

# **Comparing and Understanding Legal Aid Priorities**

**a paper prepared for Legal Aid Ontario**

**by**

**Mary Jane Mossman, Professor of Law**

**with**

**Karen Schucher, PhD candidate  
and Claudia Schmeing, LLB Class of 2010**

**Osgoode Hall Law School  
York University**

**April 2009**

## **Preface**

*[T]he symbiotic relationship between the legal aid system and the broader justice system requires emphasis....: many of the reforms of the broader justice system can work effectively only if the parties are legally represented.*

Michael Trebilcock, *Report of the Legal Aid Review*  
2008 at 161.

*I think it can be agreed that the quality of justice received, even in our system, ... is impacted by the presence or absence, and the quality of, legal representation of the respective parties. I readily acknowledge that it may well be beyond our power to create a perfectly equal system, but, that acknowledged, there is no acceptable reason to avoid doing what we can do, even if it is perceived that what we do may not be well received by other governmental entities that will have to address the impact of our rulings....*

Cathell, J (concurring) in *Frase v Barnhart et al*  
379 Md 100; 840 A 2d 114 (2003) at 133.

*The legal aid system in Ontario should ... move towards a regime which considers more than the abstract gravity of the case. In order to target services most effectively, the system will have to develop the capacity to assess the impact that a denial of services has on individual clients and to allocate resources accordingly.*

*Report of the Ontario Legal Aid Review (the Blueprint report) 1997 at 172.*

*We were also told on more than one occasion that the profession tended to adopt a narrow concept of what constituted a “legal problem” and occasionally appeared unsympathetic to problems which traditionally affect the poor such as Small Claims Court cases, landlord and tenant, welfare and unemployment insurance problems.... The Plan that we envisage must have room for much more flexibility and experimentation in answer to the perceived needs [of clients] and the developing needs of the community.*

*Report of the Task Force on Legal Aid, 1974 at 21-23.*

*It is the conclusion of the Committee that overwhelming opinion today is that legal aid should form part of the administration of justice in its broad sense.*

*Report of the Joint Committee on Legal Aid 1965 at 97.*

## **Contents**

**Preface**  
**Acknowledgements and Terms of Reference**

<b><u>Part I</u></b>	<b><u>Introduction</u></b>	<b>1</b>
1.	Overview	1
2.	The Background for Defining Legal Aid Priorities	1
	The 1997 <i>Review</i> of Legal Aid	1
	The 2008 <i>Review</i> of Legal Aid	2
3.	Detailed Organization of the Paper	3
	Part II: Contexts for Defining Legal Aid Priorities	3
	Part III: Goals for Legal Aid Priorities	3
	Part IV: Comparing and Understanding Legal Aid Priorities	4
<b><u>Part II</u></b>	<b><u>Contexts for Defining Legal Aid Priorities</u></b>	<b>5</b>
1.	Access to Justice and Legal Aid in Ontario	5
	“Access to Justice”: Legal Aid and “Waves” of Access to Justice	5
	Cappelletti and Garth: Different “waves”	5
	Parker: Legal aid, access to justice and the legal profession	6
	Macdonald and access to justice in Canada	6
	Ontario Legal Aid: Significant Themes in its Evolution	7
	The <i>Joint Committee Report</i> 1965 and the <i>Legal Aid Act</i>	8
	The <i>Task Force on Legal Aid</i> in 1974	9
	The <i>Report of the Commission on Clinical Funding</i> , 1978	9
	Summary	10
2.	Other Jurisdictions: Legal Aid Challenges and Strategies	11
	United States	11
	Legal aid for indigent accused	11
	Civil legal aid	12
	The use of technology: the Project for the Future of Equal Justice	13
	Ideas for Ontario	14
	Australia	15
	Overview	15
	“Priorities,” “Guidelines,” and “Special circumstances”	15
	Ideas for Ontario	15
	New Zealand	17
	Overview	17
	Law Commission recommendations	17
	Ideas for Ontario	18
	United Kingdom (England and Wales)	19
	Background	19
	Recent reforms: the <i>Access to Justice Act</i> , 1999	19
	Legal aid and governmental policies of “social exclusion”	19
	“Social exclusion” and research about “justiciable problems”	20
	New legal aid arrangements	20
	Ideas for Ontario	21
	Europe: A Note on Selected Jurisdictions	22
	Summary: Ideas for Further Exploration in Ontario	22
3.	The <i>Charter</i> and LAO Responsibilities for Providing Legal Aid	23

	<i>Charter</i> Values and Equality Goals	24
	The State’s Obligation to Promote Access to Justice: A Primary Role for LAO	25
	Ideas for Ontario	26
<b><u>Part III</u></b>	<b><u>Goals for Legal Aid Priorities</u></b>	<b>27</b>
	1. Understanding Legal Aid in the Legal Services (Justice System) Context	27
	A Broad View of Law in Society	27
	Increasing legalization and criminalization	28
	Increasing numbers and roles of legal actors	29
	Alternatives to courts and the adversary system	30
	Summary	30
	2. Legal Aid and Legal “Needs”	31
	Research about Legal “Needs”	31
	Defining legal aid needs: an evolution	31
	“Legal needs” and “justiciable problems”	32
	Beyond “Justiciable Problems” to “Social Inclusion”	34
	Rethinking the Politics of Justice “Needs”	35
	3. A Systemic Perspective: LAO and the Justice System	36
	LAO and the Provision of Legal Information	37
	Access to Legal Information and Addressing Systemic Issues	37
<b><u>Part IV</u></b>	<b><u>Comparing and Understanding Legal Aid Priorities</u></b>	<b>39</b>
	1. Introduction	39
	2. A “Legal Categories” Approach	40
	“Legal Categories” as a Traditional Approach to Legal Aid Priorities	40
	Limitations of the Legal Categories Approach to Defining Priorities	41
	A focus on the category rather than the client	41
	A focus on the individual rather than the systemic problem	41
	The impact of inadequate legal aid resources	43
	3. A “Legal Needs / Social Exclusion” Approach	44
	Legal Advice for the Public	44
	The need for additional funding	44
	Holistic and integrated services	45
	Legal Aid and Client Impact	45
	Combining “legal categories” and “legal needs / social exclusion”	45
	“Legal needs / social exclusion” <i>per se</i>	46
	The limitations of a focus on services for individuals	47
	4. A “Social Inclusion / Systemic” Approach	48
	Legal Aid and “Social Inclusion”	48
	Focusing on systems and practices that create inequality	48
	A transformative and holistic perspective	49
	5. Conclusion: LAO’s Proactive Role and Ideas for Further Research and Experiment	50
	Systemic Approaches to Legal Aid Priorities	51
<b>Endnotes and Bibliography</b>		<b>54</b>

The authors gratefully acknowledge the advice and assistance of Nye Thomas at Legal Aid Ontario, and the opportunity to engage with the challenges of comparing and understanding legal aid priorities in this work. We also thank Mary Marrone and staff at LAO who engaged in a consultation process with us in January 2009.

