar to the Legal Aid Watch carried out by the CBA over a period of years but in a format designed for a broader audience, perhaps to include video clips. For example, the British Legal Action Group has linked up with the *Guardian* and *Observer* newspapers and a series of films are being broadcast by the *Guardian* which will draw on the Legal Action Group project and interviews.

³⁹¹ For example the British Access to Justice Alliance (which includes the Law Society) organized a week of demonstrations to increase awareness of proposed changes to legal aid in May 2007. For details see:
www.accesstojusticealliance.org.uk/

³⁹² One good example is the British Access to Justice Alliance’s “A Right to Justice Policy Briefing.”
www.accesstojusticealliance.org.uk/

These strategies and others have been and/or are currently being employed by organizations in other jurisdictions and lessons could be drawn from their experiences. The other specific proposals for policy renewal set out below could also be seen as part of this overarching campaign.

Proposal #1: Major National Legal Aid Campaign

The CBA could consider a multi-year campaign and employ creative strategies for the renewal of the Canadian legal aid system. A coalition of supportive organizations could be established for this purpose.

Proposal #2: Study on Economic Costs of Inadequate Legal Aid and Financial Requirements of a Properly Funded Legal Aid system

The CBA might undertake a study on the economic costs of inadequate legal aid and the financial requirements of an effective properly funded legal aid system as a central information component of this campaign.

➤ ***Policy Statement on the Objectives of the Legal Aid System***

With a few exceptions, most legal aid developments in the last decade have been shaped by a narrow focus on cost-cutting and efficiency. Empirical research has demonstrated that timely legal assistance is an important strategy in fighting social exclusion and enhancing equality. An updated policy statement that clearly enunciates the underlying value of legal aid in social terms could be valuable both in providing a reference point for establishing priorities and appropriate delivery models, as well as for advocating for increased funding for this purpose. Two of the examples discussed above are the British approach to linking legal aid reform to their action plan to combat social exclusion and the recommendation by the Australian National Legal Aid Association that legal aid policy should prioritize ameliorating disadvantage (i.e. vulnerable families, Indigenous Australians) rather than types of legal problems. The Boston Bar Association's project to develop a more contextualized right to counsel is another important initiative and a similar approach to particularizing the right to counsel could be undertaken by the CBA.

Many of the specific policy issues raised in this discussion paper could be addressed in a renewed statement of legal aid policy principles including, *inter alia*:

- a revised and more particularized and contextualized statement on entitlement to counsel and coverage issues;

³⁹³ The National Coalition for a Civil Right to Counsel hosts an excellent website on civil legal aid issues: www.civilrighttocounsel.org/

- the need for greater cooperation between legal aid service providers;
- a statement on the specific legal aid needs of vulnerable communities;
- a statement on how to meet the needs of rural, regional and remote clients;
- extended and commentary on the need for increased funding with specific dollar amounts to the extent possible (based on the study recommended in Proposal #2);
- extended commentary on a renewed role of the federal government;
- a statement on the role of dispute resolution in the legal aid context;
- a statement on the relationship between legal aid and justice system reform;
- a statement demarcating the boundary between the government's responsibility for legal aid and the legal profession's contribution through *pro bono* activity;
- a statement on the role of private practitioners; and
- a statement on the importance of innovation and empirical legal aid research.

Proposal #3: Renewed and Expanded Legal Aid Policy Statement

The CBA could consider developing and adopting an updated policy statement on the objectives of the legal aid system that integrates the key findings set out in this discussion paper. In particular, the revised policy statement might include a more detailed contextualized statement on the right to counsel.

