



THE CANADIAN
BAR ASSOCIATION

A NATIONAL FRAMEWORK FOR MEETING LEGAL NEEDS: PROPOSED NATIONAL BENCHMARKS FOR PUBLIC LEGAL ASSISTANCE SERVICES

Report of Canadian Bar Association Access to
Justice Committee



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Proposed National Benchmarks for Public Legal Assistance Services¹

1. A National Public Legal Assistance System

Canadian public legal assistance systems are sustainably-funded and provide comprehensive, people-centered legal services tailored to local, regional and provincial and territorial circumstances to meet essential legal needs and contribute to the health and well-being of disadvantaged and low-income Canadians.

2. Scope of Services

Public legal assistance services are provided to individuals, families and communities with essential legal needs who are otherwise unable to afford assistance. Essential legal needs are legal problems or situations that put into jeopardy a person or a person's family's liberty, personal safety and security, health, equality, employment, housing or ability to meet the basic necessities of life.

3. Service Priorities

Public legal assistance services are provided on a priority basis to individuals, families and communities who are financially disadvantaged or otherwise vulnerable to experiencing unmet essential legal needs.

4. Spectrum of Services

Public legal assistance service providers use discrete and systemic legal strategies and work in collaboration with non-legal service providers to offer a broad range of services, from outreach to after care, targeted and tailored to people's legal needs, circumstances and capabilities.

5. Quality of Services

Public legal assistance services in all provinces and territories are fully accessible, timely, high quality, culturally appropriate and cost-effective. Such services will lead to evaluated meaningful participation and fair and equitable outcomes, and contribute to the empowerment and resilience of individuals, families and communities.

6. A Supported, Collaborative, Integrated Service Sector

Public legal assistance service providers participate in collaborative service planning across this sector and are mandated and supported to innovate and to fulfill their integral role of ensuring access to justice and an effective justice system, working in partnership with all stakeholders.

¹ These six national benchmarks were prepared by a joint working group of the CBA Access to Justice Committee and the Association of Legal Aid Plans of Canada.

A. Developing National Benchmarks

National benchmarks are the next step to closing the access gap in public legal assistance services. They can help to build common aspirational and measurable goals, better inform public legal assistance provision and policy, and promote shared learning and collaboration.

The Canadian Bar Association Access to Justice Committee (CBA Committee) retained Dr. Melina Buckley as consultant on the project. In early consultations, people were asked about what they expect and need from the public legal assistance services system in Canada. There was a remarkable consensus among the broad and diverse group who commented, and the benchmarks developed bring together that input.

B. Next Steps

The proposed national benchmarks continue a conversation about public legal assistance that began with the Canadian Bar Association's 2013 *Reaching Equal Justice* report. The next steps in this ongoing conversation leading to concrete change are:

- 1) Promoting public discussion about the benchmarks.** More people need to be included in the conversation about the proposed benchmarks. Over time, the benchmarks can contribute to a shared public understanding of the importance of legal assistance when people have pressing legal problems and ensure a consistent, sector-wide approach to meeting the legal needs of disadvantaged people.
- 2) Developing indicators for the benchmarks and measuring progress.** At the Expert Roundtable held in Toronto in 2015, leading authority Dr. Ab Currie likened the idea of national benchmarks to the top of a funnel, with development of more and more refined indicators and measurements over time. Part of the process of implementing the benchmarks will be to develop modest but meaningful measurements.

Not every aspect can be concretely measured but even unmeasurable goals and actions may be valuable. Process and dialogue can be as important, sometimes more, to innovation and improved service as measurement tools.

- 3) Breathing life into the benchmarks.** The proposed benchmarks offer a common measure of success while also allowing for tailoring to local needs. This process of breathing life into Canada's benchmarks can begin today. All public legal assistance service providers can take steps within current resources and capacity toward advancing one or more of the benchmarks and share their experiences with other providers. Similarly, funders and policymakers can promote the benchmarks by facilitating concrete steps toward their realization.