At Osgoode Hall Law School, we received excellent support for the ongoing administration of the project from Hazel Pollack, and helpful advice about references and source materials from Daniel Perlin and other reference librarians and staff in the Library.

We also acknowledge the advice of Professor Janet Mosher at Osgoode, helpful resources provided by Professor Shelley Gavigan and Kevin Smith at Parkdale Community Legal Services, and research reports provided by Michele Leering in relation to the meeting of the International Legal Aid Group in New Zealand in April 2009. In addition, Simon Rice at ANU and representatives of the Commonwealth Legal Aid program in Canberra provided useful information about recent legal aid developments in Australia.

Finally, we thank Laurie Cormack at Osgoode and Michelle Lindsay and Paula Perri at York for assistance in establishing this University research contract.

### **Terms of Reference**

Research Contract, Appendix A

### **Comparing and Understanding Legal Aid Priorities**

This research project will involve historical and contemporary rationales for determining priorities for legal aid services in Ontario, as well as some interdisciplinary and comparative research.

The purpose of the project is to assess a variety of different rationales and to compare their advantages and disadvantages in the provision of effective legal aid services in Ontario.

In this context, the research will need to assess the relative significance of a variety of factors for defining legal aid priorities, such as loss of liberty through incarceration; the need to maintain family bonds; goals of “social inclusion;” responsibility for providing the necessities of life; the impact of current and potential *Charter* requirements; the relevance of race, gender, and religion as well as economic need in defining “needs” for legal services; and issues relating to the administration of justice and the adversary system, including a range of new developments such as restorative justice initiatives and institutional alternatives for resolving disputes.

## **PART I: INTRODUCTION**

### **1. Overview**

The purpose of this paper is to contribute to discussions about priorities for legal aid in Ontario. As requested in the Terms of Reference, the paper explores ways of comparing and understanding different approaches to

legal aid priorities. Following this Introduction in Part I, the paper includes three Parts:

PART II: Contexts for Legal Aid Priorities

The paper first situates issues about legal aid priorities within legal and social contexts in Ontario. These issues include an understanding of the evolution of legal aid in Ontario as part of access to justice movements; a review of recent experiences in other jurisdictions with respect to priorities for legal aid; and an assessment of how *Charter* rights, and *Charter values*, may affect definitions of priorities.

PART III: Goals for Legal Aid Priorities

In this Part, the paper reflects on relationships between the justice system and legal aid priorities, and how changes in the administration of justice may impact on the provision of legal aid. In this context, the paper also reviews concepts of “legal needs” and “justiciable problems,” and situates these concepts within broader policy and political contexts that affect legal aid priorities. Finally, the paper examines the leadership role required of LAO in promoting access to justice goals.

PART IV: Approaches to Legal Aid Priorities

In Part IV, the paper examines three approaches to legal aid priorities: the “legal categories” approach, the “legal needs/ social exclusion” approach; and the “social inclusion/ systemic” approach. The paper assesses the advantages and disadvantages of these differing approaches, and explores their application to some current issues in relation to legal aid in Ontario. The paper also suggests directions for continuing research and evaluation.

Overall, the paper reflects the view of the *Report of the Ontario Legal Aid Review* that “the problem of priority-setting for legal aid in the context of fixed resources requires consideration of some fundamental questions of public policy;” these are the “hard choices” that are necessarily involved in current and future efforts to define priorities for legal aid in Ontario.<sup>1</sup>

## **2. The Background for Defining Legal Aid Priorities**

This paper reflects the new legal aid context in Ontario, introduced by the shift in the 1990s: from governance by the Law Society of Upper Canada and “open-ended funding” for statutorily-defined legal aid services - to the establishment of Legal Aid Ontario and “capped annual budgets.”

The 1997 Review of Legal Aid: In this context, the 1997 *Report of the Ontario Legal Aid Review* [the *Blueprint* report] examined principles concerning state obligations to fund legal aid in the context of the rule of law, as well as the impact of fundamental obligations to provide legal aid services created by the *Charter*, statutory provisions, and international law.<sup>2</sup> The report then identified a series of factors to be taken into account in determining priorities for the legal aid system as a whole:

- the importance of consultation in defining needs and of responding to a broad range of needs;
- strategic oversight at a system-wide level with responsiveness to local conditions;
- limitation of the impact of the “negative liberty” test;
- the need to integrate delivery model issues into the priority-setting process and to focus on client impact;
- the strategic use of resources to facilitate access to law; and

- the need to monitor and revise priorities in an “evolving social and legal environment.”<sup>3</sup>

At the outset, it is important to note that this paper reflects the *Blueprint* report’s recommendation that priorities be created for “the entire legal aid system” in Ontario.<sup>4</sup> However, in doing so, it is necessary to acknowledge two different traditions in the history of Ontario legal aid: in relation to judicare services, priorities for legal aid services were originally established by statute and regulations, and these services were “open-ended” until they became subject to annual budgets when LAO was established. By contrast, community legal clinics have *always* been funded in accordance with fixed annual budgets, ever since they were included as part of Ontario legal aid in the 1970s. Indeed, the *Blueprint* report noted that clinics “have [always] had to adjust their service level and service mix to accommodate fluctuating demand.”<sup>5</sup>

In this context, the *Blueprint* report recommended that the Board of Legal Aid Ontario assume responsibility for creating cyclical strategic plans and for determining legal aid priorities, taking into account the requirements of the rule of law, *for the overall legal aid program*.<sup>6</sup> This paper thus explores options for determining overall priorities for legal aid in the context of Ontario’s justice system.

