THE CANADIAN BAR ASSOCIATION

L'ASSOCIATION DU BARREAU CANADIEN

Toward National Standards for Publicly-Funded Legal Services

Envisioning Equal Justice

An Initiative of the Canadian Bar Association

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Table of Contents

***Note**: This discussion paper has been produced by the Canadian Bar Association's Standing Committee on Access to Justice for consultation only. It has not been approved by the CBA, and does not represent an official statement of CBA policy. It is intended to foster discussion. That discussion will be considered by the Committee in making its Final Report and recommendations to the CBA at the Canadian Legal Conference in August 2013.*

Toward National Standards for Publicly-Funded Legal Services

1. Foreword

The Canadian Bar Association's Access to Justice Committee is preparing five discussion papers as part of its *Envisioning Equal Justice* initiative.[1] The initiative aims to tackle four barriers that impede sustainable and sustained improvement to access to justice: lack of political profile; inadequate strategy and coordination of access initiatives; absence of mechanisms to measure change; and identifiable gaps in our knowledge as to what actually works to improve access.

This discussion paper contributes to a strategic framework for the access to justice agenda by exploring the concept of national standards for publicly-funded legal services. Legal aid services are rationed in three main ways:

- types of legal matters covered (coverage);
- who can access services (eligibility); and
- the type and scope or amount of legal assistance provided (quality).

This paper considers the value of the national standards approach and reviews principled policy foundations for these standards. Emphasis is placed on integrating insights from research and studies into this foundation. The paper concludes with consultation questions to elicit feedback and discussion on the issues and options canvassed. Your input will assist the CBA Committee to develop its report and recommendations to be tabled at the Canadian Legal Conference in August 2013.

This paper is best read in conjunction with the related CBA Committee discussion paper, *Future Directions for Legal Aid Delivery.*[2] These two papers have been developed as complementary approaches to different but interrelated sides of the legal aid issue: the scope of the requirement for legal aid; and the enhancement of effective and cost-efficient legal aid service delivery. This paper also dovetails with the discussion paper *Tension at the Border: Pro Bono and Legal Aid,* circulated in fall 2012, which, among other things, considers the issue of a principled division between voluntary and publicly-funded legal services.

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[1] The discussion papers, *Access to Justice Metrics*; *Toward National Standards for Publicly-Funded Legal Services*; *Future Directions for Legal Aid Delivery*; *Tension at the Border": Pro Bono and Legal Aid*; and *Underexplored Alternatives for the Middle Class* are available on the CBA website. For a full project description see: www.cba.org/CBA/Access/main/project.aspx

[2] www.cba.org/CBA/Access/main/project.aspx

The CBA Committee invites your responses to any or all of the consultation questions, or the content of this Discussion Paper, and asks that all input be sent to the attention of Gaylene Schellenberg, Project Director, by **May 15, 2013**.

2. Introduction

The Chief Justice of Canada has galvanized the national agenda for access to justice, in part by highlighting Canada's poor rating on international access to justice indicators. She has noted with dismay that the World Justice Project found that on civil justice, Canada ranked 9 out of 12 in Western Europe and North America.[3] In 2012, Canada ranked 13 out of 29 in the larger category of high income countries. Two sub-factors in particular contribute to Canada's low ranking: delays in the resolution of civil matters; and inadequate access to legal counsel.[4]

According to the 2011 World Justice Project report, one of Canada's greatest weaknesses is the area of access to civil legal aid, especially for marginalized segments of the population. Here Canada ranks a shocking 54th in the world, well behind many countries with lower Gross Domestic Products. Somewhat surprisingly given the greater volubility of Canada's public commitment to a social safety net, Canada even ranks behind the US, ranked at 50th in the world on this indicator.[5] The report notes that these issues "require attention from both policy makers and civil society to ensure that all people are able to benefit from the civil justice system."[6] A recent US study carried out by the RAND Institute of Civil Justice similarly concluded, "[t]he policy ramifications of diminished legal aid, in terms of what the civil justice system actually accomplishes and whom it serves, present a troubling set of questions for society."[7]

It is clear that the supply and demand of legal aid are out of balance. For example, the Public Commission on Legal Aid, headed by Leonard Doust, Q.C. concluded:

> While LSS [Legal Services Society of BC] has prioritized the protection of its core services in an environment of insufficient and uncertain funding, it is clear to me that the legal aid system is failing to meet even the most basic needs of British Columbians. Additional reductions in service occurred in 2009 — on top of what was then an unsustainable and highly volatile legal aid system.

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[3] See the 2010-11 survey. In the 2012-2013 survey, Canada ranked 9 out of 16 (due to a change in the number of countries in the region) - www.worldjusticeproject.org/country/canada

[4] Mark Agrast, Juan Carlos Botero and Alejandro Ponce, *The Rule of Law Index 2011 Report* (Washington DC: World Justice Project, 2011) at 23.

[5] *Ibid*. at 21.

[6] *Ibid*. at 21.

[7] Michael D. Greenberg and Geoffrey McGovern, *An Early Assessment of the Civil Justice System After the Financial Crisis - Something Wicked This Way Comes?* (Santa Monica, CA: Rand Institute for Civil Justice Occasional Paper, 2012) at 44.

> Based on the evidence presented to me, I cannot come to any conclusion other than the services provided in British Columbia today are too little, their longevity or consistency too uncertain.[8]

The availability of legal aid varies between and within provinces and territories. The inadequacy of legal aid, however is a shared problem.[9] At present, there are broad disparities in access to legal aid in non-criminal matters across Canada, and in all provinces and territories legal aid programs are unable to meet the need for legal assistance. There are serious problems in access to legal aid for criminal law matters as well. However, a minimum national standard is set and guaranteed to some extent under the Canadian *Constitution* and through federal/provincial/territorial cost-sharing agreements, which set standards for minimum legal aid coverage for criminal matters throughout Canada.

More generally, one American commentator aptly states: we "face a legal world that is thick with legal structure but thin on legal resources."[10] More than a decade of solid research unequivocally demonstrates that the extent of unmet legal need is vast, so vast as to be almost beyond our comprehension.[11] The growing demand for legal services is not surprising given the fact that we live in societies "increasingly suffused by law."[12]

No one to our knowledge has proposed that legal aid be available on a universal basis in a manner comparable to health care or education. Accepting the proposition that not all legal needs can or should be met through the expenditure of public funds, the question becomes: *on what basis do we ration this scarce public service?* This paper explores a number of approaches to this question, and

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[8] Leonard T. Doust, Q.C., *Foundations for Change: The Report of the Public Commission on Legal Aid* (Vancouver: March 2011) at 7 [Doust Report].

[9] *Ibid.* See for example: Dr. J. L. Hughes and E.L. Mackinnon, *If there were legal aid in New Brunswick… A Review of Legal Aid Services in New Brunswick* (New Brunswick, September 2007).

[10] Gillian K. Hadfield, "Higher Demand, Lower Supply? A Comparative Assessment of the Legal Resource Landscape for Ordinary Americans" (2010) 37 Fordham Urban Law Journal 129 at 151.

[11] A few examples include: 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); Hazel G. Genn, *Paths to Justice: What People Do and Think About Going to Law* (Oxford: Hart Publishing, 1999); Dr. Ab Currie, *National Civil Legal Needs Studies 2004 and 2006* (Ottawa: Justice Canada, 2006); Legal Services Agency, *Report on the 2006 National Survey of Unmet Legal Needs and Access to Services* (Wellington, NZ: Legal Services Agency, 2006); Ipsos Reid for the Legal Services Society, *Legal Problems Faced in Everyday Lives of British Columbians* (Vancouver: LSS, 2008); Carol McEown, *Civil Legal Needs Research* (Vancouver: Law Foundation of British Columbia, 2008); Pascoe Pleasence, Nigel Blamer, 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); Roy McMurtry, Chair, *Listening to Ontarians: Report of the Ontario Civil Legal Needs Project* (Toronto: Ontario Legal Needs Steering Committee, May 2010).

[12] Marc Galanter, "Access to Justice in a World of Expanding Social Capability" (February 2010) 37:1 Fordham Urban Law Journal 115 at 123, citing his own work in Marc Galanter, "Law Abounding: Legalization Around the North Atlantic" (1992) 55 Mod. L. Rev. 1.

suggests that developing national standards for publicly-funded legal services could provide a meaningful and principled framework for this difficult decision-making process.

The provision of legal aid was originally founded on the idea of an entitlement to it as a social service, so that all people who could not reasonably afford legal assistance and representation would have that help as an aspect of Canadian social citizenship. Notions of an entitlement to legal aid may strike some as outdated, given the current whittling away of the commitment to legal aid as part of a national social safety net. This trend was accelerated by the demise of the *Canadian Assistance Plan* in the mid-1990s. Still, there may be good reasons at both policy and practical levels for regenerating an entitlement approach through national legal aid standards.