➤ ***Model Legislation***

The CBA has long recommended that the federal government enact a legislative framework for a national legal aid program (perhaps similar to the *Canada Health Act*). The CBA could draft a model statute as a mechanism for galvanizing public support and government action. The *Charter of Public Legal Services* adopted in 1993 and reproduced above could serve as the starting point for this project. As noted above, the California Access to Justice Commission has drafted two model legal aid statutes, the *State Equal Justice Act* and the *State Basic Access to Justice Act* which could also serve as precedents for discussion purposes. The goal of this project is not adoption of the model statute *per se*, but rather enhancing the dialogue on the value and content of such legislation by identifying and resolving the issues that would need to be addressed in a national statute. However, consideration could also be given to advocating the presentation of the model statute as a Private Member's Bill by a supportive Member of Parliament who could become its champion.

Proposal #4: Model National Legal Aid Statute

The CBA could consider drafting a model national legal aid statute.

➤ **Modernizing and Expanding Eligibility**

One of the specific challenges facing the CBA in renewing its legal aid policy is the issue of eligibility for legal aid. Due to budgetary cuts over the last two decades, the cut-off level (based on income and assets) for legal assistance and representation has been lowered to the point where in many provinces an individual is only eligible for civil legal aid if she or he is in receipt of social assistance. At the same time, many of the developments discussed in this paper such as public legal information and self-help centres are available to all regardless of income. The CBA's *Charter of Public Legal Services* states that the test for financial eligibility should be "the ability to retain counsel without suffering undue financial hardship" and that "financial eligibility rules should cover everyone below the national poverty levels and anyone above those levels who is unable to acquire essential public legal services without impoverishing him or herself or his or her family." It further specifies that "a reasonable contribution to all or part of the cost of providing the services should be made, where possible."

The current financial eligibility guidelines vary across Canada but are unrelated to any overarching conception of basic needs or a more general and coherent conception of poverty to which various social programs (including legal aid) might be anchored. This gives rise to two issues that deserve further consideration: the development of a principled basis for determining eligibility and the question of whether or not there should be a single national means test that operates across Canada. Projects are underway in the U.K. to reconsider the existing means tests and in Australia to develop a principled national means test.

In its advocacy efforts, the CBA has focused primarily on the fundamental requirement for legal aid to meet the essential legal needs of poor persons. This priority is reinforced in the first discussion point concerning linking the policy objectives of the legal aid system with assisting the vulnerable and combating social exclusion. However, the CBA acknowledges that even if this basic threshold were met (and it currently is not), many Canadians would still not be able to afford access to the needed legal services. In his review of Legal Aid Ontario, Professor Trebilcock suggests that expanding the services available to the middle class could be one way to gain greater public support for the legal aid system. In making this suggestion, he contrasts the high public support for the medical system which provides services to all with the lack of public support for legal aid. He also notes that the British legal aid system serves a larger proportion of society and is also broadly supported by the public despite the fact that it is the most expensive legal aid system in the world on a *per capita* basis.

Trebilcock recognizes the concern that moving in the direction of expanded eligibility might exacerbate the already precarious financial positions of legal aid programs. He comments:

However, I believe that this paradox is more apparent than real. For middle-class citizens of Ontario to support the legal aid system with anything approaching the enthusiasm with which they support public health care and public education in the province, their participation in this system, other than as merely taxpayers who underwrite it, is a *sine qua non* for its future health.³⁹⁴

If the CBA decided to undertake a research and consultation project on the issue of legal aid eligibility, it might address three central issues: (1) establishing a principled basis for eligibility standards; (2) investigating the issue of a single national means test; and (3) considering the issue of expanded eligibility to individuals with mid-level incomes for certain types of legal aid services.

³⁹⁴ Trebilcock, *supra* note 106 at 81.

Proposal #5: Study on Legal Aid Eligibility

The CBA could undertake a research and consultation study on the issue of legal aid eligibility to investigate and make recommendations on: (1) a principled basis for eligibility standards; (2) a single national means test; and (3) expanding eligibility for legal aid beyond the low-income threshold.