The 2008 Review of Legal Aid: This paper benefited from access to the recently-released *Report of the Legal Aid Review 2008* [the Trebilcock Report],<sup>7</sup> and a number of its specific recommendations are considered later in this paper. At the outset, however, it is important to note some aspects of the Trebilcock Report that are reflected in this paper:

- the Trebilcock Report adopts a conception of legal aid as an integral part of the overall justice system, and allocates to Legal Aid Ontario a significant and proactive role in improving access to justice for vulnerable individuals in Ontario; both these issues are significant for the assessment of legal aid priorities in this paper;
- the Trebilcock Report recommends broadening legal aid services to provide information about law to the larger community without means-testing, a recommendation designed to create wider support for legal aid services among middle class taxpayers; while this paper supports the need for broader access to information about law and legal processes, it differs on issues of implementation in relation to this work with respect to the role of community legal clinics; and
- the Trebilcock Report recommends better integration of legal aid services, and of legal and social services, with the goal of achieving holistic services for clients; this paper recommends more detailed attention to current initiatives in community legal clinics in promoting these goals.

In addition, this paper argues that there is a need to envisage legal aid in broader terms than “services” to individual clients, as documented in the Trebilcock Report. More specifically, this paper links the work of community legal clinics with traditional and ongoing efforts to utilize *legal aid as a strategy for confronting systemic barriers to equality* in Ontario.

Thus, in reflecting on approaches to legal aid priorities, the paper seeks to connect traditional roles of community legal clinics with current proposals for more holistic legal aid services, which can better address systemic (rather than just individualized) problems in the lives of those who are the poorest and most vulnerable members of our community.

Overall, this paper conceptualizes legal aid services as both *holistic* and *transformative*, and

offers ways of rethinking the provision of legal aid to achieve these goals. In doing so, the paper seeks to provide a basis for discussion and debate about the role of legal aid and of Legal Aid Ontario in the overall context of the justice system in Ontario.

### **3. Detailed Organization of the Paper**

#### **Part II: Contexts for Defining Legal Aid Priorities**

Part II of the paper explores ideas about legal aid priorities by taking account of three contexts that shape legal aid programs in Ontario.

1. The paper first situates current legal aid arrangements within the broader movements of access to justice in Canada and elsewhere, and identifies themes that have characterized the evolution of legal aid in Ontario, some of which may need to be addressed in efforts to define current and future legal aid priorities;
2. The paper then provides a brief review of recent developments in other similar jurisdictions, where policies of governmental restraint have also necessitated cutbacks in legal aid and other services of the welfare state in recent decades. The paper reviews strategies adopted and debated in the United States, Australia, New Zealand, and the United Kingdom, with a brief report on developments in western Europe, and uses these developments in its assessment of approaches to legal aid priorities;
3. The final section of this Part offers a brief assessment of legal requirements created by the *Charter*, by Canadian statutes and by international law norms with respect to legal aid priorities. The paper argues that *Charter values*, and not only *Charter rights*, may need to be considered in defining legal aid priorities.

#### **Part III: Goals for Legal Aid Priorities**

Part III of this paper focuses on goals for legal aid priorities.

1. The first section of this Part situates legal aid within systems of law and justice, and examines how overall contexts for legal services and the justice system shape the role of legal aid. For example, the impact of complex statutory regimes involving individual rights and procedures that may necessitate expert advice, the degree to which activities are subject to criminal regulation, the growth of a variety of venues and processes for resolving disputes, the impact of discourses of privatization and “responsabilization,” the expansion of the range of providers of legal services and their markets, and governmental demands for accountability and limitations on expenditures, may all constitute factors that necessitate (changing) needs for access to legal aid. In this way, one goal for legal aid is to serve the overall justice system effectively.
2. The second section assesses the goals of “legal needs” in relation to recent research concerning “justiciable problems” and ideas of “social exclusion” and “social inclusion.” The paper argues that these concepts must be understood in terms of political choices about



legal aid priorities, and that it is necessary to be attentive to the ways that legal discourse both reflects and shapes ideas about the role of the state in the provision of legal services to individuals and communities. In this context, legal aid priorities must be attentive to these concepts and their political goals within the administration of justice.

3. Finally, the last section of this Part addresses the role of Legal Aid Ontario, as a state actor with primary responsibility for promoting access to justice for vulnerable individuals and communities in Ontario. It also emphasizes how goals of innovation and responsiveness to communities require that governmental programs for legal aid be designed to confront *systemic* problems of inequality. It also suggests a need for ongoing monitoring and experimentation in defining priorities and in designing delivery systems for legal aid.

#### Part IV: Comparing and Understanding Legal Aid Priorities

This Part explores three broad approaches to defining legal aid priorities:

- the “legal categories” approach;
- the “legal needs / social exclusion” approach; and
- the “social inclusion / systemic” approach.

In assessing how each of these approaches shapes the content of legal aid services and achieves particular goals, the paper offers some current examples for implementing these approaches, and makes suggestions about further research and evaluation for LAO.

*Overall, the paper’s goal is to encourage discussion and debate about the nature of legal aid in Ontario as an integral part of the justice system, and to identify proactive measures to enable Legal Aid Ontario to make these goals effective in practice.*

In accordance with the Terms of Reference, the paper was initially prepared by reviewing a wide range of literature in Canada and in other jurisdictions, including academic books and articles as well as government documents, task force and legal aid reports, and relevant cases and statutes. The bibliography identifies this literature, much of which is also examined in the paper’s discussion and analysis. This revised Paper benefited from consultation with staff at LAO and others involved in legal aid in January 2009, brief consultations in Australia in March 2009, and the opportunity to review papers presented at the April 2009 meeting of the International Legal Aid Group in New Zealand.