Past approaches to developing legal aid standards have generally been based on rights-based principles. For example, the CBA adopted a model statement of national legal aid standards in its 1993 *Charter of Public Legal Services (CBA Charter)*[13] as a principled formulation of rationing principles. The *CBA Charter* states: "National standards for all essential public legal services should be embodied in federal and provincial legislation". The substantive content of the *CBA Charter* is discussed below and the full text is appended to this discussion paper. The CBA has continued to call for national standards over the years, without success.[14]

A 2010 report prepared for the CBA, *Moving Forward on Legal Aid – Research on Needs and Innovative Approaches,* contains ten proposals for legal aid policy renewal.[15] Three are relevant here:

- the development and adoption of an updated policy statement on the objectives of the legal aid system integrating our expanded knowledge base, potentially including a more detailed contextualized statement on the right to counsel;
- drafting a model legal aid statute; and
- undertaking a study on legal aid eligibility.[16]

The underlying rationale for these proposals is the need for a well-considered basis to counter the trend toward shaping legal aid developments largely through a narrow focus on cost-cutting and efficiency. In particular, these initiatives could integrate empirical findings about legal needs and the impact of unsolved legal problems on individuals and society, and better emphasize the link

[13] 93-11-A

[14] See, for example, Resolutions 92-09-A, 92-10-A, 95-02-M (Recommendations 11.3 and 14.3), 00-06-A, 02-10-M, 02-05-A, 04-04-A, 05-01-M, discussed in Melina Buckley, *Moving Forward on Legal Aid – Research on Needs and Innovative Approaches* (Ottawa: CBA, 2010).

[15] *Moving Forward*, *ibid.* at 120.

[16] *Ibid*. at 123-126.

between adequate legal aid and overcoming conditions of inequality, disadvantage, social exclusion and marginalization.[17]

This discussion paper builds on the *Moving Forward* report, but considers the issue of national standards for publicly-funded legal services not simply as an issue of CBA policy, but as an important component of a strategic framework for the national access to justice agenda. There is no question that many organizations are dedicating a tremendous amount of energy and limited resources to new approaches to improve access to justice.[18] However, the effectiveness of these efforts is hampered by a lack of strategic coordination and an inadequately developed understanding of how individual innovations can affect systemic change. Agreement on common broad objectives, such as national standards for publicly-funded legal services, would assist in overcoming this barrier to substantive progress by providing a shared framework within which we can each make our individual contributions.

This paper consists of three parts.

- It explores the concept of national standards and assessment of their potential utility in contributing to enhanced access to justice.
- It considers different approaches to the foundation of national standards for publicly-funded legal services. Emphasis is placed on how other countries are integrating insights from research and studies into refined standards. Insights from these approaches are synthesized in three short sections focusing on:
    - eligibility – who can access services;
    - coverage – type of matters for which legal aid services should be provided; and
    - quality –the type and scope or amount of legal assistance provided.
- The paper concludes with consultation questions designed to elicit feedback and discussion on the issues and options canvassed.

3. The Case for National Standards

With the inception of formal legal aid plans over 40 years ago, the federal government of the day envisioned "the establishment of a coast-to-coast federally funded legal aid system that would

[17] *Ibid*. at 123.

[18] See, for example, a summary overview of these efforts in Melina Buckley, *Access to Legal Services in Canada: A Discussion Paper* (paper prepared for the National Action Committee on Civil and Family Matters, April 2011).

cover both civil and criminal cases", modeled on the medicare system.[19] The CBA had also advocated for this approach, but met with resistance on the grounds of both cost and jurisdiction.

Despite the failure of this initial vision for a national legal aid program, a basic level of civil legal aid, which met minimum national standards, was ensured for many years through federal transfers on a cost-sharing basis with the provinces under the *Canada Assistance Plan*.[20] However, the change in funding mechanism to the *Canada Health and Social Transfer* in 1996 eliminated any pretense of national standards. The shift to the separate *Canada Health Transfer* and *Canada Social Transfer* in 2004 did nothing to stem the dramatic erosion of civil legal aid. Provinces now reject the federal government's position that it already funds civil legal aid through the *Canada Social Transfer* of block funding. To the extent there is any federal contribution to civil legal aid, it is impossible to trace. National standards for civil legal aid in Canada are non-existent.[21]

The tides have changed over the decades since the original attempt to establish a national legal aid program. By the mid-2000s, both provincial and territorial Attorneys-General began to advocate openly for an increased federal role in civil legal aid, and a return to the original leadership role and levels of commitment for criminal legal aid. In 2005, then Minister of Justice Irwin Cotler and his provincial and territorial counterparts reached an agreement in principle on the creation of a new national legal aid program, which came with a commitment of a substantial boost in federal funding for a dedicated civil legal aid plan.[22] Then Manitoba Justice Minister Gord Mackintosh was reported to have said: "There is a very heavy onus now that shifts to the federal government to respond to the unanimous request from the provinces and territories for a robust partnership on civil and criminal legal aid."[23] National standards were an explicit component of this agreement. Implementation issues, including what should be covered under civil legal aid agreements, were referred to a working group of Federal/Provincial/Territorial officials.

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[19] Paul Litt, *Elusive Destiny: The Political Vocation of John Napier Turner* (Vancouver: UBC Press, 2011) at 112. See discussion in a blog post by Adam Dodek, "Justice and John Turner: What Might Have Been", www.slaw.practicesource.com/blog/tag/legal-aid/

[20] The federal contribution to Canada's three territories is provided through *Access to Justice Services Agreements*, which contain contributions for justice related services, including criminal and civil legal aid, public legal education and for Aboriginal court workers. See, www.justice.gc.ca/eng/pi/pb-dgp/arr-ente/acces.html

[21] There was some optimism that the Social Union Framework Agreement (SUFA), created in 1997, would be an alternative vehicle through which national standards could be designed and agreed upon between the federal and provincial governments. However, this potential has not materialized. See discussion in Shelagh Day and Gwen Brodsky, *Women and the Canada Social Transfer: Securing the Social Union* (Ottawa: Status of Women Canada, 2007).

[22] Cristin Schmitz, "Justice Ministers Commit to National Legal Aid Program" *The Lawyer's Weekly* (4 February 2005), www.lawyersweekly.ca/index.php?section=article&articleid=27

[23] *Ibid*.

The energy behind this initiative has dissipated since 2005, although from time to time, Canadian politicians continue to reference the importance of a national standard for legal aid.[24]

Why national standards? In the context of this discussion paper, national standards are primarily seen as potentially enhancing equal access to justice by providing a principled framework to counterbalance the sole focus on reducing expenditure as the driver of legal aid reforms. It is rare today for legal aid standards to be guaranteed through legislation, as governments have preferred more flexible arrangements in which the availability of legal aid can be constantly shifting.[25]

New Zealand appears poised to buck this trend. In August 2011, the New Zealand Government introduced the *Legal Aid (Sustainability) Amendment Act,* which, among other things, would have eliminated a statutory entitlement to legal aid, making it subject to regulation by Cabinet.[26] This approach did not survive the Justice and Electoral Committee, which introduced substantial amendments to the Bill by all party agreement: not even the title was unscathed with the word "sustainability" being removed. The Labour and Green Party Minority report explains:

> As introduced, this bill contains a series of drastic reductions to entitlements to State-provided legal assistance. Extremely low thresholds for eligibility for such assistance would have applied; the value of an applicant's clothing, household furniture and tools of trade would have had to be taken into account in deciding eligibility; *specification of the types of legal proceeding for which assistance would be available would have been stripped out of the statute and determined instead by ministerial fiat*; … All this—as the original title of the bill indicates—was in pursuit of cost savings out of the legal aid scheme, with scant regard for the catastrophic effect on low-income New Zealanders' ability to access the justice system that these changes would have represented.[27] (emphasis added)

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[24] Robert Todd, "Legal Aid – a System in Peril" *Canadian Lawyer* (October 2010) 28, which reported that Joe Comartin, NPP Justice Critic at that time, mentioned the importance of "more stable funding from the feds is principally important for the creation of a national standard for legal aid." www.canadianlawyermag.com/Legal-aid-a-system-in-peril.html

[25] For example, from 1979 to 2002, in British Columbia, the *Legal Service Society Act R.S.B.C.* 1979, c. 227 **required** that legal services be available in specific circumstances: (i) criminal proceedings that could lead to imprisonment; (ii) civil proceedings that could lead to confinement or imprisonment; (iii) domestic disputes that affected the individual's physical or mental safety or health or that of the individual's children; (iv) legal problems that threatened (1) the individual's family's physical or mental health or safety; (2) the individual's ability to feed, clothe, or provide shelter for himself or herself and the individual's dependents; or (3) the individual's livelihood. Today, coverage is determined by a memorandum of agreement between the government and LSS. The Quebec legal aid statute continues to employ the language of entitlement to services. See, Loi sur l'aide juridique (L.R.Q., c. A-14) sections 4.4-4.13.

