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legal aid plans of canada  
régimes d'aide juridique du Canada

# What Do We Want?

## Canada's Future Legal Aid System

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### *Backgrounder on* National Legal Aid Benchmarks

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Prepared by the  
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Working Group on National Legal Aid Benchmarks

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## Introduction

In spring 2015, a Working Group of the Canadian Bar Association's Access to Justice Committee (CBA Committee) and the Association of Legal Aid Plans of Canada (ALAP) initiated the National Legal Aid Benchmarks project. The project is intended to start a different type of conversation and encourage new ways of thinking about legal aid reform, to build support for and encourage substantial change.

The project has its genesis in the CBA's *Reaching Equal Justice* report, which sets 31 targets for achieving equal access to justice by 2030.<sup>1</sup> Several of the targets address the need for legal aid renewal and one specifically calls for national benchmarks for legal aid coverage, eligibility and quality of legal services to be in place by 2020, with a commitment and plan for their progressive realization across Canada. Rather than a minimum threshold, national benchmarks should be aspirational and provide targets for progressive implementation. They can supply a principled basis for legal aid funding decisions, be focused and concrete, while still leaving scope for local priority setting and innovation.

**To encourage feedback about the idea of national legal aid benchmarks and launch the new conversation about legal aid reform, the Working Group offers this detailed *Backgrounder* as well as a shorter *Consultation Paper*. *Questions for Discussion* are included in both documents.** This consultation process is only a first step. The Working Group hopes it will foster a dialogue and encourage action to develop, and eventually adopt and implement national legal aid benchmarks in Canada.

For now, feedback is sought on the *Questions for Discussion* and consultation materials generally, as well as on the overarching question of '*what do we want Canada's future legal aid system to look like?*' This initiative provides us, the justice community, with an opportunity to begin a collaborative process to determine what we want from Canada's future legal aid system. *Note that the Working Group uses "we" to mean the 'justice community', and defines that community in broad and inclusive terms, encompassing those working in the sector and those seeking assistance from it, on equal footing.*

**All feedback is requested by July 17, 2015.**

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<sup>1</sup> It is also grounded in earlier CBA legal aid advocacy work including the 1993 *Charter of Public Legal Services* and the Access to Justice Committee's discussion paper, [Toward National Standards for Publicly Funded Legal Services](#) (with the *Charter* as an appendix) (Ottawa: CBA, 2013) ('Building Block' discussion paper for CBA *Envisioning Equal Justice* research and consultation phase).

Part I of this *Backgrounder* makes a case for national legal aid benchmarks by investigating approaches to benchmarking in other sectors and considering the value of this type of exercise. It provides examples of benchmarks, including the Canadian justice sector as a whole and then within the legal aid sector specifically, both at home and abroad. These concrete examples assist in understanding the diversity of benchmarks and their potential value. Part I concludes with a discussion of how benchmarks could assist in legal aid renewal in Canada.

Part II canvasses options for national legal aid benchmarks. What should guide Canada's legal aid system? What should it be targeted at? How should it be delivered? To aid in responding to these questions, the *Backgrounder* provides a brief overview of the current Canadian situation, a summary of evidence-informed best practices and some options for related benchmarks.

Note that benchmark options provided are only to illustrate examples for discussion. Not all of these examples of benchmarks are compatible. *The examples of benchmarks do not reflect a Committee consensus or the views of either the CBA Committee or ALAP. They are presented in concrete form to stimulate, not foreclose debate.*

The Working Group's goal is to see the eventual adoption of national legal aid benchmarks by responsible government entities, perhaps partially in the form of federal legislation or a national federal/provincial/territorial agreement.

Based on feedback received, the Working Group will prepare draft national legal aid benchmarks for publication in fall 2015. It will then begin a range of consultation activities, with the continued objectives of refining the substantive content in the draft benchmarks and aiding legal aid renewal by building public and political support for the benchmarks.

The CBA's *Reaching Equal Justice* report (2013) suggests that an important milestone in meeting the CBA's legal aid targets would be for federal, provincial and territorial governments to establish a national working group with representation from all stakeholders, including recipients of legal aid, to develop national benchmarks. Developing national benchmarks provides the opportunity to step back from the current system, and consider the important basic question posed above – *'what do we want Canada's future legal aid system to look like?'* Responses to that question can inform benchmarks that integrate empirical knowledge and best practices for delivering legal aid services. In many fields, benchmarks have been used to foster a process of continuous learning and improvement through a framework of best practice standards that both express a common goal and provide a way to measure specific achievements and overall progress.

Measuring is key to reinventing justice. Justice and rule of law indicators are useful tools to evaluate performance, draw attention to issues, establish benchmarks, monitor progress, and evaluate the impact of interventions or reforms. Indicators, together with other monitoring and evaluation mechanisms, are essential to providing feedback to policy makers and reformers. When made public, these indicators may contribute to the greater transparency and public accountability of the justice system.<sup>2</sup>

The Working Group believes that the overall purpose of national legal aid benchmarks is to contribute to a positive dialogue about legal aid as a critical human services program. Our hope is that this dialogue will then lead to the revitalization of legal aid in Canada, through a long-term commitment to innovation linked to evidence-based practices, and a substantial reinvestment to ensure success.

In summary, the Working Group has four objectives for this project:

- to build awareness of the need for legal aid renewal,
- to generate discussion about the potential for national legal aid benchmarks to assist in this renewal,
- to build public and political support for national legal aid benchmarks, and
- to solicit feedback on the content of national legal aid benchmarks.

### Questions for Discussion:

#### General

1. Do you support the development of national legal aid benchmarks? Why or why not?
2. What criteria should there be for national legal aid benchmarks?
3. Do you agree with the Consultation Paper/*Backgrounder* about the major expected benefits of national legal aid benchmarks?
4. What in your view should be included in national benchmarks?

#### Guidance benchmarks

5. What benchmarks should be included to guide the national legal aid system? Do you have specific comments about the guidance options listed?

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<sup>2</sup> Yvon Dandurand and Alison MacPhail, [Using Indicators to Help Improve the Justice System \(Paper for Reinventing Justice\)](#) - Seventh National Criminal Justice Symposium in Montreal, January 24, 2015 at 1-2.

### **Coverage benchmarks**

6. What should national standards include on legal aid coverage? Do you have specific comments about the coverage options listed?

### **Eligibility benchmarks**

7. What should national benchmarks include on eligibility for legal aid? Do you have specific comments about the eligibility options listed?

### **Service Delivery benchmarks**

8. What should be included in national legal aid service delivery benchmarks? Do you have specific comments about the service delivery options listed?

### **System benchmarks**

9. What should be included in national legal aid system benchmarks? Do you have specific comments about the systems options listed?  
What did we forget?

### **What have we omitted? Other issues?**

10. What other issues should be considered in developing national standards for legal aid?

### **Process**

11. 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 on the issue of national legal aid benchmarks?

### **The Challenge**

Canada's legal aid system is the primary vehicle for providing publicly-funded legal assistance services. It was established by the federal, provincial and territorial governments in the early 1970s as an integral part of ensuring the justice system is accessible to all. It recognizes the important social, economic and health implications of unresolved legal problems and an unequal justice system. Along with other publicly funded 'human services', including health, education, employment insurance, and social assistance, legal aid is designed to ensure the welfare of individuals and the well-being of the community. The term 'human services' is replacing the more traditional concept of social services and recognizes that human needs are best met through an interdisciplinary approach focusing on prevention and remediation of problems.

Legal aid has always been the poor cousin compared to the other publicly funded human services, and has lost ground relative to them over the years. While it is difficult to make exact comparisons between countries because of variations in coverage and service delivery, Canada is one of the lower funding nations on a per capita basis.<sup>3</sup> The overall inability of the legal aid system to meet the legal needs of Canadian residents is well-documented.<sup>4</sup> In most of the country, the quantum and nature of services have been scaled back over time due to declining funding levels. An important exception is the recent injection of substantial additional provincial funding to Legal Aid Ontario and the Ontario community legal clinic system.<sup>5</sup>

In addition, legal aid services vary much more between provinces and territories than for other publicly funded human services. Individuals seeking legal assistance are seldom certain as to what publicly funded benefits they are entitled to access. None of the comparable services vary as much depending on where one lives or in what year one might apply for assistance.

The pressures on the Canadian legal aid system are not unique. A recent comparative investigation of nine European legal aid systems concluded:

All countries in this research are working on legal aid reform. Most changes are incremental and oriented on cost savings, not improving the quality of access to justice. Countries are introducing tighter eligibility criteria. A clear trend in reforms is to make litigants pay higher contributions. Except Scotland, the countries studied appear to have difficulties in formulating a broader access to justice strategy.<sup>6</sup>

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<sup>3</sup> Rough calculations were provided for illustrative purposes by Dr. Ab Currie, Senior Fellow at the Canadian Forum on Civil Justice. Canadian spending is well behind the UK (even with recent drastic cuts), Scotland and Ireland and about on par with Australia and New Zealand. The Australian Productivity Commission considered Australia to be a 'low' legal aid spending country and as noted below, recently recommended an injection of \$200 million AUD to the national legal aid scheme (Australian Government Productivity Commission, *Access to Justice Arrangements – Productivity Commission Inquiry Report*, volume 2 (Sydney: APC, No. 72, 2014) at 738 (Australian Productivity Commission Report or PCR).

<sup>4</sup> For example, CBA Access to Justice Committee, *Reaching Equal Justice* (Ottawa: CBA, 2013). See also, Dr. Melina Buckley, *Moving Forward on Legal Aid* (Ottawa: CBA, 2010); L. Doust, QC, *Foundation for Change* (Vancouver: BCLS, 2011); A. Brewin and K. Govender, *Rights Based Legal Aid: Rebuilding BC's Broken System* (Vancouver: CCPA and West Coast Leaf, 2010); National Action Committee on Access to Justice in Civil and Family Matters (NAC), *Roadmap for Change* (Toronto: CFCJ, 2013).

<sup>5</sup> The 2014 budget included an initial investment of \$95.7 million to increase the eligibility threshold by six per cent for the first three years of the plan. The first increase took place on Nov. 1, 2014. [Giving More Ontarians Access to Affordable Legal Services.](#)

<sup>6</sup> Maurits Barendrecht *et al.*, *Legal Aid in Europe: Nine Different Ways to Guarantee Access to Justice?* (Hague: HiiL, 2014).



In England and Wales, recent dramatic statutory changes<sup>7</sup> and funding reductions have led to vigorous political action and some successful legal challenges.<sup>8</sup> In 2014, two separate reviews of the Australian national legal aid system both concluded that the system was sound, but unable to meet demands without substantial additional funding.<sup>9</sup> These reports build on several earlier and thoughtful access to justice reports in that country.<sup>10</sup> In *Legal Assistance in Scotland: Fit for the 21st Century*, the Law Society of Scotland stated:

The current legal aid system is not working. It is not working for those who need legal advice. And it is not working for those providing legal advice. The time is right to rethink the system as a whole.<sup>11</sup>

Canadian legal aid plans are doing tremendous work with limited resources, but there is always room for improvement in the delivery of services and greater strategic coordination and systemic reform within the justice sector as a whole, including for legal aid provision. Public services must ensure value for money and any call for additional funding must be matched with assurance that public monies are being spent as efficiently and effectively as possible.

*Developing national benchmarks is one strategy for advancing the renewal of legal aid in Canada, by focusing first on what we want our legal aid system to accomplish. The secondary question is what steps, including securing additional dollars, must be taken to achieve benchmarks that set out what we want our legal aid system to accomplish.*

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<sup>7</sup> See: *Legal Aid, Sentencing and Punishment of Offenders Act 2012* and [Civil Legal Aid \(Remuneration\) \(Amendment\) \(No. 3\) Regulations 2014](#), SI 2014 No. 607.

<sup>8</sup> See, for example, judgments relating to the Lord Chancellor's guidance on the civil exceptional funding scheme (*Gudanaviciene and Ors v DLAC and Lord Chancellor*, [2014] EWCA Civ. 1622 and *Letts v Lord Chancellor*, [2015] EWHC 402 (Admin)); relating to the proposal to introduce a 'residence test' by secondary legislation, see *Public Law Project v Secretary of State for Justice*, [2014] EWHC 2365 (Admin); and on the issue of legal aid provision for judicial reviews, see *The Queen on the application of Ben Hoare Bell Solicitors, Deighton Pierce Glynn Solicitors, Mackintosh Law, Public Law Solicitors, Shelter Claimants and Lord Chancellor*, [2015] EWHC 523. The government's plans to cut legal aid for people accused of crimes have now been put on hold while the Court of Appeal considers a challenge from The Law Society, the Criminal Law Solicitors Association and the London Criminal Courts Solicitors Association.

<sup>9</sup> PCR, *supra* note 3 at 665-808; Allen Group, [Review of the National Partnership Agreement on Legal Assistance Services: Final Report](#) (Melbourne: Allen Group for the Australian Government Attorney-General's Department, June 2014).

<sup>10</sup> Access to Justice Taskforce, [A Strategic Framework for Access to Justice in the Federal Civil Justice System](#) (Sydney: Commonwealth of Australia, September 2009).

<sup>11</sup> Alistair Morris, "[Inside Track: Time has come to rethink legal aid](#)", *Herald Scotland* (24 January 2015). For full report see: [Legal Assistance in Scotland, Fit for the 21st Century](#).

Benchmarks are one mechanism to shift legal aid discourse from simply “more funding is required’ to ‘what can we do to improve the legal aid system?’”<sup>12</sup>

The deficiencies in the Canadian legal aid system are not new but this is an opportune time to rethink legal aid with a view to fundamental renewal. A recent report on potential directions for maximizing the federal contribution to criminal legal aid summaries timelines for this renewal process:

The deficiencies in the Canadian legal aid system are not new but this is an opportune time to rethink legal aid with a view to fundamental renewal.

- Momentum is building for justice system reform at both the federal and provincial/territorial levels, to address the lack of system coordination and to increase efficiencies.
- There is an increasing and significant focus on access to justice, at the federal level (e.g. Public Safety Canada’s economics of policing initiative) and nationally (e.g. Canadian Bar Association’s Reaching Equal Justice report and the work of the National Action Committee on Access to Justice in Civil and Family Matters). A common theme is improving access to justice through increased justice system efficiencies.
- Legal aid needs must be understood as part of a larger network of services (i.e. comprising a mix of approaches to assistance) available to Canadians and therefore has a limited and targeted role in providing access to justice (i.e. legal representation assistance when required).
- As innovations are explored, it is important to consider whether there is sufficient capacity and momentum in the current legal aid system to encourage innovation.<sup>13</sup>

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National legal aid benchmarks will not end the debate about the appropriate level of legal aid funding in Canada. They could though contribute to a policy framework for making funding decisions and reinvigorate the federal government’s contribution to both criminal and civil legal aid.

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<sup>12</sup> [Report of the Deputy Minister Advisory Panel on Criminal Legal Aid](#) (Ottawa: Justice Canada, 2014).

<sup>13</sup> *Ibid.*

## Part I – Making the Case for National Legal Aid Benchmarks

### What Do Benchmarks Offer?

Benchmarking supports evidence-informed decision-making and is foremost a method for continuous quality improvement. It is used widely in the corporate, regulatory, education, and health sectors. Approaches to and uses of benchmarking are highly diverse.<sup>14</sup> Benchmarking involves comparing performance between entities with comparisons carried out within a sector or cross sectors, at a national or international level. A report on benchmarks in the corporate sector says:

Benchmarking provides a rational method for setting performance goals and gaining market leadership and a broader, more accurate organizational management perspective. *Since it is based on what the best are doing, it takes the emotion out of arguments about the need to change.*<sup>15</sup> (emphasis added)

In some instances, benchmarking has become more narrowly defined to analyze process of success factors for producing higher levels of performance. In the healthcare sector, the main objective of benchmarking is “to better delineate those areas where policy efforts should be concentrated to improve healthcare system performance.”<sup>16</sup> The goal of benchmarking is also to learn from others, adapt, implement, and improve.

“Better is possible. It does not take genius. It takes diligence. It takes moral clarity. It takes ingenuity. And above all, it takes a willingness to try.”

— Atul Gawande, *Better: A Surgeon's Notes on Performance* (New Delhi: Metropolitan, 2007).

Benchmarking is directed at pursuing best practices, best outcomes and best ways to meet client/patient expectations. The benchmarking process can be competitive or collaborative and involves structured comparisons. It can contribute to increased productivity, greater standardization of service, and heightened quality control.

Benchmarks can be used both for internal improvement and for external monitoring. One Danish health benchmark program used a process midway between internal and external monitoring. It involved regular dialogue between the agency collecting the indicators and representatives of the service providing

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<sup>14</sup> Dr. Amina Ettorchi-Tardy, Dr. Marie Levif and Dr. Philippe Michel, “[Benchmarking: A Method for Continuous Quality Improvement in Health, Healthcare Policy](#),” (2012) 7:4 *Healthcare Policy* 101.

<sup>15</sup> Statements on Management Accounting, [Effective Benchmarking](#) (Montvale, NJ: Institute of Management Accountants, 1995).

<sup>16</sup> Suzanne Wait and Ellen Nolte, “[Benchmarking health systems: trends, conceptual issues and future perspectives](#)”, (2005) 12:5 *Benchmarking: An International Journal* at 436-448.

institutions, as well as structured dialogues with institutions whose results are atypical.<sup>17</sup>

**Key concepts in benchmarking:**

- Continuously compare efforts against those of industry leaders
- Seek collective methods of improvement
- Search for best practices to ensure superiority
- Find world-class examples and match or exceed them
- Build continuous improvement processes
- Create comprehensive and participative policy of continuous quality improvement (not time limited)
- Compare efforts with best-performers to learn about the latest work methods and practices in other organizations
- Compare efforts against others to set challenging but attainable goals and implement a realistic course of action to become and remain best in a reasonable time
- Identify applicable best practices to incorporate into a redesign effort
- Engage in systematic review of external reference points used to evaluate and redesign processes
- Identify practices to make efforts next best-in-class – not an exercise in imitation

Adapted from Amina Ettorchi-Tardy, Marie Levif and Philippe Michel, “Benchmarking: A Method for Continuous Quality Improvement in Health and Healthcare Policy”, *supra* note 14.

Benchmarking can encourage the best uses of limited resources because they encourage learning effective practices from others, sharing information, and asking and answering questions about how to improve.<sup>18</sup>

Still, it is important to recognize that the utility of benchmarks is finite. While they can be used to target, measure and direct practices, they can also pose threats to effectiveness depending on the focus and how they are measured: “If not appropriately targeted, benchmarks can reduce innovative approaches, stifle

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<sup>17</sup> J. Mainz, A.M. Hansen, T. Palshof and P.D. Bartels, “[National quality measurement using clinical indicators: the Danish National Indicator Project](#)”, (2009) 99(8) *Journal of Surgical Oncology* at 500-504.

<sup>18</sup> Center for Community College Student Engagement, “[Benchmarking and Benchmarks: Effective Practice with Entering Students](#)” (Austin: University of Texas at Austin, 2009) at 2.

debate, and lead to over compliance and red tape.”<sup>19</sup> For example, in the international aid context, benchmarks have resulted in some agencies seeking to invest only in activities that can most easily be measured (e.g. vaccinations), as opposed to programs that might drive more transformational change (e.g. women's leadership). To avoid these problems, benchmarks must focus on long-term program planning and evidence-based good practices.<sup>20</sup> Performance measures “may invite perverse and unintended consequences” but this problem can be alleviated by selecting and crafting the indicators to be measured.<sup>21</sup>

Further, benchmarks should not be considered a “report card” on a given service delivery or program. Various forces are at work in the justice system, many of them out the control of any single institution or organization. As Dandurand and MacPhail point out:

A more useful perspective is one where “justice indicators” are seen mainly as a way to monitor how the system is performing under changing circumstances, facing new challenges, and responding or not to our efforts to improve it. Indicators are really useful when they can measure change over time, with a reasonable degree of confidence...They are even more useful when they can be compared over time to changes observed through other key social indicators.<sup>22</sup>

### What Makes Benchmarks Effective?

The effectiveness of benchmarking depends on the process use to develop and implement them and the way they are framed. Effective benchmarks:

- provide clear definitions of what needs to be done, measurable in early evidence of change, short and long term outcomes
- leave little room for interpretation – everyone reading a given benchmark should have the same understanding
- outline evidence that is reasonable to collect

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<sup>19</sup> Australian Council for International Development, “[Benchmarks for an Effective and Accountable Australian Aid Program](#)” (2014) at 3.

<sup>20</sup> Andrew Natsios, “[The clash of counter-bureaucracy and development](#)”, Centre for Global Development Essay (July 2010).

<sup>21</sup> *Ibid.*

<sup>22</sup> Dandurand and MacPhail, *supra* note 2 at 11-12.

- are focused and aligned: “together benchmarks should represent a whole that is greater than the sum of the parts”
- should be SMART, meaning they are:

Specific and Strategic

Measurable

Action-oriented

Represent the ‘3 R’s’ (Rigorous, Realistic and Results-focused)

Timed<sup>23</sup>

Finally, a few strategic benchmarks are better than an overwhelming list.<sup>24</sup>

Coherence is also key: “Together, and over time, the benchmarks and related evidence should tell a clear, causal story about how transformation was accomplished.”<sup>25</sup>

Benchmarks are measured not against an average performance but to an objective standard of excellence. The focus should be squarely on the future:

Benchmarks are measured not against an average performance but to an objective standard of excellence. The focus should be squarely on the future.

Determining the current level of performance is less important than understanding the trend in that performance. Instead of aiming at today’s target, teams should project the benchmark into the future to understand what level of performance will be required and what enablers may help them attain that level.<sup>26</sup>

There are many different approaches to developing benchmarks, and “it can be hard to ‘get it right’ the first time. Often benchmarks are strengthened in an iterative process as stakeholders engage with the evidence and reflect on whether it is helping to show progress, or show where it is stuck.”<sup>27</sup>

It is important to identify key process enablers, that is, “those activities that facilitate or stimulate the key behavioral or process changes”.<sup>28</sup> Process enablers are not new methods of practices designed to meet the benchmarks, but “a set of

<sup>23</sup> See, Massachusetts Department of Primary and Secondary Education, *What makes a Goal “SMARTer”?* (2011) [Handout and related guidance created for the Educator Evaluation Framework](#).

<sup>24</sup> *Ibid.*

<sup>25</sup> *Ibid.*

<sup>26</sup> *Statements on Management Accounting, supra* note 15 at 29.

<sup>27</sup> *Supra* note 23.

<sup>28</sup> *Statements on Management Accounting, supra* note 15 at 31.

activities that enhance implementability.”<sup>29</sup> Conditions for successful benchmarking include:

- Careful preparation of the process
- Monitoring of the relevant indicators
- Staff involvement (not only management)
- Inter-organizational visits
- A culture that is receptive to transparent exchanges.<sup>30</sup>

Effective benchmarks need to be widely accepted, and this generally involves an initial process of justification to get buy-in.<sup>31</sup> The magnitude of the changes is likely to determine the extent of education and communication required. In the corporate sector, benchmarking projects involve a strong communications component with the following elements:

- the current internal performance and situation
- the benchmarking project objectives
- the team profile
- the benchmarking partners and the rationale for their selection
- basic findings and their causal factors
- the benchmark gaps between the current and desired state
- interim and long-term goals leading to the desired state and their implications
- comparison of costs associated with the present state and the desired state (savings), including the cost of change
- action plans, investments, schedules, and responsibilities, and
- feedback and monitoring systems.<sup>32</sup>

Monitoring implementation of benchmarks is generally done according to an agreed upon schedule. These predetermined “proof points” of progress offer “targets for improvement that become opportunities to celebrate accomplishments and/or to reflect on how practice can be improved.”<sup>33</sup> Benchmarks emphasize the process of

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<sup>29</sup> *Ibid.*

<sup>30</sup> *Supra* note 14.

<sup>31</sup> *Statements on Management Accounting*, *supra* note 15 at 32.

<sup>32</sup> *Ibid* at 32-33.

<sup>33</sup> *Supra* note 23.

continuous learning. This can be conceptualized as a series of steps; conduct self-assessment, establish strategic objectives and initiatives, set targets for improvement, implement the plan and monitor and report upon progress.<sup>34</sup> The monitoring process is also staged to measure early evidence of change, short and long term outcomes.<sup>35</sup> Early evidence of change benchmarks is a particularly important step in the learning/change process. This early evidence outlines changes in actions, discourse, beliefs, expectations and practice that suggest that the action steps are adding up to meaningful changes.<sup>36</sup>

## Benchmarks in Other Public Sectors

This section offers four examples to illustrate different approaches to benchmarks in the public sector.

### Essence of care program

The UK National Health Service's *Essence of Care* program is one of the most advanced examples of benchmarking in healthcare services.<sup>37</sup> Launched in 2001, the program aims to improve the quality of the fundamental components of nursing care:

It uses clinical best practice evidence to structure a patient-centred approach to care and to inform clinical governance, a generic term designating the managerial policy of making care teams directly responsible for improving clinical performance. Benchmarking, as described in *Essence of Care*, helps practitioners adopt a structured approach to sharing and comparing practices so that they can identify best practices and develop action plans.<sup>38</sup>

Benchmarks have been developed and updated over a decade and cover twelve specific topics (e.g. communication, safety, food and drink). They are used by front line staff in their day-to-day activities and by regulators to focus and improve quality of care.<sup>39</sup> They are seen as a versatile tool that can be used in many ways and at different levels, as:

- a quality assurance or benchmarking tool
- a reference document or checklist
- an audit tool – as a foundation and focus for audit data collection tools used to assess practice and care

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<sup>34</sup> *Ibid.*

<sup>35</sup> *Ibid.*

<sup>36</sup> *Ibid.*

<sup>37</sup> National Health Service, [Consolidated Essence of Care](#) (Leeds: Department of Health, 2010).

<sup>38</sup> *Supra* note 14 at 13.

<sup>39</sup> *Supra* note 37.



- a dissemination tool – to spread current good practice and care across organizations
- a root cause analysis tool – when examining incidents and complaints or addressing risks
- an education tool – to educate and train staff of all levels about people's and carers needs and preferences, and to highlight the areas where specific competencies are required to provide care
- a tool to provide evidence of compliance with registration criteria for the Care Quality Commission
- a tool to provide evidence of achievement and best practice and care– for example, to the regulator or Health Service Ombudsman, for the National Cleaning Standards, when using the National Service Frameworks, or in commissioning assurance.<sup>40</sup>

The benchmarks can be used by individuals, teams, directorates, and within and across organizations of all sizes. They can also be used locally or strategically, or ideally both, and are designed to have 'a universal application'.<sup>41</sup>

The *Essence of Care* benchmarks are a useful example for the Working Group's project. The agreed outcome is: *People will be supported to make healthier choices for themselves and others* with seven factors facilitating the benchmarks:<sup>42</sup>

Factor	Best Practice
1. Empowerment	People, carers and communities are enabled to find ways to maintain or improve their health and well-being via every appropriate contact
2. Assessment	People, carers and communities are enabled to identify their health and well-being promotion needs
3. Engagement	People, carers and communities are involved in planning and actions concerning promotion of health and well-being

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<sup>40</sup> *Ibid.*

<sup>41</sup> *Ibid* at 7.

<sup>42</sup> National Health Service, [Benchmarks for Promoting Health and Well Being](#) (2010), *supra* note 37.

<b>Factor</b>	<b>Best Practice</b>
4. Partnership	Promotion of health and well-being is undertaken in partnership with others using a variety of expertise and experiences
5. Access	People, carers and communities have access to information, services and support that meets their health and well-being needs and circumstances
6. Environment	People, carers, communities and agencies influence and create environments that promote people's health and well-being
7. Outcomes and promotion of health and well-being	People, carers and communities have an improved, sustainable and good quality of health and well-being

The benchmark also identifies poor practice, best practices, and indicators of best practices for each factor. For empowerment (factor 1), poor practice is equated with “No assessment of health or well-being promotion needs takes place”, whereas the best practice is “People, carers and communities are enabled to identify their health and well-being promotion needs”.

Indicators supporting best practices for promoting health and well-being are related to empowerment:

- a. general indicators are considered in relation to this factor
- b. people, careers and communities are supported to gain the knowledge, skills and opportunities to maintain and improve their own, and others', health
- c. a person-focused approach exists
- d. advocacy services are accessible
- e. a comprehensive directory of local health-promoting services for local and national, health and social, statutory and voluntary organisations is available
- f. people are guided to information and services
- g. people's decisions are based on informed choices and opportunities
- h. opportunities to participate in relevant programmes, for example, the Expert Patients Programme or 'stop smoking' programme, are available
- i. directed and self-referral to health promoting services can be demonstrated
- j. every opportunity is taken to identify ways to provide equal access to promotion of health and well-being
- k. a range of approaches are used to make the most of every contact
- l. the culture of workplaces promotes the health and well-being of the workforce

- m. systems are in place to measure whether opportunities are taken by people, carers, staff, communities, and statutory and voluntary organisations to promote health and well-being, for example, by auditing of the use of services
- n. add your local indicators here.<sup>43</sup>

### Canada Health Act/CIHI Performance Measurement Framework

Canada's national publicly funded health insurance program is designed to ensure that all residents have reasonable access to medically necessary hospital and physician services on a prepaid basis. Instead of having a single national plan, there is a national program composed of 13 interlocking provincial and territorial health insurance plans, all sharing certain common features and basic standards of coverage.<sup>44</sup>

The *Canada Health Act* (CHA) sets out the primary policy objective, "to protect, promote and restore the physical and mental well-being of residents of Canada and to facilitate reasonable access to health services without financial or other barriers."<sup>45</sup> The CHA is intended to ensure that eligible residents of Canada have reasonable access to insured health services on a prepaid basis, without direct charges at the point of service for such services. It establishes criteria and conditions related to insured health services and extended health care services that provinces and territories must fulfill to receive the full federal cash contribution under the *Canada Health Transfer* (CHT). National principles govern the health insurance system: public administration, comprehensiveness, universality, portability and accessibility, reflecting "the underlying Canadian values of equality and solidarity."<sup>46</sup>

The Federal Minister of Health must report to Parliament annually on the administration and operation of the CHA.<sup>47</sup> The public report provides a comprehensive description of insured health services in each of the provinces and territories, but not on the status of Canada's health care system as a whole.<sup>48</sup>

Many Canadian organizations have developed more refined health services benchmarks within the overarching framework of the CHA. The Canadian Institute

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<sup>43</sup> *Ibid* at 10.

<sup>44</sup> Health Canada, [Canada's Health Care System](#) (Medicare).

<sup>45</sup> *Canada Health Act*, RSC 1985, c.C-6.