## **PART II CONTEXTS FOR DEFINING LEGAL AID PRIORITIES**

### **1. Access to Justice and Legal Aid in Ontario**

**“Access to Justice”: Legal Aid and “Waves” of Access to Justice**

[W]hile the term “access to justice” has been used mainly in relation to the legal system, the “justice” to which it refers has been taken by reformers to mean much more than legal justice. *The history of the access to justice movement can be read as an ongoing struggle to overcome the discrepancy between the claims of substantive justice and the formal legal system. The term has been useful precisely because it signifies this tension between legal justice and substantive justice.* The first wave of access to justice reform focused on increasing the availability of formal legal means of access to justice by increasing access to lawyers’ services.<sup>8</sup>

Christine Parker’s formulation of the relationship between legal aid and access to justice explains how legal aid was part of the “first wave” of access to justice initiatives in the second half of the twentieth century. Parker’s formulation is based on the classic view of access to justice, defined by the *Florence Access to Justice Project* in the 1970s to include three “waves.”<sup>9</sup> In reviewing their project later, Cappelletti and Garth identified two basic purposes of the legal system: it must be “equally accessible to all” and it must “lead to results that are individually and socially just.” As the authors stated firmly, “a basic premise [is] that social justice, as sought by our modern societies, *presupposes* effective access.”<sup>10</sup>

Cappelletti and Garth: Different “waves”: In responding to this need for effective access, Cappelletti and Garth identified three waves of reforms: the first wave introduced legal aid services; the second wave included a group of reforms aimed at providing legal representation for “diffuse” interests, especially in relation to consumer and environmental protections; and the third wave constituted more comprehensive reforms, including changes in procedures and the structures of courts (and the creation of new courts), the use of laypersons and paraprofessionals, reforms of substantive laws to avoid disputes or facilitate their resolution, and the use of private, informal dispute resolution processes.<sup>11</sup> As Cappelletti and Garth argued, these three waves sometimes overlap and intersect in different ways, but together, they represent a range of different kinds of initiatives that may accomplish the goal of increasing access to justice.

**Two features of the goals identified by Cappelletti and Garth are relevant to this paper’s assessment of legal aid priorities:**

One is that the “legal aid” approach to access to justice (“first wave”) necessitates a large cadre of lawyers who must be funded by the state to provide services to those who are unable to pay for them; as a result, it is less likely that “uneconomic” small claims will be funded, even though they may be of some significance to individual clients, and it may also prove more complicated to provide representation for “diffuse” group (community) interests, by contrast with individual claims.<sup>12</sup>

Second, Cappelletti and Garth suggested that the full panoply of access to justice initiatives should accomplish more than cosmetic changes by producing “beneficial changes in the day-to-day lives of the groups for whom the rights were created.”<sup>13</sup> Clearly, the authors understood access to justice goals in terms of *substantive*, not merely procedural, outcomes. Significantly, they also recognized that their approach necessitates political choices, arguing that “access to justice implicates issues central to the politics of the modern welfare state.”<sup>14</sup> This insight reveals how political choices are necessarily involved in defining priorities for legal aid services.

Parker: Legal aid, access to justice and the legal profession: More recently, Parker attempted to link recent

efforts to reform the legal profession with these evolving concepts of access to justice. As she noted, although the term “access to justice” has focused mainly on the legal system, “the ‘justice’ to which it refers has been taken by reformers to mean much more than legal justice.”<sup>15</sup> In this context, because “people do see the legal profession as a major access to justice institution,” Parker argued that much access to justice policy “relies either directly or indirectly on reorganizing institutions of legal professionalism and legal service delivery.”<sup>16</sup>

Parker focused on the “three waves” of access to justice reforms to assess their current advantages and disadvantages. In relation to legal aid, for example, she suggested a close connection between arrangements for legal aid services and the “enlightened self-interest” of solicitors and barristers, for whom the provision of such services offers regular fees. Thus, she concluded that although legal aid has improved access for some clients, “it has only marginally changed the ways legal services are provided and the legal system works;”<sup>17</sup> moreover, she agreed with Cappelletti and Garth that legal aid can never address many “everyday injustices” for which professional assistance is economically inefficient. Yet, even with respect to “second wave” and “third wave” reforms, Parker concluded that the radical potential of new forums, new sources of law, and different ways of promoting self-empowerment were often undermined in practice, both by governments interested primarily in containing costs and by lawyers who tend to “colonize” them.<sup>18</sup>

In the end, Parker recommended the adaptation of existing ideas of neighbourhood justice arrangements to create responsive access to justice initiatives within powerful organizations (including globalized corporations).<sup>19</sup> Significantly, by shifting some justice claims to these other sites, she argued that state resources could be directed not only to the infrastructure of formal justice in the courts, but also target those who “suffer domination in non-institutional settings” (particularly women and children within families, “the smallest, yet most ubiquitously powerful unit in post-industrial societies”).

**Parker’s assessment is thus relevant to this Paper’s concerns about legal aid priorities because:**

For Parker, *the problems of women and children in families should be “the priority for state access to justice spending.”*<sup>20</sup> In addition to identifying family problems as a priority for legal aid, Parker’s analysis is significant because it links access to justice reforms to the need for changes in the provision of services by the legal profession and in court processes.

Macdonald and access to justice in Canada: In the Canadian context, Roderick Macdonald’s scholarly work on access to justice in Canada<sup>21</sup> offers a detailed and comprehensive assessment of five “waves;” although his first three correspond broadly to those of the *Florence Access to Justice Project*, he identified a fourth wave involving increased efforts at preventative law and citizen participation in governmental decision-making, and a fifth wave of initiatives that have fostered more equal access to positions of authority within the legal system.<sup>22</sup> Macdonald also emphasized the challenges of increasingly diverse populations, globalization, and new patterns in personal relationships.<sup>23</sup> In this context, he recommended a multi-dimensional strategy and efforts to ensure access to justice in non-state institutions.<sup>24</sup> In addition, he identified target groups for whom access to justice is particularly significant, including persons who experience economic disadvantage, who are unrepresented in the civil justice system, who are stigmatized by criminal records, and who suffer disabilities or health problems or the impact of psychological trauma.<sup>25</sup>

Macdonald also focused on legal aid as one strategy for achieving access to justice; like the Trebilcock Report, he also considered other strategies, including changes in legal fees, the use of alternative service

providers for some legal services, the role of legal insurance, the use of subsidies and contingency fee arrangements, changes in the structural cost of litigation and government services, and ADR and alternatives to courts.<sup>26</sup> Significantly, both Macdonald and the Trebilcock Report concluded that issues about access to justice are closely connected to other issues of inequality in Canadian society; as Macdonald argued, a lack of access to justice is just a symptom of a larger set of issues for many citizens: medical, social and economic. Thus, he concluded that “improving the socio-economic situation of many Canadians by focusing on issues of social justice and the distribution of social power in Canada today ... may be a self-correcting creative approach to everyday problems of access to justice.”<sup>27</sup>

**Macdonald’s analysis is important to assessing priorities for legal aid in three ways:**

First, Macdonald envisages legal aid as an integral part of access to justice goals, and as clearly linked to other strategies designed to meet these goals; in this context, any process of defining priorities for legal aid must take account of these broader goals;

Second, Macdonald recognizes that some Canadians may experience a lack of access to justice that is linked to problems of social justice and socio-economic status. In this way, his analysis connects ideas about access to justice and concepts of “social exclusion;” and

Finally, by recognizing the need for access to justice to include participation in law creation and administration, Macdonald’s vision of access to justice (re)defines the “quest for justice through law” in terms of democratic values and social citizenship.