[26] Bill 316-1 www.legislation.govt.nz/bill/government/2011/0316/latest/versions.aspx

[27] New Zealand Parliament, *Legal Assistance (Sustainability) Amendment Bill*, Report from Justice and Electoral Committee, October 2012, Commentary at 10 (includes full amended bill, Bill 316-2).

In many fields, standards are developed as a type of external benchmark, implying that there is currently an undesirable level of underachievement on shared goals. The existence of a standard to work toward establishes an intention to improve, provides a common goal, and provides a framework for determining specific achievements and overall progress. In their study on the *Canada Social Transfer*, Day and Brodsky concluded:

> There is a remarkable level of agreement among policy experts, civil society organizations, and professional associations on the need for national or cross-jurisdictional standards… Though people may mean different things when they use this term, there is still a broad consensus that national standards are needed... The need for strong national standards for social programs is a dominant concern of civil society organizations with expertise in social policy.[28]

International human rights bodies and organizations develop standards to translate human rights guarantees into practical guidance for implementation by national governments. For example, the United Nations Committee on Economic Social and Cultural Rights has drafted a number of general comments on various rights with a view to formulating a universal minimum core. The Committee has used the "minimum core" concept to give substance to the Covenant's enumerated rights to food, health, housing and education, and the emerging right to water.[29] This work initiates the process of developing a common legal standard, a baseline of socioeconomic protections across various countries with vastly different levels of available resources and addresses the progressive realization issue. These general comments are considered authoritative and given considerable legal weight. The approach is not without controversy as there is a concern that it detracts too much from the idea of a right and tends to work toward the "lowest common denominator."[30]

A better comparison for the purposes of this paper is the UN *Standard Minimum Rules for the Treatment of Prisoners*, first adopted in 1955 and updated over time.[31] While styled as "minimum

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[28] Day and Brodsky, *supra,* note 21 at 10, citing: Tammy Findlay, "Analysis of the Social Union Framework Agreement (SUFA) 3-Year Review" (paper prepared for the Social Rights Advocacy Project, 2005) at 33.

[29] See for example: Committee on Economic Social and Cultural Rights, *General Comment No. 12: The Right to Adequate Food (art.11)*, U.N. Doc. E/C.12/1999/5 (12 May 1999); Committee on Economic Social and Cultural Rights, *General Comment No. 14: The Right to the Highest Attainable Standard of Health (art.12)*, U.N. Doc. E/C.12/2000/4 (11 Aug. 2000); Committee on Economic Social and Cultural Rights, *General Comment No. 13: The Right to Education (art.13)*, U.N. Doc. E/C.12/1999/10 (8 Dec. 1999); Committee on Economic Social and Cultural Rights, *General Comment No. 15: The Right to Water (arts.11, 12)*, U.N. Doc. E/C.12/2002/11 (20 Jan. 2003).

[30] Audrey Chapman and Sage Russell, "Introduction" in Chapman and Russell (eds.), *Core Obligations: Building a Framework for Economic, Social and Cultural Rights* (Cambridge, UK: Interstentia 2002) at 3; See also: Katharine G. Young, "The Minimum Core of Economic and Social Rights: A Concept in Search of Content" (2008) 33 The Yale Journal of International Law 113 at 139.

[31] United Nations, *Standard Minimum Rules for the Treatment of Prisoners* (30 August 1955), available at: www.unhcr.org/refworld/docid/3ae6b36e8.html

rules", the standards have been very effective in improving the treatment of prisoners according to international human rights guarantees.[32] Preliminary observations to the standards state:

1. The following rules are not intended to describe in detail a model system of penal institutions. They seek only, on the basis of the general consensus of contemporary thought and the essential elements of the most adequate systems of today, to set out what is generally accepted as being good principle and practice in the treatment of prisoners and the management of institutions.
2. In view of the great variety of legal, social, economic and geographical conditions of the world, it is evident that not all of the rules are capable of application in all places and at all times. They should, however, serve to stimulate a constant endeavour to overcome practical difficulties in the way of their application, in the knowledge that they represent, as a whole, the minimum conditions which are accepted as suitable by the United Nations.[33]

The *Standard Minimum Rules for the Treatment of Prisoners* contain rules of general application and rules applicable to special categories of prisoners. Matters include registration, medical services, food, discipline and punishment, contact with the outside world, and so on.

There is little question of a basic state obligation under international law to ensure legal aid in some form, based on provisions enshrining the rule of law, the right to a fair hearing, the right to equality, and the right to effective remedies.[34] Active steps are underway by international and regional human rights bodies to refine standards on the extent of the state obligation to provide legal aid, including the nature of funding and kinds of services covered. In December 2012, the UN General Assembly adopted the world's first international instrument dedicated to legal aid, the *United Nations Principles and Guidelines on Access to Legal Aid in the Criminal Justice System*.[35] It specifies, among other matters, at what stages of the proceedings legal aid should be available to accused persons. It is grounded in "the emerging best practices and evolving jurisprudential and normative developments around the world."[36] The European Commission is working on a proposal for a draft

[32] See for example: Advocates for the Prevention of Torture, "Respect for the UN Standard Minimum Rules through effective implementation" (APT Position Paper, April 2012) at 1: "…the Standard Minimum Rules, adopted by the first Crime Congress in 1955, are an historic text which remains a critical benchmark for the treatment of detainees for many countries around the world." R.S. Clark, *The United Nations Crime Prevention and Criminal Justice Program: formulation of standards and efforts at their implementation* (Philadelphia: University of Pennsylvania Press, 1994).

[33] *Ibid.*

[34] Eileen Skinnider, "The Responsibility of the State to Provide Legal Aid" (Vancouver: The International Centre for Criminal Law Reform and Criminal Justice Policy, 1999) at 16.

[35] United Nations, *Principles and Guidelines on Access to Legal Aid in the Criminal Justice System*, A/C.3/67/L.6.

[36] Zaza Namoradze, "UN General Assembly Enacts Global Standards on Access to Legal Aid" (Open Source Foundations, 21 December 2012) www.legalaidreform.org/international-standards/item/485-un-general-assembly-enacts-global-standards-on-access-to-legal-aid.

EU directive on legal aid, which is expected to be published for negotiations in the second half of 2013.[37]

In 2003, the EU adopted a directive on legal aid in cross-border civil and commercial cases.[38] The directive establishes the principle that persons who do not have sufficient resources to defend their rights in law are entitled to receive appropriate legal aid. The directive lays down the services that must be provided for the legal aid to be considered appropriate:

- access to pre-litigation advice
- legal assistance and representation in court
- exemption from, or assistance with, the cost of proceedings, including the costs connected with the cross-border nature of the case.

The directive also specifies the conditions relating to the applicant's financial resources or the substance of the dispute required by the Member States to award legal aid.

International standards are the interface between international rights and obligations on the state; so too national standards are the interface between Canadian social programs and federal and provincial responsibilities under the Canadian *Constitution* and international human rights instruments to which Canada is a party.[39] Importantly, national legal aid standards would be one step toward satisfying the commitment under s. 36(1)(c) of the *Constitution Act, 1982*, which commits federal and provincial governments to "providing essential public services of reasonable quality to all Canadians" and the right to publicly-funded counsel required under s. 7, s. 10(b) and s. 15 of the *Charter of Rights*.

National standards do not mean uniformity in program delivery or accountability mechanisms in all provinces and territories. Standards are framed at a general level, leaving scope for local priority setting and innovation in each region. This is the case, for example, under the *Canada Health Act.* Historically, this has been a particular concern for Quebec and has been accommodated by establishing province-specific programs. National standards for legal aid can "be developed and enforced in ways that respects Canada's national complexity" while at the same time serving the shared commitment to equal justice and constitutional and international rights obligations.[40]

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[37] *Proposal for a Directive of the European Parliament and of the Council on the right of access to a lawyer in criminal proceedings and on the right to communicate upon arrest* (Council of the European Union, 9 March 2012: 7337/12).

[38] Council Directive 2002/8/EC of 27 January 2003 to improve access to justice in cross-border disputes by establishing minimum common rules relating to legal aid for such disputes, www.eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32003L0008:EN:NOT

[39] Day and Brodsky, *supra*, note 21 at 10.

[40] Day and Brodsky, *supra*, note 21 at 15.

4. Developing National Standards

This section reviews four approaches to developing national standards for publicly-funded legal services. These are:

- a rights-based approach;
- the Tilburg-HiiL empirical study of "urgent legal needs";
- the US context-based right to counsel research and initiatives and
- the Australian Commonwealth approach.