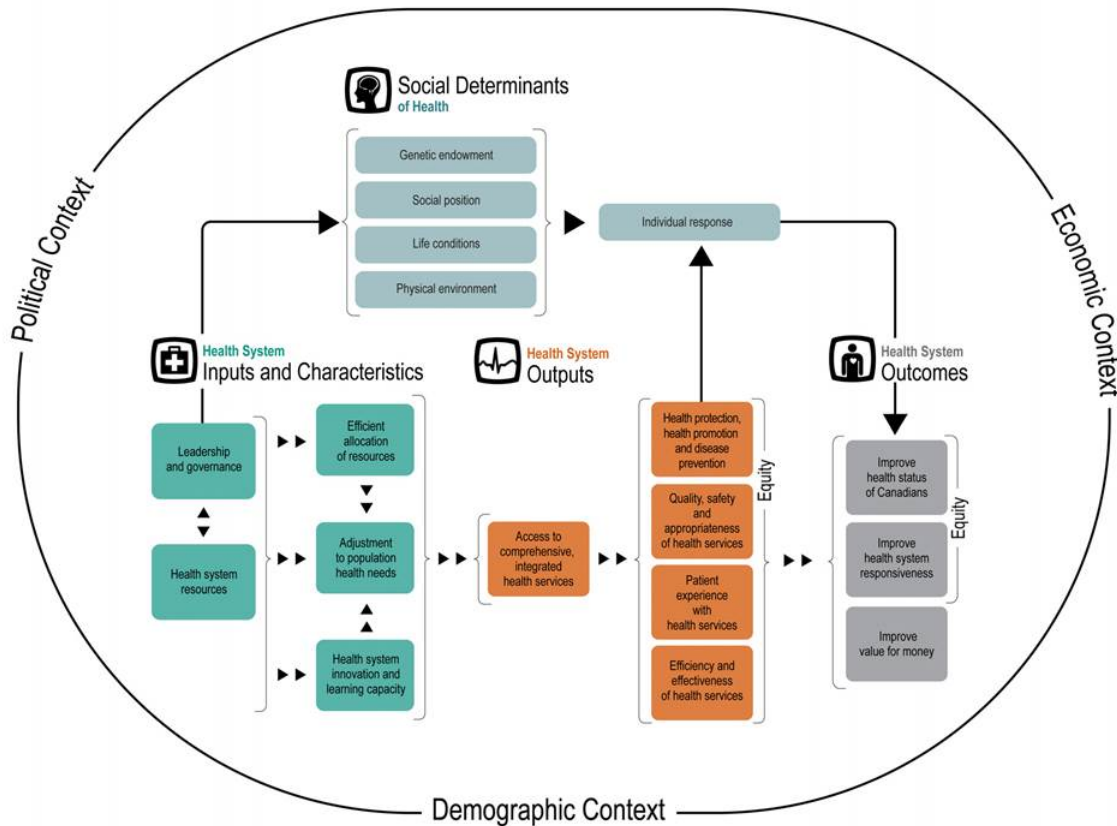
<sup>46</sup> *Supra* note 44.

<sup>47</sup> *Ibid* section 23.

<sup>48</sup> [Reports and Publications - Canada Health Act Annual Reports](#).

for Health Information (CIHI) has developed internationally recognized health indicators,<sup>49</sup> designed to provide a dynamic model that elucidates the relationship and impact between indicators.<sup>50</sup> CIHI answers the question, “Why have a performance framework?” this way:

To meet the health system performance information needs of health system managers and policy-makers, as well as those of the general public, a sound health system performance measurement framework should take into consideration the evolving performance information needs of its various users; be grounded in the current state of scientific knowledge; and offer an analytical and interpretative framework, which has been theoretically justified, that can be used to manage and improve health system performance.<sup>51</sup>



<sup>49</sup> Canadian Institute for Health Information (CIHI), *A Performance Measurement Framework for the Canadian Health System* (Ottawa: CIHI, updated November 2013).

<sup>50</sup> *Ibid* at 9.

<sup>51</sup> *Ibid*.

The CIHI performance measurement framework has four components, illustrated above:

1. health system outcomes
2. social determinants of health
3. health system inputs and characteristics
4. health system outputs (immediate objectives)

The framework recognizes that the health system operates within and is influenced by the political, cultural, demographic and economic contexts. It also defines key terms that contribute to the clarity of the benchmarks, including:

- Value for money
- Person-centred health services
- Access to comprehensive, high-quality health services
- Appropriate and effective health services
- Equality (in health system outputs)
- Leadership and governance.

### Effective educational practice

A third example is the benchmarks of effective educational practice through student engagement developed for and by the Center for Community College Student Engagement.<sup>52</sup> The overarching goal is increasing student success as measured by student learning; course completion and retention rates; and the rate at which students earn credentials, graduate, and/or transfer to four-year institutions. The benchmarks were based on a growing body of evidence about practices that effectively improve outcomes at community colleges and in particular, acknowledgement that early effective student engagement is key.

Five main benchmarks are set out in the form of statements. Indicators have been developed for each benchmark and are used by US (and some Canadian) colleges for both internal monitoring and comparative purposes.<sup>53</sup> The five areas are level of academic challenge; active collaborative learning; student-faculty interaction; enriching educational experiences; and supportive campus environment.

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<sup>52</sup> Center for Community College Student Engagement, *supra* note 18 at 2.

<sup>53</sup> *Ibid.*

These clearly articulated benchmarks “can help communicate expectations to educators and students involved in the work, and makes it easier to gain agreement about whether or not progress is being made.”<sup>54</sup> Results relative to these benchmarks is much more informative than simply reporting on graduation levels because they provide quality information about how and where an institution is succeeding or falling short. The benchmarks promote a process of continuous learning by colleges.

### ***SENSE* Benchmarks of Effective Educational Practice with Entering Students**

#### **1. Level of Academic Challenge**

*Challenging intellectual and creative work is central to student learning and collegiate quality. Colleges and universities promote high levels of student achievement by setting high expectations for student performance.*

#### **2. Student Interactions with Faculty Members**

*Students learn firsthand how experts think about and solve practical problems by interacting with faculty members inside and outside the classroom. As a result, their teachers become role models, mentors, and guides for continuous, life-long learning.*

#### **3. Active and Collaborative Learning**

*Students learn more when they are intensively involved in their education and are asked to think about and apply what they are learning in different settings. Collaborating with others in solving problems or mastering difficult material prepares student to deal with the messy, unscripted problems they will encounter daily, both during and after college.*

#### **4. Enriching Educational Experiences**

*Complementary learning opportunities inside and outside the classroom augment the academic program. Experiencing diversity teaches students valuable things about themselves and other cultures. Used appropriately, technology facilitates learning and promotes collaboration between peers and instructors. Internships, community service, and senior capstone courses provide students with opportunities to synthesize, integrate, and apply their knowledge. Such experiences make learning more meaningful and, ultimately, more useful because what students know becomes a part of who they are.*

#### **5. Supportive Campus Environment**

*Students perform better and are more satisfied at colleges that are committed to their success and cultivate positive working and social relations among different groups on campus.*

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<sup>54</sup> *Ibid.*

### Effective and accountable foreign aid

The Australian Council for International Development (ACFID) developed eight benchmarks to ensure an effective and accountable Australian aid program based on internationally agreed standards and good practice.<sup>55</sup> This is a particularly useful example because the benchmarks focus on policy outcomes (as opposed to service delivery outcomes). For example, one benchmark is that aid is delivered with effective partnerships.

For each of these benchmarks, ACFID examined the industry standard, where the standard comes from, where Australia is at now in relation to that standard, what attaining that standard or 'success' looks like, and the milestones to get there.

#### ***Aid guided by:***

1. Comprehensive policy statement

#### ***Aid targeted at:***

2. Inclusive growth
  - Targeting the poorest 40 per cent of people in middle and low income countries
  - Creating opportunities for all including women's empowerment, disability inclusion and other vulnerable and marginalized groups
3. Peace, security and governance
4. Environmental sustainability

#### ***Aid delivered with:***

5. Effective partnerships
6. Civil society and people-to-people links
7. Predictability, transparency and accountability
8. Expertise, evidence and innovation

### Why Do We Need Legal Aid Benchmarks in Canada?

We need legal aid benchmarks in Canada for two interrelated reasons:

- the inadequacy of the Canadian legal aid system, and

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<sup>55</sup> Australian Council for International Development, *supra* note 19.

- the inadequacy of metrics for legal aid performance and for the justice system as a whole.

These two conditions are interrelated and self-reinforcing.

### Snapshot of the Canadian legal aid system

At its inception over 40 years ago, the federal government envisioned establishing “a coast-to-coast federally funded legal aid system that would cover both civil and criminal cases”, modeled on the Canadian medicare system. This vision was never met.<sup>56</sup> Canada is further away from this goal in 2015 than when the program was created. National benchmarks for legal aid are virtually non-existent, limited as they are to minimum conditions on federal contributions to criminal legal aid. In fact, since 1996, it is hard to even say that Canada has a national civil legal aid scheme. At that point, the federal government changed the funding mechanism for transfer payments to the provinces and territories and relinquished any attempt at ensuring even minimum standards.<sup>57</sup>

For decades now and for the most part, legal aid programs have been making do, trying to do more with less as demand far exceeds capacity. Any advances in capacity are hard-won and vulnerable to funding cuts. Highly successful legal aid pilot projects rarely receive sustained funding for services demonstrated to be efficient and effective in increasing access to justice. Frequent changes create further obstacles to access when former established ‘paths to justice’ are broken.

The CBA *Reaching Equal Justice* report provides an overview of the current status of the non-criminal aspects of the national legal aid situation.<sup>58</sup> The major points are reproduced here to provide a background snapshot. Greater detail is provided in Part II of this paper (see the discussion of options for potential benchmarks related to specific issues, such as what types of legal matters are covered, who is eligible for them, and how legal aid is delivered).

At present, many low income people and people living in poverty are unable to access the services they need from legal aid.

In Canada, each legal aid plan determines how to provide legal aid services, which legal services are provided, who is eligible for legal aid services, and how to

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<sup>56</sup> National Health and Welfare did indeed propose a combined criminal and civil program at that time, but the Department of Justice opposed it and the criminal cost sharing program emerged. Health and Welfare developed civil legal aid funding under the *Canada Assistance Plan* as a default. See Deiter Hoehne, *Legal Aid in Canada* (Lewiston, NY: Edwin Mellen Press, 1989) and Dr. Ab Currie, “Down the Wrong Road” (2006) 13:1 *International Journal of the Legal Profession* 99.

<sup>57</sup> There are many discussions about the impact of the 1996 funding change on civil legal aid. For one example, see, Dr. Melina Buckley, *Moving Forward on Legal Aid*, *supra* note 4.

<sup>58</sup> *Reaching Equal Justice*, *supra* note 4 at 37-40.



compensate legal aid personnel, including lawyers. Accordingly, there is significant variation across the country. Some plans operate as government departments, but most operate as boards or commissions with varying degrees of independence from government. Some regions use a staff model, others community clinics and many provide the public with certificates to take to members of the private bar.

In some jurisdictions, there is no legal aid (beyond information) for many civil legal problems that affect areas of vital interest, such as housing. Some services such as public legal information are generally available to all, but most assistance and representation is available only on the basis of means testing. Often, an individual or family has to be receiving social assistance or earning just above this threshold to qualify for legal aid. Until very recently, even recipients of Assured Income for the Severally Handicapped in Alberta were ineligible for legal aid.<sup>59</sup> People working full time for minimum wage qualify for legal aid only in a few provinces. Until the recent substantial increase in Ontario provincial government funding, the financial eligibility rate had not been increased in that province since 1996.<sup>60</sup>

Today legal aid plans offer an array of legal services that vary widely from jurisdiction to jurisdiction. In some places, services include a full continuum from legal information to representation, while in others legal aid provides a narrow range of services, such as duty counsel and representation. In addition to direct service, the continuum of services can include strategic advocacy and test case litigation on issues affecting low-income people, so that problems can be addressed on a systemic basis instead of dealing repeatedly with individual cases. At present, few legal aid plans have the capacity to provide this service. Services are provided by a mix of employees, often operating through legal centres or clinics and by lawyers in private practice working for rates generally far below market rates.

The reduction in federal spending overall, increased complexity in the substantive law and growing demands for criminal legal aid have placed pressure on legal aid providers to ration services – in a way often inconsistent with the general purpose and public policy values underlying the program.

The reduction in federal spending overall, increased complexity in the substantive law and growing demands for criminal legal aid have placed pressure on legal aid providers to ration services – in a way often inconsistent with the general purpose and public policy values underlying the program. To date, the courts have recognized a constitutional right to legal representation in a narrow range of cases: in criminal matters where there is a risk of imprisonment and in child protection

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<sup>59</sup> Andrew Bates, [New Legal Aid funding addresses Albertans on disability](#) (November 2 2014) *Fort McMurray Today*.

<sup>60</sup> *Reaching Equal Justice*, *supra* note 4 at 107.

proceedings where a parent is threatened with loss of custody of his or her child to the state.<sup>61</sup> Yet even in these cases, legal aid services can be inadequate.

Inadequate legal aid has a devastating impact on individuals and families, and the most vulnerable members of our society suffer the most damaging consequences. This means that the lack of legal aid actually reinforces poverty and social exclusion.<sup>62</sup> Costs and consequences flow to society at large.<sup>63</sup>

More, inadequate legal aid has a pernicious effect on the justice system contributing to inefficiencies in processes and ineffectiveness in the application of laws. Legal aid specialist Ab Currie notes that the “vitality of the legal aid system is of vital importance.”<sup>64</sup> Because the legal aid system is not as healthy as it once was, “it probably will not play the important, and perhaps key, role it might in the evolution of access to justice in Canada without resources to repair the erosion” that has occurred since the early 1990s.<sup>65</sup>

### Current justice system benchmarks and related measures

The Canadian justice system is plagued by a lack of data and metrics. This is particularly true for the access to justice and civil justice systems,<sup>66</sup> though the criminal justice system has made greater progress on this front.<sup>67</sup> Without data and mechanisms to measure change, there can be no practical definition of success. Metrics are measures of an organization’s activities and performance, and are based on established objectives, indicators or criteria for specific areas of accomplishments. Metrics are quantifiable measures that drive improvement and characterize progress.

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<sup>61</sup> *Ibid*, see note 103. See, *G(J) v New Brunswick*, [1999] 3 SCC 46 and *British Columbia (Attorney General) v Christie*, [2007] 1 SCC 873. In the criminal law context, some examples include *R v Sechon* (1995), 104 CCC (3d) 554 at 560 (Que CA); *Deutsch v Law Society of Upper Canada Legal Aid Fund* (1985), 48 CR (3d) 166 (Ont Div Ct); *R v Cormier* (1988), 90 NBR (2d) 265 (QB); *R v McKibbin* (1988), 45 CCC (3d) 334 (Ont CA); *R v James* (1990), 107 AR 241 (QB); *Spellacy v Newfoundland* (1991), 91 Nfld & PEIR 74 (Nfld SC); *Mireau v Canada (Attorney General)* (1991), 96 Sask R 197 (Q.B.); *R v Rothbotham*, 1988CanLII 147 (ON CA); *R v Fisher*, [1997] S.J. No. 530. (QB); *R v Brydges*, [1990] 1 SCC 190; *R v Bartle*, [1994] 3 SCC 173; *R v Prosper*, [1994] 3 SCC 236; *R v Matheson*, [1994] 3 SCC 328. See also, *Universal Declaration of Human Rights*, GA Res 217 A (III), UN Doc. A/810 (1948), cited by the New Brunswick Court of Appeal in *G(J)*.

<sup>62</sup> *Reach Equal Justice*, *supra* note 4 at 50.

<sup>63</sup> *Ibid*.

<sup>64</sup> Currie, *supra* note 56.

<sup>65</sup> *Ibid*.

<sup>66</sup> *Reaching Equal Justice*, *supra* note 4, NAC *Roadmap for Change*, *supra* note 4; CBA Access to Justice Committee, *Access to Justice Metrics* (Ottawa: CBA, 2013) (‘Building Block’ discussion paper for CBA *Envisioning Equal Justice* project, research and consultation phase).

<sup>67</sup> Dandurand and MacPhail, *supra* note 2.

One of the reasons behind the lack of data and measurement in the justice sector is that many players are resistant to measurement. The developers of the Rule of Law Index noted that the “most fundamental barrier appears to be a deeply rooted culture among government officers and practitioners in this field that is hostile to measurement”. They have witnessed this as a global phenomenon stating: “In all corners of the planet”, “judges and lawyers often act as if they were allergic to numbers, or when these numbers are collected, they are neither systematically analysed nor publicly disclosed”.<sup>68</sup>

Dandurand and MacPhail hypothesize that some of the resistance is:

...due to an appreciation that because the system is so complex, the significant outcomes of the justice system – public confidence, public safety, fairness, accessibility – do not depend on the actions of any one sector. Since people often worry that they will be blamed for the actions of others, it is easier to be measured on the effort and activities within one's own sector rather than on whether those activities have led to meaningful change overall.

At the same time, this focus on one's own limited area of responsibility can mean that no one takes responsibility for the system as a whole. As well, and as noted earlier, it means that there is no attention paid to the ways in which the different sectors can unwittingly undermine the conscientious efforts of the other sectors.<sup>69</sup>

They point out that the complexity of the justice system and the fact that many factors are outside the control of a given institution are not unique. They compare it to the health field where:

...there is longstanding acceptance of fundamental indicators of health, for example, mortality rates, child mortality rates, etc., even though clearly these are influenced by a variety of factors including those outside the health care system, for example income and poverty issues. However this does not detract from the efforts of the health care system to take steps to decrease these rates.<sup>70</sup>

Metrics, however, will only be useful if the objectives are clear, the indicators well-thought out and the computation accurate. Experience at the international level

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<sup>68</sup> J.C. Botero, J. Martinez, A. Ponce and C. S. Pratt, “The Rule of Law Measurement Revolution: Complementarity Between Official Statistics, Qualitative Assessment and Quantitative Indicators of the Rule of Law”, in J.C. Botero, et al. (eds.), *Innovations in Rule of Law* (Hague: HiiL and the World Justice Project, 2012) at 8-11, 9.

<sup>69</sup> *Supra* note 2.

<sup>70</sup> *Ibid.*

suggests that time must be invested in developing a common language to articulate results and a shared framework for capturing data.

National legal aid benchmarks can serve as one piece of this overarching justice system performance framework. The examples above illustrate that performance indicators can be developed on the basis of benchmarks. Benchmarks help to ensure that rather than measuring what is easiest to measure, we can find ways to measure what is most important to measure.

The utility of national legal aid benchmarks and other justice sector performance measures is confirmed by the deliberations of the Deputy Minister of Justice's Criminal Legal Aid Panel. The Panel commented on the similarities between the health care and criminal legal aid systems, noting there were lessons to be learned from health care reform applicable in the justice context. Commonalities identified were:

- strong stakeholders (doctors/lawyers);
- challenges associated with employing metrics;
- complexity of the delivery systems; and,
- the perception that government is an insurance company (health insurance/legal aid).<sup>71</sup>

As in health care reform, to move forward, “leadership, goals, performance measurement, public reporting on a common set of performance metrics, and audit assurances must all be addressed.”<sup>72</sup> One Panel member summed it up: “As in health care, once you define what you are trying to improve performance in then you can define what it is you want – action plans, metrics, targets.”<sup>73</sup> Interestingly the Panel concluded that what is needed are standards (more like benchmarks) rather than simply listing best practices.<sup>74</sup>

To date, data collected about the Canadian justice system has focused on measuring inputs and counting activities.<sup>75</sup> There are relatively few examples of benchmarking or standards that could serve as a foundation for national legal aid benchmarks.

This section provides a selected overview of justice sector benchmarks and performance measures.

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<sup>71</sup> *Supra* note 12.

<sup>72</sup> *Ibid.*

<sup>73</sup> *Ibid.*

<sup>74</sup> *Ibid.*

<sup>75</sup> See, *Access to Justice Metrics*, *supra* note 66; Dandurand and MacPhail, *supra* note 2.

Justice BC's **Data Dashboards** provide court, corrections and prosecution data,<sup>76</sup> and court statistics about the justice system's operations and progress over the past five fiscal years. The statistics represent activity in all three levels of court (BC Provincial, Supreme and Appeal Courts) and both justice divisions (criminal and civil, which includes family justice). This includes new court cases, concluded Provincial Court cases, province-wide breakdown on Provincial Court criminal cases by time to conclude, as well as median time to conclude those cases, court sitting hours, scheduled court appearances, and civil court documents filed.

The Data Dashboards' approach "is perhaps one of the most accessible and innovative approaches, but it provides only a limited, partial picture of justice system performance."<sup>77</sup> Evaluations of specific types of justice system services, such as public legal education and information and legal aid, also tend to focus on inputs and counting activities, although they often extend to reporting on client satisfaction statistics.<sup>78</sup> Only recently have justice system service providers begun to gather information and report on outcomes, although to a limited extent.<sup>79</sup>

Benchmarks for effective criminal courts in Ontario were developed as part of the **Justice on Target (JOT) strategy**, the ultimate goal of which "is to promote continuous improvement in Ontario's criminal justice system by setting annual targets to improve performance against the benchmarks".<sup>80</sup> They set out dates for completion and number of court appearances for three case types: less complex, more complex, and federal and provincial. The benchmarks were determined following consultations with justice participant groups. Goals are set and progress is recorded both for individual courts and for the criminal courts as a whole.

The report on these benchmarks and progress in achieving them clarifies that "JOT strategy benchmarks should not be considered a rule or legal standard. Rather, the benchmarks create a tool by which the province can measure progress. Not every case can or should meet the benchmarks." Performance is reported as a percentage of cases of each case type meeting the benchmarks in a given year.

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<sup>76</sup> [Justice BC's Data Dashboards](#).

<sup>77</sup> Dandurand and MacPhail, *supra* note 2.

<sup>78</sup> Erol Digiusto, "Effectiveness of public legal assistance services – A discussion paper" (Justice Issues Paper 16, Law and Justice Foundation of New South Wales, October 2012) at 4; Lindsay Cader, "Evaluation of Public Legal Education and Information: An Annotated Bibliography" (Ottawa: Justice Canada, 2003); PLEI Coordination and Resource Unit, "A Snapshot of Evaluations from PLEI Groups in Canada" (2010, and updated).

<sup>79</sup> Dr. Melina Buckley, [Evolving Legal Services: Review of Current Literature](#) (prepared for Community Legal Education Ontario, unpublished draft, March 2013).

<sup>80</sup> [Benchmarks for Effective Criminal Courts](#).

**BC Crown Corporations Service Plan Guidelines** also require identifying “appropriate benchmarks by reviewing the performance of other comparable organizations as a means to allow for what some might deem to be an objective comparison of performance”.<sup>81</sup>

Many Canadian legal aid plans have some type of quality assurance programs and/or performance review processes, some initiated as much as two decades ago. They can be applied to both services provided by legal and paralegal staff and those provided by independent legal counsel. Some legal aid plans have begun to develop more sophisticated performance measures.

For example, the **Legal Services Society of BC (LSS)** has developed a **performance plan** consisting of goals, strategies, and performance measures designed to “engage LSS staff, our service partners, and our clients in finding timely and lasting solutions to clients’ legal issues while managing the budget.”<sup>82</sup> The plan is amended from time to time. LSS reports on its progress relative to this plan on an annual basis.

*(\*Please see Appendix A at 1 for LSS’s goals, strategies and performance measures.)*

To gauge performance, LSS conducts four major stakeholder surveys (client satisfaction, work environment, and lawyer surveys conducted triennially and a public opinion poll conducted annually). A new information system will provide opportunities to track and report on new operational measures.

LSS also benchmarks its performance against like organizations, where possible, using the Common Measurement Tool (CMT). CMT is an independent client satisfaction benchmarking tool and data service that allows us to compare client satisfaction results against agencies providing similar services. For example, LSS benchmarks its employee engagement score against the BC Public Service using statistics provided by BC Statistics.

**Legal Aid Ontario has recently developed performance measures for legal aid clinics** and refined them through a consultative process with the clinics.<sup>83</sup> The measures will be tracked mainly through the (about to be implemented) Clinic Information Management System (CIMS)<sup>84</sup> and are intended to:

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<sup>81</sup> British Columbia, *Crown Corporation Service Plan Guidelines* (Victoria: Ministry of Finance, Crown Agencies Resource Office, 2013). Referenced in Dandurand and MacPhail, *supra* note 2 at 15, see note 31.

<sup>82</sup> British Columbia Legal Services Society 2015/16 - 2017/18 *Service Plan*.

<sup>83</sup> *Report of the Performance Measures Working Group of the Association of Community Legal Clinics of Ontario to the Integrated Performance Measures Advisory Committee of Legal Aid Ontario* (Toronto: ACLCO, December, 2009). See, [Performance measures for clinics](#).

<sup>84</sup> Measures related to governance, quality of non-case activity, client satisfaction, and complaints statistics will be captured and reported outside of this database.

- demonstrate whether the clinic is meeting its mandate and strategic goals
- inform decisions
- promote continuous improvement
- fulfill obligations for accountability and transparency to the public.<sup>85</sup>

Guiding principles used in developing the measures are: supports Legal Aid Ontario in meeting its legislative requirements; collecting data for performance measures should have minimal impacts on the end user; and reports should not take more time to generate than the value they add. Data collection and reporting on these measures is expected to begin in 2015. The measures are:

1. Cases and initiatives: services provided, average cost per case, and cost of initiatives (number of standard and test cases, by area of law);
2. Resource allocation (hours docketed), efficiency measure % of staff time (admin, standard case work, test cases, initiatives);
3. Service outcomes (successful, partially successful, unsuccessful, withdrawn/discontinued) and client feedback;
4. Client served versus client denied services (including reasons why they were denied e.g. not eligible, not part of clinic's areas of law, out of catchment, clinic capacity);
5. Stage when case file outcomes are achieved with clinic involvement (resolution stage: before hearing, after hearing, cases withdrawn or lost contact).
6. Complaints filed and founded including time to resolve complaints (+/- 30 days).<sup>86</sup>

LAO will collect some information outside of the CIMS including the complaints statistics and by measuring client satisfaction on four dimensions using a scale of one to five (timeliness of services provided, ease of access to service, responsiveness to needs, and treatment received from staff).

The Association of Legal Clinics of Ontario (ACLCO) is the representative body of Ontario's community legal aid clinics. In 2009, **ACLCO developed a system of integrated performance measures** with related indicators through a consultative

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<sup>85</sup> *Supra* note 83.

<sup>86</sup> *Ibid.*

process.<sup>87</sup> LAO will also employ some of these performance measures for non-case clinic activities:<sup>88</sup>

1. Legal clinics develop a strong organizational learning culture through participation in appropriate professional development opportunities
2. Legal clinics promote access to justice in their communities by providing high quality community development and outreach services.
3. Clinics engage proactively to confront legislative and policy decisions that regulate the lives of low-income people and seek to create community empowerment.<sup>89</sup>

LAO acknowledges that ACLCO developed its performance measures as “a complete system of integrated measures – it was not intended as a menu of possible measures to be selected by the funder.”<sup>90</sup> In its 2009 report, ACLCO considered the limitations of using solely narrow quantitative indicators to measure performance. Two of the points made were:

- Clinics provide legal services to communities and clients who frequently present with multiple, complex and entrenched social and legal needs. A service delivery strategy suitable to such clients and needs must be flexible and adaptive and pursue a broad range of service provision strategies that goes well beyond individual casework representation and advice. The nature of the work that clinics do is consequently not easily or adequately captured by quantitative measurement. There is much evidence supporting the need for qualitative research to competently measure and evaluate complex outcomes.
- There is great value in using qualitative data sources as indicators of performance. These may include but are not limited to narrative sources, testimonials or thematic extractions.<sup>91</sup>

For each of six performance areas to be measured, ACLCO developed a comprehensive set of objectives, activities, inputs, outputs and indicators, and outcomes. These criteria were designed to operate on a system-wide basis considering the wide variety of mandates and services provided by community legal clinics throughout the province.

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<sup>87</sup> *Ibid.*

<sup>88</sup> Non-case activities include: Public Legal Education/outreach: providing information or education to the client community, training, community development, policy advocacy/law reform/systemic advocacy, partners/network/community groups, LAO/clinic committee & consultations, inter-clinic groups, media, governance and administration.

<sup>89</sup> *Supra* note 83, [Quality indicators for non-case activity](#).

<sup>90</sup> *Ibid.*

<sup>91</sup> *Ibid.*



(\*Please see Appendix A at 3 for the objectives and outcomes in each of the six performance areas.)

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In its report, LSS notes that legal aid plans across Canada have not yet developed a common method of measuring performance but performance and outcome information is shared on a regular basis.<sup>92</sup> ALAP has established a working group to foster the development of pan-Canadian performance measures.

### Legal aid benchmarks in other jurisdictions

International and national approaches to the development of legal aid standards may provide assistance in considering the utility of and approaches to benchmarking in the Canadian context. Some precedents from other jurisdictions are presented here to illustrate the range of potential approaches.

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.<sup>93</sup> 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* (UN Criminal Legal Aid Principles).<sup>94</sup> These principles are not benchmarks *per se* and they are non-binding. Still, they have the potential to be very effective, as has been true for the UN *Standard Minimum Rules for the Treatment of Prisoners* first adopted in 1955 and updated over time.<sup>95</sup> While styled as "minimum rules", these older standards have been effective in improving the treatment of prisoners according to international human rights guarantees.<sup>96</sup>

The *UN Criminal Legal Aid Principles* are grounded in "the emerging best practices and evolving jurisprudential and normative developments around the world."<sup>97</sup> The

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<sup>92</sup> *Supra* note 82.

<sup>93</sup> *Supra* note 1, see in particular, notes 37 and 38.

<sup>94</sup> United Nations [Principles and Guidelines on Access to Legal Aid in the Criminal Justice System](#), A/C.3/67/L.6.

<sup>95</sup> United Nations, [Standard Minimum Rules for the Treatment of Prisoners](#), 30 August 1955.

<sup>96</sup> 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* (University of Pennsylvania Press, 1994).

<sup>97</sup> Zaza Namoradze, "[UN General Assembly Enacts Global Standards on Access to Legal Aid](#)" (Open Source Foundations, December 21, 2012).

principles specify among other matters, at what stages of the proceedings legal aid should be available to accused persons.<sup>98</sup> Particular attention is paid to the situation of the most vulnerable in society. An underlying notion of the *UN Principles and Guidelines* is that member states, where appropriate, undertake measures to “maximize the positive impact that the establishment and/or reinforcement of a properly working legal aid system may have on a proper functioning criminal justice system and on access to justice”.<sup>99</sup> (*\*Please see Appendix A at 6 for further detail.*)

The *UN Guidelines* address the following topics in greater, more practical, detail: provision of legal aid (eligibility); right to be informed on legal aid; other rights of persons detained, arrested, suspected or accused of, or charged with a criminal offence (general rights such as right to privacy and confidentiality in dealings with legal aid counsel); legal aid at the pretrial stage; legal aid during court proceedings; legal aid at the post-trial stage (while imprisoned); legal aid for victims; legal aid for witnesses; implementation of the right of women to access legal aid; special measures for children; national wide legal aid system; funding the nationwide legal aid system; human resources; paralegals; regulation and oversight of legal aid providers; partnerships with non-State legal aid service providers and universities; research and data; and technical assistance. (*\*Please see Appendix A at 7 for Guidelines for a nationwide legal aid system, including for funding, research and data collection.*)

Performance criteria for evaluating legal aid programs provide another approach to identifying national benchmarks. The United States’ Legal Services Corporation (LSC) has developed performance criteria designed to assist in evaluating effectiveness of services and contributing to program improvement and accountability, though not measured in quantitative terms. The vision behind the original criteria is: “by providing a single framework for structured evaluations by peers or other experts, the criteria support a consistent national system for measuring program performance.”<sup>100</sup> The LSC criteria refer to and integrate much of the *ABA Standards for the Provision of Civil Legal Aid*.<sup>101</sup>

The LSC performance criteria are expressed in three levels of increasing detail:

- a) The individual criteria themselves, which describe in broad terms the desired effectiveness for that area;
- b) The indicators, a set of specific markers or factors, which are suggestive of whether the criteria are being met (this list is open-ended); and

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<sup>98</sup> *Supra* note 94.