**Ontario Legal Aid: Significant Themes in its Evolution**

In the context of these ideas about access to justice, it is important to conceptualize legal aid in terms of broader legal and social goals. Yet, it has often been argued that legal aid services, as “first wave” services only, offer no challenge to the status quo; as David Trubek concluded, for example, “legal aid simply reassured us that the distribution of income was not a threat to the classical liberal’s vision of self-empowerment through law.”<sup>28</sup>

However, this assertion may need to be qualified in relation to the history of legal aid in Ontario. Although some features of legal aid programs may have reflected the limits of the “first wave” of access to justice, other aspects reveal aspirations to larger goals of social justice. That is, while some legal aid services were designed primarily to offer representation in the courts in matters for which lawyers generally offer services to paying clients (judicare services), community legal clinics in Ontario were expressly designed to provide specialized services for poor and disadvantaged clients, *and to use legal strategies to confront systemic barriers to equality and democratic participation for vulnerable communities*. In this way, while Trubek’s criticism might apply to judicare services, it is arguable that community legal clinics were established with different goals, including the goal of challenging the status quo.

**Two aspects about comparing and understanding legal aid priorities are particularly relevant to this history of Ontario legal aid services:**

One is that current challenges with respect to defining legal aid priorities must be understood as a *continuity* within Ontario’s legal aid program; in particular, the experiences of community clinics in defining, monitoring and revising legal aid priorities provide a major

(and perhaps largely untapped) resource for identifying the most significant legal problems for legal aid clients; and

Second, the history of legal aid in Ontario clearly reveals that legal aid has been designed not only to provide *equality of access* before courts and tribunals (access to law), but that it has also aspired to goals of *social justice* and *transformation* within poor communities.

Thus, the brief history of legal aid in Ontario, which follows, provides an important institutional background for current LAO work, as well as concrete examples of aspirations for social justice within the tradition of priorities for legal aid in Ontario.

The Joint Committee Report 1965 and the Legal Aid Act 1966: The *Legal Aid Act* of 1966 established the certificate system for legal aid services in Ontario, based on recommendations of the *Joint Committee Report* (the Joint Committee included representatives of the Attorney General and the Law Society). The Joint Committee expressly concluded that “legal aid should form part of the administration of justice in its broadest sense,” and that it was “no longer a charity but a right.”<sup>29</sup>

The Joint Committee also expressed its conclusion that the “prime responsibility for the cost of legal aid” belonged to the government.<sup>30</sup> From a contemporary perspective, the Joint Committee’s recommendations reveal how legal aid services were conceptualized as providing “access to law,” that is, as a fundamental service of the liberal state.<sup>31</sup> In this context, the range of services offered to indigent clients was modelled on services available to paying clients, with little recognition that “poor people are not just like rich people without money.”<sup>32</sup>

**Yet, at the same time, there is evidence in the *Joint Committee Report* that services might need to be tailored to the *particular circumstances of individual clients*:**

For example, in determining eligibility for legal aid in criminal matters, the report recommended that “the test should be the gravity of a conviction in the circumstances of the accused.”<sup>33</sup>

Similarly, the *Report* recommended that legal aid be available in family courts to “level the balance where a wife ... is without means to retain counsel and her husband ... appears with counsel [a typical and frequent occurrence, and noting that such a situation] places the wife at a disadvantage and the Judge under a disability.”<sup>34</sup>

In addition, the *Report* acknowledged the growing importance of administrative tribunals which “exercise a large and increasing jurisdiction to deal with the rights of individuals in Ontario,” and concluded that there was “no logical reason” to treat courts and tribunals differently with respect to access to legal aid.<sup>35</sup>

These examples demonstrate that, even within a traditional judicare system, based on *legal categories* of services available to paying clients, the Joint Committee recognized the importance of taking account of *the impact on the individual* in defining priorities for legal aid.

The Task Force on Legal Aid in 1974: Almost a decade after the *Joint Committee Report*, the Attorney General established another task force to examine legal aid. The *Task Force on Legal Aid* (the Osler Report)

began by commending the legal aid program in Ontario for contributing to the goal of equality before the law.<sup>36</sup> However, by contrast with the *Joint Committee Report*, the Osler Report identified a number of “gaps” in legal aid services: the need for legal advice;<sup>37</sup> advice in “small claims;”<sup>38</sup> problems of increasing legislation enacted as a result of social and economic changes and that particularly affected the poor;<sup>39</sup> the need to foster values of community consultation and democratic participation;<sup>40</sup> and problems of geographical and cultural inaccessibility of legal services.<sup>41</sup> In responding to these “gaps” in services, the Osler Report recommended flexibility in the delivery of a broad range of legal aid services to different communities across Ontario to “remedy the chronic under-utilization of the profession and the law by the poor.”<sup>42</sup>

**Significantly, in its recommendations for legal aid services, the Osler Report focused on the particular needs of poor clients:**

[These needs include] *the fact that they are more often responding to legal problems rather than initiating claims, the problem that many of their claims involve only small amounts of money but may nonetheless be critically important to them, the inappropriateness of using the test of the “man of modest means” in determining whether legal aid services are necessary for poor clients, and the need to include education about legal rights as part of legal aid services.*

Moreover, the Osler Report used the language of “poverty law” to describe the needs of poor clients for which traditional legal services were generally unavailable. In this context, the Report recommended that the legal aid program establish and fund neighbourhood legal aid clinics; however, it also envisaged that clinic Boards of Directors would have authority to determine special priorities, while encouraging them to give priority to the “gaps” that had been identified: “requests for legal advice and assistance, community group advice and representation and the development of community education programmes.”<sup>43</sup>

The Report of the Commission on Clinical Funding in 1978: Following the 1974 Osler Report, legal aid funding was extended to community legal clinics, but when problems occurred in relation to these new funding arrangements, the Attorney General again established an inquiry with respect to “clinical funding.” The 1978 *Report of the Commission on Clinical Funding* was important to Ontario legal services, not only because it recommended community clinics as an integral part of legal aid in the province, but also because it clearly emphasized how “the clinics have brought the law and its remedies to countless citizens of this province who otherwise would never have known its benefits.”<sup>44</sup>

The result of the Commission’s Report was a new Clinic Funding Regulation, which confirmed the Report’s assessment of the role of community legal clinics as an essential part of the “mixed model” of legal aid services in Ontario.