The issues and ideas introduced in these four examples are synthesized in brief discussions on the topics of eligibility standards, standards relating to coverage and quality standards.

A. Rights-Based Approach

A common approach to developing standards for where and when legal aid services should be provided begins from a rights-based approach: when is legal aid required by the legal principles fundamental to our justice system. For example, the 1993 *CBA Charter* states the general principle: "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." The American Bar Association adopted a resolution on the right to counsel in 2006, discussed further below.

The *CBA Charter* elaborated on the situations in which these fundamental interests would generally be at risk:

> 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 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.

On eligibility, the *CBA Charter* states: "Every person in Canada should have the ability to retain counsel of choice, without suffering undue financial hardship."

While focused on situations requiring legal representation, the *CBA Charter* also recognized that other types of legal assistance should be provided on a non-means tested basis:

> 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.

More recently, the Doust Report recommended amending provincial legislation in British Columbia to recognize legal aid as:

> … an essential public service and the entitlement to legal aid where an individual has a legal problem that puts into jeopardy their or their family's security — be it their liberty, health, employment, housing, or ability to meet the basic necessities of life — and he or she has no meaningful ability to pay for legal services.[41]

Doust also recommended the development of "a new approach to defining core public legal aid services and priorities." This would merge the traditional legal categories approach (e.g., criminal law, family law and poverty law) with an approach based on the fundamental interests of the most disadvantaged clients, "where the need is most pressing and the benefit is likely to be the greatest."[42]

He also recommended the modernization and expansion of financial eligibility criteria:

(a) Financial eligibility criteria should be modified so that more needy individuals qualify for legal aid and the criteria should be linked to a generally accepted measure of poverty such as Statistics Canada's Low-Income Cut-Off or Market Basket Measure.

(b) Legal aid should be made available to the "working poor", defined as those earning up to 200 percent of the poverty rate through a sliding scale contribution system.

[41] *Supra*, note 8, Recommendation 1.

[42] *Ibid.* Recommendation 2.

(c) Basic legal aid services such as legal information and limited legal advice should be available to all residents of British Columbia, but only to the extent that the entitlements under (a) and (b) to comprehensive legal aid is fully met.[43]

In its response to the Doust Report, the Legal Services Society (the BC legal aid plan) stated that its financial eligibility cut off is higher than LICO and therefore adopting the standard would eliminate coverage for some people, rather than expanding it as intended.[44]

B. Tilburg/Hiil Empirical Study of "Urgent Legal Needs"

A team of researchers at Tilburg University in Germany and the Hague Institute for the Internationalisation of Law (HiiL), working on a multi-year Measuring Access to Justice Project has identified twelve categories of legal problems "that appear to be urgent in many, if not most, legal systems and locations."[45] The researchers developed a preliminary, intuitive list of pressing legal problems faced by individuals, reproduced here in Table 1.

Table 1: Initial List of Possibly Urgent Legal Problems

CATEGORY	EXAMPLES
1 Subsistence problems	Problems with access to basic survival needs such as food, water, heating, urgent health care.
2 Basic personal security	Crimes to the person. Unfair detention. Personal injury.
3 Property rights protection	Crimes to property. Registration of property. Property disputes. Expropriation.
4 Identity issues and documents	Acknowledgement of identity and nationality.
5 Problems in land use relationships	Eviction. Problems with land use or house leases.
6 Problems in employment relationships	Dismissal. Employment conditions. Safety in the workplace.

[43] *Ibid.* Recommendation 3.

[44] Legal Services Society, *Backgrounder – Comments on the Public Commission Report* (8 March 2011) at 3. www.lss.bc.ca/assets/media/newsReleases/backgrounderPublicCommissionReport.pdf

[45] Maurits Barendrecht, Peter Kamminga and Jin Ho Verdonschot, "Priorities for the Justice System: Responding to the Most Urgent Legal Problems of Individuals" (Tilburg Netherlands: TISCO Working Paper Series on Civil Law and Conflict Resolution Systems. No. 001/2008, February 2008).

CATEGORY	EXAMPLES
7 Problems in family relationships	Divorce. Domestic violence. Exploitation of women or children.
8 Problems in neighbor relationships	Disturbances. Environmental damage.
9 Problems with sellers of goods and services	Issues with quality of goods or services.
10 Business problems	Problems with setting up businesses. Unfair regulation. Unfair taxation. Problems between participants in enterprise. Problems with suppliers.
11 Debt problems	Unpaid debt.
12 Problems with financial services	Savings. Insurance. Pensions.

The researchers then 'tested' this starting premise of what legal problems were the most urgent by applying six approaches:

- Comparing the list with the results of legal needs surveys in 10 countries;
- Comparing the list with indications of severity of legal problems as reported in legal needs surveys;
- Determining how often countries developed specialized courts to deal with the categories of legal issues;
- Reviewing theories of which interests require societal protection on the understanding that the more valued an interest the more social protection it will attract;
- Examining the costs of self-protection (as opposed to intervention by the legal system); and
- Costs associated with leaving the situation, i.e., giving up the interest because protection is unavailable.

The research team also considered "supply" side issues: what types of legal norms were available to answer a category of legal problems; what types of legal interventions are available; and how much capacity is there in the legal system or justice system to fulfill these needs (given the number of legal problems expected to arise in any category).

On the basis of this thorough analysis, integrating both empirical and theoretical input, the research team devised a list of "the most important legal problems for average individuals."[46] The intent was

[46] *Ibid.* at 36.

to develop a universal list that would be relevant in a wide cross-section of countries, and did not address the legal problems of particular groups within a given society. The top categories were legal problems related to basic personal security and to the two most important forms of relationships in which people invest: family and employment. Rights in land and housing that protect another important category of investments of individuals were also high on the list of justice needs. The researchers found that consumer problems and problems associated with debt were frequent "but on average they do not disrupt life" with the exception of debt problems so overwhelming that they lead to insolvency.[47]

The Tilburg/Hiil research team took the position that urgent legal problems faced by median and lower income persons are "generally the same" and they would highlight any differences between the groups where demonstrated in the evidence.[48] This proposition flows to some extent from the meta-level of analysis across a wide-range of countries, tending to smooth over the urgent needs of minority groups. Other empirical studies into legal needs have highlighted both the similarities and important differences between the pressing legal needs of people with moderate incomes and those who live in poverty.[49] Some of these studies have also recognized that members of some marginalized groups, the homeless for example, may be missed even in large-scale surveys.[50]

C. US Context-Based Right to Counsel Initiatives and Research

A priority of the US access to justice movement over the past decade has been to build recognition of a right to publicly-funded counsel in civil matters. This project is often referred to as a "Civil Gideon" referring to the US Supreme Court recognizing a right to counsel in criminal matters in the *Gideon* case.[51] Many individuals and organizations are contributing to this national right to civil counsel movement through wide-ranging initiatives from research, to lobbying, to litigation. Some of these advocates have come together as the National Coalition for a Civil Right to Counsel (NCCRC). The NCCRC provides information-sharing, training, networking, coordination, research assistance, and other support to advocates pursuing, or considering pursuing, a civil right to counsel. It includes over 100 advocates from legal services programs, private law firms, state bar associations, law schools, national strategic centers and state access to justice commissions, representing over 30 states. At present, active civil-right-to-counsel projects are underway in at least eight jurisdictions and discussions are taking place in a number of others. The heart of this work is to develop an evidence-based definition of where legal representation can be shown to be empirically necessary for a fair proceeding.

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[47] *Ibid*. at 37.

[48] *Ibid*. at 7.

[49] See CBA Committee's discussion in *Unexplored Alternatives for the Middle Class* or *Future Directions for Legal Aid Delivery, supra*, note 1 (Ottawa: CBA, 2013).

[50] Buckley, *Access to Legal Services in Canada, supra*, note 18 at 3.

[51] *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963).

Although the Civil Gideon movement was initiated before the ABA adopted its 2006 resolution on the right to civil counsel, the resolution is a central feature of these efforts. The resolution states:

> 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.[52]

The report supporting this resolution notes that it "…offers a careful, incremental approach to making effective access to justice a matter of right, starting with representation by counsel in those categories of matters in which basic human needs are at stake."[53] The resolution does not suggest that jurisdictions should limit their provision of counsel and other law-related services to these high-priority categories. Rather it indicates that in these categories they should *guarantee* no low income person is ever denied a fair hearing because of their economic status.