<sup>99</sup> *Ibid* at para. 11.

<sup>100</sup> Legal Services Corporation, [Performance Criteria](#) (2007) at 3.

<sup>101</sup> *Ibid*.

- c) The areas of inquiry, a third level of detail, which provide specific guidance to reviewers in terms of questions to be asked and topics to be examined.

The criteria are specifically designed “to take account of the reality that Legal Services programs do not have sufficient resources to provide comprehensive services that fully meet all of the major civil legal needs of low-income people in an entire service area.”<sup>102</sup> Given that reality, the LSC criteria focus on “the most pressing civil legal needs” and particularly on results and outcomes for clients and the low-income population.<sup>103</sup> Processes and systems and other “input” factors such as staff experience, equipment, office space, research capabilities, and so on are also examined. LSC explains:

While results and outcomes for clients are central, examination of systems, processes, and inputs is also important, since their presence makes it more likely that successful outcomes can be replicated consistently over time.<sup>104</sup>

While providing a national framework, the criteria are meant to “embody a dynamic vision of program work, related to the specific needs, resources and situations in each particular community” and the incorporation of experience and learning into change processes. The commitment to capturing this dynamism in the evaluation framework is described in this way:

...the Criteria begin with an examination of the effectiveness of the program's assessments of legal needs, and follow a logical flow: identification of the most pressing problems; setting goals, priorities, and objectives; developing delivery and advocacy strategies; targeting resources based upon the most pressing legal needs; implementing the objectives and working toward the desired, expressed outcomes; and then assessing and evaluating the effectiveness of the efforts before making a new determination of need and going through the entire process again.<sup>105</sup>

*(\*Please see Appendix A at 12 for LSC Performance Criteria.)*

Australia's national legal aid policy has evolved substantially over the last two decades, leading to the adoption of national benchmarks as part of a Commonwealth (i.e. the federal or national) government initiative to strengthen legal assistance

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<sup>102</sup> *Ibid* at 3.

<sup>103</sup> *Ibid* at 4.

<sup>104</sup> *Ibid* at 4.

<sup>105</sup> *Ibid* at 4.

services throughout the country in priority areas. These developments have been closely aligned with other progressive access to justice policies in Australia.

The landmark 1994 report of the Australian Access to Justice Advisory Committee concluded that the “Commonwealth Government has not been sufficiently energetic and innovative in legal aid policy:”<sup>106</sup>

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 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 equality in the provision of legal aid.*<sup>107</sup> (Emphasis added)

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 equality 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.<sup>108</sup>

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

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<sup>106</sup> Access to Justice Advisory Committee, *Access to justice: an action plan* (Canberra: Australia Gov't Public Service, 1994).

<sup>107</sup> Australia Attorney-General's Department, [The Justice Statement \(Response to the Access to Justice Advisory Committee Report\)](#) – Chapter 6 Legal Aid.

<sup>108</sup> *Ibid.*

suite of Commonwealth legal assistance services. The NPA can be seen as integrating national benchmarks.

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.”<sup>109</sup>

The objective of the NPA is:

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, equality, efficiency, and effectiveness.”<sup>110</sup>

The NPA contains 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

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<sup>109</sup> Council of Australian Governments, [National Partnership Agreement on Legal Assistance Services](#) (2010). See, section 4.

<sup>110</sup> *Ibid* section 15.

- d) Strategic national response to critical challenges and pressures affecting the legal assistance sector.<sup>111</sup>

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, equality, 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
  - iii. Dispute resolution services, duty lawyer services, litigation services, and post resolution support services.<sup>112</sup>

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.<sup>113</sup>

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<sup>111</sup> *Ibid* section 16.

<sup>112</sup> *Ibid*.

<sup>113</sup> *Ibid*.

## How Can Benchmarks Assist in Achieving Legal Aid Renewal?

This discussion has demonstrated why we need to think hard about who should receive publicly funded legal assistance services, for what kinds of legal problems, and how to integrate evidence-informed best practices into legal aid policy, service delivery, and system reform. Benchmarks would assist in achieving legal aid renewal by providing a clear picture of what success looks like.

Setting benchmarks begins by grappling with the issue of how good we want the Canadian legal aid system to be. What metrics and standards should we use to define excellence in the areas most central to fulfilling that mission? We can ask how well each legal aid program is doing relative to others both across Canada and compared to other countries. We can ask why some legal aid providers facing similar challenges are achieving better results than others, and learn from them. We can review empirical and policy research for evidence of best practices relevant to legal aid benchmarks.

Benchmarks are also a way of integrating international human rights standards on access to justice and legal aid. Importantly, national legal aid benchmarks would be one step toward satisfying the commitment under section 36(1)(c) of the *Constitution Act, 1982*, committing federal and provincial governments to "providing essential public services of reasonable quality to all Canadians" and the right to publicly-funded counsel required under section 7, section 10(b) and section 15 of the *Charter of Rights*.

National benchmarks do not mean uniformity in program delivery or accountability mechanisms throughout all provinces and territories. Benchmarks 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*. National benchmarks 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.<sup>114</sup>

Legal aid renewal will not occur without increased public understanding and vocal support for legal aid. There are some indications that legal aid is considered a social norm and that the costs of inadequate legal aid are becoming more visible. This is largely a result of concerted efforts by several organizations and a robust and inclusive public dialogue about this important human service. One way to shape this dialogue is through a structured conversation about options for national legal aid benchmarks. Part II of this *Backgrounder* provides an initial structure for that

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<sup>114</sup> Shelagh Day and Gwen Brodsky, *Women and the Canada Social Transfer: Securing the Social Union* (Ottawa: Status of Women Canada, 2007) at 15.

conversation, building on the lessons and examples set out in Part I and integrating wherever possible evidence concerning best practices.

### Hard Costs and Hard to Know Costs

The policy rationale for Canada’s legal aid system is well-developed and set out in numerous other reports.<sup>115</sup> In this *Background*, the Working Group notes only that sound principles and policy reasons to support enhanced legal aid are not enough; legal aid providers must also show they are “providing the ‘right’ mix of services, to the ‘right’ clients, in the ‘right’ areas of law and in the ‘right’ locations.”<sup>116</sup>

Benchmarks can help us do that. In Canada, we need to strike a better balance between financial restraints and guaranteeing access to justice than at present. There are incontrovertible reasons for doing so to the benefit of all Canadians. The money question cannot be ignored.

Providing legal aid is costly. So is not providing legal aid.

However, additional resources must become available as an inevitable part of legal aid renewal. It boils down to this: “Providing legal aid is costly. So is not providing legal aid.”<sup>117</sup> Legal aid is a miniscule line item under already modest justice system spending within federal, provincial and territorial budgets, especially compared to spending on other human services, like health. Still, the history of legal aid funding reveals that it is all too tempting a target in times of fiscal tightening and restraint. Strong arguments can and have been made for how legal aid spending saves in other areas of government spending.<sup>118</sup>

A recent Canadian Forum on Civil Justice (CFCJ) factsheet on everyday legal problems and the costs of justice in Canada (based on an extensive multi-year research project) made a number of key findings:

- Everyday legal problems, particularly those unresolved, affect the social and economic well-being of individuals, their families, and their businesses.
- Everyday legal problems have several associated costs. Nearly 18% of people who reported having a legal problem experienced stress or emotional difficulty as a direct consequence of having that problem.
- The percentage of respondents reporting they experienced a physical health problem as a result of the legal problem increased from 39.1% for people 18-35 years of age to 61.5% for individuals aged 55-64.
- Women were more likely than men to identify a physical health problem as a direct result of a legal problem; 67.1% of women compared with 53.2% of men.

<sup>115</sup> As some examples, see references *supra* note 4.

<sup>116</sup> PCR, *supra* note 3 at 704.

<sup>117</sup> Former Chief Justice Gleeson (of Australia), *The State of the Judicature* (Canberra: 1999), cited in Law Council of Australia, sub. 96 at 114 and reproduced in PCR, *ibid* at 739.

<sup>118</sup> For example, see discussion in *Reaching Equal Justice*, *supra* note 4 at 53-55.



- Unresolved legal problems result in annual increased costs to the public purse. For example, we estimate that Canadians' unresolved legal problems result in approximately:
  - \$458 million in additional employment insurance costs.
  - \$248 million in additional social assistance costs.
  - \$40 million in additional health care costs.

These “knock on” costs cost the state an estimated \$746,000,000 dollars annually. This is approximately 2.35 times greater than the annual direct service expenditures on legal aid.<sup>119</sup>

The fact that cutting legal aid funding does not necessarily mean more efficient and effective services is increasingly recognized in Canada and elsewhere. The Australian Productivity Commission concluded that sometimes cuts to legal aid funding clearly only causes reductions in access to justice, not more effective services or increases in system efficiency.<sup>120</sup> Similarly, in Canada, the Deputy Minister of Justice's Criminal Legal Aid Panel stated:

Given legal aid pressures (e.g. rising costs, increasing demands, fiscal constraints) there is a need to identify and implement efficient and economical practices and means to relieve these pressures. While legal aid plans have undertaken a variety of measures to increase the efficiency/economy of their service delivery, some of these approaches may represent a reduction in accessibility rather than an improvement in efficiency.<sup>121</sup>

It is difficult to integrate this growing knowledge about the visible and invisible costs of inadequate legal aid into discussions about legal aid funding. Government funding in silos between departments and programs exacerbates these difficulties.<sup>122</sup> While expenditures may be in plain view, the benefits are intrinsically difficult to measure: “Often it is a question of large avoided costs to individuals and the community through time, rather than an immediate, tangible benefit.”<sup>123</sup> Benchmarks can help us to draw together the visible ‘hard costs’ of legal aid with the invisible but just as real ‘hard to know’ costs resulting from its denial.

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<sup>119</sup> See also, CFCJ factsheet, [What is Access to Justice?](#)

<sup>120</sup> *Legal Aid Act: Submission to Productivity Commission*, October 2013.

<sup>121</sup> Department of Justice Canada, [Legal Aid Program Evaluation 2012](#).

<sup>122</sup> Pascoe Pleasence, Christine Coumarelos, Suzie Forell and Hugh M. McDonald (foreword by Geoff Mulhrerin), [Reshaping legal assistance services: building on the evidence base: a discussion paper](#) (Sydney: Law and Justice Foundation of New South Wales, April 2014).

<sup>123</sup> PCR, *supra* note 3 at 756 and Appendix K.

## Part II – Options for National Legal Aid Benchmarks

Part I of this Backgrounder set out the rationale for developing and implementing national legal aid benchmarks in Canada. This project provides us, the justice community, with an opportunity to engage in a collaborative process about what we want from Canada's future legal aid system. As set out in Part 1, the Working Group defines the 'justice community' in broad and inclusive terms, encompassing those working in the sector and those seeking assistance from it, on equal footing. Part 1's overview of the purpose of benchmarking emphasizes that this is a forward-looking practice, which while rooted in today's evidence-informed best practices is designed to foster continual learning and improvement.

Part I also provides examples from other sectors more advanced in benchmarking, recent developments in establishing metrics for the justice sector in Canada and examples of legal aid benchmarks from abroad. These examples provide a solid foundation for the justice community to develop effective national legal aid benchmarks.

In making the case for legal aid benchmarks, this paper emphasizes the inadequacy of current legal aid services in meeting the needs of Canadians. It highlights in particular vast disparities in services across the country. More details about these disparities are discussed below with respect to specific aspects of legal aid coverage, eligibility and service delivery. Enhanced national equality, ensuring that legal aid services provided across the country are of sufficient quality, is one of the strongest arguments in favour of national benchmarks. As demonstrated in the examples in Part I, benchmarks leave room for local innovation and responsiveness; they provide a balance between flexibility and enhanced level of quality.

Current inadequacies and disparities have created increased pressure for additional funding, particularly from the federal government whose relative share of both criminal and civil legal aid funding has decreased substantially over time.<sup>124</sup> Benchmarking could assist in building support for reinvestment and renewal of Canada's commitment to equal access to justice through effective legal aid, while also helping to ensure value for money in public spending.

Part II canvasses options for national legal aid benchmarks. This discussion focuses on three questions:

- What should the Canadian legal aid system be guided by?
- What should it be targeted at?
- What should it be delivered with?

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<sup>124</sup> As one example, see [Press Release – Federal, Provincial and Territorial Ministers Responsible for Justice and Public Safety Meet](#) (Winnipeg: Canadian Intergovernmental Conference Secretariat, 2007).

For each issue raised by these questions, the paper provides a brief overview of the current Canadian situation, a summary of evidence-informed best practices and some options for related benchmarks. The Working Group's intent in Part II is to spark a conversation about where the Canadian legal aid system is now and what a successful renewal process will look like. It is largely based on the relatively new but swiftly evolving body of research on 'what works' in legal assistance schemes.

*The benchmark options provided in this Part serve as examples only. Not all of the examples included are compatible. These examples are not proposed benchmarks and do not reflect a Committee consensus nor the views of the CBA or ALAP. They are presented in concrete form to facilitate and stimulate discussion and debate, not to foreclose deliberation.*

*Reaching Equal Justice* proposed three main components for the renewal of Canada's legal aid system:

- national legal aid benchmarks with a commitment to their progressive implementation, monitored through an open, transparent process;
- reasonable eligibility policies that give priority to people of low and modest means but provide graduated access to all residents of Canada who are unable to retain private counsel (including through contributory schemes); and
- effective legal service delivery approaches and mechanisms designed to meet community needs and the meaningful access to justice standard.<sup>125</sup>

*Reaching Equal Justice* suggests that benchmarks focus on three main features of the legal aid system: coverage, eligibility and quality of services. These features are central in Part II of this *Backgrounder*, under the heading of: "a legal aid system targeted at...". Based on its research in Part 1, the Working Group proposes consideration be given to developing benchmarks under two further rubrics: "a legal aid system guided" by and "a legal aid system delivered with". These additions consider the potential of benchmarks to provide general guidance to the system and contribute to a supporting framework for the Canadian legal aid system.

### **A Legal Aid System Guided By...**

Several examples of effective public sector benchmarks discussed in Part I include a general policy statement to frame more tailored practice-oriented benchmarks. In the health care sector, for example, the *Essence of Care* program is framed by the overall health outcome "People will be supported to make healthier choices for themselves and others" and the Canadian Institute for Informational Health performance measurement framework is geared toward three outcomes: improved

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<sup>125</sup> *Reaching Equal Justice*, supra note 4 at 105.

health status for Canadians, improved health system responsiveness, and improved value for money.<sup>126</sup>

Recent reports on legal aid reform have emphasized the importance of clarifying the purpose of individual public legal assistance services and the public good assured through an effective and efficient legal aid system.<sup>127</sup> An Australian report puts it this way: “clarity is needed as to the place of legal assistance services within the broader human services sector. The law is a tool to solve problems – issues which commonly have their genesis in other domains beyond the remit of legal services.”<sup>128</sup>

A general policy statement or guidance benchmark should articulate why it is in the national – and – ethical – public interest to provide adequate legal aid. There is some evidence that the availability of legal aid is considered a social norm.<sup>129</sup> Indeed many Canadians are surprised to learn that they cannot access these services when needed.<sup>130</sup> A guidance benchmark could provide concrete form to this social norm.

Given the chronic and current underfunding of legal aid, the guidance benchmark would also benefit from a statement on the shared federal, provincial and territorial responsibility for legal aid and on overarching funding principles.

### National legal aid policy statement

*Reaching Equal Justice* advocates fundamental change to show how equal justice is both a value in itself, and supports healthy and well-functioning communities and Canadian society as a whole.<sup>131</sup> Everyone is entitled to justice; that is a common thread of public dialogue and individual understanding. Less well understood is the fact that law and access to processes for the resolution of legal problems is a simple fact of life in the 21<sup>st</sup> century. In a developed political economy like Canada, law “knits together the fabric of our society”.<sup>132</sup> Inaccessible justice contributes to growing poverty and social exclusion and is a threat to economic growth and Canadian democracy.<sup>133</sup> Unequal access to justice is also expensive. Evidence is

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<sup>126</sup> *Infra* at 16.

<sup>127</sup> See for example, *Deputy Minister’s Advisory Panel Report*, *supra* note 12; *Reshaping legal assistance services*, *supra* note 122.

<sup>128</sup> *Reshaping legal assistance services*, *ibid* at 178.

<sup>129</sup> This is evident, for example, in the high popular support for legal aid in public surveys by the Legal Services Society of BC. See discussion in *Reaching Equal Justice*, *supra* note 4 at 14.

<sup>130</sup> This became apparent in public ‘on the street’ interviews organized by the CBA Access to Justice Committee and the Canadian Forum on Civil Justice in 2012-2013.

<sup>131</sup> *Supra* note 4 at 49.

<sup>132</sup> *Ibid* at 50.

<sup>133</sup> *Ibid* at 52.

mounting that unresolved legal problems are costly both to the individuals directly affected and to society as a whole.<sup>134</sup>

Legal aid is the primary public program for ensuring equal access to justice and contributing to social inclusion. Studies have repeatedly shown that there is strong return on investment from public spending on legal aid.<sup>135</sup>

The objectives of legal aid are usually described as a blend of principles and policy goals related to the purpose and functioning of the justice system. Justice Canada's Criminal Legal Aid Panel recommended that the goal of Canadian criminal legal aid should be: *More fair, effective and efficient justice system for economically disadvantaged Canadians*.<sup>136</sup> Panel members recommended that four pillars should form part of the underlying policy of reform: accessibility, efficiency, effectiveness and accountability. These pillars could "serve as the tools by which to measure success" of renewal strategies.<sup>137</sup> Similarly, the Australian National Partnership Agreement is based on the following overarching policy statement:

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, equality, efficiency, and effectiveness.<sup>138</sup>

More rarely, the objectives of legal aid are described in broader terms relating to the improved status of individuals and groups living in situations of disadvantage in society as a whole, rather than simply in relation to the justice system. This moves the focus from simply resolving legal issues and problems to encompassing broader notions of preventing legal problems, promoting legal health and legal empowerment, contributing to social inclusion and advancing systemic change. The goal moves beyond ensuring procedural fairness to ensuring substantively just outcomes.<sup>139</sup> This broader view is consistent with public conceptions of access to justice.<sup>140</sup>

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<sup>134</sup> *Ibid* at 52.

<sup>135</sup> *Ibid* at 53.

<sup>136</sup> Deputy Ministers' Advisory Panel Report, *supra* note 12 at 9.

<sup>137</sup> *Ibid*.

<sup>138</sup> *Supra* note 109.

<sup>139</sup> See extended discussion of the shift in focus away from procedure to outcomes in legal aid services in Dr. Melina Buckley "Evolving Legal Services", *supra* note 79.

<sup>140</sup> See *Access to Justice Metrics*, *supra* note 66; Amanda Dodge, [Envisioning Equal Justice: Community Consultation Report](#) (Ottawa: CBA, 2013).

Canadian legal aid scholar Professor Mary Jane Mossman recommends framing legal aid priorities around the goal of social inclusion, rather than resolving individual legal problems, meeting legal needs or combatting social exclusion.<sup>141</sup> She argues that it is important to envisage legal aid in broader terms than "services" to individual clients and rather as a strategy to confront systemic barriers to equality.<sup>142</sup> Ontario community legal clinics have always integrated this broader vision into their work as recognized in various reviews of legal aid in that province.<sup>143</sup>

Other reports have emphasized the important role of Canada's legal aid plans in contributing to reform of both the justice system and substantive law.<sup>144</sup> The Trebilcock Report on Legal Aid Ontario, for example, conceives of legal aid as an integral part of the overall justice system.<sup>145</sup> *Reaching Equal Justice* talks about how legal aid plans and community-based clinics have a particularly key role in contributing to legal health, both at the individual and systemic levels. These organizations are well placed, either alone or in concert with other groups, to keep tabs on a community's broader 'legal health' – providing valuable feedback about the incidence of legal problems in a community and potential systemic solutions. These organizations could offer an early warning system about general increases in certain types of legal problems with a view to timely intervention and prevention.<sup>146</sup>

A forward-looking national policy statement on legal aid could also be based on *Charter* values and equality goals. The rights of equality, liberty, life and security of the person and the right to participate in proceedings that are fundamentally just are core values embedded in the *Charter* and apply to all governmental action. To date, judicial decisions about any constitutional obligation on governments to provide legal aid have been incremental and represent only a minimum standard. However, creating or renewing a national policy statement about government programs such as legal aid "must meet a higher, proactive, and more comprehensive standard" than those developed by the courts in isolated cases:

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<sup>141</sup> These ideas are discussed further in the section on coverage. Mary Jane Mossman, with Karen Schucher and Claudia Schmeing, *Comparing and Understanding Legal Aid Priorities* (paper prepared for Legal Aid Ontario, Review of Legal and Social Issues) (2010) 29 W.R.L.S.I. 149.

<sup>142</sup> *Ibid.*

<sup>143</sup> Ontario Legal Aid Review, *Report of the Ontario Legal Aid Review: a blueprint for publicly funded legal services* (Toronto: Ministry of the Attorney General, 1997); M. Trebilcock, *Report of the Legal Aid Review 2008* (Toronto: Ministry of the Attorney General, 2008) [[Trebilcock Report](#)].

<sup>144</sup> *Reaching Equal Justice*, *supra* note 4 at 67; *Moving Forward on Legal aid*, *supra* note 4 at 129.

<sup>145</sup> *Trebilcock Report*, *supra* note 143 at 11.

<sup>146</sup> *Reaching Equal Justice*, *supra* note 4 at 67-70.

Indeed, the state's obligation must ensure that legal aid services foster fundamental constitutional values, including the rule of law and democratic participation, as well as equality.<sup>147</sup>

### Shared governmental responsibility

Clarifying the shared federal, provincial and territorial responsibility for legal aid is important for a guidance benchmark. While provincial and territorial governments have primary responsibility for the day to day functioning of the justice system, the federal government also has a critical role. Like healthcare, justice is a shared governmental responsibility. Renewal, and in particular national equality, depends on revitalizing the federal government's role for both criminal and civil legal aid. Equal justice is about more than the administration of justice in a province or territory: it is about the health, safety and security of all residents of Canada and ensuring good governance through a fair and effective legal system. These are national concerns, both as a matter of constitutional division of powers and good public policy.

Equal justice is about more than the administration of justice in a province or territory: it is about the health, safety and security of all residents of Canada and ensuring good governance through a fair and effective legal system.

*Reaching Equal Justice* concludes that a reinvigorated federal role is imperative to reach equal justice.<sup>148</sup> The shared responsibility for legal aid is founded on Canada's Constitutional framework, both in terms of the division of powers between levels of government and the joint commitment to "ensuring essential public services of reasonable quality to all Canadians."<sup>149</sup>

Reaffirming that shared governmental responsibility is important not only to ensure that the federal government "pays its fair share as a partner in the justice system,"<sup>150</sup> but to ensure that we do in fact have a national legal aid system.

*Reaching Equal Justice* calls on the federal government to be a leader in access to justice innovation, including on legal aid. For example, the Deputy Minister's Advisory Panel report on criminal legal aid concluded that while funding levels continue to be a primary concern, the federal government could also support legal aid by:

- Having a vision

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<sup>147</sup> Mossman, *supra* note 141 at 29-30.

<sup>148</sup> *Supra* note 4 at 147-148.

<sup>149</sup> *Constitution Act* 1982, section 36(1)(c).

<sup>150</sup> See, *supra* note 124.



- Promoting a culture of measurement
- Serving an advocacy/leadership role
- Encouraging an interdisciplinary approach to legal aid
- Conducting research
- Facilitating information sharing
- Considering the effects of policy and legislation on legal aid.<sup>151</sup>

### Funding principles

Sustainable funding is key to the future Canadian legal aid system. Putting funding for these essential public services on a sustainable course involves several factors:

- a principled method for determining total funding requirements,
- a principle setting out the relative responsibility of the federal, provincial and territorial governments,
- a method for determining priorities during the progressive move toward full funding, and
- a statement on the relative funding for criminal and civil legal aid.

The issue of principled methods for determining total funding requirements was recently canvassed in two Australian reports. A report prepared for the Law and Justice Foundation of New South Wales described an ideal approach to a national funding structure in that federation:

Finally, an appropriate system of funding and responsibility might ideally see the national and jurisdictional levels agree on priorities for target groups, secure the necessary higher-level agreements to support and encourage cross-sectoral collaboration at lower levels, and allocate resources on a needs basis. Such funding allocations and accountability regimes must then provide sufficient flexibility to jurisdictional, regional and local level agencies to plan, collaborate and ultimately deliver services that are targeted, joined up, timely and appropriate to the needs and capabilities of the users, but do so taking into account the particular characteristics of the need to be addressed and the particular mix of available services.<sup>152</sup>

The Australian Productivity Commission concluded that sustainable legal aid funding should be ensured with “future funding levels determined in reference to a comprehensive assessment of legal need:”<sup>153</sup>

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<sup>151</sup> *Supra* note 12, Annex 5, *Legal Aid Research Findings* at 28.

<sup>152</sup> Geoff Mulherin, *Reshaping the Legal Assistance Landscape*, *supra* note 122, introduction at vii.

<sup>153</sup> PCR, *supra* note 3 at 739.



The Commission considers that a comprehensive assessment of legal need (by both civil law type and geographic area) is required in each jurisdiction. The assessment should be forward looking, taking into account likely population and other demographic changes.<sup>154</sup>

(The role of legal aid needs assessments are discussed in greater detail below.) The Productivity Commission noted that the 'global funding envelope' should be broadly related to the costs associated with meeting identified needs, with providers collaborating and delivering the most efficient services possible.<sup>155</sup> Funding should be "stable enough to allow for longer term planning and flexible enough to accommodate the anticipated reduction in other sources of funding" (particularly the equivalent of interest on trust funds) in coming years.<sup>156</sup> Funding shortfalls should be made more transparent through annual public reports by all governments on the extent of any failure to meet agreed coverage and priorities.<sup>157</sup>

Over time, it should become possible to improve forecasting on legal aid spending with more sophisticated risk analysis, for example risk factors for likelihood of family law disputes.<sup>158</sup> Forecasting could take into account external factors that impact on demand, such as policy and legislative changes that can significantly affect demand for legal assistance services.<sup>159</sup>

In the Canadian context, the focus has been on re-establishing the federal government as an equal funding partner in legal aid. The last time the federal government was actually an equal 50/50 partner was 1990/1991.<sup>160</sup> *Reaching Equal Justice* calls for a full funded national legal aid system by the year 2025 and, in the interim, for the federal government to reinstate legal aid funding to 1994 levels and commit to increases in line with national legal aid benchmarks, at latest by the year 2020. The specific actions and milestones envisioned are:

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<sup>154</sup> *Ibid* at 742.

<sup>155</sup> *Ibid*.

<sup>156</sup> *Ibid*.

<sup>157</sup> *Ibid*.

<sup>158</sup> For example, *The Legal Australia Wide (LAW) Survey*, provides a more detailed insight into legal need. "indicates that the factors most strongly associated with experiencing a family legal problem are (in descending order of importance) being in a single parent family, having a disability, living in disadvantaged housing, receiving government benefits as the main source of income, being unemployed and living in a regional area (relative to a major city);" PCR, *supra* note 3 at 744.

<sup>159</sup> *Trebilcock Report*, *supra* note 143; Dr. Melina Buckley, *Access to Legal Services in Canada: A Discussion Paper* (Prepared for the National Action Commission on Access to Justice in Civil and Family Matters, 2011) at 19 and 39.

<sup>160</sup> Dr. Ab Currie, "[The State of Civil Legal Aid in Canada: By the Numbers in 2011-2012](#)" (Toronto: CFCJ, 2013).

- The federal government commits to steady increases in contributions to legal aid funding including returning to 50% cost-sharing in criminal matters and establishing a dedicated civil legal aid contribution
- The federal government makes funding for civil legal aid transparent and works with provincial and territorial governments and justice system stakeholders to regenerate legal aid.<sup>161</sup>

Funding principles could also address incentives for relatively low funding provinces to increase their contributions. Funding principles could also guide allocations and spending priorities as legal aid funding begins to increase and until the goals of full funding are met. Priorities will depend to some extent on benchmarks on coverage, eligibility and service delivery (discussed below).

At the same time, overall economic and non-economic criteria might also be needed to guide progressive implementation of the benchmarks on a nation-wide basis. Legal Aid Ontario and the Association of Community Legal Clinics of Ontario have engaged in this type of exercise for deciding where to spend the recent substantial increase in provincial funding for both certificate and clinic funding. Factors that could be considered nationally include:

- the breadth and depth of poverty in various regions
- the current ratio between location of low income populations and legal aid funding
- the needs of rural and remote communities, and
- using an equality lens to identify both economic and non-economic considerations affecting disadvantaged groups and communities.

Finally, funding principles could address the recurring issue of funding for criminal legal aid having priority over funding for non-criminal matters. The central rationale for providing publicly-funded legal counsel has been based on “negative liberty” interests; situations where the state initiates a legal proceeding with the potential to deprive an individual or his or her liberty. This focus has been reinforced through Canadian jurisprudence establishing a minimum standard for legal aid provision in criminal proceedings where there is likelihood of incarceration.<sup>162</sup> But, research has shown that many other legal issues can also threaten fundamental individual interests, whether or not the state is a party to the proceedings.<sup>163</sup> As it stands, limited legal aid budgets are stretched just to meet essential criminal legal aid services, resulting in substantial asymmetry in the availability of criminal versus civil legal aid in most provinces and territories.<sup>164</sup>

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<sup>161</sup> *Reaching Equal Justice*, *supra* note 4 at 149.

<sup>162</sup> ‘Right to counsel’ cases, *supra* note 61.

<sup>163</sup> This research is summarized in Mossman *et al*, *supra* note 141 at 28-29.

<sup>164</sup> *Reaching Equal Justice*, *supra* note 4 at 38-39.

### Options for guidance benchmarks

The Working Group has identified potential guidance benchmarks to facilitate and encourage dialogue. Some are meant to be alternative approaches, or more than one benchmark may be required to adequately define a basic framework for the Canadian legal aid system.