Question:

What do we want Canada's legal aid system to look like in 2020?

Answer:

We want a national public legal assistance system that fully meets the legal needs of people living in Canada, prioritizing individuals and communities experiencing disadvantage and adapting to local realities.

C. Digging Deeper

Project overview

In 2013, the Canadian Bar Association released *Reaching Equal Justice*, a comprehensive multi-dimensional report offering six main strategies for achieving equal justice in Canada by 2030. It includes 31 longer term targets, each with actions to begin immediately and interim milestones. Several address the need for a renewed approach to public legal assistance services in Canada, with one specifically calling for national benchmarks for legal aid coverage, eligibility and quality of legal services by 2020.

Since the release of *Reaching Equal Justice*, the CBA Committee has worked with several partners to advance the 31 targets. In 2014, a joint Working Group of the Association of Legal Aid Plans of Canada (ALAP) and the CBA Committee agreed to collaborate to propose national benchmarks for public legal assistance services in Canada. This work advances both organizations' commitment to achieving a robust legal aid system in Canada, and key aspects of the CBA report.

After extensive discussion, consultations and research commissioned by the CBA from Dr. Buckley,² the Working Group developed the national benchmarks that began this report. They are intended to constitute guiding principles to achieve the shared goal of a national, integrated system of public legal assistance services, focused on improving access to justice and meeting the needs of disadvantaged people across Canada.

With this strong foundation, both organizations will now use the benchmarks to support their respective efforts to improve Canada's public legal assistance system.

The CBA Committee acknowledges, with thanks, the Working Group members:

Dr. Melina Buckley (Co-Chair)
Karen Hudson, Q.C. (Co-Chair)
Mark Benton, Q.C.
Teena Hartman
Trish Hebert, Q.C.
David McKillop
Ed Montigny
Nick Summers
Gaylene Schellenberg (CBA Staff Lawyer)

² Based on that research and preliminary consultation, the Working Group produced a *Background Paper*, *Discussion Paper* and a *Consultation Kit* in 2015. Feedback was received through a web survey, written submissions, public consultation sessions in several locations, a workshop at the *Innovating Access to Justice Conference* in Montreal, October 2015, and the Working Group's *Expert Roundtable* in Toronto in November 2015. The *Expert Roundtable* was generously funded by the BC Legal Services Society and the Law Foundation of BC *Access to Justice Research Fund*.

Meeting the legal needs of people in Canada

Most people in Canada experience legal problems at some point in their lives. Indeed, many experience multiple legal problems simultaneously and these problems often have both legal and non-legal dimensions.

People who experience economic, social or other disadvantage have more legal problems.³ They experience higher rates of legal need and have more contact with the justice system than others. Often those most susceptible to legal problems are less equipped to deal effectively with those problems. Indigenous people face particular disadvantage, along with significantly higher rates of incarceration.

People's legal needs are not well understood by the public or by governments. Generally, legal needs are not recognized to near the same extent as other aspects of Canada's social safety net. Yet, access to law and the need for help to resolve legal problems are simple facts of life in the 21st century. Laws shape and regulate most aspects of daily living and the relationships between individuals, businesses and governments.

In Canada, there is an enormous gap between people's legal needs and the public legal assistance available to address those needs and assist people when they most need help. The prevalence of legal problems and significant levels of unmet legal need cannot be addressed with existing public funding for legal aid and other legal assistance services. The results can be devastating.