The basic human needs identified in this resolution as most critical for low income persons and families include at least the following:

- "Shelter" includes a person or family's access to or ability to remain in an apartment or house, and the habitability of that shelter.
- "Sustenance" includes a person or family's sources of income whether derived from employment, government monetary payments or "in kind" benefits (e.g., food stamps). Typical legal proceedings involving this basic human need include denials of or termination of government payments or benefits, or low-wage workers' wage or employment disputes where counsel is not realistically available through market forces.
- "Safety" includes protection from physical harm, such as proceedings to obtain or enforce restraining orders because of alleged actual or threatened violence whether in the domestic context or otherwise.
- "Health" includes access to appropriate health care for treatment of significant health problems whether that health care is financed by government (e.g., Medicare, Medicaid, VA, etc.) or as an employee benefit, through private insurance, or otherwise.
- "Child custody" embraces proceedings where the custody of a child is determined or the termination of parental rights is threatened.[54]

These categories are considered to involve interests so fundamental and important as to require governments to supply low income persons with effective access to justice as a matter of right.

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[52] ABA, Report to the House of Delegates, August 2006, Resolution 112A at 1.

[53] *Ibid*. at 12.

[54] *Ibid*. at 13.

While there is a strong presumption that this mandates provision of lawyers in all such cases, trivial threats, even to a basic human need would not warrant the investment of legal resources.

In 2010, the ABA followed up on the general resolution on the right to civil counsel by adopting a statement of *Basic Principles of a Right to Counsel in Civil Legal Proceedings*.[55] The report in support of the 2010 resolution explains that it is designed to give the ABA a practical means to assist state and local efforts to establish and implement a right to counsel. These principles

> …are written in clear and concise language and embody the minimum, basic requirements for providing a right to counsel that have been culled from the larger body of relevant caselaw, statutes, standards, rules, journal articles, and other sources of legal information that may be prove to be overwhelming for laypersons to assimilate.[56]

The 10 principles embody minimum requirements and jurisdictions are encouraged to provide better protection for the rights to civil litigations where possible. The principles are:

1. Legal representation is provided as a matter of right at public expense to low-income persons in adversarial proceedings where basic human needs—such as shelter, sustenance, safety, health, or child custody—are at stake. A system is established whereby it can be readily ascertained whether a particular case falls within the categories of proceedings for which publicly-funded legal counsel is provided, and whether a person is otherwise eligible to receive such representation. The failure to designate a category of proceedings as one in which the right to counsel applies does not preclude the provision of legal representation from other sources. The jurisdiction ordinarily does not provide publicly-funded counsel in a case where the existing legal aid delivery system is willing and able to provide representation, or where the person can otherwise receive such representation at no cost.
2. Financial eligibility criteria for the appointment of counsel ordinarily take into account income, liquid assets (if any), family size and dependents, fixed debts, medical expenses, cost of living in the locality, cost of legal counsel, and other economic factors that affect the client's ability to pay attorney fees and other litigation expenses.
3. Eligibility screening and the provision of publicly-funded counsel occur early enough in an adversarial proceeding to enable effective representation and consultation during all critical stages of the proceeding. An applicant found ineligible for representation is entitled to appeal that decision through a process that guarantees a speedy and objective review by a person or persons independent of the individual who denied eligibility initially.
4. Counsel complies with all applicable rules of professional responsibility and functions independently of the appointing authority.
5. To the extent required by applicable rules of professional conduct, replacement counsel

[55] ABA, Report to House of Delegates, August 2010, Resolution 105.

[56] ABA, Report to House of Delegates, August 2010, at 7.

must be provided in situations involving a conflict of interest.

6. Caseload limits are established to ensure the provision of competent, ethical, and high quality representation.
7. Counsel has the relevant experience and ability, receives appropriate training, is required to attend continuing legal education, and is required to fulfill the basic duties appropriate for each type of assigned case. Counsel's performance is evaluated systematically for quality, effectiveness and efficiency according to nationally and locally adopted standards.
8. Counsel receives adequate compensation and is provided with the resources necessary to provide competent, ethical and high-quality representation.
9. Litigants receive timely and adequate notice of their potential right to publicly-funded counsel and, once eligibility for such counsel has been established, any waivers of the right are accepted only if they have been made knowingly, intelligently, and voluntarily.
10. A system is established that ensures that publicly-funded counsel is provided throughout the implementing jurisdiction in a manner that adheres to the standards established by these basic Principles and is consistent with the "American Bar Association Principles of a State System for the Delivery of Civil Legal Aid."[57]

The *Basic Principles of a Right Counsel in Civil Legal Proceedings* also contains detailed commentary of each of the ten principles.

A large body of US research is aimed at providing data to inform how to draw the line on spending scarce legal aid resources. Many reports explore the impact of counsel who handle civil cases in various settings.[58] Reports consistently show that representation is a significant variable affecting a claimant's chances for success in eviction, custody and debt collection cases, as well as administrative proceedings. Rebecca Sandefur's meta-analysis of studies on the effects of representation reports that: "parties represented by lawyers are between 17 percent more likely and 1380 percent more likely to receive favorable outcomes in adjudication than are parties appearing pro se."[59] Similarly, Russell Engler's overview of this research concludes:

> Notwithstanding methodological differences, reports consistently show that representation is a significant variable affecting a claimant's chances for success in

[57] *Supra*, note 55.

[58] See, for example, Russell Engler, "Reflections on a Civil Right to Counsel and Drawing Lines: When Does Access to Justice Mean Full Representation by Counsel, and When Might Less Assistance Suffice?" (2010) 9:1 Seattle Journal for Social Justice 97 at 115 (Engler, 2010). He also references his article, "Connecting Self-Representation to Civil Gideon: What Existing Data Reveal About When Counsel is Most Needed" (2010) 37 Fordham URB. L.J. 37 at 66.

[59] Engler, 2010, *ibid.* at 115, referencing an unpublished paper by Rebecca Sandefur, "Elements of Expertise: Lawyers' Impact on Civil Trial and Hearing Outcomes" (26 Mar. 2008) (on file with author) at 24.

> eviction, custody, and debt collection cases. That finding also applies to administrative proceedings…[60]

He concludes that, particularly in family and housing law cases, represented litigants are anywhere from two to ten times more likely to procure the relief they seek when they enjoy the benefit of full representation by counsel.[61]

Sandefur's meta-analysis concludes that when people are represented by lawyers, they are, on average, more likely to win in adjudication than people who are unrepresented.[62] However she also finds that how much more likely they are to win varies greatly across studies and between different types of civil justice problems. One of the main factors she identifies on the impact of counsel is the complexity of the documents and procedures necessary to pursue a justice problem as a court case. She hypothesizes that expanded access to counsel would likely increase the rate at which currently unrepresented people win their cases because lawyers' understanding of procedure would reveal meritorious claims that are currently buried under unrepresented litigants' confusion about, and misunderstanding of, the legal process.[63]

The US data shows that the greater the imbalance of power between the parties, the more likely extensive assistance will be necessary to improve the case outcome. Power imbalances can derive from many different aspects of the legal situation:

- The substantive or procedural law;
- The judge;
- The operation of the forum;
- Disparities in economic resources;
- Barriers such as those due to race, ethnicity, disability, and language; and
- The presence of counsel for only one side can affect the calculus as well.[64]

As Engler points out the dynamic of power imbalances commonly occurs in a variety of cases. "Eviction cases pit vulnerable tenants against powerful landlords. Victims of domestic violence fighting their abusers in custody proceedings are vulnerable as well, particularly where counsel

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[60] Engler, *Connecting Self-Representation, supra,* note 58.

[61] *Ibid*.

[62] Rebecca Sandefur, "The Impact of Counsel: An analysis of the empirical evidence" (2010) 9 Seattle Journal for Social Justice 51 at 52, and discussion in Section IV.

[63] *Ibid.* at 78.

[64] Melina Buckley, *Evolving Legal Services: Review of Current Literature* (Prepared for Community Legal Education Ontario, unpublished draft, March 2013) at 18.

represents the opposing party."[65] He points out that the results from surveys of judges "demonstrate that scenarios pitting an unrepresented party against a represented one are the most difficult for judges to handle."[66] Early reports from triage efforts of self- help centers suggest that these are also the cases in most need of referrals.[67]

The US studies conclude that the greater the imbalance of power, the greater the need for a skilled advocate with expertise in the forum to provide needed help.[68] Engler advocates for right to counsel initiatives and research that maintain "a disciplined focus on scenarios involving power imbalances that reflect a breakdown of our adversary system's proper functioning."[69] He found that power imbalances often flow "from the vulnerability of a family whose basic needs are in jeopardy, as well as the comparative power of an adverse party."[70]

The most comprehensive approach to developing an empirical, context-specific right to counsel is being implemented by the Boston Bar Association (BBA) Civil Gideon Task Force. This initiative is based on

> …the basic proposition that where a civil proceeding involves a basic need or right, and nothing short of representation by counsel will preserve that right, counsel must be provided. No one is calling for a lawyer for all litigants in all civil matters. No one is calling for representation by counsel when lesser forms of assistance will do. No one is calling for representation where the rights at issue do not involve basic human needs.[71]

The BBA Task Force has developed a series of pilot projects, and reviewed research and consultations, to empirically demonstrate the scenarios in which counsel is most needed. The concept of identifying power imbalances provided one of the "common threads" that emerged in the BBA Task Force's selection of pilot projects. As the Report explains, some of the pilots flowed from scenarios closely analogous to the criminal context—where physical liberty was at stake—while others "involved the potential loss of basic human needs due to a dramatic power

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[65] Engler 2010, *supra*, note 58 at 122.