#### **Option #1 – Policy Statement A**

*The Canadian legal aid system is integrated, efficient, cost-effective and focused on providing services for disadvantaged Canadians in accordance with access to justice principles of accessibility, appropriateness, equality, efficiency and effectiveness.*

#### **Option #2 – Policy Statement B**

*The Canadian legal aid system provides holistic and transformative legal assistance and value for money, and contributes to the health and well-being of disadvantaged and low-income Canadians, combats social exclusion and provides an accessible and effective justice system.*

#### **Option#3 – Shared Governmental Responsibility**

*The federal, provincial and territorial governments are equal partners in ensuring the provision of essential public legal services of reasonable quality to across Canada. The federal government is a leader in supporting national equality in legal aid.*

#### **Option#4 – Funding Principles**

*Essential public legal services are provided with stable and sustainable funding based on triennial comprehensive needs assessments for both criminal and civil legal needs on an equitable basis.*

### A Legal Aid System Targeted At...

Legal aid is designed to provide meaningful access to justice for those who require legal assistance but cannot obtain in on their own due to financial or other barriers. Unlike health care and public education, legal aid has never been a universal social program. Thoughtful consideration has been given to the benefits of shifting legal aid away from a targeted social service for low income and disadvantaged individuals to one that serves all who cannot afford legal services, and to potential ways to fund universal services through a public insurance scheme.<sup>165</sup>

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<sup>165</sup> *Reaching Equal Justice*, *supra* note 4 at 107-108; Trebilcock Report, *supra* note 143 at 76-78; S Choudry, M. Trebilcock and J. Wilson, "Growing Legal Aid Ontario into the Middle Class: A Proposal

Legal aid services are rationed in three main ways: types of legal matters covered (coverage); who can access services (eligibility); and the type, depth and quality of legal assistance provided, that is whether a client gets full or partial assistance (service delivery). Other rationing measures include financial contributions by clients and limited remuneration of service providers (e.g. below market rates for both staff and judicare lawyers, claw-backs, and partial payments). There is a critical relationship between these elements and the strategic policy choices required to ensure meaningful access to justice. The three main ways of rationing are inextricably connected. For example, by setting very narrow eligibility criteria, a legal aid provider could provide full high-quality services in a large range of matters to a very small group of people. Or conversely by having more generous eligibility criteria, a legal aid plan could provide partial assistance in a few selected areas to a large group of people.

The overarching question here is: what should the future Canadian legal aid system be *targeted at*? This section considers issues for targeting legal aid services by canvassing potential benchmarks related to coverage, eligibility and service delivery.

### Coverage

Coverage refers to the *scope* of legal aid services provided by a program or system. It is usually defined with reference to specific areas of law or types of legal issues. The concept of legal aid coverage used to be synonymous with a right to legal representation but now 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, as opposed to legal information or limited assistance. The coverage issue therefore overlaps with the third targeting principle, limits to the type, depth and quality of legal aid services provided for a client on a particular legal problem or matter. The term “service delivery” is used for this latter category of benchmarks.

The initial important question is what services should be considered ‘essential.’ Services deemed essential must be fairly awarded to all who need them and qualify financially. As only governments can ensure that is what consistently happens, these services are by definition public services.

People experience a wide range of legal problems, and laws and legal issues affect people in a wide range of ways and situations. As with other human services, legal aid is a public program that must prioritize providing essential legal services. The

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for Public Legal Expenses Insurance” in *Middle Income Access to Justice* (Toronto: University of Toronto: 2011).

initial important question is what services should be considered 'essential.' Services deemed essential must be fairly awarded to all who need them and qualify financially. As only governments can ensure that is what consistently happens, these services are by definition public services.

### *Overview of current situation*

There are wide disparities in legal aid coverage across Canada. In most jurisdictions, a lack of resources means that some case types are not covered "or only covered 'thinly.'"<sup>166</sup> In principle, all legal aid plans provide legal aid in serious and/or complex criminal matters where the accused is facing the likelihood of incarceration and cannot otherwise afford a lawyer, and for youths charged under the *Youth Criminal Justice Act*. However, in practice, accused can and do still appear unrepresented in Canadian courts, sometimes due to gaps or delays in accessing service.<sup>167</sup> Similarly, and with the same caveat, legal aid is guaranteed to all parents who cannot afford legal assistance in child protection proceedings if there is the possibility that the state will take custody of their child or children.<sup>168</sup> Beyond this baseline, provincial and territorial legal aid plans provide a range of legal assistance services in mental health proceedings, family, immigration and refugee, human rights, prison, poverty and other civil law matters.<sup>169</sup> In rare cases, legal aid funding is also provided for test cases and strategic litigation.<sup>170</sup>

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<sup>166</sup> This phrase is used in the PCR, *supra* note 3 at, for example, at 723 and 871.

<sup>167</sup> Dr. Ab Currie, [Unmet Need for Criminal Legal Aid: A Summary of Research Results](#) (Ottawa: Justice Canada, 2003).; Robert Hann, Joan Nuffield, Colin Meredith and Mira Svoboda, *Court Site Study of Adult Unrepresented Accused, Part I: Overview Report and Part II: Site Reports* (Toronto: Robert Hann & Associates, 2002) and (Ottawa: ARC Research Consultants, 2002).

<sup>168</sup> The tip of this iceberg is demonstrated in the right to counsel cases brought by individuals who have been denied legal aid in these matters. See, for example, *British Columbia (Attorney General) v. T.L.*, 2010 BCSC 105 (and cases cited therein).

<sup>169</sup> To illustrate, 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. In contrast, 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, sections 4.4-4.13. See also, [Toward National Standards for Publicly Funded Legal Services](#) (Ottawa: CBA, 2013) ('Building Block' discussion paper prepared for CBA *Envisioning Equal Justice*, research and consultation phase).

<sup>170</sup> For example, [Ontario's Community Clinics](#) retain "law reform, and test case litigation" within their mandate. This approach can preclude legal aid lawyers having to fight injustices on a repetitive, individual basis, in favour of systemic reform to benefit many people with similar problems.

The availability of legal aid for various types of cases has changed over time in most provinces and territories depending upon the funding available to legal aid plans. In some cases, changes frequently occur as legal aid plans strive to balance their budgets. The resultant uncertainty can create additional barriers for people to access justice.<sup>171</sup>

The problem is not unique to Canada. As noted in the Australian Productivity Commission report: “ There is currently no benchmark for what civil law services should be offered by LACs [Legal Aid Commissions] and this variability means access to justice depends arbitrarily on state of residence.”<sup>172</sup>

### *Evidence-informed best practices*

There are five main approaches to defining essential public legal services that could serve as coverage benchmarks. These are: legal categories, basic needs, empirical needs assessments, high risk and complex needs, and strategic/systemic impact advocacy.

#### Legal categories

Legal aid coverage has traditionally been described from the perspective of the justice system to focus on legal categories, legal matters and areas of law. In some Canadian jurisdictions, coverage was originally set out as entitlements in provincial legislation but this is no longer the case.<sup>173</sup> For example, BC’s *Legal Services Society Act* formerly required the legal aid plan to provide legal services in the following circumstances:

- Criminal proceedings that could lead to imprisonment;
- Civil proceedings that could lead to confinement or imprisonment;
- Domestic disputes that affected the individual’s physical or mental safety or health or that of the individual’s children;
- Legal problems that threaten:
  - The individual’s physical or mental safety or health;
  - The individual’s ability to feed, clothe, or provide shelter for himself or herself and the individual’s dependents;
  - The individual’s livelihood.<sup>174</sup>

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<sup>171</sup> See, for example, Geoff Mulherin’s comments about ‘broken pathways’ creating additional barriers in *Reaching Equal Justice*, *supra* note 4 at 71.

<sup>172</sup> PCR, *supra* note 3 at 723, citing the NSW Society of Labor Lawyers (sub. 130, s. 34).

<sup>173</sup> *Loi sur l’aide*, *supra* note 169.

<sup>174</sup> *Legal Services Society Act*, R.S.B.C. 1979, c.227. The Quebec legal aid statute continues to employ the language of entitlement to services, *supra* note 169 at 4.13.

The legal categories approach focuses on identifying situations or types of legal matters where fundamental interests are engaged, the proceedings are complex, and/or the potential negative legal consequences are severe.

Another, more expansive example along these lines is found in the CBA's 1993 *Charter of Public Legal Services*, which defined essential legal services as:

- (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.

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.<sup>175</sup>

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<sup>175</sup> Resolution 93-11-A.

The CBA *Charter* does not specifically mention prison law and post-conviction matters although respect for the human rights of prisoners and those with criminal records is a matter of long standing CBA policy.<sup>176</sup>

Many legal aid plans worldwide continue to identify priority areas for public service provision in relation to legal categories.<sup>177</sup> Similarly reform efforts tend to focus on areas of law where legal aid services are thin. The recent Australian Productivity Commission report noted that legal assistance is inadequate in a number of areas including employment, housing, rights and consumer matters and low-value family law property matters.<sup>178</sup> The Commission concluded:

...that there are grounds for providing more comprehensive coverage of civil disputes, including in areas of law already identified by government as being a priority. Resources should be focused where disputes impact significantly on the lives of individuals or have the potential to escalate, imposing costs on society more broadly.<sup>179</sup>

### Basic legal needs

A second approach to defining essential legal services is with reference to basic needs. The starting point is not the justice system's definition of legal category but rather the underlying interest affected from the perspective of the individual. *Reaching Equal Justice*, the BC Public Commission on Legal Aid (*Doust Report*), and the American Bar Association have all recommended statements of basic needs as the basis for legal aid standards.

*Reaching Equal Justice* uses this definition:

We understand essential legal needs to be those arising from legal problems or situations that put into jeopardy the security of a person's or that person's family's security – including liberty, personal security, health, employment, housing, or ability to meet the basic necessities of life and extending to other urgent legal needs.<sup>180</sup>

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

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<sup>176</sup> As one example, see Professor Michael Jackson, *Locking Up Natives in Canada* (Ottawa: CBA, 1988) and *Justice Behind the Walls* (Ottawa: CBA, 1988). The recommendations of both reports were adopted as CBA policy in (89-02-A, 89-04-A), and continue to ground the association's policy positions to the present time.

<sup>177</sup> As one example, in the UK, the [Civil Legal Advice Service](#) provides help for civil "problems including: debt, if your home is at risk; housing; domestic abuse; family, if you've been in an abusive relationship; special educational needs; discrimination; and issues around a child being taken into care."

<sup>178</sup> PCR, *supra* note 3 at 723.

<sup>179</sup> *Ibid.*

<sup>180</sup> *Reaching Equal Justice*, *supra* note 4, referring to *Doust Report* at 9.



... 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.<sup>181</sup>

The *Doust Report* also recommended developing “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.”<sup>182</sup> It called for this type of merging between the traditional legal categories approach and an approach based on addressing the needs of the most disadvantaged clients, often with a mix of legal and non legal problems.

In 2006, the ABA adopted a resolution on the right to civil counsel, which 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.<sup>183</sup>

The report supporting this resolution notes that it represents a baseline or minimum that “...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.”<sup>184</sup> The resolution does not suggest that jurisdictions should limit providing 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.<sup>185</sup>

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

- “Shelter” includes a person or family’s access to or ability to remain in an apartment or house, and the habitability of that shelter.

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<sup>181</sup> *Supra* note 4, Recommendation 1.

<sup>182</sup> *Ibid.* Recommendation 2.

<sup>183</sup> ABA, *Report to the House of Delegates*, August 2006, Resolution 112A at 1.

<sup>184</sup> *Ibid* at 12.

<sup>185</sup> *Ibid.*

- “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.<sup>186</sup>

While there is a strong presumption that lawyers must be provided in all cases engaging these interests, trivial threats, even to a basic human need would not warrant the investment of legal resources.<sup>187</sup>

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.”<sup>188</sup> 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.

<sup>186</sup> *Ibid* at 13.

<sup>187</sup> *Ibid*.

<sup>188</sup> 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).

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.
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 initial list of the most urgent legal problems 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 are available to respond to a category of legal problems; what types of legal interventions are available; and the capacity of the legal system or justice system to fill 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.”<sup>189</sup> The intent was to develop a universal list that would be relevant in a wide cross-section of countries, and not to address 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 protecting another important category of individual investments 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.<sup>190</sup>

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.<sup>191</sup> 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.<sup>192</sup> 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.<sup>193</sup>

In its most recent report on legal aid in Europe, HiiL researchers defined basic legal needs in this way:

The most frequent justiciable problems include consumer problems, problems between neighbours, family problems, employment problems, issues regarding tenure, eviction and property rights on land and housing, as well as debt problems and personal injury cases. People may also become the victim of crime, or become suspected of committing a crime. A final category of legal problems creating a need for access to justice is issues in relation to government, such as conflicts about social security, migration problems or problems related to government permits.

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<sup>189</sup> *Ibid* at 36.

<sup>190</sup> *Ibid* at 37.

<sup>191</sup> *Ibid* at 7.

<sup>192</sup> See CBA Committee’s discussions in [Unexplored Alternatives for the Middle Class](#) or [Future Directions for Legal Aid Delivery](#) (Ottawa: CBA, 2013) (‘Building Block’ discussion papers for CBA *Envisioning Equal Justice*, research and consultation phase).

<sup>193</sup> Melina Buckley, *Access to Legal Services in Canada*, *supra* note 159 at 3.

Many problems with the highest impact tend to come up in key relationships between people living or working together for a long time and investing much in these relationships. These are family issues (divorce, inheritance), employment (termination), land and housing issues (property rights, tenure, eviction) and neighbour problems.

Another high impact issue which requires access to justice is being held in (pre-trial) detention, and subsequently, the criminal justice procedure.<sup>194</sup>

### Needs assessments

Several empirical approaches have been taken to defining legal needs. A legal needs approach has the potential to be more responsive than using rigid legal categories. One major trend is the use of broad based surveys of legal needs throughout a country or region's population. This civil legal needs survey research has reached surprisingly similar results across many jurisdictions internationally.<sup>195</sup> It measures the most frequently experienced legal problems, steps taken by survey respondents to address these problems and the impact of unresolved legal problems.

For the most part the civil legal aid survey results do not yield evidence about the need for legal aid *per se*. The Civil Law Division of Legal Aid New South Wales, however, has developed a problem solving approach to civil law matters based around law for 'everyday life'.<sup>196</sup> These services are considered the Australian 'high water mark' and have been described in these terms:

The civil law program focuses on areas that have the most impact on people's lives, including tenancy and housing issues, debt and social security. Legal Aid NSW exemplifies leading practice with its civil law division and services.<sup>197</sup>

A second major trend in needs assessments focuses on determining situations where individuals require full legal representation. Several ongoing US initiatives have been established to empirically demonstrate where publicly funded counsel is essential. The Boston Bar Association's *Civil Gideon Project* and the California legislature's *Access to Justice Statute*, known as the *Shriver Pilot*<sup>198</sup> are designed to

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<sup>194</sup> HiiL 2014 report, *supra* note 6 at 25, which cites their earlier report, HiiLTrend Report – [Part 1: Towards Basic Justice Care for Everyone. Challenges and Promising Approaches](#) (2012) 47.

<sup>195</sup> Melina Buckley, *Access to Legal Services in Canada*, *supra* note 159 at 11.

<sup>196</sup> This program is described in PCR, *supra* note 3 at 722-723.

<sup>197</sup> *Ibid* at 723.

<sup>198</sup> See: 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); Clare Pastore, ["California's Sargent Shriver Civil Counsel Act Tests Impact of More Assistance for Low-Income Litigants"](#) (Shriver National Center on Poverty Law, July- August 2013).

yield the evidence needed to support coverage benchmarks. Community Legal Education Ontario (CLEO), one of the Ontario community legal clinics, has recently received funding to carry out a similar project.<sup>199</sup>

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

- Substantive or procedural law
- The judge
- 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.<sup>200</sup>

The Boston Bar Association pilot projects were developed based on a conceptualization of basic human needs. Some 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 imbalance.”<sup>201</sup> This research identified features of legal matters and proceedings that tend to require counsel:

- 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).<sup>202</sup>

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 as to when publicly-

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<sup>199</sup> [CLEO, Centre for Research and Innovation](#), media release March 3, 2015.

<sup>200</sup> Dr. Melina Buckley, *Evolving Legal Services*, *supra* note 79 at 18.

<sup>201</sup> *Gideon’s New Trumpet*, *supra* note 198 at 7.

<sup>202</sup> D. James Greiner and Cassandra Wolos Pattanayak, “[Randomized Evaluation in Legal Assistance: What Difference Does Representation \(Offer and Actual Use\) Make?](#)” (Draft of July 29, 2011). See extended discussion at 23-37.

funded counsel should be available. It is anticipated that over the next few years, these empirical assessments will provide additional evidence that will assist in refining coverage benchmarks.

Some reports have called for more sophisticated legal aid needs assessments that would take into account a range of systemic factors that shape the demand for essential legal services.<sup>203</sup> This third approach reflects the inevitability that legal needs change over time along with social and legal norms and the law.<sup>204</sup> For example, the *Ontario Legal Aid Review's 1997 Blueprint* report identified a series of factors to be taken into account in determining priorities for the provincial legal aid system as a whole:

- I. the importance of consultation in defining needs and of responding to a broad range of needs;
- II. strategic oversight at a system-wide level with responsiveness to local conditions;
- III. limitation of the impact of the "negative liberty" test;
- IV. the need to integrate delivery model issues into the priority-setting process and to focus on client impact;
- V. the strategic use of resources to facilitate access to law; and
- VI. the need to monitor and revise priorities in an "evolving social and legal environment".<sup>205</sup>

A more dynamic conception of legal aid "necessitates an ongoing system for measuring and evaluating the impact of choices with respect to priorities, and initiatives to respond to them more effectively."<sup>206</sup> In moving away from traditional, static conceptions, it is possible "that initiatives to address problems may involve efforts to seek reforms to the law and to court procedures to achieve systemic changes, rather than modest adjustments to priorities for individual legal aid services."<sup>207</sup>

#### High risk and complex needs

The approaches to defining coverage benchmarks discussed above mainly take a generic approach and do not necessarily consider situations of real disadvantage lived by many low-income individuals and groups. Community legal clinics were

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<sup>203</sup> See for example, *Ontario Blueprint Report*, *supra* note 143; PCR, *supra* note 3 at 742-744.

<sup>204</sup> *Reshaping legal assistance services*, *supra* note 122.

<sup>205</sup> *Ontario Blueprint Report*, *supra* note 143 at 90.

<sup>206</sup> Mossman et al, *supra* note 141 at 41.

<sup>207</sup> *Ibid.*

established both in Canada and abroad in recognition that poor people have distinct legal needs. Despite more than 40 years of experience, there are still large gaps in research related to substantial problems and hard to reach target groups.<sup>208</sup>

Civil legal needs research provides further evidence of the patterns of legal problems experienced by identifiable groups of people.<sup>209</sup> Vulnerable groups generally have more contact with the law than others. Canadian studies have made the same findings: legal problems tend to ‘cluster’, multiply, and have an additive effect and this pattern of cascading problems disproportionately impacts people living in marginalized conditions.<sup>210</sup> For every additional problem experienced the probability of experiencing more problems increases.

These surveys also draw an important link between unresolved legal problems and issues of health, social welfare and economic well-being, social exclusion and poverty. In addition to fostering problems in non legal areas of life, people who experience one legal problem are much more likely to experience more than one, and this is especially true for people living on low incomes and conditions of disadvantage.

It follows from this research base that coverage benchmarks could be designed based on the high risks and complex legal aid needs associated with disadvantage, poverty, and social exclusion.

The Australian approach to legal aid priorities offers one way of taking account of high risk and complex needs. Priorities are initially defined in terms of legal categories, but they also require assessment of "special circumstances": language or literacy problems, intellectual or dis/ability (physical or psychiatric) challenges, geographic isolation, a likelihood of domestic violence in family law matters, etc.<sup>211</sup> Several recent Australian reports stress the importance of giving priority to meeting complex needs and conclude that more proactive steps need to be taken.<sup>212</sup> For example, the Productivity Commission concluded that:

Providers of legal assistance services would also be in a position to offer *services in areas of law already identified by government as priorities to disadvantaged people* (many of whom would qualify under the current means

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<sup>209</sup> For an overview of this extensive research see *Reaching Equal Justice*, *supra* note 4 at 32-35.

<sup>210</sup> Dr. Ab Currie, "A National Survey of the Civil Justice Problems of Low and Moderate Income Canadians: Incidence and Patterns" (2006) 13:3 *International Journal of the Legal Profession* 217.

<sup>211</sup> For example, as set out *infra* at 53, the National Legal Aid 2008 position paper and 2011 strategic plan (see note 214) prioritizes services by areas of disadvantage and focuses on promoting social inclusion and human rights. This emphasis on taking into account special circumstances is also found in the Australian PCR, *supra* note 3, and *Reshaping legal assistance services*, *supra* note 122.

<sup>212</sup> See for example, *Reshaping legal assistance services*, *ibid.* at 62.



test). These include family violence, tenancy, housing, debt and social security matters.<sup>213</sup>

National Legal Aid (NLA), an umbrella organization of legal aid providers across Australia, 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 identified six priority areas of need, suggesting they 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.
- 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.<sup>214</sup>

Similarly, Justice Canada's Deputy Minister's Advisory Panel noted the need to focus on high users of the system and to design community specific responses to better address the particular needs of certain groups (accused with mental health issues and drug addiction problems, and Aboriginal people).<sup>215</sup> The report notes:

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<sup>213</sup> PCR, *supra* note 3 at 738.

<sup>214</sup> National Legal Aid, "A New National Policy for Legal Aid in Australia" (2008); National Legal Aid 2011, Strategic Plan 2011-2013.

<sup>215</sup> *Supra* note 12 at 6.

Of particular importance was the need to be mindful about the unique differences in the delivery of criminal justice in the North (access to communities is often more difficult and costly, limited availability of other services, more costly delivery). Community dynamics differ based on demographic make-up, including accused with mental health issues, Aboriginal and visible minority populations. As a result there is a need to re-invent parts of the justice system to respond to the needs of these communities.<sup>216</sup>

### Strategic advocacy

Some legal aid providers in Canada and abroad provide strategic advocacy (also known as systemic or impact advocacy) and law reform activities, in addition to direct services to individuals to resolve legal problems. Strategic advocacy to reform laws, regulations and institutions is often the only effective way to eliminate recurring problems, as it gets at the root causes of repeated and often routine legal issues. One successful strategic legal initiative can result in resolving and preventing many individual cases, reducing the demand for legal aid. It also has potential to improve the overall functioning of laws, the justice system, and beyond. The Australian Productivity Commission noted that strategic advocacy can have significant impacts on other government agencies:

When done effectively, strategic advocacy can create significant savings not simply for the legal assistance sector but also a cascading impact on other agencies. This includes improving primary decision making providing government with the advantages that flow from getting a decision right the first time and short-circuiting the duplication and delay caused by poorly made decisions.<sup>217</sup>

Legal aid providers are uniquely placed to identify systemic problems affecting disadvantaged persons. Yet, this type of legal aid work can be viewed as contentious and is often restricted or eliminated during lean fiscal times.<sup>218</sup>

Strategic advocacy can be seen as another service on the continuum of legal aid services. However, it is more accurately an issue to be considered in developing coverage benchmarks because it relates to perceptions of the fundamental role of legal aid. As noted earlier about Professor Mary Jane Mossman's work, at its inception, legal aid extended beyond assisting individuals with their problems to include a commitment to achieving social justice or social inclusion through legal strategies to overcome "systemic problems in social and economic arrangements that create barriers to full participation for the most vulnerable."<sup>219</sup>

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<sup>216</sup> *Ibid.*

<sup>217</sup> PCR, *supra* note 3 at 710, quoting the submission of Victoria Legal Aid (sub. 102, at 6).

<sup>218</sup> *Ibid.*

<sup>219</sup> Mossman, *supra* note 141 at 39.

The Australian Productivity Commission concluded that: “strategic advocacy and law reform that seeks to identify and remedy systemic issues, and so reduce the need for frontline services, should be a core activity of LACs [legal aid commissions] and CLCs [community legal clinics] (particularly peak bodies and the larger CLCs).<sup>220</sup>

#### ***Options for coverage benchmarks***

The Working Group has identified the following potential coverage benchmarks to facilitate dialogue. Some are meant to be alternative approaches, and more than one benchmark may be required to adequately define essential legal services.

##### **Option #5 – Coverage: Areas of law**

*The Canadian legal aid system provides assistance to eligible persons with essential legal needs in family law, criminal law, prisoner law, civil commitment proceedings under mental health legislation, immigration and refugee law, administrative law and other civil legal matters.*

##### **Option #6 – Coverage: Basic needs**

*The Canadian legal aid system provides assistance to eligible persons wherever legal problems or situations put into jeopardy a person's or a person's family's security – including liberty, personal safety and security, health, equality, employment, housing or ability to meet the basic necessities of life.*

##### **Option #7 – Coverage: Needs assessments**

*The Canadian legal aid system provides assistance to eligible persons with essential legal needs based on comprehensive needs assessments.*

##### **Option#8 – Coverage: Focus on High Risk and Complex Needs**

*The Canadian legal aid system prioritizes assistance to persons at risk and those with complex needs. This includes people with a disability, people in remote areas, people from non-English and/or non-French backgrounds, homeless people, First Nations people, people with mental illnesses, people experiencing or at risk of family violence and people who are financially disadvantaged.*

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<sup>220</sup> PCR, *supra* note 3 at 717.

**Option#9 – Coverage: Strategic legal advocacy**

***The Canadian legal aid system includes as a core function strategic legal advocacy to correct systemic problems affecting low-income persons, with providers using a broad range of impact strategies and measuring outcomes.***

**Eligibility**

Eligibility is the second major issue to be considered in developing benchmarks to guide and measure the targeting of legal aid. Eligibility criteria decide who can apply for and receive legal aid, sometimes referred to as a “means test.” The main focus is usually on the financial capacity of the individual or family seeking assistance, although sometimes other criteria are also considered. In some cases, legal aid information or assistance services, particularly web based or print material, are provided to everyone regardless of their financial situation. The group of people who are eligible for legal aid can also be extended by requiring financial contributions from those who do meet financial criteria but still cannot afford legal services.

The central issues here are:

- the underlying principles and method for determining financial eligibility;
- if and how to take into account other non-financial factors in determining who should receive publicly-funded services; and
- how to deal with the gap between who qualifies for legal aid and who requires services but cannot afford to pay for them.

These issues are interrelated with the availability of affordable services in the private market and the complexity of law and procedures. The latter determines the range of situations in which partial or full legal assistance/representation are required to ensure meaningful access to justice. In addition, it is important that eligibility tests are simple, fair and can be administered efficiently.

In most Canadian jurisdictions and in many other countries, it is harder to qualify for legal aid services today than in the 1980s. This has been called the ‘welfarisation of legal aid’.<sup>221</sup> Put simply, “means tests have become too mean.”<sup>222</sup> While at their inception, Canadian legal aid programs were meant to assist low-income people, today eligibility is generally at basic subsistence levels. This remains true despite increases in eligibility levels in most provinces and territories over the past few years.

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<sup>221</sup> PCR, *supra* note 3 at 717.

<sup>222</sup> *Ibid* at 16.

Finland is one exception to this general trend. In 2002, the government expanded the availability of legal aid in matters not covered by legal expense insurance to approximately 75% of the population.<sup>223</sup> Some other European countries make legal aid available to approximately a third of its nationals and other resident European Union citizens.<sup>224</sup> In Australia, approximately 8% of the population qualifies for legal aid while another 3% are eligible on a contributory basis.<sup>225</sup> A recent Australian report concluded: “the number of households eligible for legal aid appears to be very low. Indeed, some means tests are below some common measures of poverty.”<sup>226</sup> No similar statistic is available for Canada, but it is likely that less than 10% of people in this country qualify for legal aid.<sup>227</sup>

There are two main challenges in developing national eligibility benchmarks. The first is developing a national means test based on an effective measure of poverty and disadvantage. The second is the need to continue to prioritize the disadvantaged while finding ways to serve other individuals who cannot access legal assistance to meet essential legal needs.

There are two main challenges in developing national eligibility benchmarks. The first is developing a national means test based on an effective measure of poverty and disadvantage. The second is the need to continue to prioritize the disadvantaged while finding ways to serve other individuals who cannot access legal assistance to meet essential legal needs.

Further, as noted at the outset, increases in eligibility cannot be made at the expense of the range of matters covered by legal aid or the quality of services provided.

### *Overview of current situation*

A 2002 study commissioned by Justice Canada concluded that “legal aid eligibility guidelines are consistently below low income levels”.<sup>228</sup> The 2012 Legal Aid Program evaluation carried out by the federal government noted that financial eligibility guidelines of legal aid plans for criminal matters:

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<sup>223</sup> *Reaching Equal Justice*, *supra* note 4 at 102.

<sup>224</sup> *Ibid.*

<sup>225</sup> PCR, *supra* note 3, Appendix H “*Eligibility for legal aid and the cost of extending it*” at 1016.

<sup>226</sup> *Ibid* at 1021.

<sup>227</sup> Approximately 10% of the Canadian population lives below the LICO rate and only some legal aid plans have eligibility rates that are higher than this rate. See discussion on measures of poverty, *infra* at 63.

<sup>228</sup> Spyridoula Tsoukalas and Paul Roberts, *Legal Aid Eligibility and Coverage in Canada* (Ottawa: Department of Justice, Legal Aid Research Series, 2002).

...have not kept pace with various economic indicators over time, such as Low Income Cut-Off and the consumer price index and that this has implications for accessibility to legal aid. For most plans, financial eligibility levels are now set so low that many low-income individuals facing the likelihood of imprisonment can neither afford lawyers nor qualify for legal aid.<sup>229</sup>

Legal aid financial eligibility guidelines are updated periodically, but not on a regular basis to keep pace with changes in economic indicators. The current system tends to put someone who just qualifies financially very far ahead of a person who just misses out for financial reasons, and who has no prospect of paying for legal help. Some legal aid plans soften the impact of that dividing line with client contribution programs, providing legal aid on a contributory basis (partial or full repayment) to the working poor.

Similar to the patchwork of legal aid coverage described above, eligibility for legal aid varies widely between jurisdictions. In 2014, to be eligible for criminal legal aid, a person in Ontario had to earn less than \$10,800 annually, while a person in BC could earn up to \$17,040.<sup>230</sup> In late 2014, Ontario increased funding to Legal Aid Ontario to raise eligibility rates that had been stagnant since 1996. In preparing this *Backgrounder*, the Working Group surveyed Canadian legal aid providers on the issue of eligibility. This section summarizes the information received in response to the survey.

All legal aid plans except two have income thresholds expressed in either monthly or annual net income, which vary depending upon family size. In New Brunswick, there is no threshold. The legal aid plan determines who is eligible for legal representation taking into consideration income, expenses, assets, any liabilities, family situation and type of legal services required. Newfoundland and Labrador also analyze net family income less family expenses. The income thresholds are much higher in Nunavut and the Northwest Territories reflecting the higher costs of living in the North. Assets are also taken into account and calculated in many different ways depending on the Plan's view of what could reasonably be sold to pay for a lawyer. Often a first house and a car are exempted from the assets calculation. In all jurisdictions except Alberta and the Northwest Territories, recipients of social assistance obtain an automatic qualification.<sup>231</sup> In about half of the jurisdictions

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<sup>229</sup> Department of Justice Canada, *Legal Aid program evaluation: Final report 2012*, Office of Strategic Planning and Performance Measurement, Evaluation Division. See also Deputy Ministers' Advisory Panel, *supra* note 12 at 20.

<sup>230</sup> *Ibid.*

<sup>231</sup> Although in Manitoba, social assistant recipients may be disqualified after the asset test is carried out and in Ontario there are exceptions where there is "clear evidence to the contrary", e.g. when a person applying for legal aid is cohabiting in an equivalent to married situation then joint income is considered.

eligibility levels are set at different levels for duty counsel services than for full legal representation.