Unresolved legal problems escalate, cause undue personal hardship and trigger non-legal problems like health and social welfare issues. They inhibit people's ability to participate effectively in society.⁴ A recent Organization for Economic and Cultural Development (OECD) initiative recognized that effective public legal assistance makes a strong social and economic contribution to individuals, families and small and medium enterprises, both at the community and at the societal level.⁵ Conversely, there is increasing acknowledgement in many circles that inadequate legal aid is costly.⁶

3 CBA *Reaching Equal Justice* (Ottawa: CBA, 2013) at 32, 33.

4 For further discussion and examples, see CBA *Reaching Equal Justice*, *ibid.*

5 OECD, *Equal Access to Justice*, 2nd Expert Roundtable Background Notes (Paris, December 2015). See also, Trevor C. W. Farrow, Ab Currie, Nicole Aylwin, Les Jacobs, David Northrup and Lisa Moore, [Everyday Legal Problems and the Cost of Justice in Canada: Overview Report](#) (Toronto: Canadian Forum on Civil Justice, 2016).

6 Melina Buckley, *Moving Forward on Legal Aid* (Ottawa: CBA, 2010) at 52; *Reaching Equal Justice*, *supra* note 3 at 53.

Towards understanding the impact of public legal assistance

- Legal aid can assist individuals and families to resolve legal and social needs, obtain access to opportunities and become full participants in the community and economy.
- Legal aid can contribute to reducing inequality by breaking down the cycle of dependency and increasing resilience by assisting individuals to address recurring patterns of problems in their lives and by interrupting the process of escalating problems, in such a diverse range of issues as health, housing, employment, violence, education and family.
- At the community level, the aggregate impact of legal aid can contribute to social cohesion and the social fabric of communities by promoting social mobility, reducing criminality and increasing business and economic opportunities.
- Investment in legal aid services can lead to economic growth in the community by increasing jobs, reducing work days missed due to legal problems, creating more stable housing, resolving debt issues and stimulating business activity.
- At the societal level, civil legal aid has been found to lead to a series of social benefits, which in turn benefits governments and societies economically through reduced cost on social interventions that would otherwise be needed to address those specific challenges.
- There is increasing evidence that benefits of civil legal aid may range from a reduction in domestic violence, less time spent by children in foster care, reduction in the need for safety-net programs, reduction in evictions, greater protection of patients' health and greater participation in public assistance programs. Aggregate health benefits have also been demonstrated.
- Conversely lack of access is associated with negative impacts at the individual, community and societal levels. Unequal access to justice is expensive. Evidence is mounting that unresolved legal problems are costly both to the individuals directly affected and to society as a whole.
- Studies have repeatedly shown that there is strong return on investment from public spending on legal aid.
- Unresolved legal problems and the requirement to navigate justice systems without appropriate assistance result in individuals bearing additional stress with an attendant impact on emotional and physical health, lost days of work and in some cases unemployment, and negatively impacts parenting and other family relationships.
- At a societal level these costs include lower economic productivity and knock-on costs to public spending in other areas (e.g. employment insurance, social assistance, health). Recent Canadian research estimates these knock-on costs are approximately 2.35 times greater than the annual direct service expenditures on legal aid.
- Studies have also shown that inadequate legal aid results in additional costs to other justice services, through for example longer and less efficient hearings.⁷

⁷ Additional references omitted. Excerpted and adapted from OECD, Equal Access to Justice, 2nd Expert Roundtable Background Notes, *supra* note 5.

Toward a responsive national public legal assistance system

Canada has no national public legal assistance system. Services are primarily provided by legal aid plans (plans) in each province and territory,⁸ in conjunction with organizations like public legal education providers and community-based advocacy groups. Many of these groups also receive some public funding. Plans generally help the most disadvantaged people get the legal support they need to engage effectively with the justice system but there are significant variations across Canada, much more than for other public services.

Legal aid has often been synonymous with legal assistance and representation by a lawyer. Today, most plans provide a continuum of legal information, assistance, dispute resolution and representation services, either directly or through referrals to other agencies. A range of services can better respond to the range of people's legal needs, but it can also reflect the reality of severe budgetary constraints for most public legal assistance providers, as demand continually outstrips capacity. We use the more inclusive term, "public legal assistance services" to reflect these developments and the full spectrum of resources necessary, without diminishing the importance of actual representation in meeting the legal needs of people in Canada.