➤ *Promoting Effective Service Delivery Models*

Two service delivery priorities emerge from this review of recent research and trends. The first is that the most effective approach to legal aid service delivery is one that is *comprehensive* or *holistic* in meeting the needs of clients (legal and non-legal) and is well *integrated* with other relevant social service delivery agencies. One of the important breakthroughs that can be achieved through a more comprehensive client-centered approach is that it minimizes the separation between criminal and civil legal aid and between legal problems and other related social, economic and health problems. The second priority is for effective outreach programs in order to meet the needs of individuals who face barriers to accessing legal aid services for which they are eligible.

The CBA could encourage these innovative service delivery models through the establishment of detailed principles or best practices to guide legal aid service delivery. The ABA has adopted a series of basic principles for the delivery of both criminal and civil legal aid. National Legal Aid in Australia has developed a series of best practices to guide various aspects of service delivery. Such a statement of principles or best practices could provide a standard against which legal aid providers could review their work and could also enhance national uniformity while leaving significant room for local innovation. Two of the specific issues that have been identified are those relating to conflict of interest and protection of solicitor-client privilege within multidisciplinary clinics.

Proposal #6: Principles and Practices for Effective Legal Aid Service Delivery Models

The CBA could develop statements of principles or best practices to promote effective legal aid service delivery models, particularly comprehensive and integrated programs and effective outreach programs.

➤ *Promoting Justice Communities*

Civil legal assistance is provided through a patchwork of agencies and programs in each province and territory. In some provinces the formal government-funded legal aid program plays only a small role in enhancing access to justice by comparison to community organizations, clinics funded through law foundations and other non-governmental funding sources and so on. Many of the developments discussed in this paper are not what one might think of as being “legal aid” in the

strict sense, for example, legal information available on websites, assistance to self-represented clients, and expanded *pro bono* programs.

The focus of the CBA's legal aid advocacy has been on government-funded programs and this critical focal point is important to maintain. At the same time, it is equally clear that access to justice would best be served by transforming the current patchwork of legal assistance providers into a true network. The Alberta Legal Services Mapping Project is making important strides in this regard and is a model that could be adapted in other provinces and territories. In the U.S., this movement is referred to as building "state justice communities" and is generally initiated through the establishment of a state access to justice commission. The CBA could take steps to promote efforts to build justice communities across Canada including through the development of a policy paper and resolution recommending the establishment of access to justice communities in each province and territory.

Proposal #7: Promotion of Access to Justice Communities

The CBA could promote efforts to build justice communities across Canada through the development of a policy paper and resolution recommending the establishment of access to justice communities in each province and territory.

➤ ***Establishing Quality Standards or Guidelines***

Many countries have begun to investigate and adopt measures to ensure the quality of legal aid services. In Britain, service providers must attain a "quality mark" in order to be part of the referral network. In the U.S., efforts are being made to ensure the quality of civil legal services, through case management systems, standards and performance criteria, peer review and examinations of the overall effectiveness of programs (based on the standards and performance criteria). Some Canadian legal aid programs, notably in Ontario and British Columbia, have undertaken similar initiatives. The ABA developed standards for the provision of legal aid services many years ago and has recently completed and adopted an updated version. National guidelines may be of particular assistance to legal aid organizations in smaller provinces that do not have the resources to undertake the development of quality standards. The CBA could have a role in establishing national quality standards or guidelines for the provision of legal aid services or assisting other organizations in these efforts by consulting with provincial and territorial legal aid organizations and law societies.

Proposal #8: Consultation on National Guidelines for the Provision of Legal Aid Services

The CBA could consult with provincial and territorial legal aid organizations and law societies to determine its role in supporting the development and adoption of quality standards and/or establishing national guidelines for the provision of legal aid services.

➤ ***Developing and Supporting Legal Aid Lawyers***

Another significant Canadian and international trend is the decrease in lawyers available to provide legal aid services. The causes of this decrease are varied but relate in a general way to the uncertainties and difficulties associated with this type of work, underfunding of the legal aid system, and the lower status ascribed to these fields of law (particularly family law and poverty law). In some Canadian cities, towns and regions, lawyers cannot be found to take on legal aid clients and some commentators have begun to raise serious concerns about the implications of this trend. The CBA could play an important role in developing a vision of the future of legal aid advocacy and assisting in the development and promotion of legal aid lawyers.