[66] *Ibid*. referencing Russell Engler, "Ethics in Transition: Unrepresented Litigants and the Changing Judicial Role" (2008) 22 Notre Dame J.L., Ethics & Public Policy 367.

[67] *Ibid*. referencing at footnote 153: *e.g.*, Telephone Interview with Bonnie Rose Hough, Judicial Council of California, Administrative Office of the Courts, San Francisco (June 12, 2006). In identifying the scenarios in which referral to an attorney might be most important, Hough has identified the following triggers: the complexity of the legal issues, language barriers, characteristics of the litigant, and characteristics of the judge.

[68] *Ibid*. at 115, referencing *Connecting Self-Representation, supra*, note 58.

[69] *Ibid*. at 125.

[70] *Ibid*. at 122, referring to the work of the Boston Bar Association Task Force on Expanding the Civil Right to Counsel, *Gideon's New Trumpet: Expanding the Civil Right to Counsel in Massachusetts* (September 2008) [BBA Task Force Report].

[71] BBA Task Force Report, *ibid.* at 2.

imbalance."[72] This research has identified features of legal matters and proceedings that will make counsel necessary:

- Complications in applicable law (multiple sources of law, multiple doctrines, evidence) create a greater need for representation;
- Parts of the adjudicatory system that are more traditionally adversarial and where the volume of cases preclude much personal judicial intervention in the hearing;
- Cases that have a higher need for pre-hearing factual development (e.g. more preparatory work is required).[73]

A recent California study carried out an in-depth evaluation of unbundled legal services in housing-related cases. As lead researcher Jessica Steinberg points out, the move to limited scope representation is based on the untested assumption that "unbundling *actually helps poor litigants* and is worth the reform of centuries-old notions about the role a lawyer should—and must—play in advancing a client's interests."[74] The California study was designed to test this proposition.

The study tracks outcomes for nearly 100 tenants facing eviction in a single California trial court. All received unbundled help drafting a responsive pleading ("ghostwriting"). Half also received one-time assistance negotiating with their landlords at pre-trial settlement conferences. Case results achieved by the tenants who received unbundled legal aid are compared to those obtained by two other groups: more than 300 tenants who received no legal assistance at all; and 20 tenants who received full representation through Stanford's Community Law Clinic. Steinberg notes that her study "is the first published experimental study to evaluate comprehensive outcomes from tenants who receive unbundled legal services and to make comparisons to both a control group receiving no legal assistance and a secondary treatment group receiving full representation."[75]

The outcomes assessed in this study were both procedural and substantive in nature. The findings indicate that the San Mateo Legal Aid's unbundled legal services program was successful in furthering procedural justice, but its impact on substantive case outcomes was limited. The study's overall conclusion was:

> While the unbundled aid provided did afford initial access to the justice system for low-income litigants, both by preventing default judgment and helping the unrepresented formulate valid defenses, the findings of this study suggest that

[72] *Ibid*. at 7.

[73] D. James Greiner and Cassandra Wolos Pattanayak, "Randomized Evaluation in Legal Assistance: What Difference Does Representation (Offer and Actual Use) Make?" (Draft of 29 July 2011) Electronic copy available at: www.ssrn.com/abstract=1708664. See extended discussion at 23-37.

[74] Jessica Steinberg, "In Pursuit of Justice? Case Outcomes and the Delivery of Unbundled Legal Services" (2011) 18 Geo. J. Poverty Law & Pol'y 453 at 455.

[75] *Ibid*. at 474.

> unbundling did not secure more actual relief for its client population than unassisted *pro se* tenants in the same jurisdiction achieved without ever consulting a lawyer. These findings support a hypothesis that the unbundled services model might not provide benefit to all assisted clients in all circumstances, as has been presumed, and they illuminate the need for rigorous evaluation of the model, in its various forms and in numerous contexts, if we aim to understand where--if at all--rendering less than the "full bundle" of assistance can maximize favorable outcomes for indigent litigants.[76]

Steinberg concludes that "the study cannot provide conclusive data. Yet, the findings challenge long-held assumptions about the utility of unbundled legal services. Thus, the study provides a valuable jumping off point for further public discussion of the unbundled model and future study of its impact."[77]

Steinberg's study leaves open the possibility that different types of unbundling, or unbundled services directed at different types of legal problems, could prove more effective in bolstering access to justice. Representation may be particularly important in eviction cases, which are described as "fast-paced and procedurally complex" requiring "fact finding, knowledge of evidentiary rules, preparation of witnesses, the ability to propound and respond to discovery, and skill at preparing specialized motions, all at breakneck speed."[78]

This brief overview of the US empirical research demonstrates the importance of looking beyond categories of underlying interests and legal matters to other facets of the situation (capacity of the individual, complexity of the law and procedures) to build a rational policy basis for determining national standards governing when publicly-funded counsel should be available.

D. Australian Commonwealth Approach

The landmark 1994 report of the Access to Justice Advisory Committee concluded that the "Commonwealth Government has not been sufficiently energetic and innovative in legal aid policy:"[79]

> While recognising the substantial financial contribution made by the Commonwealth to legal aid, the Access to Justice Advisory Committee identified a systemic weakness in the administration of legal aid in Australia. The Advisory Committee stated that there had been a lack of strategic direction at the national level that has resulted in inefficiencies and unequal access to legal aid. Notwithstanding that it is the major funder of legal aid, the Commonwealth has not

[76] *Ibid*. at 457.

[77] *Ibid*. at 474-475.

[78] *Ibid*. at 503.

[79] Access to Justice Advisory Committee, *Access to justice: an action plan* (Canberra: Australia Gov't Public Service, 1994).

> pursued an active leadership role and has not had an involvement in legal aid policy and direction commensurate with its funding contribution. While the Commonwealth is entitled, under the Commonwealth/State funding agreements for legal aid, to set parameters in relation to programs and budgets, it has not done so to the extent that it could to direct priorities for legal aid and specify national standards.
>
> The Access to Justice Advisory Committee considered that the Commonwealth's role should not be limited to providing funds, but that it should also take steps to see that legal assistance throughout Australia is provided efficiently and effectively and should promote national equity in the provision of legal aid.[80]

The Australian Government responded to this challenge and began to pursue a more active role in legal aid at the national level based on two commitments:

- Promoting national equity of services so that people are not disadvantaged in gaining access to legal services according to where they live.
- Ensuring that those who suffer special disadvantages due to language barriers, social dislocation, sex, race, disability or geographic location, are able to access the services provided by legal aid commissions.[81]

Eventually, this national commitment resulted in the four-year *National Partnership Agreement on Legal Assistance Services* (NPA) between the Commonwealth and all of the states and territories, signed in 2010. The NPA sets out the shared objectives, outcomes, and outputs of Commonwealth, state and territory governments for a suite of Commonwealth legal assistance services.

The NPA is designed to facilitate reform in the legal assistance sector and provide access to justice for disadvantaged Australians through the delivery of legal assistance services. It will

> …improve the targeting of services for disadvantaged Australians and the wider community, realize opportunities for using services more effectively and efficiently between service providers and progress national reform of issues that affect legal assistance services."[82]

The objective of the NPA is:

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[80] Australia Attorney-General's Department, *The Justice Statement (Response to the Access to Justice Advisory Committee Report)* – Chapter 6 Legal Aid - www.austlii.edu.au/austlii/articles/scm/jchap6.html

[81] *Ibid*.

[82] www.federalfinancialrelations.gov.au/content/national_partnership_agreements/Other/Legal_Assistance_Services_NP.pdf See, section 4.