Public legal assistance schemes have evolved significantly over the past sixty years, both in service delivery and policy foundation. Originally based on advancing procedural justice and maintaining the rule of law by ensuring the law applies equally to all people, they also protected fundamental rights like the presumption of innocence and the right to a fair trial. These original priorities were court-centered and to some extent reflected the needs of the justice system and the legal profession.

In the 1960s, public legal assistance grew in importance as a tool to promote human rights and social justice. Over time, governments increasingly recognized the connection between legal health and social and economic wellness, leading to further expansion and recognition in the 1970s. However, in the 1990s, a general trend toward reducing public services and the social safety net and instead promoting individual responsibility meant cutbacks to public legal assistance in many jurisdictions, including many Canadian provinces and territories.

Today, the rationale for robust public legal assistance is shifting with a growing appreciation of the sound empirical foundation of current legal needs research, which has shown both the personal impact and spiraling costs of unmet legal need, and a growing understanding of the social return on investment when public funds are spent on legal assistance. This broader perspective is consistent with general concepts of access to justice, including achieving just outcomes and promoting legal health, legal empowerment and social inclusion.

These mega trends in the provision of public legal assistance are illustrated in the following chart.

⁸ Many legal aid plans provide some specialty clinics/programs, although the availability and focus of those offices are not consistent across the country.

Evolution of Public Legal Assistance in Canada



PROCEDURAL JUSTICE

- Growing recognition of need for legal counsel to ensure fair trials
- Provided on an ad hoc basis, often pro bono
- Court centered
- Law Societies, lawyers and judges lead

SOCIAL JUSTICE/CIVIL SOCIETY

- **1960s** – greater emphasis on human rights and empowerment
- Community-based clinics begin to provide legal aid
- Political but non-partisan
- Non-lawyers lead, lawyers and legal bodies also active



POLITICS AND SOCIAL WELFARE

- **1970s** – greater emphasis on public/governmental responsibility for legal aid
- Federal funding for legal aid is formalized
- Links between health and unmet legal need are recognized by Health Canada
- Government leads

RETRENCHMENT OF THE PUBLIC SAFETY NET

- **1990s** – emphasis on reducing spending and individual responsibility
- Shift in federal transfer payments and budget cuts to most provincial/territorial legal aid plans
- Non-criminal legal aid is dramatically scaled back in many provinces/territories
- Marked increases in unrepresented litigants and unmet legal need



LEGAL NEEDS, LEGAL HEALTH, LEGAL EMPOWERMENT

- **Today** – greater emphasis on empirical findings on costs of unmet legal need (individual and societal)
- Focus on understanding and building legal capability
- Recognition that a range of services and providers are needed to meet range of needs
- Collaborative leadership

One strategy: national benchmarks

Benchmarks are one effective strategy to achieve today's focus on a people-centered, responsive national public legal assistance system. Our consultations showed near unanimous support for national benchmarks, even though justice system participants and culture have historically resisted performance management and measurement. The main barriers to building this responsive national public legal assistance system are little public and political awareness of, and support for public legal assistance, especially compared to other human services such as health, education and social assistance. Benchmarks can contribute to a new conversation about meeting the legal needs of people in Canada and the concerted action required to move forward.

Most basically, a benchmark is a point of reference for measuring change and progress.⁹ It can be defined as a minimum requirement, a target, or by reference to a principle or norm (e.g. human rights), a goal, past performance or a comparison with another system or organization. Most benchmarks are a mixture of different reference points. All provide clear targets. Micro benchmarks target the behavior of individual service providers while macro benchmarks target aggregate behavior or systemic operations.

Benchmarks can:

- create an opportunity for developing and sharing a common vocabulary on progress and measurement among various stakeholders, including the public;
- provide a lens for interpreting variations in performance indicators and other metrics;
- offer an external validation of performance, rather than relying on those working in the system to determine what is to be considered “good enough”.