Many issues need to be addressed on this front. For example, in some states, law school tuition loans are reduced for lawyers who undertake public service. Some of the recommendations under discussion in England include, among others, salary parity between legal aid lawyers and other public service lawyers and increased support for professional development of legal aid lawyers (including where they are private practitioners under the *judicare* system). Another specific suggestion is the creation of more funded poverty law articling positions.

The Law Council of Australia's National Access to Justice Committee is actively working on a new national legal aid policy to be presented to government. While continuing its calls for an adequately funded legal aid system, the Committee has also recognized the need to give incentives to the private profession to further engage in legal aid work. The Committee is in the process of developing a proposal, with the assistance of the Law Institute of Victoria's Commercial Law Section, and the Business Law Section's Tax Committee, which will include some tax incentives.

Proposal #9: A Vision of the Future of Legal Aid Advocacy

The CBA could undertake a research and consultation project to develop a vision of the future of legal aid advocacy and make recommendations to assist in the development, promotion and support of legal aid lawyers working both within staff and *judicare* settings.

➤ ***Promoting Innovation in Legal Aid Policy and Service Delivery***

Like all contemporary social programs, the legal aid system is under pressure to be more efficient and effective and hence is in a constant cycle of review and improvement. We now know that there is no "silver bullet, no previously unimagined idea that will reveal the best, most efficient and most cost effective means of delivering legal aid in all contexts."³⁹⁵ We also know that the only way forward is to continue to try new approaches to service delivery informed by a more sophisticated client-focus and in close collaboration with others. There are often gaps between understanding the need for novel approaches and implementing them successfully. Like many aspects of the justice system, there is an inclination toward tradition and the status quo in the way that we deliver legal services.

³⁹⁵ Trebilcock, *supra* note 106 at 83.

Several lessons about encouraging innovation can be drawn from the experience in other jurisdictions. These lessons are:

- Devote greater resources to research and development;
- Create a greater capacity for evidence-based research and evaluation;
- Take specific measures to encourage and reward innovation (such as pilot projects);
- Create a climate in which innovation is fostered and individuals feel supported to take risks and try novel approaches;
- Share information about pilot projects and other innovations;
- Scan for innovative practice (domestically and internationally); and
- Establish a champion of specific innovations – ideally a single body with an explicit mission to promote innovation and develop a cross-sectoral strategy for investment and support for innovation.

In the last decade, Justice Canada has begun to play a more substantive role in fostering innovations in legal aid through its research program and through funding for pilot projects. However, there is a great deal more that could and should be done in this regard. With proper funding, other independent actors could also play a larger role in evidence-based research, particularly law school based legal aid clinics. At present, there is also a greater need for networking and sharing of information about legal aid, although the Canadian Forum for Civil Justice does carry out this function to the extent that it connects with its broader mandate. In Australia National Legal Aid has become an important force in public discourse while in Canada the Association of Legal Aid Plans appears to remain an informal vehicle for information exchange.

This discussion paper is a small step in fostering innovation by making information about legal aid research and service delivery trends more broadly available. The CBA could continue to play a role in promoting innovation in legal aid policy and service delivery by encouraging other organizations to undertake evidence-based research and evaluation. Law schools, particularly those with strong clinical programs are an important untapped resource in this regard. The CBA might also consider direct steps to foster innovation by, for example, carrying out environmental scans on important legal aid trends, research and evaluations across Canada and in other jurisdictions on a regular and ongoing basis and providing this information to legal aid providers and other interested individuals and organizations.

Proposal #10: Promoting Innovation in Legal Aid Policy and Service Delivery

The CBA could promote innovation in legal aid policy and service delivery by encouraging relevant organizations, particularly law schools and legal clinics, to undertake evidence-based research and evaluation and by taking active steps to foster innovation including by carrying out environmental scans on legal aid trends, research and evaluations on a regular and ongoing basis.