> A national system of legal assistance that is integrated, efficient, cost-effective, and focused on providing services for disadvantaged Australians in accordance with access to justice principles of accessibility, appropriateness, equity, efficiency, and effectiveness."[83]

The NPA contains a set of specific outcomes:

> The Agreement will contribute to the following reforms across the legal assistance sector and to successful outcomes to be achieved by legal aid commissions providing efficient and cost-effective legal aid services for disadvantaged Australians in accordance with Commonwealth legal aid service priorities:
>
> a) Earlier resolution of legal problems for disadvantaged Australians that, when appropriate, avoid the need for litigation
>
> b) More appropriate targeting of legal assistance services to people who experience or are at the risk of experiencing social exclusion
>
> c) Increased collaboration and cooperation between legal assistance providers themselves and with other service providers to ensure client receive "joined up" service provision to address legal and other problems, and
>
> d) Strategic national response to critical challenges and pressures affecting the legal assistance sector.[84]

The objectives and outcomes of the NPA will be achieved through a series of specific outputs:

> a) Legal assistance providers increasing the delivery of preventative, early intervention and dispute resolution services
>
> b) Comprehensive legal information services and seamless referral for preventative and early intervention legal assistance services within each State and Territory
>
> c) Delivery by State and Territory legal aid commissions efficient and cost-effective legal aid services in accordance with Schedules A and B, consistent with the access to justice principles of accessibility, appropriateness, equity, efficiency, and effectiveness, including:
>
> i. Preventative legal services such as community legal education, legal information and referral
>
> ii. Early intervention legal services such as advice, minor assistance, advocacy other than advocacy provided under a general grant of legal aid

[83] *Ibid.* section 15.

[84] *Ibid*. section 16.

iii. Dispute resolution services, duty lawyer services, litigation services, and post resolution support services.[85]

Schedule A to the NPA sets out the "Commonwealth Legal Aid Service Priorities". First there are "general priorities" to be applied to each priority. These general priorities are:

- consideration to what other services (legal and non-legal) may be relevant to a client's need
- focus on resolution rather than litigation
- provision of all preventative and early intervention legal education, information, advice, assistance, and advocacy services are considered a Commonwealth legal aid service priority regardless of whether the matter type comes within Commonwealth or State/Territory Law.[86]

The substantive law priorities relate specifically to the "grant of legal aid", meaning right to legal representation, in family law, criminal law and civil law.

Family law priorities involve the grant of legal aid being provided to assist:

- children, including the appointment of a court appointed independent children's lawyer
- people who have experienced, are experiencing, or are at risk of experiencing family violence, and
- family members to resolve complex issues relating to the living arrangements, relationships and financial support of their children.

Criminal law priorities involve the grant of legal aid to children, and a person who if convicted is likely to receive a sentence involving a period of imprisonment.

Commonwealth civil law priorities that involve a grant of legal aid being provided for:

a) assistance to veterans under the War Veterans Legal Aid Scheme

b) matters relating to social security and other Commonwealth benefits

c) migration matters where the assistance is not available from services funded by the Department of Immigration and Citizenship

d) Commonwealth employment, equal opportunity and discrimination cases

e) Commonwealth consumer law matters

f) Matters arising under the *Proceeds of Crime Act, 2002*

[85] *Ibid.*

[86] *Ibid.*

g) Proceedings under s.19 or 21 of the *Extradition Act*

In addition to these subject matter priorities, priorities can relate to the "special circumstance of the applicant":

> Cases requiring a grant of legal aid involving special circumstances such as a language or literacy problem, intellectual, psychiatric or physical disability, a person's remote location making it difficult to obtain legal assistance or where the person would otherwise be at risk of social exclusion.
>
> Cases requiring a grant of legal aid where the applicant is a child or the applicant is appointed under the *Crime Act, 1914*, to question a child complainant or witness, should be considered a priority.

Schedule B to the NPA sets out "Principles for Assessing Eligibility for A Grant of Legal Aid". The following key principles apply to the means test:

- Persons receiving the maximum rate of income support payment or benefit as their total income satisfy the means test.
- For others – "the person's income will be determined by making deductions from their total income in relation to objectively referenced costs of housing and providing support to dependents and measured against a nationally standardized income threshold."
- Those who do not initially satisfy the means test may be granted legal aid on a contributory basis based on a sliding scale.
- A person may hold some assets and still be eligible for a grant of legal aid. An assets test component will include allowable exemptions such as the equity in the applicant's principal place of residence, equity in a used motor vehicle, and household furniture that are based on nationally standardized asset thresholds.
- If a person exceeds the asset threshold, may still be eligible in limited circumstances if they are unable to borrow against their assets.[87]

Finally, Schedule C to the NPA contains the new funding model. As part of the NPA, the Commonwealth Government made substantial additional funds available to legal aid providers in the states and territories.

Along with this historic partnership agreement, the Australian Government established the National Legal Assistance Advisory Body (NLAAB) with a mandate "to advise the Commonwealth Attorney-General on issues affecting the legal assistance system consistent with the Australian

[87] *Ibid.*

Government's Access to Justice Framework and broader agendas for social inclusion and closing the gap on Indigenous disadvantage."[88]

The NPA established a form of national standards or national benchmarks for the provision of legal aid in Australia. The extensive reporting provisions will allow the governments to monitor the impact of the agreement and its ability to meet the objectives, outcomes and outputs. A thorough evaluation of the NPA is underway and is scheduled to be completed before the expiry of the NPA in 2014, so the results can inform the negotiation of the successor agreement.

National Legal Aid (NLA), an umbrella organization of legal aid providers across Australia, remains concerned that some members of disadvantaged communities continue to miss out under the NPA.[89] Concerns include the operation of the means and merits tests, which determine who will get legal aid and for what cases, as well as cases that fall into the gap between commonwealth and state priorities for legal aid provision.

NLA proposed a new paradigm for legal aid in 2008. In the paper, "A New National Policy for Legal Aid in Australia", NLA proposed that the Commonwealth should adopt a new, simple approach to legal aid based on prioritized areas of need. The approach would address priority areas of disadvantage, rather than depending on whether the law was enacted by a Commonwealth or state parliament. The policy proposed in the NLA paper identified six priority areas of need, which, it suggested, would become Commonwealth legal aid priorities:

- Supporting Australian families and protecting vulnerable family members. This would, for example, allow for a more seamless provision of assistance when family problems result in cases in both the Commonwealth and State courts.
- Supporting Australians at risk of social exclusion due to poverty. This priority would focus on the restoration of a civil law legal assistance program.
- Supporting Indigenous Australians at risk of social exclusion with a priority on the legal representation of Indigenous Australians in any matters.
- Supporting Australians at risk of social exclusion due to special circumstances including young people, women, people in rural, regional and remote areas, people with disabilities and older people.
- Supporting a fair criminal justice system. This priority would ensure that the extraordinary powers of Australia's policing and investigative authorities are used strictly according to law, ensuring that miscarriages of justice do not occur.

[88] National Legal Aid Advisory Board, *Terms of Reference*. www.ag.gov.au/LegalSystem/Legalaidprograms/Pages/NLAAB.aspx

[89] Hamish Gilmore, "A New National Policy for Legal Aid: who misses out?" (Unpublished paper presented to the National Access to Justice Conference).

- Supporting human rights and equal opportunity. This priority underpins our democratic system by protecting all the basic human rights and freedoms recognized by Australian law not covered by other priorities such as freedom from discrimination on grounds of race or religion.

The NLA is working within the framework for evaluation and renewal of the NPA to address the issues they have identified and to improve the agreement going forward.

E. Eligibility

The reference point for eligibility for free legal aid services is general considered basic subsistence levels. A 2002 study commissioned by the Department of Justice Canada concluded:

> The financial eligibility guidelines in use in all legal aid plans fall below low income levels as measured by the Statistics Canada Low Income Cut-Off (LICO). The extent to which the financial eligibility guidelines fall below low income levels varies considerably from one jurisdiction to the next. Depending on the jurisdiction, the percentage of poor adults aged 18 to 35 who would qualify for legal aid varies between 21% and 88%. Financial eligibility guidelines are income by family size grids, and these percentages would vary slightly from one family size category to the next.[90]

Thus, one could say that "legal aid eligibility guidelines are consistently below low income levels".[91] Some legal aid plans have client contribution programs that provide legal aid on a contributory basis (partial or full repayment) to the working poor.

But, the reality is that whatever the test used, it must enable Commissions to work within their budgets, as they are currently funded. Most initiatives dedicated to reforming means assessment tests focus on ensuring that the tests are simple, fair, and can be administered efficiently.[92]

What is a principled basis for national eligibility standards? Options include "subsistence (welfare) levels", "low-income", and "disadvantaged." One priority is to set the standard in relation to a measurable indicator. For example, the Barreau du Quebec has initiated a campaign to raise eligibility rates to make them consistent with the income of a person working full time for minimum wage.[93] Doust recommended full legal aid coverage for people living in poverty

[90] Spyridoula Tsoukalas and Paul Roberts, Canadian Council on Social Development, *Legal Aid Eligibility and Coverage in Canada* (Ottawa: Department of Justice Canada, Legal Aid Research Series, 2002). Note: this study focused on criminal legal aid.

[91] *Ibid*.

[92] See for example: Alexy Buck and Graham Stark, *Means Assessment: Options for Change,* Legal Services Research Centre Research Paper 8 (February 2001).