Most legal aid plans have some discretion to provide legal aid to clients who are slightly above the eligibility thresholds and/or who have special needs.<sup>232</sup> All plans, except BC and New Brunswick, expand eligibility by seeking client contributions from individuals who do not meet the criteria and would otherwise be denied service. Quebec has the most expansive client contribution scheme: a family consisting of one adult and one dependent with an income of up to \$19,948 will receive free legal aid, but services are provided on a contributory basis to the same size family earning up to \$32,185. Nova Scotia Legal Aid has also recently expanded its reach by providing services to clients who are 50% to 100% above eligibility thresholds on a contributory basis, in some matters.

In some cases financial eligibility is set by legislation or regulation and in others the legal aid provider has a role in setting the criteria. The frequency with which eligibility criteria are updated and the basis upon which these rates are increased or decreased varies significantly. BC updates its criteria annually based on the BC consumer price index. In recent years, Alberta and Saskatchewan both increased their eligibility criteria by substantial amounts to ensure that all social assistance recipients could qualify (by approximately 18% and 15% respectively). To address its stagnant eligibility rates, LAO benchmarked against LIM (Low Income Measure, a common measurement of poverty) and developed a 10-year strategy to reach that benchmark. Quebec was also successful in garnering substantial increase to its eligibility rates in 2015 with a further commitment to increases in January 2016 with the minimum wage as a reference point. The territorial plans have based their requests for increases on comparative analysis to other legal aid plan eligibility criteria, along with other factors such as the cost of living.

Eligibility criteria can be flexible, even without formal revisions. For example, in Manitoba, eligibility thresholds have not been updated since 2000, but eligibility is set by plan managers using data on efficiency to develop a business model focused on a 'cost per completed case'. In recent years, this has allowed Legal Aid Manitoba to maintain full representation in many cases while adjusting eligibility upwards. This is a dynamic process and as a result, commitment to a particular eligibility level is relatively short term.

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<sup>232</sup> For example, LAO has more discretion with respect to providing services to mental health clients and to individuals or families with extraordinary healthcare costs.

## Evidence-informed best practices

### General principles

Canadian courts have recognized that where there is a constitutional right to counsel, the state may be required to provide legal representation even where the individual is not financially eligible under a particular legal aid scheme. There is extensive jurisprudence on how a judge is to determine whether an individual can actually afford to pay for counsel.<sup>233</sup> In the past year, low legal eligibility rates have resulted in several court applications by people accused of serious crimes who were unable to access legal aid and could not afford a lawyer. The European Court of Human Rights has also developed extensive jurisprudence on eligibility and has maintained two cumulative conditions to the right to free legal assistance: (1) lack of sufficient means to pay for legal assistance and (2) the interests of justice requires that such assistance be free.<sup>234</sup>

Some legal aid providers consider factors other than financial circumstances to determine eligibility. In civil matters, providers can apply both merit tests and significance tests. A merit test requires that the case involve some degree of possible success, such as ‘reasonable likelihood’, ‘reasonable probability’, or ‘reasonable possibility of success’.<sup>235</sup> A significance test is usually expressed as a significant or substantial interest. It is sometimes measured against a hypothetical ‘modest income litigant’, asking whether such a person would hire a lawyer in a particular case.<sup>236</sup>

The CBA and the ABA have developed policy principles for the financial eligibility criteria. The CBA’s *Charter of Public Legal Services* states that the test for financial eligibility should be “the ability to retain counsel without undue hardship” and that “financial eligibility rules should cover everyone below national poverty levels and anyone above those levels who is unable to acquire essential public services without impoverishing him or herself or his or her family. It further specifies that: “a reasonable contribution to all or part of the cost of providing the service should be made, wherever possible.”<sup>237</sup>

In 2010, the ABA followed a general resolution on the right to civil counsel by adopting a statement of *Basic Principles of a Right to Counsel in Civil Legal*

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<sup>233</sup> See, ‘right to counsel’ cases, cited *supra* note 61.

<sup>234</sup> Open Society Justice Initiative, Public Interest Law Institute, *European Court of Human Rights Jurisprudence on the Right to Legal Aid* (6 December 2006).

<sup>235</sup> Alan Houseman, [Civil Legal Aid in the United States an Update for 2013](#) (CLASP, November 2013) at 7.

<sup>236</sup> *Ibid.*

<sup>237</sup> *Ibid.*



*Proceedings*.<sup>238</sup> The report in support of the 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.<sup>239</sup>

Two principles address eligibility issues:

- 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.
- 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.<sup>240</sup>

Similarly, Australian National Legal Aid has stated that its underlying philosophy is that eligibility should be determined having regard to an applicant's ability to pay – not by a 'cut off point'.<sup>241</sup>

The *Doust Report* directly addressed the issue of national standards on eligibility, recommending that they should cover the poor, the working poor and further a sliding scale for others unable to retain counsel. As well coverage should be mandated for those with mental disabilities or other special circumstances.<sup>242</sup> The report also recommended modernizing and expanding 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

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<sup>238</sup> ABA, *Report to House of Delegates*, August 2010, Resolution 105.

<sup>239</sup> ABA, *Report to House of Delegates*, August 2010, at 7.

<sup>240</sup> *Ibid.*

<sup>241</sup> Hamish Gilmore, "A New National Policy for Legal Aid – who misses out", paper presented at National Access to Justice Conference (2009) at 1.

<sup>242</sup> Doust, *supra* note 4 at 9-10.

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.
- (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 are fully met.<sup>243</sup>

In its response to the *Doust Report*, BC's legal aid plan noted that its existing financial eligibility cut off is higher than LICO and so to adopt the report's proposal would eliminate coverage for some people, rather than expanding it as intended.<sup>244</sup> However, this is not true for all Canadian jurisdictions.

The issue of a national benchmark for legal aid is a live issue in Australia, where, as in Canada, there are disparities in eligibility between states. In general, legal aid providers who receive funding from the national government determine eligibility based on several factors, including:

- applicant's means (based on income and assets);
- the merit of the matter;
- the priority given to the case given competing demands on resources; and
- any special circumstances that might be relevant to an applicant's capacity to self-help are also taken into account.<sup>245</sup>

Within this broad framework each legal aid commission and community legal clinic develops their own criteria for legal aid funding grants.<sup>246</sup>

The Australian Productivity Commission concluded that eligibility principles "should be agreed between the Australian and state and territory governments and clearly communicated to providers."<sup>247</sup> Financial limits should be "increased, linked to a measure of disadvantage and indexed over time."<sup>248</sup> As an interim arrangement, the Commission recommended that the means test for civil (including family) law

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<sup>243</sup> *Ibid.* Recommendation 3.

<sup>244</sup> Legal Services Society, [Backgrounder – Comments on the Public Commission Report](#) (March 8, 2011) at 3.

<sup>245</sup> PCR, *supra* note 3 at 672.

<sup>246</sup> *Ibid.* For detailed discussion see Appendix H to that report.

<sup>247</sup> *Ibid.* at 721.

<sup>248</sup> *Ibid.*, see Recommendation 21 .2.

matters applied by the legal aid commissions should be increased by 10 per cent, “as such a policy would allow more individuals to receive the legal assistance that they require, but are manifestly unable to afford at present”<sup>249</sup> Additional data should be collected to inform the appropriate level of access to legal assistance services over the longer term.

The Commission stated that the objective for eligibility reform is greater consistency and transparency. The agreed eligibility principles should be set out in national partnership agreements and the two main providers, legal aid commission and community legal clinics, would then be responsible for agreeing on their respective roles (and so tailored eligibility criteria) within these parameters. The aim would be to have — at least within a given jurisdiction — consistent and complementary, but not necessarily identical, eligibility criteria.

The Commission also stated that: “Financial eligibility criteria should be linked to an agreed measure of disadvantage and appropriately indexed so that they do not become more restrictive in real terms over time.”<sup>250</sup> The Commission report includes an appendix setting out the range of measures of disadvantage and the relative benefits and drawbacks of each measure (discussed below).<sup>251</sup> In their view, determining which measure to use “will necessarily involve judgments on the part of governments.”<sup>252</sup>

The Commission further recommended that legal aid providers should retain flexibility to provide assistance to individuals who fall outside the parameters agreed by governments in exceptional circumstances. Such situations might be where individuals face an immediate and real risk of violence.<sup>253</sup> Legal aid providers should collect information on how often, and the circumstances under which people who exceed the financial eligibility guidelines access services:

The Commission notes that many CLCs already collect information on the frequency with which they provide casework services to medium and high income earners and the nature of the services they receive. This practice should continue and the information collected should be analysed. This information should be used to identify any systemic gaps in coverage, prompt a system wide assessment of impacts and — if the evidence suggests

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<sup>249</sup> *Ibid* at 722.

<sup>250</sup> *Ibid* at 721.

<sup>251</sup> *Ibid*, Appendix H.

<sup>252</sup> *Ibid* at 721.

<sup>253</sup> *Ibid*.

it is warranted — changes to eligibility criteria in the future. A byproduct of this arrangement is improved transparency in the use of public funds.<sup>254</sup>

National eligibility benchmarks may also have to take into account flexibility to vary rates depending on local circumstances, regional or economic factors.

#### National means test

Canadian national legal aid benchmarks on eligibility could be based on a national means test. Other countries' experience may be helpful in taking this route.<sup>255</sup> Earlier Australian efforts are described here as a point of reference.

The Australian Productivity Commission provides a summary of that country's experience with establishing a national means test. In the mid 1990s, a working party comprised of representatives from all the legal aid commissions developed a test to ensure that eligibility for grants of legal aid were determined using the same factors and taking into account an individual's capacity to pay.<sup>256</sup> The income test starts with the applicant's total gross income and then subtracts allowable deductions (including income tax, housing costs, dependent allowances, child care costs and child support paid) up to allowed thresholds. The test then compares the balance with an amount considered reasonable for other living expenses. This amount is based on the Henderson Poverty Line (HPL). Any income above the poverty line is regarded as 'discretionary' income, which is available to pay for legal costs. The income test also sets a limit at which an applicant is eligible for aid with no contribution or with only a minimal contribution.

The asset test takes account all assets other than 'excluded' assets. Assets such as home equality or motor vehicle equality are excluded up to a threshold. Ordinary household effects and tools of trade are excluded to a 'reasonable' level. Lump sum compensation payments may be excluded as assets, but assessed as deemed income. While the actual dollar value varies across the legal aid commissions, the thresholds for allowable deductions and excluded assets are based on particular benchmarks, which are standardised nationally.<sup>257</sup>

Over the years funding has not kept pace with demand or inflation and so, cut off levels applied by Australia's legal aid commission are set as a percentage of the national means test thresholds.<sup>258</sup> A recent report concluded that efforts to

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<sup>254</sup> *Ibid* at 715 (Box 21.3).

<sup>255</sup> See for example, Alexy Buck and Graham Stark, *Means Assessment: Options for Change* (London: Legal Services Commission, 2001) (LSRC Research Paper No.8); Law Council of Australia, *Legal Aid and Access to Justice Policy Principles* (2008) and *National Legal Aid, Policy and Principles Statement* (2008).

<sup>256</sup> PCR, *supra* note 3 at 715.

<sup>257</sup> *Ibid*.

<sup>258</sup> Allen Group, *supra* note 9 at 110.

standardize means tests have been unsuccessful due to the differences in resources available to jurisdictions:

While the broad components of the means and merits tests are consistent across jurisdictions, and generally result in grants of legal aid being restricted to those facing financial disadvantage, differences in income and asset thresholds, allowable deductions and required contributions can lead to different outcomes for individuals residing in different parts of Australia. Based on available information, eligibility does not appear to be measured based on nationally standardised income thresholds.<sup>259</sup>

#### Measures of poverty and disadvantage

Developing a national means test or common eligibility criteria in Canada would likely be based on a measurement of poverty and disadvantage. As noted above, subsistence levels, or welfare rates, is the most common measure. There is no single accepted poverty level in Canada, but some legal aid plans consider other calculations of low income in determining eligibility criteria. Three commonly used measures are:

- *Low Income Measure (LIM)*: an international standard developed by the OECD. In simple terms, the LIM is a fixed percentage (50%) of median adjusted household income, where "adjusted" indicates that household needs are taken into account. Adjustment for household sizes reflects the fact that a household's needs increase as the number of members increases. Most would agree that a household of six has greater needs than a household of two, although these needs are not necessarily three times as costly.
- *Low Income Cut Offs (LICO)*: Stats Canada's main standard, representing an income threshold where a family is likely to spend 20% more of its income on food, shelter and clothing than the average family, leaving less income available for other expenses such as health, education, transportation and recreation. LICO are calculated for families and communities of different sizes; and
- *Market Basket Measure (MBM)*: is based on the cost of a specific basket of goods and services representing a modest, basic standard of living. It includes the costs of food, clothing, footwear, transportation, shelter and other expenses for a reference family of two adults (aged 25 to 49) and two children (aged 9 and 13). It provides thresholds for a finer geographic level than the low income cut-off (LICO) allowing, for example, different costs for

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<sup>259</sup> *Ibid.*

rural areas in the different provinces. These thresholds are compared to disposable income of families to determine low income status.<sup>260</sup>

In the United States, the federally-funded Legal Services Commission programs serve clients at or under 125% of the Poverty Guidelines,<sup>261</sup> by household size as determined by the Department of Health and Human Services with guidance from the Office of Management and Budget (in the Executive Office of the President). The poverty guidelines are income thresholds established in 1963 and updated each year by a cost of living index. Research underlying the original thresholds was based on food expenditures by low-income families in 1955. Calculations showed families then spent about a third of their income on food. The low-income food budget was multiplied by three to come up with the poverty line. There has been much controversy about the adequacy of the poverty guidelines, but they have not been changed and remain the basis for eligibility and income distribution for many federal programs.<sup>262</sup>

Some American legal aid providers have developed more refined criteria for measuring poverty. The Legal Services of New Jersey (LSNJ),<sup>263</sup> which has been in operation for almost 50 years, created the Poverty Research Institute (PRI) in 1997 to assemble data and other information to assist in providing civil legal aid.<sup>264</sup> Such information can pinpoint the location, demographics and other aspects of poverty, helping fashion more effective and efficient legal responses and solutions. Periodically, as a public service, LSNJ publishes reports and statistics gleaned from this data to enhance public awareness of poverty's scope, causes, consequences, and remedies.

LSNJ begins with a standard at 250% of the Federal Poverty Level, which it considers a conservative marker for poverty in that state: "Nearly everyone with incomes below that level faces significant deprivation, the operational definition of poverty."<sup>265</sup> The LSNJ poverty benchmarks include a range of indicators:

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<sup>260</sup> [Statistics Canada, Low Income Definitions](#). Disposable income is defined as the sum remaining after deducting the following from total family income: total income taxes paid; the personal portion of payroll taxes; other mandatory payroll deductions such as contributions to employer-sponsored pension plans, supplementary health plans, and union dues; child support and alimony payments made to another family; out-of-pocket spending on child care; and non-insured but medically prescribed health-related expenses such as dental and vision care, prescription drugs, and aids for persons with disabilities.

<sup>261</sup> Houseman, *supra* note 235 at 6.

<sup>262</sup> *Ibid.*

<sup>263</sup> Legal Services of New Jersey, [Poverty Benchmarks 2014: Assessing New Jersey's Progress in Combatting Poverty](#) (2014).

<sup>264</sup> Legal Services of New Jersey, [Poverty Information and Research](#).

<sup>265</sup> *Supra* note 263 at 4.

- poverty rates
- poverty rates by vulnerable groups
- geographic location of vulnerable groups
- unemployment rates
- percentage of lower wage jobs
- erosion of wages
- data on aspects and consequences of unemployment
- food security
- food stamp usage
- bankruptcies
- residential foreclosures
- union membership
- % of renter households experiencing onerous housing costs
- % of renter families living in poverty
- as well as any changes in major public responses to poverty: income support, employment, food and nutrition, housing, healthcare.<sup>266</sup>

The Australian Productivity Commission reviewed a range of potential benchmarks for legal aid eligibility noting:

There are many measures of disadvantage that consider factors beyond relative income, such as including combinations of assets, income and consumption, length of time in poverty, and broader measures of social exclusion (McLachlan, Gilfillan and Gordon 2013). Each of these has benefits and drawbacks when considered as a measure to determine eligibility for legal aid.<sup>267</sup>

Many of the submissions the Commission received proposed a poverty measure like the Henderson Poverty Line (based on equivalent disposable income for different household types) and the OECD Relative Poverty Line may be an 'appropriate starting point' but not an end point.<sup>268</sup> The Commission ultimately decided that

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<sup>266</sup> *Ibid.*

<sup>267</sup> PCR, *supra* note 3, Appendix H at 1021.

<sup>268</sup> *Ibid.*

further information was required to best identify the measure or measures that should best be used to determine eligibility for legal aid.<sup>269</sup>

Another approach to measurement is the minimum wage. The Barreau du Quebec initiated a campaign to raise eligibility rates to make them consistent with the income of a person working full time for minimum wage.<sup>270</sup> As noted above, the Quebec government has committed to raising eligibility rates to this level (on a contributory basis) in January 2016.

Finally, the benchmark could be set using a specified percentile of the population reflecting the relative economic situation of various strata within Canadian society. For example, the percentile could be set to a level that ensures legal aid services are provided to all low-income households. This is a form of pure relative income measure, like LIM.

#### Expanding eligibility

The priority for legal aid is and must remain on meeting the essential legal needs of poor persons who are at the greatest risk of suffering adverse consequences from legal problems. At the same time, even if the Canadian legal aid system fully met this threshold (and it currently is not), many people would still not be able to afford access to the needed legal services.

The priority for legal aid is and must remain on meeting the essential legal needs of poor persons who are at the greatest risk of suffering adverse consequences from legal problems.

There is a clear consensus that legal aid should be available to a wider range of people than at present. The stumbling block is not that this is a bad idea, but that it is impractical and unaffordable. A more difficult question is, if eligibility should be extended, how far should it go: To people earning the equivalent of a full time minimum wage salary? To people of modest means? To all Canadians?

In Australia, the working poor (low-income earners) were identified by several participants as a group that misses out on grants of legal aid but also cannot afford to pay for legal services. For example, Legal Aid NSW reported that its current means test income limit was 52.4 per cent of the minimum weekly wage in 2012-13 — down from around 60 per cent of the minimum weekly wage in 2007-08.<sup>271</sup>

In his review of Legal Aid Ontario, Professor Trebilcock suggests that expanding the services available to the middle class could be one way to gain greater public support for the legal aid system. He contrasts the high public support for the

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<sup>269</sup> *Ibid* at 722.

<sup>270</sup> Presentation by the Batonnier du Quebec, Me. Nicolas Plourde, Pro Bono Conference Montreal November 2012.

<sup>271</sup> PCR, *supra* note 3 at 717.



medical system, which provides services to all, with the lack of public support for legal aid. Recognizing the concern that moving toward extended eligibility might exacerbate the already precarious financial positions of legal aid programs, he comments:

I believe this paradox is more apparent than real. For middle-class citizens of Ontario to support the legal aid system with anything approaching the enthusiasm with which they support public health care and public education in the province, their participation in the system, other than as mere taxpayers who underwrite it, is a sine qua non for its future health.<sup>272</sup>

*Reaching Equal Justice* sets targets on eligibility for legal aid proposing that eligibility be increased gradually over time so that by 2020 all Canadians living at and below poverty level are eligible for full legal aid coverage for essential legal services, and by 2025 those services are available to low-income Canadians, defined as those with incomes less than two times poverty levels. The report also proposed that by the year 2030, options for national justice care system (modelled on the health care system) be fully canvassed and used to inform public dialogue on this issue.

Funding options include client contribution schemes (based on ability to pay) and public insurance schemes (whether mandatory or opt-out). Professors Sujit Choudry and Michael Trebilcock and James Wilson have developed a proposal for a non-profit legal expense insurance scheme for Ontario that would operate through the province's legal aid plan. The proposal would address shortfalls in access to justice, while remaining grounded in the public interest, in contrast to for-profit private market legal expense insurance plans. Under their proposal, everyone would be assumed to subscribe to the insurance scheme, with allowance for people to opt out.<sup>273</sup>

#### Single or multiple criteria

Another important policy issue is whether the eligibility rate should be the same for legal representation as for other forms of legal help. Eligibility can be approached flexibly: it does not have to be uniform for all services. A few Canadian legal aid plans already apply slightly different eligibility criteria for different legal assistance (e.g. full representation versus duty counsel services). 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.<sup>274</sup> Doust agreed that basic legal aid services such as legal information and limited legal advice should be available to all residents

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<sup>272</sup> *Trebilcock Report, supra* note 143 at 81.

<sup>273</sup> S. Choudry, M. Trebilcock, J. Wilson, *supra* note 165.

<sup>274</sup> *Trebilcock Report, supra* note 143.

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.<sup>275</sup> In Australia, some types of legal aid services are not means tested, including minor assistance and information services.<sup>276</sup>

#### Flexibility and special circumstances

Another policy issue to be considered in developing eligibility benchmarks is the degree of flexibility for legal aid providers in applying the criteria, allowing them to take special circumstances into consideration. For example, in some Australian states, the specific guidelines can be waived in special or exceptional circumstances:

These can include hardship — financial or otherwise — to the applicant if legal assistance were not provided; or emergency situations in which the liberty, livelihood, possessions or physical and mental wellbeing of the applicant and any dependents are threatened. Indeed, most LAC CEOs have the discretion to exceed a funding ceiling or cap in exceptional circumstances.<sup>277</sup>

Flexibility can be built into eligibility benchmarks through case-specific discretion or through recognition 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.<sup>278</sup>

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.<sup>279</sup>

This type of benchmark recognizes that disadvantage and social exclusion are not simply economic or financial phenomenon, and considers additional issues that affect a person's legal aid needs.

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<sup>275</sup> *Doust Report*, *supra* note 4 at 50.

<sup>276</sup> PCR, *supra* note 3 at 668-670.

<sup>277</sup> *Ibid* at 673.

<sup>278</sup> *Supra* note 108 - Schedule A.

<sup>279</sup> *Supra* note 1 at section 19.

### *Options for eligibility benchmarks*

**Option #10 – Eligibility: Policy statement**

*The Canadian legal aid system prioritizes meeting the needs of disadvantaged people, while gradually expanding service availability to all low income households.*

**Option #11 – Eligibility: National Means Test**

*Financial eligibility for legal aid services is determined based on a national means test with a formula taking into account regional differences. The means test is reassessed every three years.*

**Option #12 – Eligibility: Poverty Level**

*All Canadian residents living at 125% of the poverty line are eligible for free legal aid in matters of essential legal need. All Canadian residents living at 250% of the poverty line are eligible for legal aid in matters of essential legal need, on a sliding scale contributory basis.*

**Option #13 – Eligibility: Percentile of Population**

*Legal aid is provided to members of the lowest quartile of Canadian households.*

**Option #14 – Eligibility: Special Circumstances**

*In determining eligibility, legal aid providers must take into account special circumstances making it difficult to obtain legal assistance. Special circumstances include language or literacy problems, intellectual, psychiatric or physical disabilities, a person's remote location or status as a prisoner, or where the person is otherwise at risk of social exclusion.*

### **Service Delivery: Types, Depth and Quality of Legal Service**

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 a holistic approach where individuals can access integrated assistance with both legal and non legal dimensions of their problems. At the other end of the spectrum are the least comprehensive models, including methods of making legal information and materials available to the public. While there is some tendency to conflate legal representation with representation at a hearing, it is important to begin by 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.<sup>280</sup>

In addition to deciding who gets legal aid and for which legal matters, targeting legal aid services involves determining the right type, depth and quality of service required by an individual experiencing a legal problem or addressing a systemic legal problems affecting disadvantaged people as a group.

Setting service delivery benchmarks involves assessing the quality of legal services and how they meet the needs of a given client and a given situation. *Reaching Equal Justice* proposes that services be judged against the standard of ‘meaningful and effective access to justice’. This phrase was employed by the Supreme Court of Canada to determine whether state funded counsel was required in the *J.G.* case.<sup>281</sup> The Court did not define or delineate this standard but linked it to three elements: the capacity of the individual, the complexity of the legal proceeding, and the seriousness of the potential outcome. These factors serve as the beginning of a typology of indicators of when different types of legal services will be required but do not go very far in elaborating what constitutes the standard of “meaningful and effective” access to justice.

Similar approaches have been taken by high courts in other countries which have concluded that there is no absolute right to state funded counsel. The jurisprudence of the European Court of Human Rights, for example, has refined some of these elements to determine where counsel is required for the “practical and effective enjoyment of his or her right to free legal assistance.”<sup>282</sup> Factors include:

complexity of the procedure and substantive law (“the necessity to address complicated points of law or to establish facts, involving expert evidence and the examination of witnesses”),<sup>283</sup> and “the degree of emotional involvement that is scarcely compatible with the degree of objectivity required by advocacy in court”.<sup>284</sup>

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<sup>280</sup> *Middle Income Access to Civil Justice Initiatives: Background Paper* (unpublished, 2011) at 28-29 [University of Toronto Report].

<sup>281</sup> [New Brunswick \(Minister of Health and Community Services\) v G \(J\)](#), *supra* note 61.

<sup>282</sup> *Artico v. Italy* (1980) Appl. no. 6694/74, para. 33; Open Society Justice Initiative, Public Interest Law institute, *European Court of Human Rights Jurisprudence on the Right to Legal Aid*, (6 December 2006) 3-4. See summary in HiiL, *Legal Aid in Europe*, *supra* note 6 at 90.

<sup>283</sup> *PC. and S. v. The United Kingdom* (2002) Appl. no. 56547/00, para. 89.

<sup>284</sup> *Ibid*, referring to *Airey v. Ireland* (1979) Appl. no. 6289/73, para. 26.

In *Turner v. Rogers*, the US Supreme Court approached this issue from the opposite perspective and focused on elaborating where alternatives are constitutionally sufficient to safeguard access to justice.<sup>285</sup> For example, simplification of procedures may be sufficient because the complexity of procedure is a key reason to require legal aid.<sup>286</sup> However, the European Court has made it clear that: "The limited access to legal assistance must not lead to an inequality of arms between the parties".<sup>287</sup>

Constitutional requirements for legal aid set the absolute minimum government obligation. Establishing national benchmarks on a system-wide basis is very different than a court's consideration of what is required on a case-by-case basis. The components of the meaningful and effective access to justice standard are considered from a systemic perspective and elaborated throughout this section of the *Backgrounder*.

Decisions about which legal aid service will most efficiently and effectively resolve legal issues, and therefore provide meaningful access to justice, are complicated. They involve a deep appreciation of issues, including:

- the personal and legal capability of the individual or group
- the nature/characteristics of the legal issue or problem
- the interests at stake and potential consequences
- the relationship with other party/parties
- the interrelatedness of legal issues with other problems experienced by an individual or group
- the procedural options/dispute resolution processes available and their complexity
- the types of legal assistance available
- the procedural, substantive and systemic outcomes desired, and
- the legal aid provider's resources.

All these dimensions are dynamic. A person's legal problem can change over the course of a resolution process, as can the person's knowledge and ability to participate effectively in the dispute resolution process. Further, as Engler has pointed out, legal-judicial institutions are not static and the need for legal

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<sup>285</sup> *Turner v Rogers*, 131 S.Ct.2507 (2011).

<sup>286</sup> *Ibid.*

<sup>287</sup> HiiL, *Legal Aid in Europe*, *supra* note 6 at 96.

assistance/representation is tied directly to the effectiveness of the efforts of the court/tribunal system in assisting the litigant. He states:

The better the job that the courts do in providing meaningful access, and the more successful limited assistance programs are in affecting case outcomes, the smaller the pool of cases needing counsel.<sup>288</sup>

There is no ideal model of service delivery that will work in all contexts. These issues require complex thinking and complex policy responses. A new but rapidly growing body of legal aid research focuses on questions of “what works, for whom, when, why and at what cost?”<sup>289</sup> This evolving evidence base can assist in developing national legal aid service delivery benchmarks.

These research questions are rooted in the empirical civil legal needs literature and integrate its findings about legal needs and justice system experiences of disadvantaged individuals and groups. The main research findings should inform legal aid service delivery benchmarks. In summary, people who are poor and live in situations of disadvantage:

- are particularly vulnerable to legal problems and there is a complex relationship between economic disadvantage and legal problems;
- tend to experience clusters of problems and non legal problems;
- experience multiple problems that compound inequality;
- experience barriers to action and obstacles in resolving legal and non legal problems;
- experience inequality of outcomes (although this can be mitigated where appropriate advice and assistance is accessed).<sup>290</sup>

Civil legal needs research underscores what many legal aid providers and poverty advocates have known for a long time: members of low income and disadvantaged groups require a different type of lawyering than clients with higher income levels.

Following a brief overview of the current situation in Canada, issues and evidence-informed best practices for consideration in formulating national legal aid service delivery benchmarks are offered below under seven themes: strengthened client-centered approaches; personal and legal capability; intake, diagnosis, referral and outreach; comprehensive and holistic services; a focus on outcomes, including

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<sup>288</sup> 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 *Seattle Journal for Social Justice* 97 at 123.

<sup>289</sup> *Reshaping legal assistance services*, *supra* note 122 at 180.

<sup>290</sup> Refer to civil legal needs discussion *infra* at 53-58. See also, *Reshaping legal assistance services*, *supra* note 122 at 5-25.

timeliness, prevention and post-resolution support; cooperation, collaboration and integration; and as efficient and effective services.

### *Overview of current situation*

Today legal aid plans offer an array of legal services that vary widely from jurisdiction to jurisdiction. In some places, services include the full continuum from legal information to representation, while in others legal aid provides a narrower range of services, such as duty counsel and representation. In addition to direct service, the continuum of services can include strategic advocacy and test case litigation on issues affecting low income people, so that problems can be addressed systematically instead of dealing repeatedly with individual cases. Services are provided by a mix of people, often through legal centres or clinics or by lawyers in private practice working for rates generally far below market rates.

It makes sense to look at need as a continuous, rather than as an “either/or” concept...”, legal aid can mean preventing ordinary problems from becoming legal problems, diverting situations from the legal system to dispute resolution or mediation to achieve a solution created by the involved parties, providing people with appropriate legal information so they can assess their own best next steps, instituting an effective triage system to get people to the most appropriate legal, social or health related services as soon as possible and before the situation worsens, or ensuring that a solution is sustainable.

Dr. Ab Currie. note 297

A background paper prepared for the CBA's *Envisioning Equal Justice* initiative provides an overview of innovations in legal aid service delivery in Canada,<sup>291</sup> building on an earlier report prepared for the CBA by Dr. Melina Buckley.<sup>292</sup> A synopsis of this paper is included here. A more detailed list of examples and trends in innovative legal aid service delivery is also available.<sup>293</sup>

A 2007 UK study identified legal aid as traditionally being a “low innovation” sector, driven by cost concerns and efforts to improve access, but inhibited by conservatism and lack of incentives to reward more imaginative thinking. “The challenge for all legal aid providers is how to foster ongoing change by moving from a tradition-bound system to one that values and rewards problem-solving and innovation.”<sup>294</sup>

<sup>291</sup> *Future Directions for Legal Aid Delivery*, *supra* note 192.

<sup>292</sup> *Moving Forward on Legal Aid*, *supra* note 4.

<sup>293</sup> *Future Directions for Legal Aid Delivery*, *supra* note 192 at 16-27.