**However, the 1978 Report recognized several unique aspects of community legal clinics:**

Unlike the legal aid certificate services established in 1966, community clinic services were always funded based on annual funding allocations, and their *Boards were required to establish priorities for their services, to monitor the provision of services, and to redefine priorities as necessary.*

Clinics were not intended to extend to the poor the same services that were available to paying clients; instead, the services offered by community clinics were designed to meet the

*different needs of poor and vulnerable individuals, groups and communities.*

Finally, community clinics were not generally confined to litigation in courts, but their mandates extended to advice and education services, representation before tribunals, test case litigation, and law reform and community development strategies on behalf of their clients, all designed to confront *systemic problems of inequality*.<sup>45</sup>

## Summary

**As this brief historical overview of legal aid in Ontario suggests, two themes are relevant for this paper about comparing and understanding legal aid priorities:**

Legal aid beyond formal representation: One is that legal aid services in Ontario may not fall entirely within the traditional “first wave” of access to justice initiatives. Particularly in relation to the development of community legal clinics, legal aid programs in Ontario were intended to extend *beyond the provision of legal representation in the courts*, and to embrace some of the goals of “second” and “third wave” access to justice programs: group and community actions; representation in a variety of settings other than courts; law reform, legal advice and strategic legal actions to confront systemic barriers to access to justice. In this context, there is considerable expertise in community clinics with respect to poor clients and vulnerable communities and their “legal needs” and “justiciable problems.”

Priority setting experience in clinics: Second, the history of legal aid services in Ontario reveals that, well before the “hard cap” on certificate services was introduced in the 1990s, community clinics were engaged in *priority setting* for legal aid in the context of their fixed annual budgets and the need to “join up” legal aid and other social services in communities.<sup>46</sup> In this context, the experiences of community legal clinics offer much useful data and experience with processes and strategies for defining overall priorities for legal aid.

Thus, since “our concepts of social justice have never remained constant,”<sup>47</sup> it is important to understand current discussions about legal aid priorities as part of an ongoing process for defining legal aid in Ontario; and that community legal clinics have both longstanding expertise and valuable experience that is useful, perhaps even critical, to this process.

## **2. Other Jurisdictions: Legal Aid Challenges and Strategies**

[S]cholarly tensions and concerns have been heavily underlined by a direct challenge to the level of state spending on legal and related advice services across Western societies. This has led to a growing interest in measures which enable greater control over expenditure, but also a wider ideological challenge to the desirability of such funding, and the utility of lawyers more generally.<sup>48</sup>

As this comment indicates, there are “tensions and concerns” about legal aid in other western jurisdictions, many of them quite similar to those experienced in Ontario in recent decades.<sup>49</sup> As governments have increasingly embraced neo-liberal approaches to the provision of public services, moving away from the welfare state commitment to universality and instead emphasizing the need to “target” services to meet needs efficiently, budgetary allocations for legal aid have come under increasing scrutiny.<sup>50</sup> As the *Blueprint* report suggested, the institution of a “capped” budget for legal aid necessitated that “resources be directed to the

most compelling legal needs and that they be deployed in the most efficient manner possible;” in this context, the report recognized that this goal required “prioritization of legal needs and a detailed analysis of the most cost-effective means of providing specific services.”<sup>51</sup> As this comment reveals, defining priorities is closely connected to choices about services and about service delivery.

In understanding and comparing approaches to defining priorities for legal aid, this paper provides a brief overview of some recent developments in selected common law jurisdictions: the United States, Australia, New Zealand, and the United Kingdom; and more briefly in relation to western Europe. Some of these developments are explored more fully in relation to the paper’s later discussion of different approaches to legal aid priorities.

## United States

Legal aid for indigent accused: Courts in the United States established a constitutional right to counsel for indigent criminal defendants in a series of cases several decades ago, including the well-known decision in *Gideon v Wainwright*.<sup>52</sup> However, in a study conducted by the American Bar Association forty years later, *Gideon’s Broken Promise*, “witnesses documented deep-rooted problems in the delivery of indigent defense services, establishing a clear and pressing need for reform.”<sup>53</sup> Indeed, this 2004 ABA report concluded that indigent defense in the United States was in “a state of crisis,” lacking fundamental fairness and creating risks of wrongful conviction.<sup>54</sup>

In addition to reviewing a number of promising reforms in several states, the ABA identified ten principles of a public defense delivery system, including measures to ensure the independence of the defense function and a variety of procedures to avoid delay and to achieve quality of services<sup>55</sup> (including monitoring and control of caseloads; parity between defense counsel and prosecution with respect to resources such as technology, research, investigators and access to experts; and arrangements for supervision and quality control).<sup>56</sup> From the perspective of legal aid in Ontario, these recommendations are of interest because services for indigent criminal accused are matters of priority in most parts of the United States; thus, the serious problems identified by the ABA with respect to the efficacy of criminal legal aid warrant careful attention in assessing connections between priorities and service delivery to accused persons in Ontario.

Civil legal aid: By contrast with the right to counsel for indigent accused, courts in the United States have not recognized similar guarantees for civil claims, even where crucial interests are at stake. According to the Supreme Court, the due process clause requires appointment of counsel in civil cases only if the proceeding would otherwise prove “fundamentally unfair;” in making this determination, courts must consider the private interests at stake, the government’s interest, and the risk that lack of counsel will lead to erroneous decisions.<sup>57</sup> According to Deborah Rhode, courts have tended to apply this test in such a restrictive fashion that “counsel is almost never required in civil cases.”<sup>58</sup>

More recently, the 2007 Legal Services Corporation’s report, *Documenting the Justice Gap in America*,<sup>59</sup> attempted to update earlier ABA studies of legal needs studies published in 1994. The 2007 report confirmed that, with one exception, recent studies found “a level of need substantially *higher* than the level found in the earlier ABA study.”<sup>60</sup> As a result, the report recommended substantially increased levels of funding for the Legal Services Corporation, arguing that a “nation committed to disposition of legal grievances through lawful means cannot blindly turn away from this situation.”<sup>61</sup>