On the other hand, implementing benchmarks requires careful monitoring to avoid perverse or unintended consequences. Australian benchmarks that encouraged early intervention resulted in shifting resources to written materials, although those interventions are not necessarily uniformly effective. Benchmarking is an iterative process and benchmarks need to be frequently updated to adjust for their impact on performance.

The national benchmarks at the beginning of this report capture the predominant evidence-based ideas about public legal assistance services and define pathways for the future. They are aspirational but grounded in current international research and best practices. They present a transformative vision beyond what currently exists and describe the potential of enhanced public legal assistance. They assist different audiences to understand the important public good involved, that working hand-in-hand with other human services contributes to the social and economic welfare and health of our communities. The proposed benchmarks:

- establish a common aspirational and measurable goal
- contribute to informed provision of legal assistance services and policy, and
- promote shared learning and collaboration.

⁹ These points were made by Yvon Dandurand, international expert on justice system indicators, at the November 2015 *Expert Roundtable*, *supra* note 2.

The benchmarks are *not* performance indicators. They go far beyond what most Canadian legal assistance providers currently do and far beyond what we can measure. However, for each benchmark, examples are provided below of indicators and milestones that could be used to measure progress.

The benchmarks provide a foundation for developing staged measures. They begin with measurements of what legal assistance providers have capacity to measure today and anticipate gradually increased capacity toward national indicators with common data measurement.

D. Proposed national benchmarks with milestones and indicators

The benchmarks constitute guiding principles to achieve the shared goal of a national, integrated system of public legal assistance focused on improving access to justice and fully meeting the needs of disadvantaged people across Canada. They are bold and focus on the longer term, rather than simply on what is immediately achievable. These benchmarks incorporate bellwether behavior, that is, leading best practices and evidence-based trends.

Benchmark 1 – A National Public Legal Assistance System

Canadian public legal assistance systems are sustainably-funded and provide comprehensive, people-centered legal services tailored to local, regional and provincial and territorial circumstances to meet essential legal needs and contribute to the health and well-being of disadvantaged and low-income Canadians.

Indicative milestones and indicators of progress for achieving Benchmark 1 include:

- Development of national public legal assistance data standards to facilitate collection of consistent and comparable data¹⁰
- National public legal assistance common data measurement standards
- A “smart” system that better supports service planning and ongoing “modest but meaningful” monitoring and evaluation, and supports evidence-based policy, decision-making and service delivery¹¹
- Effective triage and navigation support within each province and territory
- Growing knowledge base and system-wide learning concerning “what works, for whom, under what conditions and at what cost”¹²
- Indicators that measure the relationship between legal needs, service provision and outcomes.

10 See for example, Australian Government, *National Legal Assistance Data Standards Manual* (Sydney: Attorney General, 2015).

11 Presentation by Dr. Hugh MacDonald at the *Expert Roundtable*, *supra* note 2. See also Pascoe Pleasence et al, *Reshaping Legal Assistance Services: Building on the Evidence Base* (Sydney South: Law and Justice Foundation of New South Wales, 2014).

12 *Ibid.*

Benchmark 2 – Scope of Services

Public legal assistance services are provided to individuals, families and communities with essential legal needs who are otherwise unable to afford assistance. Essential legal needs are legal problems or situations that put into jeopardy a person or a person’s family’s liberty, personal safety and security, health, equality, employment, housing or ability to meet the basic necessities of life.

Benchmark 3 – Service Priorities

Public legal assistance services are provided on a priority basis to individuals, families and communities who are financially disadvantaged or otherwise vulnerable to experiencing unmet essential legal needs.

Priority clients and communities will vary across and within Canadian jurisdictions. In general these are likely to include:

- Indigenous Canadians, people experiencing or at risk of domestic violence, youth, the elderly, recent immigrants, people experiencing language or literacy barriers, people with disabilities, including mental illness, prisoners, people living in remote and rural areas, and those otherwise at risk of social exclusion.
- People who live at or below 150% of the Low Income Measure¹³ are considered to be financially disadvantaged.