<sup>294</sup> NESTA, [Hidden Innovation: How Innovation Happens in Six “Low-innovation” Sectors](#) (2007), referred to in *Moving Forward on Legal Aid*, *supra* note 4 at 72.

Finding ways to most effectively deliver legal aid has long been a focus of attention for researchers and policy makers in Canada.<sup>295</sup> Central to recent innovations in Canada and elsewhere is the recognition that providing legal aid services does not always require or even benefit from a lawyer's involvement from beginning to end of a case. The 2008 *Ontario Legal Aid Review* identified, as one of several principles to guide its new legal aid system, that a greater mix of legal services was required to reduce the divide between full legal representation and no representation.<sup>296</sup>

According to Dr. Ab Currie, "it makes sense to look at need as a continuous, rather than as an "either/or" concept."<sup>297</sup> In addition to legal representation for cases where a lawyer's specialized skills and knowledge remain essential, legal aid can mean preventing ordinary problems from becoming legal problems, diverting situations from the legal system to dispute resolution or mediation to achieve a solution created by the involved parties, providing people with appropriate legal information so they can assess their own best next steps, instituting an effective triage system to get people to the most appropriate legal, social or health related services as soon as possible and before the situation worsens, or ensuring that a solution is sustainable.

Overall, innovation is characterized by having a greater mix of legal services to address legal needs and bridge the gap between full legal representation and no representation, in a situation of scarce resources. The predominant trend is to provide information and limited assistance, putting the onus on the individual to 'self-help', with various levels of support:

Budgetary pressures, along with pressures for greater efficiencies and innovations to improve service delivery, have led to changes in Canada and internationally. A significant trend has been to shift the onus onto individuals to navigate the justice system on their own, equipped with enhanced public legal information and a variety of self help materials.<sup>298</sup>

Overall, innovation is characterized by having a greater mix of legal services to address legal needs and bridge the gap between full legal representation and no representation, in a situation of scarce resources.

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<sup>295</sup> For example, see Legal Aid Liaison Standing Committee, *The Provision of Legal Aid Services in Canada* (Ottawa: CBA, 1985) and *Legal Aid Delivery Models: A Discussion Paper* (Ottawa: CBA, 1988).

<sup>296</sup> *Trebilcock Report*, *supra* note 143 at 12.

<sup>297</sup> Dr. Ab Currie, *The Legal Problems of Everyday Life: The Nature, Extent and Consequences of Justiciable Problems* (Ottawa : Justice Canada, 2009) at 89.

<sup>298</sup> *Moving Forward on Legal Aid*, *supra* note 4 at 77.



Some of these legal aid services are now available without means testing, so they are available to anyone. This includes public legal education materials, self-help assistance, and some duty counsel or summary advice services. This can help people slightly above the cut off to be eligible for legal aid, for example, those working at minimum wage, often called the 'working poor'. Some jurisdictions also allow or require clients to make a financial contribution, or repay the legal aid plan over time. Offering a broad range of affordable or free services including to those in the middle class, makes sense from a public policy perspective. The middle class funds legal aid plans through their tax dollars and will be more supportive of continuing to do so if they themselves have access to legal help.<sup>299</sup>

A focus on providing the *most* services possible to the *most* people seems unobjectionable, and potentially a significant step in bridging the gap between full legal representation and no help at all. It may represent progress to better meeting the legal needs of the working poor and middle class, as well as the poor. Informational materials, telephone hotlines or expanded duty counsel for all who ask for help, are examples currently taking hold in most parts of Canada.

While most of the innovative strategies have proven beneficial, they have had a tendency to shift the energy and focus away from the need for actual legal representation as part of the legal aid spectrum.

The problem though is that, "while most of the innovative strategies have proven beneficial, they have had a tendency to shift the energy and focus away from the need for actual legal representation as part of the legal aid spectrum."<sup>300</sup>

Commissioner Doust made some of the same observations in his recent report. While one of his seven overarching findings is to "Establish regional legal aid centres and innovative service delivery", another is that "Legal Information is not an adequate substitute for legal assistance and representation."<sup>301</sup> He notes the limits of 'self-help' materials, including that:

- they are not helpful for many people, notably those with language and literacy barriers, or limited access to computers,
- they may inform about legal rights but without providing legal advice and representation, those rights may be hollow,

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<sup>299</sup> Trebilcock, *Middle Class Access to Justice*, *supra* note 165.

<sup>300</sup> *Moving Forward on Legal Aid*, *supra* note 4 at 37, citing Carol McEown at note 9.

<sup>301</sup> *Doust Report*, *supra* note 4 at 23.

- and regardless of how complete materials are, they cannot teach a person how to effectively represent themselves in legal proceedings.<sup>302</sup>

When legal aid innovations come from finite legal aid budgets, the emphasis on vehicles for legal information and ‘self-help’ materials has a serious risk of taking away services from the most marginalized and vulnerable people, who may well need an actual person to assist or a lawyer to manage their cases. This population may not benefit fully, if at all, from even a full buffet of ‘self-help’ offerings. Those offerings have often been shown to be more helpful when accompanied by people available to assist.<sup>303</sup>

Marginalized and vulnerable populations must remain the primary focus and responsibility of legal aid programs. It is important to provide an honest assessment of any proposed innovations, to identify which populations are more likely to benefit, and which would have difficulty taking advantage of them. An overall renewal or regeneration of legal aid in Canada should be rooted in the knowledge we now have about the legal needs of people living in poverty, and occur in consultation with community members and advocates for marginalized communities.

The reality is that legal aid plans often have to ration access to a service provider, be it through limited assistance, duty counsel or about representation. This can place lawyers in an untenable position if unable to prepare a case to the level required by their commitment to professionalism due to a plan’s restrictions on time.<sup>304</sup> In a survey of legal aid lawyers carried out by the CBA Access to Justice Committee in 2013, a large percentage of the 700 respondents expressed a belief that legal aid services are not meeting the ever-increasing demand for services and basic needs of the community.<sup>305</sup> Many also expressed serious concerns about their ability to meet their professional obligations given the demands and constraints they face in their work.<sup>306</sup>

Marginalized and vulnerable populations must remain the primary focus and responsibility of legal aid programs. It is important to provide an honest assessment of any proposed innovations, to identify which populations are more likely to benefit, and which would have difficulty taking advantage of them.

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<sup>302</sup> *Ibid.*

<sup>303</sup> Gayla Reid and John Malcomson, *Voices from the Field: Needs Mapping Self Help Services* (Vancouver: LSS, 2008).

<sup>304</sup> See for example, *LSS Tariff Lawyer Satisfaction Survey* (May 2010) at 8.

<sup>305</sup> *Reaching Equal Justice*, *supra* note 4 at 109-110.

<sup>306</sup> *Ibid.*

### *Evidence-informed best practices*

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.

#### Strengthened client-centred approach

Over time, our justice system, including in providing legal aid, has developed to reflect the needs, approaches and imperatives of courts, court administration, tribunals and the legal profession. Justice institutions are not alone in this tendency. It is common to the way many organizations and professions work, and is difficult to overcome. Countering this tendency involves redesigning the justice system to be based on the needs of people accessing it through client-centred or client-focused approaches. Both *Reaching Equal Justice* and the National Action Committee's *Roadmap for Change* emphasized the primacy of this shift and the consequent need for cultural and systemic change.<sup>307</sup> A client-focus is the starting point for the development of national legal aid service delivery benchmarks – other facets flow from it.

The Law Foundation of New South Wales' report on reshaping legal assistance defines a client-focus as having four interrelated key elements. Client-focused legal aid services are:

- **targeted** (to those most in need);
- **joined-up** with other services (legal and non legal) likely to be needed;
- **timely** to minimize the impact of the problem and maximize the value of the service; and
- **appropriate** to the needs and capabilities of users.<sup>308</sup>

As the report further notes: “these statements are easy to make but harder to operationalize”.<sup>309</sup>

In the past, and still to a large extent today, services tend to be more problem-focused than client focused. This can result in failures to detect and address related problems and poorer and less sustainable outcomes. Client-centered service delivery means that service responses “focus on mitigating the total impact of legal

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<sup>307</sup> *Reaching Equal Justice*, *supra* note 4 at 60-61; NAC, *supra* note 4 at 6-7.

<sup>308</sup> *Reshaping legal assistance services*, *supra* note 122, foreword at iii and extended discussion at 25-30.

<sup>309</sup> *Ibid.*

problems on a person's life, rather than considering each legal problem separately."<sup>310</sup> Planning legal aid services is based on comprehensive knowledge of the client group and the environment. Consideration of the capability of the person and the importance/complexity of the legal problem faced is necessary to determine the type and depth of legal aid required. Service models need to be flexible and nuanced to be responsive to client needs and informed by mapping legal needs with the location of services.

### Personal and legal capability

An overview of trends in Canadian legal aid delivery highlights the move away from full representation and toward services that build legal capability and provide limited assistance and support to individuals in a 'self-help' model. This is consistent with international trends. Two main trends identified by HiiL in its recent report on legal aid in Europe are:

- Citizens are empowered in their relationship to legal service providers and more able to solve problems at an early stage if legal information is easily accessible. In all countries, websites with legal information and advice are now proliferating.
- The trend is to provide online platforms supporting dispute resolution and access to justice.<sup>311</sup>

Empowering people by increasing their legal health and legal capabilities through sharing of information, skills development and service provision that engages clients as active participants in the legal process is a central outcome of effective legal aid. However, limited assistance services can only deliver meaningful and effective to justice to some people in some circumstances, not to all people in all circumstances. Relatively little attention has been paid to developing methods to systemically answer underlying questions: "what, if anything, can this individual do on his or her own? At what point does this individual need ongoing assistance?"<sup>312</sup> Answers turn on an understanding of capability, which has become an increasing focus in the development of legal and other human service delivery policy.<sup>313</sup>

However, limited assistance services can only deliver meaningful and effective to justice to some people in some circumstances, not to all people in all circumstances.

There is a burgeoning field of literature on personal and legal capability. For example, Parle outlined six legal capability domains affecting ability to resolve basic

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<sup>310</sup> Allen Consulting Group, *supra* note 9 at 22.

<sup>311</sup> HiiL, *Legal Aid in Europe*, *supra* note 6 at 76.

<sup>312</sup> *Reshaping legal assistance services*, *supra* note 122 at 126.

<sup>313</sup> See extended discussion *ibid* at 121-162.

legal problems: knowing rights and remedies, spotting a legal issue, knowing where to go for help, planning how to resolve the issue, communicating effectively and managing emotions.<sup>314</sup> Collard et al. developed a legal capability matrix of a mix of skills and personal attributes across 22 components in the following four domains: recognizing and framing the legal dimensions of issues and situations, finding out more about the legal dimensions of issues and situations, dealing with law-related issues, and engaging and influencing.<sup>315</sup> The first three of these can be summarized in terms of being able to 'perceive', 'seek' and 'apply or use' the law. The fourth dimension might be termed how to 'affect or change' law.<sup>316</sup>

Gramatikov and Porter described four dimensions in which legal empowerment is impaired: resource deficiency, lack of personal skills and/or abilities and knowledge, power imbalances in important relationships, and institutional failures.<sup>317</sup>

The Law and Justice Foundation of New South Wales report contains a sophisticated analysis and elaboration of the concepts of personal capability and legal capability, linked to the utility of different forms of assistance.<sup>318</sup> People can lack the legal capability necessary to resolve their legal problems and legal capability is often particularly low among disadvantaged groups.<sup>319</sup> This means that the same people in the community typically are most vulnerable to legal problems and are the priority for legal aid services are least likely to benefit from limited forms of assistance.

Some factors identified as crucial to determining the capacity for self-help are:

- Poor knowledge of legal rights, legal remedies and the justice system;
- Poor literacy, language and communication skills;
- Poor health;
- Personal efficacy;

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<sup>314</sup> L.J. Parle, *Measuring young people's legal capability* (London: Plenet, 2009), cited in *Reshaping legal assistance services, ibid* at 168.

<sup>315</sup> S. Collard, C. Deeming, L. Wintersteiger, M. Jones and J. Seargent, *Public Legal Education Evaluation Framework* (Bristol: University of Bristol Personal Finance Research Centre, 2011) cited in *Reshaping legal assistance services, ibid* at 168.

<sup>316</sup> *Reshaping legal assistance services, ibid*, Table 6.1 Legal Capability Framework at 136.

<sup>317</sup> M. Gramatikov and R.B. Porter, *Yes, I can: Subjective legal empowerment*, TISCO Working Paper Series on Access to Justice, Dispute Resolution, and Conflict Resolution Design, no. 08/2010 (Tilberg: Tilberg University, 2010) cited in *Reshaping legal assistance services, ibid* at 131, note 117.

<sup>318</sup> *Reshaping legal assistance services, ibid* at 121-162.

<sup>319</sup> *Reshaping legal assistance services, ibid* at 31.

- Living free from violence;
- Having a steady job;
- Access to resources;
- Having trust and confidence in institutions;
- Readiness to take action;
- More pressing basic needs;
- Services that are not culturally sensitive or appropriate;
- Physical and systemic barriers to justice system;
- Distance;
- Poor infrastructure;
- Fragmentation of justice system and services.

These factors are not static and there is an important dynamic between legal problems and capabilities. Some life events affect personal capability (e.g. relationship breakdown, victims of domestic violence) and also give rise to legal issues. Legal problems can contribute to illness, which in turn affects capability. This relationship can be seen in specific situations but also in persistent patterns:

The risk of experiencing disadvantage is a product of capabilities, life circumstances, events, and opportunities. People with greater capabilities are more resilient to, or are more able to make their way out of, disadvantage. This includes resilience to legal problems.<sup>320</sup>

Legal capability is best seen on a continuum with senior judges/lawyers at one end, and people who are legally incapable at the other. The Law and Justice Foundation calls the middle ground “foundational legal capability” and defines it as a tipping point where people “tip over from constrained inaction to informed inaction” and able to recognize and meet legal needs as they arise.<sup>321</sup> The report concludes that: “foundational legal capability is the minimum level required to be a legally capable and active citizen in contemporary Australian society.”<sup>322</sup> Raising legal capability through all appropriate interactions should be one objective of legal aid provision, although not the sole responsibility of that service.<sup>323</sup>

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<sup>320</sup> *Ibid* at 124.

<sup>321</sup> *Ibid* at 133, 137-138.

<sup>322</sup> *Ibid* at 137.

<sup>323</sup> See discussion on legal capability in *Reaching Equal Justice*, *supra* note 4 at 64.

The Law and Justice Foundation report contains several frameworks that could serve as the basis for legal capabilities assessment tools by legal aid providers.<sup>324</sup> The report concludes that the “multidimensionality of legal capabilities makes the design of effective legal assistance services and policy interventions challenging and complex.”<sup>325</sup> Still, a general rule of thumb is:

...the more unbundled the legal service, the more dependent outcomes are on concomitant personal and legal capability. Unbundled services can be not only inappropriate and ineffective but inefficient for some clients.<sup>326</sup>

It is difficult to overstate the importance of integrating an understanding of personal and legal capability into the Canadian legal aid system to a much greater extent than is currently the case. While eligibility criteria serve this purpose to a limited extent by focusing on vulnerable persons with complex needs, they are inadequate when service delivery options include limited assistance. The Law and Justice Foundation summed it up this way:

Legal capability has the potential to confound socio-legal studies and vex evaluation of legal service provision. Unless differential client legal capability is taken into account, evaluation of legal services may not provide an accurate picture of whether or not certain forms and modes of legal service provision ‘work’. Capability factors may obscure the particular problem and people circumstances affecting appropriateness.<sup>327</sup>

It is difficult to overstate the importance of integrating an understanding of personal and legal capability into the Canadian legal aid system to a much greater extent than is currently the case.

#### Intake, diagnosis, referral and outreach

Recent reports on access to justice have emphasized the importance of investing in more effective front-end services and on early intervention.<sup>328</sup> Traditionally, most justice system resources have been spent on formal court procedures with the trial at its apex. Civil legal needs literature has highlighted how most every day legal needs never reach the formal justice system and it has been known for a long time that few civil cases are resolved through adjudication. The justice system now provides more dispute resolution options in both civil and criminal matters. In most

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<sup>324</sup> *Reshaping legal assistance services*, *supra* note 122 at 157-160.

<sup>325</sup> *Ibid* at 138.

<sup>326</sup> *Ibid* at 144.

<sup>327</sup> *Ibid* at 161.

<sup>328</sup> *Reaching Equal Justice*, *supra* note 4 at 70-74; *NAC supra* note 4 at 11-13.



jurisdictions, however, early intervention services are fragmented and not well-integrated into the justice system. This creates obstacles for individuals seeking assistance, particularly members of vulnerable and disadvantaged groups.

Legal aid providers have a very important role to play in the early intervention sector and, in particular, a proactive role in improving access to justice for poor and disadvantaged individuals and groups through outreach. An important innovation is the development of a systematic approach to diagnostic triage and tailoring of services by implementing standard tools and procedures to identify client need and capability.<sup>329</sup>

The Halton Community Legal Service recently piloted a Legal Health Check Up project, working in partnership with intermediaries, to reach out to members of the community, help identify legal problems and provide targeted service in a timely fashion.<sup>330</sup> The process involved an active offer of service by trusted intermediaries, followed by immediate and concrete assistance from the legal aid provider, and was highly effective.<sup>331</sup> The CBA's Equal justice initiative has produced 12 Legal Health Checks offering key tips to the public on different areas of law, asking that legal service providers add local referrals and resources and then share with the public.<sup>332</sup> Another good example is the I-HELP legal health check and diagnostic tool developed in the US to be used in medical/legal partnerships.<sup>333</sup>

Legal aid providers have a very important role to play in the early intervention sector and, in particular, a proactive role in improving access to justice for poor and disadvantaged individuals and groups through outreach.

Other best practices that facilitate intake, diagnosis, referral and outreach are:

- Gateways to legal services that are simple, well-signposted and accessible, whatever their form
- Screening: comprehensive client intake, diagnostic triage and referral to appropriate legal services or at least a preliminary legal diagnosis (this was the core of idea of CLAC and CLANs in UK)<sup>334</sup>

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<sup>329</sup> See discussion in *Reshaping legal assistance services*, *supra* note 122 at 150-153.

<sup>330</sup> Dr. Ab Currie, *Extending the Reach of Legal Aid: Report on the Pilot Phase of the Legal Health Check-Up Project* (unpublished paper, 2015). Cited with permission of the author.

<sup>331</sup> *Ibid* at 1.

<sup>332</sup> See, [CBA Legal Health Checks](#)

<sup>333</sup> I-HELP stands for: **I**ncome supports, **H**ousing and utilities, **E**ducation and Employment, **L**egal status (e.g. immigration) **P**ersonal and family stability.

<sup>334</sup> See discussion in *Reshaping legal assistance services*, *supra* note 122 at 151.



- Tools for easy client identification (legal health checklists like the Halton Community Legal Service described above)<sup>335</sup>
- Software packages to identify and prioritize legal matters, streamline referral, and flag client capability issues
- Standard checklists and questionnaires
- Capability assessment and screening tools<sup>336</sup> (although this cannot be a one time assessment since some clients, even disadvantaged ones initially appear capable, and problems only become noticeable later in process);<sup>337</sup>
- Indicators to streamline intake process and/or diagnostic triage and referral
- Diagnostic expertise: whether or not unbundled services are enough is often dependent on professional expertise.<sup>338</sup>

Wayne Moore, a senior US access to justice advocate has recommended that the US Legal Service Commission develop a benchmark for front-end legal aid services which:

- Requires grantees in states with multiple LSC grantees to use a single, statewide telephone intake center as their primary source of intake.
- Requires these centralized telephone intake systems to coordinate with all other providers of legal services to low-income people, such as court-based self-help centers, law school clinics, law libraries, and pro bono programs.
- Makes the key objective of intake the referral of clients to the least expensive, delivery system capable of addressing their needs.
- Discourages case acceptance meetings, which take time without improving outcomes.<sup>339</sup>

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<sup>335</sup> The legal health checklist used in that project is appended to the evaluation report, Currie, *supra* note 330.

<sup>336</sup> As discussed above, this assessment involves measuring a mix of knowledge, skills and psychological factors as well as the particular context or situation. Examples of criteria used by CLAC advisers are: difficulty speaking English, some form of disability or learning difficulty, lack of knowledge of their rights, being highly distressed or overwhelmed by their circumstances. Other factors include: client behaviour and communication skills, health factors including medication that could affect their abilities, cognitive impairment, having poor literacy or English skills, facing substantial disadvantage, having been bullied, exhibiting high levels of anxiety and powerlessness, mental health problems, difficulty communicating, limited education, a high level of anger and frustration, fear of the legal system. See discussion in Law and Justice Foundation of New South Wales, *supra* note 78.

<sup>337</sup> *Reshaping legal services*, *supra* note 122 at 159.

<sup>338</sup> *Ibid.*

<sup>339</sup> Richard Zorza, Access to Justice Blog, "[Wayne Moore Part Two – Roles of ATJ Commissions, Pro Bono, LSC etc... and a Ten Year Vision](#)"

These intake, diagnostic and referral tools will not work if only employed passively, that is when a client contacts the legal aid service provider. A proactive attempt to reach people experiencing legal difficulties through outreach is an equally critical component.<sup>340</sup> Evidence demonstrates that effective outreach is targeted to meet priority legal needs and fill service gaps, engage clients, provide appropriate service delivery (taking into consideration the specific needs and capabilities of the target group), be client centered and provide strong referral pathways.<sup>341</sup> One benefit of effective outreach is that it can lead to systemic advocacy and law reform.

#### Comprehensive and holistic services

An effective intake system that is able to diagnose an individual's situation and legal needs is a critical first step in targeting services, but appropriate legal aid services have to be available on a timely basis. Individuals have different capabilities and face different legal problems and the nature and extent of assistance they require varies. Most Canadian legal aid providers deliver a continuum of services covering information, community education, minor assistance, dispute resolution, duty lawyers, representation in courts and tribunals and advocacy.

A continuum of services allows a legal aid plan to be comprehensive and avoid gaps in meeting the legal aid needs of the communities served. Providing a range of services helps to ensure responses proportionate to need and that problems are identified and addressed early, when possible. However, the knowledge of what services work best for whom and in what situation is still fairly limited. More information is needed on the relative merits of the various service types in terms of suitability, costs and outcomes. Several research projects aimed at enriching knowledge on this question are currently underway.<sup>342</sup>

Information, education and minor assistance services can help many people address their legal issues and problems and resolve their disputes. However, this is not always the case: "international research has consistently identified that the most vulnerable are less likely than others to have the skills and psychological readiness to achieve legal resolution on their own or with minimal assistance. These clients will require more intensive support beyond information, education, advice and minor assistance."<sup>343</sup> For example, a comparative review of seven studies on the efficacy of legal aid telephone hotlines concluded: "The benefit of the hotline expands with the depth of services offered. The best results are obtained when the

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<sup>340</sup> Currie, *supra* note 330; *Reshaping legal assistance services*, *supra* note 122 at 62-63.

<sup>341</sup> See extended discussion in *Reshaping legal assistance services*, *ibid* at 59-62.

<sup>342</sup> CLEO, *Evolving Legal Services Project*, *supra* note 79; California Shriver Project, *supra* note 198; Boston Bar Association Civil Gideon Project, *supra* note 198.

<sup>343</sup> PCR, *supra* note 3 at 705.

hotline is the 'front end' of a system that can extend through assistance to full representation."<sup>344</sup>

Comprehensive legal aid plans are more efficient and effective. The Law and Justice Foundation report concludes that there are efficiency gains to be made from ensuring that clients receive appropriate levels of support: "Resources are wasted both when levels of support are insufficient to bring about effective outcomes and when they are in excess of what is required."<sup>345</sup> This in turn depends on appropriate diagnosis of the situation and capability assessment discussed in the previous section.

How services dovetail together is very important in matching assistance with the needs and capabilities of clients. Dovetailing would ensure, for example, that legal advice is made available directly after community legal education or that outreach services have direct links to casework where additional assistance is required.<sup>346</sup> The major barrier in achieving meaningful access to a full range of high-quality legal assistance programs is the lack of programs with sufficient funding to provide the legal advice, brief service and extended representation necessary to meet the legal needs of low-income persons. The design of the Community Legal Clinics in England and Wales was aimed at overcoming this barrier by ensuring comprehensiveness, defined as "a single continuing grant of civil legal assistance, abolishing the distinction between advice and assistance, assistance by way of representation, and legal aid."<sup>347</sup>

This aspect of service delivery benchmarks involves questions of the type, nature and depth of services to be provided. Recent research and reports have emphasized the importance of comprehensive, holistic and integrated services to provide assistance with all aspects of an individual's problems or situation. Comprehensiveness and a holistic approach address qualities of legal aid services while integration refers to legal services being connected to other social services.

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<sup>344</sup> Roger Smith, "Telephone hotlines and legal advice: a preliminary discussion paper" (Legal Aid Group, January 16, 2013) at 10. (Unpublished paper) This draft discussion paper compares the findings of studies on hotlines from the US, Australia, the UK, and British Columbia).

<sup>345</sup> *Reshaping legal assistance services*, *supra* note 122 at 178.

<sup>346</sup> *Ibid* at 111.

<sup>347</sup> C. Fox, R. Moorhead, M. Sefton, and K. Wong, *Community Legal Advice Centres and Networks: A Process Evaluation* (London: LRSC, 2010); A. Buck, M. Smith, J. Sidaway, and L. Scanlan, *Piecing It Together: Exploring One-Stop Shop Legal Service Delivery in Community Legal Advice Centres* (London: Legal Services Commission, 2010); A. Buck, M. Smith, J. Sidaway, J. and N.J. Balmer, [Community Legal Advice Centres: A Survey of Clients in Reception Areas](#). (London: Legal Services Commission, 2010). M. Smith and A. Patel, *Using Monitoring Data: Examining Community Legal Advice Centre Delivery* (London: Legal Services Commission, 2010). This approach was also recommended in *Legal Assistance in Scotland – Fit for the 21st Century*, *supra* note 11.

Integrated services are discussed in the next section dealing with how legal aid providers cooperate and collaborate with other justice organizations and service providers in other sectors.

Dr. Ab Currie explains the rationale for holistic and integrated service:

The next step in expanding access to justice is providing integrated and holistic services. This is fundamental to the everyday legal problems paradigm of access to justice that views legal problems as aspects of the normal activities of everyday life and, therefore, experiencing legal problems as a human process. As well, it is well established that legal problems trigger other legal problems and legal problems trigger, and are triggered by, a range of non legal problems. Thus many people, particularly the disadvantaged, experience clusters of interconnected legal and non legal problems that, like Gordian knots, cannot be disentangled.<sup>348</sup>

He explains that “[i]ntegrated and holistic services and aspects are two sides of the same coin,”<sup>349</sup> and explains the distinctions between the two:

It is useful to distinguish integrated and holistic service. Both relate to the clusters of legal and non legal problems people experience and to the fact that experiencing legal problems is a human process. Typically for people who are desperate and afraid, dealing with legal problems has to be approached on that level of empathy. Holism is *how* you do *what* you do. Lawyers do that as illustrated in the case of Mr. H as well as professional intermediaries such as the health professionals at the Halton Hills FHT and the quite different “grass roots” people in intermediary groups such as MMG, INCA and Voices. The impression conveyed through the intermediary interviews is that a holistic approach involves a complex blend of various elements of human interaction; overcoming people’s cynicism and resistance to asking for help, drawing people out so they will tell their manifold stories, building trust and, especially, making an active offer of concrete service that is, in the words of one MMOG respondent unqualified and non-judgmental.<sup>350</sup>

An active offer of service, concrete assistance and, sometimes, advocacy, provided without judgment. It is, in the words of several intermediaries, giving people the opportunity to reveal problems when the revelation is deeply personal, and walking the path to resolving the problem with the person.

Dr. Ab Currie, note 330.

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<sup>348</sup> Currie, *supra* note 330 at 18.

<sup>349</sup> *Ibid* at 19.

<sup>350</sup> *Ibid* at 20-21.

Currie says that holistic practice involves a different kind of lawyer and lawyering – an extension and transformation of legal service. While there is clear overlap between integrated and holistic service, holism can be defined as: “an active offer of service, concrete assistance and, sometimes, advocacy, provided without judgment. It is, in the words of several intermediaries, giving people the opportunity to reveal problems when the revelation is deeply personal, and walking the path to resolving the problem with the person.”<sup>351</sup>

#### Cooperation, collaboration and integration

Another major theme of access to justice reform is the need for greater cooperation and collaboration among justice system organizations and institutions and a breaking down the silos between the justice system and other government services.<sup>352</sup>

Increased collaboration and cooperation between legal assistance providers themselves and other service providers to ensure client receive ‘joined up’ service provision to address legal and other problems.

An effective Canadian legal aid system will ensure cooperation and collaboration among legal assistance providers, between legal aid and other social service providers and between legal aid and other justice sector entities. One of the goals of enhanced collaboration is integrated services to legal aid clients and communities. In Australia this is framed as ‘joined up services’: “Increased collaboration and cooperation between legal assistance providers themselves and other service providers to ensure client receive “joined up” service provision to address legal and other problems.”<sup>353</sup>

The other main objective is a more efficient and effective justice system. This systemic perspective is discussed in the next part dealing with national benchmarks addressing what the future Canadian legal aid system should be “delivered with”.

The Law and Justice Foundation report includes an extensive discussion of potential benefits, as well as the nature, challenges and facilitators of collaborative work and joined up services. Integrated services flow from a client-centered approach and address the reality that many people experience problems that have both a legal and other dimensions. Addressing all facets of the problem then leads to better and more lasting outcomes. Service integration also addresses difficulties that many people experience in navigating multiple paths to service, including delay, “referral fatigue” and other obstacles that can lead to people giving up. From a public

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<sup>351</sup> *Ibid* at 22.

<sup>352</sup> *Reaching Equal Justice*, *supra* note 4 at 95-97, 110-12, 130-132.

<sup>353</sup> *Reshaping legal assistance services*, *supra* note 122 at 67; extended discussion at 67-100.

expenditure perspective, integrated services can enjoy competitive and economic advantages.<sup>354</sup>

There are an almost infinite variety of joined-up initiatives. They can be place-based, issue-based, client-based, education-based, to name just a few.<sup>355</sup> The best initiatives will have input from clients in planning stages. The Halton Legal Health Checklist pilot project described above is a good example of integrated service, since legal aid providers worked closely with a range of trusted intermediaries from a broad range of organizations to develop and deliver the outreach and referral program. Legal assistance services should focus on working with other service providers to incorporate all of a person's legal and non legal problems:

The model should be structured in a way to leverage the particular skills and expertise of each provider, maximise geographical coverage across the state and promote a balance between private and salaried providers that promotes quality benchmarking and cost efficacy.<sup>356</sup>

The Law and Justice Foundation report highlights two Australian best practice initiatives. The first is the Queensland Regional Legal Assistance Forums, which promote cooperation between service delivery providers, helping to identify needs and gaps in service and to improve access and referrals.<sup>357</sup> The second is the Cooperative Legal Services Delivery Program of New South Wales, which serves as both as a forum for cooperation and as "an incubator for new collaboration."<sup>358</sup> A recent evaluation found that this central agency is "a high value for money program and a successful model for increasing networking between legal and non legal agencies, sharing information, improving referral paths, increasing knowledge of non legal services about legal issues, and in providing additional legal services to address the gaps for disadvantaged populations."<sup>359</sup>

The biggest barrier to integrated services is lack of resources. Integration requires time and money, as well as aptitude for collaboration. A clearer sense of how legal services fit with other human social services is needed. Given their relatively minor capacity compared to health and welfare, "Legal services would not be at the centre of any widespread human services coordination initiative."<sup>360</sup> Although, as

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<sup>354</sup> Y.S. Chang, *The mechanisms and rationale for integrated publicly-funded services: a comparative study of England and Wales* (Phd Thesis, publication forthcoming) cited in *Reshaping legal assistance services*, *ibid* at 68.