[93] Presentation by Batonnier du Quebec, Me. Nicolas Plourde, Pro Bono Conference, Montreal, QC, November 2012.

according to an accepted measure of poverty and that legal aid should be available to the working poor, defined as those earning up to 200 percent of the poverty rate through a sliding scale contribution system. NLA has stated that the underlying philosophy is that eligibility should be determined having regard to an applicant's ability to pay – not a "cut off point". National standards would also have to take into account the flexibility to vary rates depending on local circumstances, regional or economic factors.

In addition, consideration should be given to the legal aid needs of specific classes of applicants. For example, under the Australian National Partnership Agreement, discussed above, legal aid can be granted in cases involving:

> Special circumstances such as a language or literacy problem, intellectual, psychiatric or physical disability, a person's remote location making it difficult to obtain legal assistance or where the person would otherwise be at risk of social exclusion.[94]

Along similar lines, the *CBA Charter* provides:

> 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.[95]

Another important policy issue is whether the eligibility rate should be the same for legal representation and other forms of legal help. Michael Trebilcock has made a strong case for making some legal aid services available to all, in part as a mechanism to build middle class support for legal aid.[96] Doust agreed that basic legal aid services such as legal information and limited legal advice should be available to all residents of British Columbia, but only to the extent that the legal needs of the poor and working poor were fully met on a priority basis.[97]

F. Coverage

The concept of legal aid coverage used to be synonymous with a right to legal representation. There is growing recognition that legal aid plans provide a spectrum of services. However, the greatest challenge remains deciding which situations require counsel to be provided. The coverage issue therefore overlaps with the third rationing principle: limits to the type and quantity of legal aid services provided for a client respecting a particular legal problem or matter. We use the term "quality" for this latter category of standard while recognizing its imprecise nature.

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[94] NPA, Schedule A.

[95] *Supra*, note 14 at s.19.

[96] Michael Trebilcock, *Report of the Legal Aid Review 2008* (Report prepared for ON AG Chris Bentley) (Toronto: ON AG, 2008).

[97] *Supra*, note 8.

The approaches to defining standards related to coverage remain focused on identifying the types of legal matters in which fundamental interests are engaged. The traditional categories have been reinvigorated to some extent through empirical research on legal needs, empirical studies on the impact of legal representation and more limited scope services. Nevertheless, the types of matters to be covered by legal aid are consistent across the different approaches in this paper. The Doust report called for this type of merging between the traditional legal categories approach with an approach based on addressing the needs of the most disadvantaged clients, who are likely to have a mix of legal and non-legal problems.

G. Quality of Legal Aid Services

The term "legal services" incorporates a broad range of assistance on legal matters. At one end of the spectrum are the most comprehensive models of assistance, exemplified by full representation by a lawyer or even expanded to include a holistic approach in which individuals can access integrated assistance with both the legal and non-legal dimensions of their problems. At the other end of the spectrum are the least comprehensive models, which include various methods of making legal information and materials available to the public. While there is a tendency to conflate legal representation with representation at a hearing, it is important to begin from a position of recognizing what full legal service is about:

> Full representation might involve a combination of most, if not all, of the following activities: information gathering; legal and other research and analysis; advice and counseling; commencing or defending proceedings; negotiations and mediation; interim proceedings; trials and hearings; law reform and systemic activities; and referrals. Thus legal services involve complex and continuous obligations to clients and we ought to be wary of pressure to isolate elements of these services for the purpose of limited representation models.[98]

Statistically speaking, most problems with a legal component are resolved without assistance from a lawyer, tribunal or court. However, disputes requiring legal assistance or judicial or quasi-judicial attention are often the most complex and have the most severe consequences if left unresolved. It is therefore appropriate to direct attention and public resources to this category of legal problems.

Issues of fairness extend not only to who is eligible for legal aid and for which issues, but also to the quality of services provided to them. As colourfully put by one commentator:

> Real steak, or something approximating it, is served to those who can make the matching investments required for successful legal action; most others must content themselves with some combination of real hamburger and symbolic sizzle.[99]

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[98] *Middle Income Access to Civil Justice Initiatives: Background Paper* (unpublished, 2011) at 28-29 [University of Toronto Report].

[99] Galanter, *supra*, note 12 at 199.

The concept of "quality" standards for legal aid is a broad one, extending to the type and quantity of legal assistance services made available to a client. Legal aid plans often have to ration the amount of access to a service provider, be it duty counsel or representation services. In some cases, this places lawyers in an untenable position because they are unable to prepare the case to the level required by their commitment to professionalism due to restrictions on time.[100]

The Australian NPA addresses the issue of quality from a systemic perspective and bases its national standards on a range of policy outcomes and outputs, set out in full above, including an emphasis on early intervention and the appropriate application of a variety of dispute resolution services.

The need for legal representation is determined by several factors: the capacities of the individual; the issue at stake; the complexity of the law and procedures; and the nature of the forum among others. In his work on developing a context-based right to counsel, Engler describes this dynamic:

> First, the court system's key players, including judges, court-connected mediators, and clerks, should be required to assist unrepresented litigants as necessary to ensure that these litigants do not forfeit rights due to the absence of counsel. Second, programs assisting—short of representation by a lawyer in court—unrepresented litigants should supplement the expanded roles of the court system's key players. A rigorous evaluation of those assistance programs to identify which are successful in stemming the forfeiture of rights in particular contexts and which simply relieve pressure on the courts without altering case outcomes must accompany this second step. Third, a civil right to counsel should attach where the expanded roles of the key players and assistance programs cannot stem the forfeiture of rights of unrepresented litigants.[101]

The ABA *Basic Principles of a Right Counsel in Civil Legal Proceedings* explicitly address quality standards including:

- Ensuring that counsel comply with all applicable rules of professional responsibility;
- Establishing caseload limits to ensure the provision of competent, ethical, and high quality representation;
- Ensuring that counsel has the relevant experience and ability, receives appropriate training, is required to attend continuing legal education, and is required to fulfill the basic duties appropriate for each type of assigned case. Counsel's performance is evaluated systematically for quality, effectiveness and efficiency according to nationally and locally adopted standards.

[100] See for example, LSS Tariff Lawyer Satisfaction Survey, (May 2010) at 8.

[101] Barendrecht, Kamminga and Verdonschot, *supra*, note 45.

The ABA has developed extensive standards for the provision of legal aid in both the civil and criminal contexts.[102]

5. Issues and Questions for Discussion

This discussion paper has introduced the history and concept of national standards for publicly-funded legal services in Canada. It suggests that the development of national standards could assist in promoting national equality of services across Canada and better ensure that legal aid needs are effectively met. Four main approaches are set out and discussed with a view to enriching the conversation on whether national legal aid standards should be part of our strategic framework for increasing equal access to justice, and if so in what form.

Discussion Questions

To assist the CBA Access to Justice Committee in developing recommendations in this area, we are seeking your feedback on the following questions:

1. Do you support the development of national standards for publicly-funded legal services? Why or why not?
2. What are the challenges and barriers to developing national standards? How can they be overcome?
3. What in your view should be included in national standards?
4. What should national standards include on eligibility for legal aid?
5. What should national standards include on coverage?
6. What should national standards include on type, quantity and quality of legal aid services?
7. What needs to be done to develop and agree upon national standards?
8. What strategies could or should be adopted to engage the civil justice sector, other relevant government agencies, users of the civil justice system, and the public?
9. What other issues should be considered in developing national standards for legal aid?

Please send your written responses by May 15, 2013 to the attention of Project Director, Gaylene Schellenberg, at CBA National Office (gaylenes@cba.org; 1 800 267 8860 ext 139).

[102] American Bar Association, *ABA Standards for Criminal Justice: Providing Defense Services*, 3rd ed. (1992): www.abanet.org/crimjust/standards/defsvcs_toc.html American Bar Association, *ABA Standards for the Provision of Civil Legal Aid* (2006): www.abanet.org/legalservices/sclaid/downloads/civillegalaidstds2006.pdf

6. Appendix

RESOLUTION 93 -11- A CHARTER OF PUBLIC LEGAL SERVICES

Moved by the Legal Aid Liaison Committee

WHEREAS the legal aid system in Canada is threatened due to serious underfunding by governments;

WHEREAS the federal, provincial and territorial governments have a responsibility to fund essential public legal services referred to in Appendix A in order to ensure access to justice;

BE IT RESOLVED THAT The Canadian Bar Association adopt the "Charter of Public Legal Services" (Appendix A) and urge the federal, provincial and territorial governments to fulfil their responsibilities under the Charter of Public Legal Services including the funding of essential public legal services referred to in Appendix A 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.

CARRIED

APPENDIX "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 therefrom 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.

II. 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.