Similarly, the ABA unanimously approved a resolution in 2006 urging federal, state and territorial governments to provide legal aid services in civil matters:

RESOLVED, That the American Bar Association urges federal, state, and territorial governments to provide legal counsel as a matter of right at public expense to low income persons in those categories of adversarial proceedings where basic human needs are at stake, such as those involving shelter, sustenance, safety, health or child custody, as determined by each jurisdiction.<sup>62</sup>

According to the ABA report, the matters identified in the resolution “involve interests so fundamental and important as to require governments to supply low income persons with effective access to justice as a matter of right;” in addition, the report noted “a strong presumption [that] this mandates provision of lawyers in all such cases.”<sup>63</sup> Significantly, the report also noted that the test for determining need for counsel should be “whether it can be honestly said that the litigant can obtain a fair hearing without being represented by a lawyer,” concluding that:

With rare exceptions, this will be true only when certain conditions are met: the substantive law and procedures are simple; both parties are unrepresented; both parties are individuals and neither is an institutional party; both parties have the intellectual, English language, and other skills required to participate effectively; and, the proceedings are not adversarial, but rather the judge assumes responsibility for and takes an active role in identifying the applicable legal standards and developing the facts.<sup>64</sup>

At the same time, however, since the ABA proposal focused only on the provision of counsel in adversarial proceedings, it did not include recommendations for advice and information about legal problems.<sup>65</sup> Indeed, in examining the history and politics of legal aid in the US, Earl Johnson Jr noted that no statute in the United States has ever been enacted to provide for legal aid in civil matters, a situation that is dramatically different from the UK or western Europe.<sup>66</sup> In addition, he identified a number of new and powerful political interests, particularly the “civil justice reform” movement, as generating a hostile political climate that decries both litigation and lawyers and that sees “appropriations for legal services as just using public money to do a bad thing - more *bad* lawyers to file more *bad* lawsuits.”<sup>67</sup>

Significantly, however, a 2009 report on civil legal aid suggested that “the United States may be entering a new era in civil legal aid,” because there is a new President and a new administration “sympathetic to rebuilding the civil legal aid system and its long neglected infrastructure.”<sup>68</sup> While recognizing that civil legal aid is not the highest priority of the new administration in Washington, the report argued that new appointments to the Legal Services Commission Board and the possibility of new funding could substantially alter current arrangements for civil legal aid in the United States.

The use of technology and the “Project for the Future of Equal Justice”: As the recent LAO report, *Technology in Aid of Client Services*, suggested, the use of technology has increased access to basic legal information in a number of US jurisdictions. The leading technological tools include:

- centralized, interactive websites, including public legal education and self help;
- document assembly software;
- video-based learning;
- online application and intake/online self-testing of eligibility; and

- video conferencing.<sup>69</sup>

Although the report documented a number of these technologies in use in the United States, it is important to note some of their limitations as well as their advantages, particularly as identified in the work of the “Project for the Future of Equal Justice” (a joint project established by the Center for Law and Social Policy and the National Legal Aid & Defender Association in the US).<sup>70</sup> From 1997 to 2001, the Project engaged in concerted activities to help legal services programs improve their use of technologies by setting up a website on legal issues, providing extensive training and education, modelling the use of innovative technology, disseminating information about best practices, supporting increased funding for technology, and establishing an advisory committee for future initiatives.<sup>71</sup>

**Although the “Project” achieved a good deal with technological advances, its future objectives and assessments of its activities reveal two significant issues for consideration:**

First, the use of technology is particularly challenging for the most vulnerable individuals and communities. As the report explained, there are significant issues “at the intersection of technology policy and low-income communities. These issues include universal access to the Internet, literacy (including information literacy), training in computer usage, privacy issues, creation of relevant content, and use of technology by government and other service providers...”<sup>72</sup> Obviously, significant expenditures will be required to *make technology effectively and equally available to the most vulnerable individuals and communities.*

In addition, an assessment of the Project’s goals reveals how the use of technology to provide access to legal information and advice is much less useful, unless it is also connected to an *integrated database for lawyers and the courts* - a goal which would enable creation of a seamless justice system that provides information, but also delivers “real” assistance to clients.<sup>73</sup> In the context of developing technology for use at LAO, these larger goals need to be taken seriously as well.

Overall, therefore, it is clear that the technology being utilized for information and for service delivery in the US is often relied upon because other legal aid services are currently much less available in the United States than in most other western jurisdictions, including Canada.<sup>74</sup> As the 2009 report noted,<sup>75</sup> the use of technology must be integrated with the provision of legal aid, efforts to assist self-represented litigants, the use of legal hotlines, pro bono arrangements, and expanded efforts to “engage more private attorneys ... [and provide] greater levels of service.”<sup>76</sup> Significantly, this report commented on efforts to create in every state “comprehensive, integrated statewide delivery systems, ... *state justice communities.*”<sup>77</sup> As noted:

[T]hese state justice communities seek to create a single point of entry for all low-income clients, integrate all institutional and individual providers and partners, allocate resources among providers to ensure that representation can occur in all forums for all low-income persons, and provide access to a range of services for all eligible clients - no matter where they live, the language they speak, or the ethnic or cultural group of which they are a member.<sup>78</sup>

Often organized by state Access to Justice Commissions created by the state Supreme Courts, these justice communities have an ongoing existence and a charge to “engage in ongoing assessment of the civil legal needs of low-income people in the state and to develop, coordinate, and oversee initiatives to respond to those

needs.”<sup>79</sup> Recently, the ABA Commission on Access to Civil Legal Aid was charged with expanding Access to Justice Commissions in the states; its document, *Principles of a State System for the Delivery of Civil Legal Aid*, was adopted by the House of Delegates of the ABA in 2006.<sup>80</sup>

### **Ideas for Ontario:**

**Although the history of legal aid in the United States may offer only a few suggestions for Ontario, three aspects of this review of US developments are particularly significant:**

1. Many of the *reform proposals* of the American Bar Association and the Legal Services Corporation, particularly with respect to civil legal aid, suggest ideas for further research in any reassessment of legal aid priorities in Ontario; particularly as a result of the change in administration in the US in 2009, some proposed initiatives may be implemented and provide useful models for experimentation here.
2. The US experience with technology in providing *advice and assistance* may also provide useful models for some aspects of legal aid. At the same time, it is clear that it will be necessary to take into account the limits of such arrangements for the most disadvantaged and vulnerable members of the community, a point noted above in the report of the Project for the Future of Equal Justice. Thus, links between technology for advice and assistance on one hand, and legal representation on the other, must be designed with *specific communities* in mind.
3. Finally, ideas about “state justice communities” and the role of “Access to Justice Commissions” may offer a useful model for promoting better integrated, holistic services in responding to the needs of legal aid clients.