<sup>355</sup> *Reshaping legal assistance services*, *ibid* at 69-72.

<sup>356</sup> PCR, *supra* note 3 at 746, citing the submission of Victoria Legal Aid (sub. DR252, 9)

<sup>357</sup> *Reshaping legal assistance services*, *supra* note 122 at 94-95.

<sup>358</sup> *Ibid* at 93.

<sup>359</sup> P. Ryan and K. Ray, *Evaluation of the Cooperative Legal Services Delivery Program* (Sydney: Legal Aid New South Wales, 2012) at 37. Cited in *Reshaping legal assistance services*, *ibid* at 93.

<sup>360</sup> *Ibid* at 99.



community legal clinic experience demonstrates, legal aid providers certainly have a role in defining legal and non legal issues and solutions. Lawyers are good “problem-noticers” and this function should be enhanced through institutional arrangements and incentives.

Enhanced collaboration is not simply a question of institutional arrangements. It begins with an attitude and predisposition that informs legal aid service delivery attuned to client needs: “The challenge is to encourage people to affect change in a fundamental way to ensure that they have appropriate assistance (‘no wrong door’) to address their broader needs (e.g. need for mental health services, need for housing).”<sup>361</sup>

As noted by the Deputy Minister’s Panel on Criminal Legal Aid, there is large scope for improvement in providing integrated legal aid services:

At the same time, a conversation needs to be had with regards to meeting the client’s other needs in a more holistic manner (mental health, substance abuse, poverty, homelessness). While the research on innovations, best practices and efficiencies in legal aid demonstrates an increasing trend towards a more client-centered approach to legal aid service delivery (e.g. partnership in therapeutic courts, holistic defence, identification of unique client needs through specialized services), there is still room for improvement.<sup>362</sup>

#### Outcome focus: timeliness, prevention and post-resolution support

Client-focused services shift the attention away from the traditional prominence on process by justice system players to a people-centred emphasis on outcomes. Formerly the fact of providing high quality service to ensure fair procedures was the key output for legal service providers, and few providers measured outcomes of those services. Legal aid providers and their funders are beginning to grapple with the more difficult assessment of ‘what happened’ as a result of the legal assistance, although this is still largely a ‘brave new world.’<sup>363</sup>

Benchmarks for the Canadian legal aid system could take into account at least three general categories of outcomes: procedural, substantive and systemic. Procedural outcomes include factors such as the client’s level of satisfaction with the process and the level of stress experienced. Satisfaction has several dimensions: did the client feel well-prepared, perceive the process to be fair, perceive that she or he was heard, and so on. Substantive outcomes can again be measured from the

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<sup>361</sup> Deputy Minister’s Advisory Panel Report, *supra* note 12 at 4-5.

<sup>362</sup> *Ibid* at 9.

<sup>363</sup> Buckley, *Evolving Legal Services*, *supra* note 79 at 74.

perspective of the individual's satisfaction with the outcome (initial and long-term) but the outcome can also be measured against an objective standard (evaluation relative to other similar cases). Other qualitative objectives include empowering the individual through information, education and building legal capabilities. Systemic outcomes include the extent to which there is feedback from the process and outcomes into the justice system. Such feedback can encourage learning and innovation and consideration of whether the legal assistance contributed to resilience and prevention of future disputes.

Many recent access to justice reports emphasize the importance of early intervention in contributing to positive outcomes and contributing to efficient, less costly services.<sup>364</sup> The Australian National Partnership Agreement included the policy goal of increasing early intervention services by legal aid commissions by 30%.<sup>365</sup> Early intervention can provide legal services before a legal crisis hits and prevent escalation, ideally assisting in breaking the cycle of disadvantage. The analogy employed to illustrate this shift to providing services earlier in the life of a legal problem is that building a fence at the top of the cliff is more effective than placing an ambulance at the bottom to help those who fall over.<sup>366</sup> To contribute to positive outcomes, legal aid services must not only catch a problem early, but must also prevent escalation of the problem:

If early intervention services focus on providing less intensive services early, is there a risk that these services will not be enough to prevent the escalation of issues for disadvantaged clients and later services will also be required for this target group...<sup>367</sup>

The Law and Justice Foundation report highlights the question of: when is early? Legal problems do not always follow a linear process and some issues arise suddenly. To link early intervention with stages in a legal process is to ignore the client-centered approach and maintain the traditional justice system focus. The report concludes:

A more inclusive framework may better take this approach - and focus on the timeliness of assistance relative to the experience of the client rather than defining the effectiveness of the service delivery in terms of what may be an arbitrary point in the legal process.<sup>368</sup>

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<sup>364</sup> NAC, *supra* note 4 at 11-13; NAC - Prevention, Triage and Referral Working Group, "Responding Early, Responding Well: Access to Justice through the Early Resolution Services Sector" (Toronto: CFCJ, April 2013).

<sup>365</sup> *Supra* note 108.

<sup>366</sup> See illustration in Currie, *supra* note 330 at 4.

<sup>367</sup> *Reshaping legal assistance services, supra* note 122 at 188.

<sup>368</sup> *Ibid* at 107-08.



The quality of timeliness is preferable to the more abstract notion of 'early'. Timeliness promotes a client-focus, delivering services consistent with how people experience legal issues and how they seek help. One example of best practice in this regard is duty counsel in family matters, who are able to provide valuable and timely assistance at many stages of the legal process. Another is to recognize patterns of legal needs that develop around transition points and provide legal assistance services to reach disadvantaged clients at those critical times.<sup>369</sup> This is another dimension to the quality of timeliness.<sup>370</sup>

Outcome measurement requires legal aid providers to follow up with clients to find out if legal assistance was helpful and ask about the results. The Law and Justice Foundation report notes that this follow up is particularly important with disadvantaged individuals to determine:

- if the client has not successfully resolved their problem, why not, and whether an escalated form of service is appropriate
- if the client is still trying to act and resolve the problem, whether an escalated form of service is appropriate
- if the problem is resolved, how was it resolved, and whether or not the person is satisfied with the outcome and the services received.<sup>371</sup>

The report acknowledges that few legal aid providers currently provide this type of follow-up and recommends that these procedures be integrated into new service provision.

One American legal aid pilot is investigating the effects of full civil legal assistance on women experiencing domestic violence,<sup>372</sup> in cases of divorce, custody, child support and civil protective orders. The study is measuring whether receiving legal representation enhanced client safety, psychological well-being, positive functioning and longer-term economic self-sufficiency.

In the UK, one of the performance standards for Community Legal Assistance Centres was that outcomes achieve "substantive benefit" for the client. Outcome codes were developed for various categories of legal problems. For example, in a housing case, the outcome codes included "the client is housed, re-housed or retains home" and "repairs or improvements are made to the client's home." The Centres had to report on the proportion of cases in which a substantive benefit had been

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<sup>369</sup> *Reaching Equal Justice*, *supra* note 4 at 68-69.

<sup>370</sup> *Reshaping legal assistance services*, *supra* note 122 at 171.

<sup>371</sup> *Ibid* at 161.

<sup>372</sup> Iowa Legal Aid Project described in Houseman, *supra* note 235 at 19.

achieved for their clients with the threshold target being a positive outcome in 60% of cases.<sup>373</sup>

A proposed research study on legal aid in eviction cases sponsored by the Northwest Justice Project & the Civil Right to Counsel Leadership elaborated outcome measures on a range of dimensions to measure short and long term results of legal aid provision including: legal case outcomes, court efficiency outcomes, housing outcomes, mediating outcomes (related issues such as employment and family problems) and long term health and functioning changes.<sup>374</sup>

Outcome measurements have to take into account the challenging nature of legal aid provision:

Any attempt to measure legal aid services' impact, outcomes, and/or results must take into account the challenges of working with disadvantaged and vulnerable clients. Human services such as legal aid services involve individual lives and impact on the lives in ways that can be beneficial or detrimental. Rather than assuming the impact of legal aid services is simple, easy to measure and/or predictable in advance, the approach to measurement used in these circumstances must acknowledge the difficult and unpredictable nature of service delivery when complex work is undertaken for disadvantaged and vulnerable clients. This involves listening to, informing, conducting analysis with, responding to, interacting and communicating with a range of people engaged in this complicated work.<sup>375</sup>

The measure of outcome is by definition a relative one, "the likelihood of obtaining a better result" with or without the legal service.<sup>376</sup> Further, it is difficult to define favourable outcomes since clients can have more than one goal;" "legal outcomes tell only part of the overall story."<sup>377</sup> Albiston and Sandefur present a strong argument for measuring effectiveness relative to a broad range of outcomes and impacts extending well beyond a specific case outcome: "Civil justice research must step back from narrow definitions of effectiveness that are limited to case outcomes and consider the broader, systemic effects of representation on individuals and those around them."<sup>378</sup>

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<sup>373</sup> M. Smith and A. Patel, *supra* note 347 at 5-7.

<sup>374</sup> Dr. Liz Curran, [\*We Can See There's a Light at the End of the Tunnel Now – Demonstrating and Ensuring Quality Service to Clients\*](#), at 4-5.

<sup>375</sup> *Ibid* at 1.

<sup>376</sup> Jessica K. Steinberg, "In Pursuit of Justice? Case Outcomes and the Delivery of Unbundled Legal Services" (2011) 18 *Georgetown Journal on Poverty Law & Policy* 453 at 501.

<sup>377</sup> Greiner, Pattanayak, and Hennessy, *supra* note 202 at 73.

<sup>378</sup> Catherine R. Albiston and Rebecca L. Sandefur, "Expanding the Empirical Study of Access to Justice" 2013 *Wisconsin Law Review* 101 at 111.

A paper prepared by Erol Digiusto for the Law and Justice Foundation of New South Wales notes that in civil matters there can be competing outcome goals between client-desired outcomes and systemic outcomes (such as a fair hearing or trial).<sup>379</sup> Clients can and should be involved in identifying outcomes, but where outcomes are contested or contingent as in many legal situations, it may be particularly challenging:

- Clients may be unaware or unable to understand and analyze the range of possible outcomes which are inherent in their legal problem;
- Clients may lack objectivity and may have difficulty realistically assessing the merits of their situation (inaccurately high or low expectations);
- A client's goals may not be 'fair', 'just' or legally acceptable; and
- Legal problems will often have more than one potential solution, each of which may be associated with different risks, benefits, costs, and probabilities of achieving particular goals.<sup>380</sup>

The ABA Standards for the Provision of Civil Legal Aid includes a statement on the measurement of effectiveness:

The effectiveness of a provider can be measured by the tangible, lasting results of its efforts on behalf of its clients. Lasting results can be achieved by favorably resolving individual legal problems; by teaching persons how to address the legal problems they face; by improving laws and practices...The focus of legal work is sharpened if the provider deliberately identifies the results it seeks to achieve.<sup>381</sup>

Outcome measurements will need to be multi-dimensional and could include consideration of whether:

- clients gained knowledge to solve problems;
- clients obtained resolution to their legal problem and non legal aspects of their problem;
- the resolution was durable;
- clients obtained access to the legal system or an intended benefit of the law; and
- clients had their voice heard in the legal system.<sup>382</sup>

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<sup>379</sup> Law and Justice Foundation of New South Wales, *supra* note at 5.

<sup>380</sup> *Ibid* at 6.

<sup>381</sup> American Bar Association, [Standards for the Provision of Civil Legal Aid](#) (2006) at 66-67.

<sup>382</sup> Dr. Melina Buckley, *Evolving Legal Services*, *supra* note 79 at 80.

## Efficient and effective services

National legal aid benchmarks will also need to include a standard to ensure value for the investment in public legal services. Canadian legal aid providers have made progress in developing measures of efficiency and effectiveness, such as average cost per completed case, coupled with considerations of effective resolution of legal issues.<sup>383</sup> This dimension is closely related to the previous discussion on outcome measurement. Legal aid best practices and protocols can be developed to cope with recurring issues, such as a divorce, a dismissal or a debt problem, which can in turn lead to cost savings and improved quality.<sup>384</sup>

The single biggest issue is striking the balance between meeting the needs of the most vulnerable people with the most complex needs or a larger group of people with needs more easily met

The question of efficiency and effectiveness engages broader considerations of priorities and allocation of resources. The single biggest issue in this regard is striking the balance between meeting the needs of the most vulnerable people with the most complex needs or a larger group of people with needs more easily met: “do you plough more resources into helping fewer people more, or do you help more with less?”<sup>385</sup>

Tailoring services and proportionality are key to the efficient and effective delivery of legal aid services. As noted in the section on comprehensive legal services, providing inappropriate unbundled services is wasteful and has consequences in terms of either ineffective services and unmet needs, or clients having to seek more appropriate services. Greater understanding of differentiated legal need and capability is key to developing the future Canadian legal aid system. This is our key practical challenge: “Services will be more ‘appropriate’ and potentially more efficient from funder, service provider, and client perspectives, when sufficiently personalized to match legal need and capability.”<sup>386</sup>

Services will be more ‘appropriate’ and potentially more efficient from funder, service provider, and client perspectives, when sufficiently personalized to match legal need and capability.

### *Options for service delivery benchmarks*

There are a wide range of factors and best practices for developing service delivery benchmarks. The Working Group offers a single multi-factorial benchmark here, for the purposes of initiating discussion.

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<sup>383</sup> Submissions of Manitoba Legal Aid to survey on eligibility; see also discussion of Legal Aid Ontario and Legal Services Society evaluation indicators in Part I at 24-25.

<sup>384</sup> HiiL, *Legal Aid in Europe*, *supra* note 6 at 78-79.

<sup>385</sup> *Reshaping legal assistance services*, *supra* note 122 at 177.

<sup>386</sup> *Ibid* at 149.

**Option #15 – Service Delivery**

*The Canadian legal aid system delivers a spectrum of client-focused legal aid services that provide meaningful and effective access to justice consistent with these factors:*

- a) **Empowerment** - People and communities are enabled to find ways to maintain or improve their legal health and legal capabilities and to prevent further problems;*
- b) **Accessibility** - Proactive steps are taken to increase access through effective and tailored intake, diagnosis, referral and outreach services;*
- c) **Suitability and timeliness** – People and communities have timely access to information, services and supports that meet their diverse needs, personal and legal capabilities and circumstances;*
- d) **Holism** - Services are comprehensive and holistic;*
- e) **Partnership** - Legal aid services are provided in partnership with other services so that people and communities benefit from integrated service provision;*
- f) **Outcome Focus** - People and communities have improved and sustainable legal outcomes, systemic legal health is enhanced and justice system performance is ameliorated; and*
- g) **Efficiency and Effectiveness** – Legal aid services provide effective resolution of legal issues taking into account the system-wide costs per completed case.*

**A Legal Aid System Delivered With...**

The third and final general question for national benchmarks is: what should the legal aid system be delivered with? This involves considering what supporting framework is required to ensure optimal performance of the Canadian legal aid system. The Working Group identifies three potential pillars of support: increased service provider capacity; expertise, evidence and innovation; and predictability, transparency and accountability.

**Overview of current situation**

Today there are relatively few national supports for legal aid plans in Canada. The most important is the Association of Legal Aid Plans of Canada (ALAP), an umbrella group representing each of the provincial and territorial legal aid plans. The annual general meeting of ALAP provides an opportunity to share best practices in the delivery of legal aid services. Recently, the emphasis of ALAP has been evolving toward becoming a national voice on broader access to justice issues, in addition to legal aid related matters. This role is a necessary evolution to advance understanding of the essential role carried out by legal aid plans in the access to justice dialogue.

The Federal, Provincial Territorial Working Group on Legal Aid (PWG) plays a limited policy role. The PWG is a forum for national information sharing research and joint policy development and discussions on matters of shared interest respecting legal aid, as well as for the negotiation of the federal contribution for legal aid.<sup>387</sup> From time to time, Justice Canada has played a supportive role, particularly through developing and funding research programs on innovations in legal aid service delivery.<sup>388</sup> The larger provincial legal aid plans have also developed and enlarged their policy, research and development capacity over the past decade or so.<sup>389</sup>

## Evidence-informed best practices

### *Increased service provider capacity*

One of the critical challenges facing the Canadian legal aid system is the underdevelopment of the public legal services bar and inadequate support for other legal aid providers (e.g. paralegals). This *Backgrounder* has underscored how providing legal services to vulnerable and disadvantaged groups involves a different kind of lawyering than with private legal services. These differences are not well recognized by legal educators or continuing legal education providers at present. Further, there are serious problems of retention given the relatively limited career paths and chances for advancement. Part of this is a function of the small public legal service bar.

Several regions face problems recruiting and retaining of legal aid lawyers. Maintaining an adequate roster of private bar legal aid lawyers, and levels of satisfaction among lawyers in staff offices are ongoing problems. Some regions have confronted organized withdrawals of service by lawyers to protest low tariffs or inadequate hours allotted to deliver legal services.<sup>390</sup> For regions with staff offices, complaints about workload, burnout and remuneration are common. Pilot projects to address these problems are often discontinued because of funding or shifting priorities, even when proven successful.

To improve their understanding of these problems, many legal aid plans have used a variety of means to obtain feedback from legal aid lawyers. Legal Aid Alberta commissioned surveys to understand problems with the certificate system from the perspective of lawyers, and found a general decline in lawyers willing to do legal aid

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<sup>387</sup> Department of Justice: [Legal Aid Program](#).

<sup>388</sup> *Supra* note 228.

<sup>389</sup> See for example the research and evaluation carried out by the [Legal Services Society](#) and [Legal Aid Ontario](#).

<sup>390</sup> For example, criminal lawyers in Ontario organized a withdrawal of service in Ontario in 2010, and in Manitoba in 2007-2008.

work.<sup>391</sup> BC conducted a tariff renewal project in 2005, and ultimately recommended a principled approach to tariff compensation and improved compensation, among other things.<sup>392</sup> Legal Aid Manitoba has engaged lawyers and other stakeholders to find ways to increase the number of lawyers willing to take on legal aid work, saying that “the exodus of private bar and staff lawyers has made it very difficult for LAM to meet existing client demands. This has been shown to be a systemic problem within Manitoba’s justice system.”<sup>393</sup> The legal aid plan is looking broadly at ways to encourage practicing lawyers and new lawyers to work for legal aid, particularly in regions outside of Winnipeg. Since 2010, LAO has modernized its criminal law services by improving tariff compensation, updating payment programs, improving case management and accountability, and improving the business relationship between the Plan and lawyers.

In her *Moving Forward* report, Melina Buckley suggests that in addition to focusing on ways to encourage the practicing bar to accept legal aid work, a longer term strategy is to look for ways to develop and support young lawyers interested in doing that work. She points to the Young Legal Aid Lawyers group from the UK, which identified some issues that, if addressed, would encourage more young lawyers to engage in legal aid. These include dealing with disparities in remuneration between publicly paid criminal lawyers acting for the Crown and those employed by legal aid, a shortage of training opportunities, and difficulties in repaying law school debt when working for legal aid.<sup>394</sup> She also recommends that the CBA undertake research and consultation toward recommendations that would assist in the development, promotion and support of legal aid lawyers working both within both staff and judicare settings.<sup>395</sup> In his 2008 review of Ontario’s legal aid system, Professor Michael Trebilcock also urged debt relief programs sufficient to ensure that working for legal aid or in areas of poverty law are feasible options for young lawyers.<sup>396</sup>

In the UK, “developing and engaging our people” is seen as a key to improved organizational capacity.<sup>397</sup> BC’s Legal Services Society has made it a priority to support justice system professionals to provide integrated, outcome focused

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<sup>391</sup> Prairie Research Associates Inc., *Survey of Roster and Non-Roster Lawyers* (Edmonton: Legal Aid Alberta, 2008).

<sup>392</sup> *Tariff Lawyer Satisfaction Survey Final Report* (Vancouver: LSS, 2007).

<sup>393</sup> Legal Aid Manitoba’s *Annual Report 2007-08* (Winnipeg: LAM, 2008).

<sup>394</sup> *Moving Forward on Legal Aid*, *supra* note 4 at 71.

<sup>395</sup> *Ibid* at 128.

<sup>396</sup> Cited *ibid* at 71.

<sup>397</sup> [UK Legal Aid Agency](#)



services.<sup>398</sup> The Deputy Minister's Criminal Legal Aid Panel also emphasized the importance of increasing service provider capacity:

Through legal aid lawyers, more training and information can be provided with the goal of delivering a better client service experience. The legal aid lawyer must have the capacity to deliver services to clients in the best possible way. At the same time, a conversation needs to be had with regards to meeting the client's other needs in a more holistic manner (mental health, substance abuse, poverty, homelessness).<sup>399</sup>

One of the mechanisms for improving capacity are supportive quality assurance programs. For example, the ABA *Basic Principles of a Right Counsel in Civil Legal Proceedings* explicitly addresses 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.<sup>400</sup>

LAO has had an extensive quality assurance program for over a decade.<sup>401</sup>

The Association of Legal Aid Plans (ALAP) plays an important role in fostering innovation but is not resourced to fully meet this need. Many legal aid lawyers participated in the CBA's Envisioning Equal Justice Summit (Vancouver, April 2013) and voiced a strong need for a regular forum. *Reaching Equal Justice* considered what could be done to support legal aid innovation to improve meaningful and inclusive access to justice. This was an important theme at the Summit where participants recommended:

1. Enhanced outcome-based evaluation of programs and monitoring of developments and sharing of knowledge gained

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<sup>398</sup> Legal Services Society, *Making Justice Work: Improving Outcomes and Access for British Columbians. A Report to the Minister of Justice and Attorney General The Honourable Shirley Bond*. (Vancouver: LSS, July 1 2012).

<sup>399</sup> *Supra* note 12 at 9.

<sup>400</sup> ABA Standards for the Provision of Civil Legal Aid, *supra* note 381.

<sup>401</sup> For details see [LAO website](#). For an overview see discussion in *Moving Forward on Legal Aid*, *supra* note 4 at 66-67.



2. Dedicated resources to establish and maintain mechanisms to share best practices between legal aid plans
3. Increased opportunities for legal aid providers to come together to share and learn – perhaps through an annual or biennial conference.
4. Online learning opportunities – webinars.<sup>402</sup>

*Reaching Equal Justice* recommended that the Association of Legal Aid Plans increase opportunities for legal aid providers to come together to share and learn (e.g. regular webinars, an annual or biennial conference).<sup>403</sup>

#### *Expertise, evidence and innovation*

A target in *Reaching Equal Justice* is that by 2025, all legal aid programs provide meaningful access to justice for essential legal needs through inclusive and holistic services that respond to individual and community needs and integrate evidence-based best practices. Attaining this target involves developing greater expertise, investing in evidence-based research and prioritizing innovation. Specific steps were identified as important advancements:

- Legal aid providers develop an increased capacity for outcome-based evaluation and research, as well as monitoring and sharing information about developments to facilitate evidence-based best practices
- Prototypes of innovative holistic legal aid service delivery models are developed and tested. Results are integrated into practice and broadly shared to encourage learning, further innovation and best practices.
- Legal aid providers build and strengthen relationships with other social service organizations to develop more holistic service delivery.
- The Association of Legal Aid Plans is resourced to play a national leadership role in support of strong, innovative legal aid service delivery including through research, monitoring and sharing developments
- The Association of Legal Aid Plans develops measures of inclusivity to integrate into evaluation frameworks.
- The Association of Legal Aid Plans completes its work on a common framework for data collection for all legal aid providers.<sup>404</sup>

US and Australian reports have emphasized the importance of developing networks of legal aid providers both regionally and nationally to share information, promote

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<sup>402</sup> *Reaching Equal Justice*, *supra* note 4 at 112.

<sup>403</sup> *Ibid* at 113.

<sup>404</sup> *Ibid* at 112-113.

best practices as well as expanding joint research capacity and avoid unnecessary duplication or wasted resources through ‘reinventing the wheel’. Unfortunately, funding cuts often result in eliminating these coordination functions to provide more direct service.<sup>405</sup> For example in the US, funding cuts over the past few years have meant that legal aid state support units and the regional training centers that were part of larger programs have been eliminated.<sup>406</sup>

By contrast, there are a greater number of collaborative networks in Australia. At the national level the Australian Legal Assistance Forum brings together legal aid providers with the Law Council of Australia (representing Australian lawyers and their state and territory representative bodies).<sup>407</sup> The objectives are:

1. To promote cooperation between service providers in the interests of clients to ensure that the legal needs of those clients are met with the best and most effective service available to address these individual needs.
2. To regularly disseminate information and promote communication amongst the service providers on issues of mutual concern to enhance the ability of those providers to address client needs.
3. To inform governments and other organisations on the needs of those clients and on issues relevant to the practical delivery of legal assistance and representation services.
4. To assist governments and other organisations in the development of policies to enhance access to justice for all Australians.<sup>408</sup>

One best practice for increasing legal aid expertise, evidence and innovation is a more systematic approach to change and in particular to use follow up procedures for this purpose. The Law and Justice Foundation Report concluded that a “useful strategy for fostering a ‘smart’ public legal services system, that is one that has the capacity to learn ‘what works and for whom’ is from the experience of past service provision.”<sup>409</sup> Standardization can be equated to the professionalization of public legal services.<sup>410</sup> Standard approaches to intake, diagnostic and outreach practices “may also facilitate the type of administrative data collection necessary for ‘what works’ evaluation and learning.”<sup>411</sup> Central leadership on training, research, best practices, policy development, needs assessment and evaluation makes good sense.

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<sup>405</sup> Houseman, *supra* note 235 at 9.

<sup>406</sup> *Ibid* at 10.

<sup>407</sup> [Australian Legal Assistance Forum](#) (ALAF).

<sup>408</sup> ALAF, *ibid*.

<sup>409</sup> *Reshaping legal assistance services*, *supra* note 122 at 150.

<sup>410</sup> This philosophy underlies both the HiiL, *Legal Aid in Europe*, *supra* note 6, and *Reshaping Legal Assistance Services*, *ibid*.

<sup>411</sup> *Reshaping legal assistance services*, *ibid* at 160.

The justice system, including the legal aid system, is notoriously conservative and there are many challenges to creating a culture of, and increased capacity for, innovation.<sup>412</sup> Promoting the risk-taking needed to fuel change involves fundamental changes, including ensuring that failure is not punished and “incentives for innovation are real and permanent and not short-term”.<sup>413</sup> Engaging front line stakeholders is integral to building expertise, evidence and the capacity for innovation. So too is recognizing and valuing the “rich and nuanced understanding of practitioners.”<sup>414</sup> Another aspect of ‘joined up’ services is that policy makers, service providers and researchers become more integrated to ensure collaboration, coordination and systemic learning. Finally, legal aid providers can learn from other sectors, particularly ones that also provide services to vulnerable people with complex needs.

What we need to move toward are: standardized ways to cope with recurring issues: “Within the next decade, this knowledge may develop into evidence based protocols for solving the most frequent justiciable problems, protocols, guidelines”.<sup>415</sup>

#### *Transparency and accountability*

A final benchmark could address issues of predictability, transparency and accountability within the Canadian legal aid system. The major tools to advance these goals are enhanced performance indicators that provide high-quality, meaningful information comparable across jurisdictions. *Reaching Equal Justice* and the Deputy Minister’s Criminal Legal Aid Panel both emphasized the importance of measuring and managing performance. As highlighted in Part I, there is minimal hard data available:

While the Panel acknowledged the availability of aggregate metrics (e.g. those provided through the annual Statistics Canada Legal Aid Survey), they noted such data is difficult to understand and does not necessarily tell a story that will resonate with either the public or government officials. A more compelling story is often the story of victims and families and the impact that the criminal justice system has on them.<sup>416</sup>

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<sup>412</sup> *Reaching Equal Justice*, *supra* note 4 at 137-150; NAC, *supra* note 4 at 22-23.

<sup>413</sup> Deputy Minister’s Advisory Panel, *supra* note 12 at 11.

<sup>414</sup> *Reshaping legal assistance services*, *supra* note 122 at 177. See also discussion in Dr. Liz Curran, *Literature Review: examining the literature on how to measure the ‘successful outcomes’: quality, effectiveness and efficiency of Legal Assistance Services* (Australia: February, 2012).

<sup>415</sup> HiiL, *Legal Aid in Europe*, *supra* note 6 at 78.

<sup>416</sup> Deputy Minister’s Advisory Panel, *supra* note 12 at 9-10.

The Panel considered the reasons for the lack of performance data and noted the following inadequacies:

- how to measure work within their own system (e.g. counting legal aid certificates versus legal cases)
- recording accurate data (e.g. quantifying duty counsel assists)
- resource restraints which limit analyses and reporting
- justice system data, while important for measuring outcomes, are often not available or are of variable quality
- the absence of integrated measures across legal aid and the criminal justice system to enable broader system-wide understanding of how performances intersect.<sup>417</sup>

The Panel also emphasized the importance of investing in information systems and identifying metrics.<sup>418</sup>

Recent Australian reports have reached the same conclusions.<sup>419</sup> The Productivity Commission made a strong case for revamping performance reporting:

While differences in program objectives, client needs and contextual factors complicate comparisons across providers (akin to other types of human services) the Commission considers that there is still a role for performance reporting. Wherever possible, measures of costs and outcomes should be standardised. Where data cannot be standardised, careful interpretation is preferable to avoiding comparisons altogether.<sup>420</sup>

The Commission elaborated the nature of data that would be required and outlined means to overcome existing barriers to these tasks. The main recommendation was that the reporting of costs, outputs and outcomes should be the subject of negotiation within the sector. It is no easy task to establish performance indicators and the Australian National Partnership Agreement was highly criticized due to perceptions that its performance indicators were problematic.<sup>421</sup> The Australian National Legal Aid group has established a Grants and National Statistics Working Group with a mandate to “refine benchmarks, outcome and data, which support comparative analysis and informed decision making by commissions [legal aid

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<sup>417</sup> *Ibid* at 10.

<sup>418</sup> *Ibid*.

<sup>419</sup> See for example, Allen Group, *supra* note 9; PCR, *supra* note 3 - section on “Revamping Performance Reporting”.

<sup>420</sup> PCR, *ibid* at 751.

<sup>421</sup> See, for example, Law Council of Australia, [Review of the National Partnership Agreement on Legal Assistance Services: Draft Evaluation Framework Discussion Paper](#) (12 August 2012).

providers].<sup>422</sup> In the US, peer review is used to systemically review legal aid programs thereby overcoming some of the weaknesses of traditional performance measurement.<sup>423</sup>

Perhaps a fitting closure for Part II of this *Backgrounder* is the development of national legal aid benchmarks with a commitment to their progressive implementation, monitored through an open, transparent process will foster greater accountability.