Indicative milestones and progress indicators for achieving Benchmarks 2 and 3 include:

- Triage or screening for consequences has replaced categories of service and financial eligibility in all jurisdictions
- The most intensive services (representation services) are directed to financially disadvantaged people and targeted to other priority client groups (may differ in each jurisdiction)
- Public legal assistance is provided based on comprehensive needs assessments in each community/ jurisdiction
- Public legal assistance services include a broad range of strategic legal advocacy services to correct systemic problems affecting low-income people in each province and territory

Benchmark 4 – Spectrum of Services

Public legal assistance service providers use discrete and systemic legal strategies and work in collaboration with non-legal service providers to offer a broad range of services, from outreach to after care, targeted and tailored to people’s legal needs, circumstances and capabilities.

Benchmark 5 – Quality of Services

Public legal assistance services in all provinces and territories are fully accessible, timely, high quality, culturally appropriate and cost-effective. Such services will lead to evaluated meaningful participation and fair and equitable outcomes, and contribute to the empowerment and resilience of individuals, families and communities.

¹³ <http://www.statcan.gc.ca/eng/help/bb/info/low>

Indicative milestones and progress indicators for achieving Benchmarks 4 and 5 include:

- All public legal assistance service providers have a strong diagnostic capacity to match services to client needs, circumstances and capabilities
- More effective referrals and a measurable increase in effective use of interagency cooperation and collaboration
- Public legal assistance service providers provide “joined up” or coordinated services with other service providers to address both legal and non-legal aspects of a client’s problem or situation
- Public legal assistance service providers develop strong capacities for outreach relevant to targeted local communities
- Public legal assistance service providers develop strong capacity for follow up and after care to ensure effective client outcomes, contribute to resilience and provide systemic feedback on what does and doesn’t work
- A strong client voice in evaluations
- Reductions in “new” emerging legal issues and return clients for the same or similar issues

See also the *Australian National Framework for Public Legal Assistance*,¹⁴ which offers outcomes that are relevant for Canada:

- Legal assistance services are high quality, relevant, delivered respectfully and focused upon improving people’s outcomes
- Culturally appropriate legal assistance services are accessible and available to Indigenous Australians and people from culturally and linguistically diverse communities
- Service models deliver the right mix of legal assistance services to meet people’s legal needs and capabilities where practicable
- Innovative service models are used to improve legal assistance services and better address legal need
- Legal assistance service costs are proportionate to the complexity and significance of the legal matter and people’s capability
- Legal assistance services offer a range of timely intervention services and use the most appropriate service type to address and resolve people’s legal problems
- Matters are resolved quickly and cost effectively, including through the use of alternative dispute resolution where appropriate
- People have access to information about their legal rights, responsibilities and the options they have for action
- Community legal education is tailored appropriately for different groups, coordinated across the jurisdiction, aligned with shared priorities and not duplicated unnecessarily
- People are equipped with increased skills and knowledge to help resolve future problems

¹⁴ <https://www.ag.gov.au/LegalSystem/Legalaidprogrammes>

Benchmark 6 – Supported, Collaborative, Integrated Service Sector

Public legal assistance service providers participate in collaborative service planning across this sector and are mandated and supported to innovate and to fulfill their integral role of ensuring access to justice and an effective justice system, working in partnership with all stakeholders.

Milestones and progress indicators for achieving Benchmark 6 include:

- Canadian justice system is characterized by clear and effective referral pathways and easy navigation
- Public legal assistance providers are recognized as a key component of the wider justice system with an important role in informing justice system reform, substantive and procedural law reform and broader issues such as reducing poverty and improving the situation of people with mental illnesses
- Meaningful cooperation between all participants in the justice system to achieve more timely resolution
- All public legal assistance service providers participate in collaborative service planning on a quarterly basis
- Public legal assistance indicators and measurements are aligned with those of other relevant organizations (i.e. criminal legal aid and prosecution services)
- The relationship between governments, legal aid authorities and service providers are effective partnerships.