#### Options for system benchmarks

##### **Option#16 – Service providers**

*The Canadian legal aid system values and supports service providers so that they are able to deliver consistently high-quality and respectful services.*

##### **Option#17 – Expertise, Evidence and Innovation**

*The Canadian legal aid system fosters innovation underpinned with skills in the design, implementation and management of legal assistance services as well as expertise in key related areas of knowledge, such as poverty, health, gender, race, and disability.*

##### **Option#18 – Transparency and accountability**

*The Canadian legal aid system is transparent and accountable through regular reporting of national performance measures derived from these benchmarks.*

### Part III – What Do We Want? Canada's Future Legal Aid System

The CBA/ALAP Working Group has drafted this *Backgrounder* to join the ongoing conversation about the Canadian legal aid system. It is designed to encourage new ways of thinking about how we might renew legal aid in Canada. Like all benchmark projects it builds on current practices but is focused on the future.

A shorter [Consultation Paper](#) has also been prepared to facilitate feedback and is available on the CBA website.

In closing, we reiterate the Working Group's main question: *what do we want from Canada's legal aid system in the future?* The Working Group needs your responses to this general question about the place of public legal services in our communities, as

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<sup>422</sup> [National Legal Aid, Strategic Plan 2014-2016](#), at 3-4.

<sup>423</sup> Legal Services Commission, *Performance Criteria*, *supra* note 100.

well as the more specific discussion questions listed below. Although the conclusions to each section of the paper are framed as specific benchmarks – the conversation is very much open-ended. The Working Group hopes that specific and concrete illustrations will make it easier for individuals and groups to respond.

**Please send your comments to [equaljustice@cba.org](mailto:equaljustice@cba.org) by July 17, 2015.** The Working Group will consider all input carefully and integrate the views received into proposed national legal aid benchmarks by mid-October 2015.

Thank you in advance for your input!

## Summary of Benchmark Options

The Working Group has identified potential benchmarks to facilitate dialogue. Some of these options are meant to be alternative approaches, however more than one benchmark may be required to adequately define each benchmark topic.

### Options for guidance benchmarks

#### **Option #1 – Policy Statement A**

*The Canadian legal aid system is integrated, efficient, cost-effective and focused on providing services for disadvantaged Canadians in accordance with access to justice principles of accessibility, appropriateness, equality, efficiency and effectiveness.*

#### **Option #2 – Policy Statement B**

*The Canadian legal aid system provides holistic and transformative legal assistance and value for money, and contributes to the health and well-being of disadvantaged and low-income Canadians, combats social exclusion and provides an accessible and effective justice system.*

#### **Option#3 – Shared Governmental Responsibility**

*The federal, provincial and territorial governments are equal partners in ensuring the provision of essential public legal services of reasonable quality to across Canada. The federal government is a leader in supporting national equality in legal aid.*

#### **Option#4 – Funding Principles**

*Essential public legal services are provided with stable and sustainable funding based on triennial comprehensive needs assessments for both criminal and civil legal needs on an equitable basis.*

### Options for Coverage Benchmarks

#### **Option #5 – Coverage: Areas of law**

*The Canadian legal aid system provides assistance to eligible persons with essential legal needs in family law, criminal law, prisoner law, civil commitment proceedings under mental health legislation, immigration and refugee law, administrative law and other civil legal matters.*

**Option #6 – Coverage: Basic needs**

*The Canadian legal aid system provides assistance to eligible persons wherever legal problems or situations put into jeopardy a person's or a person's family's security – including liberty, personal safety and security, health, equality, employment, housing or ability to meet the basic necessities of life.*

**Option #7 – Coverage: Needs assessments**

*The Canadian legal aid system provides assistance to eligible persons with essential legal needs based on comprehensive needs assessments.*

**Option#8 – Coverage: Focus on High Risk and Complex Needs**

*The Canadian legal aid system prioritizes assistance to persons at risk and those with complex needs. This includes people with a disability, people in remote areas, people from non-English and/or non-French backgrounds, homeless people, First Nations people, people with mental illnesses, people experiencing or at risk of family violence and people who are financially disadvantaged.*

**Option#9 – Coverage: Strategic legal advocacy**

*The Canadian legal aid system includes as a core function strategic legal advocacy to correct systemic problems affecting low-income persons, with providers using a broad range of impact strategies and measuring outcomes.*

**Options for eligibility benchmarks**

**Option #10 – Eligibility: Policy statement**

*The Canadian legal aid system prioritizes meeting the needs of disadvantaged people, while gradually expanding service availability to all low income households.*

**Option #11 – Eligibility: National Means Test**

*Financial eligibility for legal aid services is determined based on a national means test with a formula taking into account regional differences. The means test is reassessed every three years.*

**Option #12 – Eligibility: Poverty Level**

*All Canadian residents living at 125% of the poverty line are eligible for free legal aid in matters of essential legal need. All Canadian residents living at 250% of the poverty line are eligible for legal aid in matters of essential legal need, on a sliding scale contributory basis.*



**Option #13 – Eligibility: Percentile of Population**

*Legal aid is provided to members of the lowest quartile of Canadian households.*

**Option #14 – Eligibility: Special Circumstances**

*In determining eligibility, legal aid providers must take into account special circumstances making it difficult to obtain legal assistance. Special circumstances include language or literacy problems, intellectual, psychiatric or physical disabilities, a person's remote location or status as a prisoner, or where the person is otherwise at risk of social exclusion.*

**Options for service delivery benchmarks**

**Option #15 – Service Delivery**

*The Canadian legal aid system delivers a spectrum of client-focused legal aid services that provide meaningful and effective access to justice consistent with these factors:*

- h) Empowerment - People and communities are enabled to find ways to maintain or improve their legal health and legal capabilities and to prevent further problems;*
- i) Accessibility - Proactive steps are taken to increase access through effective and tailored intake, diagnosis, referral and outreach services;*
- j) Suitability and timeliness – People and communities have timely access to information, services and supports that meet their diverse needs, personal and legal capabilities and circumstances;*
- k) Holism - Services are comprehensive and holistic;*
- l) Partnership - Legal aid services are provided in partnership with other services so that people and communities benefit from integrated service provision;*
- m) Outcome Focus - People and communities have improved and sustainable legal outcomes, systemic legal health is enhanced and justice system performance is ameliorated; and*
- n) Efficiency and Effectiveness – Legal aid services provide effective resolution of legal issues taking into account the system-wide costs per completed case.*

**Options for system benchmarks**

**Option#16 – Service providers**

*The Canadian legal aid system values and supports service providers so that they are able to deliver consistently high-quality and respectful services.*

**Option#17 - Expertise, Evidence and Innovation**

*The Canadian legal aid system fosters innovation underpinned with skills in the design, implementation and management of legal assistance services as well as expertise in key related areas of knowledge, such as poverty, health, gender, race, and disability.*

**Option#18 - Transparency and accountability**

*The Canadian legal aid system is transparent and accountable through regular reporting of national performance measures derived from these benchmarks.*

## Discussion Questions

### General

1. Do you support the development of national legal aid benchmarks? Why or why not?
2. What criteria should there be for national legal aid benchmarks?
3. Do you agree with the Consultation Paper/*Backgrounder* about the major expected benefits of national legal aid benchmarks?
4. What in your view should be included in national benchmarks?

### Guidance benchmarks

5. What benchmarks should be included to guide the national legal aid system? Do you have specific comments about the guidance options listed?

### Coverage benchmarks

6. What should national standards include on legal aid coverage? Do you have specific comments about the coverage options listed?

### Eligibility benchmarks

7. What should national benchmarks include on eligibility for legal aid? Do you have specific comments about the eligibility options listed?

### Service Delivery benchmarks

8. What should be included in national legal aid service delivery benchmarks? Do you have specific comments about the service delivery options listed?

### System benchmarks

9. What should be included in national legal aid system benchmarks? Do you have specific comments about the systems options listed? What did we forget?

### What have we omitted? Other issues?

10. What other issues should be considered in developing national standards for legal aid?

### Process

11. 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 on the issue of national legal aid benchmarks?

## Appendix A

### Additional Resources – Examples of Canadian Legal Aid Plan Quality Assurance Programs

#### Legal Services Society (BC) Performance Plan

The Legal Services Society of BC (LSS) has developed a performance plan consisting of goals, strategies, and performance measures designed to “engage LSS staff, our service partners, and our clients in finding timely and lasting solutions to clients’ legal issues while managing the budget.”<sup>424</sup> The plan is amended from time to time. LSS reports on its progress relative to this plan on an annual basis. LSS’s goals, strategies and performance measures are set out in the table below.

**Goal 1:** People with low incomes who have legal issues use LSS services. LSS needs to ensure our services are accessible, address the needs of clients, are culturally appropriate, and that the public is aware that these services are available.

**Strategies:**

- Make it easier for clients to access legal aid services.
- Partner with Aboriginal and other underserved communities to deliver services that support positive client outcomes.
- Support service partners and front-line workers to deliver effective and efficient services.
- Support clients to be active participants in solving their legal issues.

**Performance Measures:**

- a) Percent of clients satisfied with the accessibility of LSS services
- b) Percent of clients satisfied with the helpfulness of LSS services
- c) Percent of clients satisfied overall with LSS services
- d) Percent of clients satisfied with LSS support to help them participate in resolving their legal issues

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<sup>424</sup> Legal Services Society [2015/16-2017/18 Service Plan](#).

**Goal 2:** People with low incomes get help with related legal issues so they can solve and prevent legal problems.

Clients' legal problems often arise from or lead to other problems such as health, housing, and debt issues. By working with other service providers to help clients get support for these issues, LSS can improve client outcomes as well as reduce clients' use of justice, health, and social services over the long term.

**Strategies:**

- Collaborate with service partners to assess and refer clients to services for their related legal issues.
- Support front-line workers to assess and refer clients to services for their related legal issues.

**Performance Measures:**

- a) Percent of clients satisfied with the level of support LSS gave them to address their related legal issues
- b) Percent of lawyers satisfied with LSS support for increasing their ability to help clients address related legal issues
- c) Percent of lawyers who support the integrated approach to providing legal aid service

**Goal 3:** LSS manages resources soundly.

LSS must manage resources effectively and efficiently to ensure we are achieving the optimum benefit for the society's clients with in available funding.

**Strategies:**

- Foster employee engagement and organizational communication.
- Engage with and develop stronger relationships with legal aid lawyers.
- Improve information technology systems to respond to a changing environment.
- Improve the nimbleness and flexibility of LSS business processes to support capacity.

<p><b>Performance Measures:</b></p> <ul style="list-style-type: none"> <li>a) Overall average employee engagement</li> <li>b) Percent of lawyers satisfied with the overall support provided by LSS</li> <li>c) Number of new lawyers taking more than three referrals in the first six months</li> <li>d) Budget-to-actual expenditure variance</li> <li>e) Percent of the public that supports the provision of legal aid services</li> </ul>
<p><b>Goal 4:</b> LSS provides leadership in justice innovation.</p> <p>LSS believes that innovation is needed to bring about the fundamental justice system changes required for clients to achieve timely and lasting resolutions to their legal issues.</p>
<p><b>Strategies</b></p> <ul style="list-style-type: none"> <li>• Promote outcomes-based justice innovation initiatives.</li> <li>• Pilot evidence-based legal aid initiatives to improve access and outcomes.</li> <li>• Communicate LSS’s strategic direction to stakeholders</li> </ul>
<p><b>Performance Measures:</b></p> <ul style="list-style-type: none"> <li>a) Volume of references to LSS and justice innovation</li> </ul>

**The Association of Legal Clinics of Ontario – Integrated Performance Measures**

The Association of Legal Clinics of Ontario (ACLCO) is the representative body of Ontario’s community legal aid clinics. In 2009, ACLCO developed a system of integrated performance measures with related indicators through a consultative process.<sup>425</sup> For each of six performance areas to be measured, ACLCO developed a comprehensive set of objectives, activities, inputs, outputs and indicators and outcomes. These criteria were designed to operate on a system-wide basis taking into consideration the wide variety of mandates and services provided by the community legal clinics throughout the province. The objectives and outcomes in each of the six performance areas are reproduced below.

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<sup>425</sup> Report of the Performance Measures Working Group of the Association of Community Legal Clinics of Ontario to the Integrated Performance Measures Advisory Committee of Legal Aid Ontario (ACLCO, December 2009).

## **Quality of Service**

### Objectives:

- To provide high quality clinic law services to individuals and the community by maintaining professional standards.
- To provide quality of work-life to clinic staff within the current environment of budgetary and human resource constraints.

### Outcomes:

- Clients receive high quality legal services to maximize positive results;
- Clinics play a leadership role within their communities on access to justice and anti-poverty issues;
- Clinic system retains an appropriate mix of lawyers and community legal workers with clinic law experience;
- Clinic system retains administrative staff with expertise in clinic practices.

## **Effectiveness**

### Objective:

- Clinics will continue to provide individual and community services, including community development and law reform activities to effectively address community needs and resolve individual legal issues.

### Outcomes:

- Clients have increased knowledge of clinic law services;
- Clients will receive the appropriate service at the appropriate time;
- Clinics have increased knowledge of client and community needs and tailor services accordingly;
- Mitigation of legal issues of client such that client has increased ability to support self and family;
- Clinic has opportunity to share knowledge and resources;
- Students and other service providers will have increased knowledge of social justice and poverty law and thus improved capability to service the needs of clients.

## **Efficiency**

### Objective:

- Clinics will deliver the best possible services within allocated resources.

#### Outcomes:

- Clinics will continue to make the best possible use of limited resources to create positive client outcomes and appropriately serve community needs;
- Reduced duplication of services due to increased collaboration and knowledge sharing between clinics.

### **Systemic Reform**

#### Objectives:

- Clinics work to improve social systems (legislative, legal and social structures) and administrative/regulatory, policy and judicial processes to improve the lives of low income people and their communities;
- Clinics strive to create individual and community empowerment;
- Clinics engage proactively to confront the legislative and policy decisions that regulate the lives of low income people;
- Law reform activities include community development and public legal education.

#### Outcomes:

- Better informed and empowered low-income citizens;
- More low-income citizens engaged in legislative and policy processes affecting them;
- Government decision-making bodies identify clinics as a source of expertise on poverty and social inclusion issues and advice on policy development;
- Government routinely looks to low-income citizens for input into legislation, policies and program development on issues that affect them.

### **Community**

#### Objectives:

- Clinics dynamically strive to be connected to and embedded in their communities;
- Clinics promote access to justice for their clients by providing high quality community development services that are cost-effective, efficient and meaningful.

#### Outcomes:

- The clinic increases its ability to identify and prioritize community legal needs and to effectively deliver clinic law services throughout its catchment area;
- The clinic community and clients have greater awareness of poverty law issues;
- The community has the knowledge and capacity to engage the legal system and other supports in the pursuit of social and legal justice.



## **Equity and Access**

### Objectives:

- To ensure that clients and members of the community are treated in a manner that is fair and recognizes the uniqueness of the circumstances (ie. linguistic, cultural, physical, psychological or other challenges that might otherwise pose barriers to their ability to receive clinic services or access to justice);
- To be respectful of those receiving poverty law services and strive to understand the uniqueness of client and community diversity;
- To provide services that are appropriate to the clients and communities' needs in the context of such diversity;
- To ensure that clients and communities have access to clinic services and clinic facilities that accommodates for the diversity of circumstance;
- To strive to remove such barriers to access as are within the clinics' control.

### Outcomes:

- To be viewed by the community and clients as sensitive and responsive to issues of access;
- To be regarded by clients and other service providers as respectful and fair.

## Additional Resources – Examples of Legal aid benchmarks outside of Canada

### The UN Criminal Legal Aid Principles

The UN Criminal Legal Aid Principles are grounded in “the emerging best practices and evolving jurisprudential and normative developments around the world.”<sup>426</sup> The principles specify among other matters, at what stages of the proceedings legal aid should be available to accused persons.<sup>427</sup> Particular attention is paid to the situation of the most vulnerable in society. An underlying notion of the UN Principles and Guidelines suggest that member states, where appropriate, undertake measures to “maximize the positive impact that the establishment and/or reinforcement of a properly working legal aid system may have on a proper functioning criminal justice system and on access to justice”.<sup>428</sup>

The UN document comprises introductory commentary, 14 principles and 18 guidelines. Some of the salient provisions are:

8. For the purposes of the Principles and Guidelines, the term “legal aid” includes legal advice, assistance and representation for persons detained, arrested or imprisoned, suspected or accused of, or charged with a criminal offence and for victims and witnesses in the criminal justice process that is provided at no cost for those without sufficient means or when the interests of justice so require. Furthermore, “legal aid” is intended to include the concepts of legal education, access to legal information and other services provided for persons through alternative dispute resolution mechanisms and restorative justice processes.
12. Recognizing that certain groups are entitled to additional protection or are more vulnerable when involved with the criminal justice system, the Principles and Guidelines also provide specific provisions for women, children and groups with special needs.
14. Recognizing that legal aid is an essential element of a functioning criminal justice system that is based on the rule of law, a foundation for the enjoyment of other rights, including the right to a fair trial, and an important safeguard that ensures fundamental fairness and public trust in the criminal justice process, States should guarantee the right to legal aid in their national legal systems at the highest possible level, including, where applicable, in the constitution.
15. States should consider the provision of legal aid their duty and responsibility. To that end, they should consider, where appropriate, enacting specific legislation and regulations and ensure that a

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<sup>426</sup> Zaza Namoradze, “[UN General Assembly Enacts Global Standards on Access to Legal Aid](#)” (Open Source Foundations, December 21, 2012)

<sup>427</sup> [United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems](#) (UNODC 2013)

<sup>428</sup> *Ibid.*

comprehensive legal aid system is in place that is accessible, effective, sustainable and credible. States should allocate the necessary human and financial resources to the legal aid system.

20. States should ensure that anyone who is arrested, detained, suspected of or charged with a criminal offence punishable by a term of imprisonment or the death penalty is entitled to legal aid at all stages of the criminal justice process.
27. States should ensure that effective legal aid is provided promptly at all stages of the criminal justice process.
28. Effective legal aid includes, but is not limited to, unhindered access to legal aid providers for detained persons, confidentiality of communications, access to case files and adequate time and facilities to prepare their defence.
32. Special measures should be taken to ensure meaningful access to legal aid for women, children and groups with special needs, including, but not limited to, the elderly, minorities, persons with disabilities, persons with mental illnesses, persons living with HIV and other serious contagious diseases, drug users, indigenous and aboriginal people, stateless persons, asylum seekers, foreign citizens, migrants and migrant workers, refugees and internally displaced persons. Such measures should address the special needs of those groups, including gender-sensitive and age-appropriate measures.
33. States should also ensure that legal aid is provided to persons living in rural, remote and economically and socially disadvantaged areas and to persons who are members of economically and socially disadvantaged groups.
37. States should put in place mechanisms to ensure that all legal aid providers possess education, training, skills and experience that are commensurate with the nature of their work, including the gravity of the offences dealt with, and the rights and needs of women, children and groups with special needs.

## UN Guidelines for a Nationwide Legal Aid System

### **Guideline 11. Nationwide legal aid system**

55. In order to encourage the functioning of a nationwide legal aid system, States should, where it is appropriate, undertake measures:
  - a) To ensure and promote the provision of effective legal aid at all stages of the criminal justice process for persons detained, arrested or imprisoned, suspected or accused of or charged with a criminal offence, and for victims of crime;

- b) To provide legal aid to persons who have been unlawfully arrested or detained or who have received a final judgement of the court as a result of a miscarriage of justice, in order to enforce their right to retrial, reparation, including compensation, rehabilitation and guarantees of non-repetition;
- c) To promote coordination between justice agencies and other professionals such as health, social services and victim support workers in order to maximize the effectiveness of the legal aid system, without prejudice to the rights of the accused;
- d) To establish partnerships with bar or legal associations to ensure the provision of legal aid at all stages of the criminal justice process;
- e) To enable paralegals to provide those forms of legal aid allowed by national law or practice to persons arrested, detained, suspected of or charged with a criminal offence, in particular in police stations or other detention centres;
- f) To promote the provision of appropriate legal aid for the purpose of crime prevention.

56. States should also take measures:

- a) To encourage legal and bar associations to support the provision of legal aid by offering a range of services, including those that are free (pro bono), in line with their professional calling and ethical duty;
- b) To identify incentives for lawyers to work in economically and socially disadvantaged areas (e.g. tax exemption, fellowships and travel and subsistence allowances);
- c) To encourage lawyers to organize regular circuits of lawyers around the country to provide legal aid to those in need.

57. In the design of their nationwide legal aid schemes, States should take into account the needs of specific groups, including but not limited to the elderly, minorities, persons with disabilities, the mentally ill, persons living with HIV and other severe contagious diseases, drug users, indigenous and aboriginal people, stateless persons, asylum-seekers, foreign citizens, refugees and internally displaced persons, in line with guidelines 9 and 10.

58. States should take appropriate measures to establish child-friendly and child-sensitive legal aid systems taking into account children's evolving capacities and the need to strike an appropriate balance between the best interests of the child and children's right to be heard in judicial proceedings, including:

- a) Establishing, where possible, dedicated mechanisms to support specialized legal aid for children and support the integration of child-friendly legal aid into general and non-specialized mechanisms;

- b) Adopting legal aid legislation, policies and regulations that explicitly take into account the child's rights and special developmental needs, including the right to have legal or other appropriate assistance in the preparation and presentation of his or her defence; the right to be heard in all judicial proceedings affecting him or her; standard procedures for determining best interest; privacy and protection of personal data; and the right to be considered for diversion;
  - c) Establishing child-friendly legal aid service standards and professional codes of conduct. Legal aid providers working with and for children should, where necessary, be subject to regular vetting to ensure their suitability for working with children;
  - d) Promoting standard legal aid training programmes. Legal aid providers representing children should be trained in and be knowledgeable about children's rights and related issues, receive ongoing and in-depth training and be capable of communicating with children at their level of understanding. All legal aid providers working with and for children should receive basic interdisciplinary training on the rights and needs of children of different age groups and on proceedings that are adapted to them, and training on psychological and other aspects of the development of children, with special attention to girls and children who are members of minority or indigenous groups, and on available measures for promoting the defence of children who are in conflict with the law;
  - e) Establishing mechanisms and procedures to ensure close cooperation and appropriate referral systems between legal aid providers and different professionals to obtain a comprehensive understanding of the child, as well as an assessment of his or her legal, psychological, social, emotional, physical and cognitive situation and needs.
59. To ensure the effective implementation of nationwide legal aid schemes,  
States should consider establishing a legal aid body or authority to provide, administer, coordinate and monitor legal aid services. Such a body should:
- a) Be free from undue political or judicial interference, be independent of the Government in decision-making related to legal aid and not be subject to the direction, control or financial intimidation of any person or authority in the performance of its functions, regardless of its administrative structure;
  - b) Have the necessary powers to provide legal aid, including but not limited to the appointment of personnel; the designation of legal aid services to individuals; the setting of criteria and accreditation of legal aid providers, including training requirements; the oversight of legal

aid providers and the establishment of independent bodies to handle complaints against them; the assessment of legal aid needs nationwide; and the power to develop its own budget;

- c) Develop, in consultation with key justice sector stakeholders and civil society organizations, a long-term strategy guiding the evolution and sustainability of legal aid;
- d) Report periodically to the responsible authority.

## **Guideline 12. Funding the nationwide legal aid system**

60. Recognizing that the benefits of legal aid services include financial benefits and cost savings throughout the criminal justice process, States should, where appropriate, make adequate and specific budget provisions for legal aid services that are commensurate with their needs, including by providing dedicated and sustainable funding mechanisms for the national legal aid system.

61. To this end, States could take measures:

- a) To establish a legal aid fund to finance legal aid schemes, including public defender schemes, to support legal aid provision by legal or bar associations; to support university law clinics; and to sponsor non-governmental organizations and other organizations, including paralegal organizations, in providing legal aid services throughout the country, especially in rural and economically and socially disadvantaged areas;
- b) To identify fiscal mechanisms for channelling funds to legal aid, such as:
  - i. Allocating a percentage of the State's criminal justice budget to legal aid services that are commensurate with the needs of effective legal aid provision;
  - ii. Using funds recovered from criminal activities through seizures or fines to cover legal aid for victims;
- c) To identify and put in place incentives for lawyers to work in rural areas and economically and socially disadvantaged areas (e.g., tax exemptions or reductions, student loan payment reductions);
- d) To ensure fair and proportional distribution of funds between prosecution and legal aid agencies.

62. The budget for legal aid should cover the full range of services to be provided to persons detained, arrested or imprisoned, suspected or accused of, or charged with a criminal offence, and to victims. Adequate special funding should be dedicated to defence expenses such as expenses for copying relevant files and documents and collection of evidence, expenses

related to expert witnesses, forensic experts and social workers, and travel expenses. Payments should be timely.

### **Guideline 17. Research and data**

73. States should ensure that mechanisms to track, monitor and evaluate legal aid are established and should continually strive to improve the provision of legal aid.
74. For this purpose, States could introduce measures:
  - a) To conduct regular research and collection of data disaggregated by the gender, age, socioeconomic status and geographical distribution of legal aid recipients and to publish the findings of such research;
  - b) To share good practices in the provision of legal aid;
  - c) To monitor the efficient and effective delivery of legal aid in accordance with international human rights standards;
  - d) To provide cross-cultural, culturally appropriate, gender-sensitive and age-appropriate training to legal aid providers;
  - e) To improve communication, coordination and cooperation between all justice agencies, especially at the local level, to identify local problems and to agree on solutions to improve the provision of legal aid.

### **US Legal Services Corporation Performance Criteria**

**PERFORMANCE AREA ONE: *Effectiveness in identifying the most pressing civil legal needs of low-income people in the service area and targeting resources to address those needs.***

- Criterion 1. **Periodic comprehensive assessment and ongoing consideration of legal needs.**
- Criterion 2. **Setting goals and objectives, developing strategies, and allocating resources.**
- Criterion 3. **Implementation.** The program pursues these goals, objectives, and strategies, working to achieve the desired outcomes through legal representation and assistance, advocacy, and other program work.
- Criterion 4. **Evaluation and adjustment.** The program regularly analyzes and evaluates the effectiveness of its delivery strategies and work, in major part by comparing the results actually achieved with the outcomes originally intended, and utilizes this analysis and evaluation to make appropriate changes in its goals, objectives, strategies, and

legal assistance activity. Such adjustments should be made on a flexible and ongoing basis, not just after the periodic comprehensive assessments.

**PERFORMANCE AREA TWO: *Effectiveness in engaging and serving the low-income population throughout the service area.***

- Criterion 1. **Dignity and sensitivity.** The program conducts its work in a way that affirms and reinforces the dignity of clients, is sensitive to clients' individual circumstances, is responsive to each client's legal problems, and is culturally and linguistically competent.
- Criterion 2. **Engagement with the low-income population.** The program is engaged effectively with the population eligible for its services, including major and distinct segments of that population and, where appropriate and feasible, incorporates perspectives from that population and its major segments in its work and operations.
- Criterion 3. **Access and utilization by the low-income population.** Consistent with its goals, objectives, and strategies, a program should, within the limits of its resources, be accessible to and facilitate effective utilization by the low-income population in its service area, including all major segments of that population, and all categories of people who traditionally have had difficulties in getting access to or utilizing civil legal assistance.

**PERFORMANCE AREA THREE: *Effectiveness of legal representation and other program activities intended to benefit the low-income population in the service area.***

- Criterion 1. **Legal representation.** The program conducts its direct legal representation, in both full and more limited forms, in an effective and high-quality fashion which comports with relevant state requirements, governing professional ethics and practice of law, funding source requirements, relevant portions of the ABA Standards for the Provision of Civil Legal Aid, and these Criteria, and in particular:
- Criterion 2. **Private attorney involvement.** The program effectively integrates private attorneys in its work in order to supplement the amount and effectiveness of its representation and other services to achieve its goals and objectives.
- Criterion 3. **Other program services to the eligible client population.** Consistent with its goals, objectives, and strategies, the program provides services in addition to direct client representation that are designed to help low-income people address their legal needs and problems. Such services may include, but are not limited to, community legal education (general legal information not predicated upon a client's particular case or facts), assistance for self-help activities and pro se appearances, offering or facilitating participation



in alternative dispute resolution, and other available approaches, utilizing the Internet, websites, interactive media, and other available technologies as appropriate. The program continually seeks to find innovative ways to deliver services and meet client needs.

- Criterion 4. **Other program activities on behalf of the eligible client population.** Consistent with its goals, objectives, and strategies, and within the limits of available resources and the terms of its funding, a program engages in other activities on behalf of its eligible client community that have a beneficial effect on systemic legal problems and economic opportunities of the eligible client population. These activities include, but are not limited to, communication and liaison with the judiciary, organized bar, government agencies, academic and research centers, social service agencies, and other information sources, state and national legal advocacy organizations, other organizations working on behalf of low-income people, and other entities whose activities have a significant effect on the eligible client population.

**PERFORMANCE AREA FOUR: *Effectiveness of governance, leadership and administration.***

- Criterion 1. **Board governance.** The program has effective board oversight and involvement in major policy decisions, including board members who are each committed to the program and its mission, and a board that holds program management accountable for effective performance in the areas delineated by these Criteria. The board also meets its affirmative responsibility to help develop resources for the program, promote awareness of the program, enhance its effectiveness and influence, and protect and defend the interests of the organization.
- Criterion 2. **Leadership.** The program has effective leadership which establishes and maintains a shared sense of vision and mission, and emphasizes excellence, innovation, and achievement of goals and objectives.
- Criterion 3. **Overall management and administration.** The program is well managed and administered including: an effective management structure; processes and systems to ensure compliance with all funder requirements and state and federal law; capacity to address problems quickly and effectively; effective utilization of technology; effective administrative procedures; competent personnel; allocation of appropriate resources to management functions; and periodic evaluations of administrative operations.
- Criterion 4. **Financial administration.** The program has and follows financial policies, procedures, and practices that comport with applicable requirements of the American Institute of Certified Public Accountants, federal, state, and local government, and the program's

funding sources, and conducts effective budget planning and oversight.

- Criterion 5. **Human resources administration.** The program maintains effective human resources administration, including compliance with all applicable laws.
- Criterion 6. **Internal communication.** The program maintains effective intra-staff and staff-management communications and relations.
- Criterion 7. **General resource development and maintenance.** To the extent possible, and consistent with the program's mission, the program seeks to maintain and expand its base of funding, with the goal of increasing the quality and quantity of the program's services to eligible clients. The program also coordinates with and where possible utilizes outside resources such as academic institutions, social service organizations, foundations, corporations, organized bar associations, members of the private bar, and other institutions and individuals to supplement its efforts. The program works to increase the overall resources devoted to the legal problems of the eligible client population.
- Criterion 8. **Coherent and comprehensive delivery structure.** Overall, the program management maintains a delivery structure and approach that effectively utilizes and integrates staff, private attorneys, and other components; emphasizes innovation and creativity in delivery; is informed by current information concerning delivery research; is well-suited to meeting the most pressing legal needs of the service area; and, given available resources, constitutes an effective and economical balancing of expenditures on the various functions and activities described in the four Performance Areas.
- Criterion 9. **Participation in an integrated legal services delivery system.** The program participates in, and seeks to expand and improve, statewide (and regional if relevant) legal assistance delivery systems to achieve equal access to justice and to meet the civil legal needs for low-income persons in the state.