### **Australia**

Overview: Australia offers legal aid based on coordination between the federal government and the states, a “mixed model ... established in the late 1970s as a result of a political compromise brokered by governments and the private legal profession.”<sup>81</sup> The federal Attorney General’s Department has overall responsibility for Commonwealth policy and provides funding in accordance with Commonwealth-State agreements for services delivered under the auspices of Legal Aid Commissions in each state and territory; legal representation is often provided by private practitioners. Legal Aid Commission staff provide duty lawyer, legal advice, telephone information, access to primary dispute resolution facilities, and community legal education; while a network of about two hundred community legal centres offer legal advice, social advocacy and minor assistance.<sup>82</sup> Although family law is a matter of federal jurisdiction in Australia, while criminal law has both federal and state aspects, “criminal law matters dominate legal aid cases in which legal representation is approved.”<sup>83</sup>

“Priorities,” “Guidelines,” and “Special circumstances”: The federal government in Australia has identified “Priorities for Commonwealth Legal Aid” and provided detailed “Guidelines” for implementing them.<sup>84</sup> In

general terms, the Priorities reflect legal categories of family law, criminal law, and civil law.<sup>85</sup> Family law priorities include matters under three family law statutes that relate to specified issues, while criminal law priorities relate to “the legal representation of a person charged with a criminal offence;” civil law priorities include problems of employment compensation; Commonwealth pensions, benefits or allowance; and matters such as discrimination, migration and consumer protection. In addition to these three categories of Priorities, however, “other matters” may be taken to be priorities in defined circumstances: that is, a matter not included may become a priority if “special circumstances” exist. “Special circumstances” include a language or literacy problem, an intellectual, psychiatric or physical disability, residence in a remote location, a likelihood of domestic violence in family law matters, or where the applicant is a child, etc.<sup>86</sup> Clearly, the use of “special circumstances” focuses on *a client’s individual circumstances*, even though the primary focus of the Commonwealth Legal Aid Priorities still relates to *categories of legal proceedings*: family, criminal and civil law matters.

**Ideas for Ontario: Three aspects of the Australian legal aid priorities are of interest in relation to defining priorities for legal aid in Ontario:**

1. Taking account of individual circumstances: One important feature of the Australian definition of legal aid priorities is the nature of the tests applied to determine eligibility for legal aid services: these include a “means test” that is applied by Legal Service Commissions, and also a “merits test.” The “merits test” includes three criteria: the reasonable prospects of success test,<sup>87</sup> the “prudent self-funding litigant” test,<sup>88</sup> and the appropriateness of spending limited public legal aid funds test.<sup>89</sup> Thus, even though the coverage for legal aid services primarily reflects *legal categories* of family, criminal and civil law matters, there is discretion in the application of these priorities, taking into account *individual needs or circumstances* of applicants, and also the “public interest.”

In addition, however, an applicant for specified services may be required to meet additional category-specific tests. For example, in relation to summary criminal prosecutions, legal aid may be provided if the applicant has a reasonable prospect of acquittal; as well, legal aid may be provided if a conviction would have a significantly detrimental effect on the applicant’s livelihood or employment (current or prospective), if it is unreasonable to expect the applicant to defend himself or herself because of “special circumstances” as defined in the Priorities, if conviction would be likely to result in a term of imprisonment (including a suspended term), or if the applicant is a child.

In theory, at least, these factors work to ensure that legal aid is not provided simply on the basis of legal categories, but rather look at the “need” for legal aid in a more holistic fashion, particularly having regard to the circumstances of an individual client, as well as overall policies for the provision of state resources. Although it appears that, in practice, considerable priority is allocated to the issue of likelihood of success,<sup>90</sup> the Australian system nonetheless offers a useful model for reform that moves away from legal categories to take account of different levels of individual need.<sup>91</sup>

2. Different kinds of legal aid services: A second feature of the Australian priorities is that

they encompass both “litigation services” and “primary dispute resolution services”<sup>92</sup> (that is, measures of alternative dispute resolution). These arrangements are particularly important in the provision of family legal aid services, where the Guidelines require consideration of primary dispute resolution services *before* a grant of litigation services in all cases except where primary dispute resolution services would be inappropriate: such cases include urgent needs for services, cases involving child abuse or allegations of such abuse, cases in which there are issues of violence and coercion, clear evidence that one party has refused to participate in such services, and cases in which there are practical difficulties in accessing such services.<sup>93</sup>

At the same time, some scholars have challenged assumptions within Australian legal aid programs that alternative dispute resolution services are *always* less expensive than legal services, and also that lawyers are *always* more prone to pursue adversarial processes. In her assessment of family law disputes in Australia, for example, Rosemary Hunter documented the costs of litigation and ADR services, and effectively challenged the accuracy of assumptions that ADR is always less expensive. She recommended more empirical research, particularly in the family law context, *where early access to legal advice and assistance seemed to foster earlier and more efficient resolution of matters*; by contrast, dispute resolution processes often prolonged such matters and increased their cost.<sup>94</sup>

Clearly, such findings argue for concrete empirical data about costs and outcomes in different legal contexts; as well as ongoing monitoring of these arrangements. Indeed, there have been a number of studies in Australia, confirming that family law clients (mainly women) who do not receive legal aid may be more willing to accept disadvantageous settlements; and this problem is exacerbated for women who have experienced domestic violence and who are not represented.<sup>95</sup> Thus, for LAO, it is important to understand that a choice to encourage primary reliance on ADR processes in family law matters does not offer a panacea.

3. Governmental initiatives to promote “social inclusion”: The Australian government recently adopted a “Social Inclusion Agenda” which includes principles to enable all Australians to be able to play a full role in all aspects of Australian life. The principles include Reducing disadvantage; Increasing social, civil and economic participation; A greater voice and greater responsibility; Building on individual and community strengths; Building partnerships with stakeholders; Developing tailored services; Giving a high priority to early intervention and prevention; Building joined up services; Using evidence and integrated data to inform policy; Using locational approaches; and Planning for sustainability.<sup>96</sup> This policy agenda has implications for the provision of governmental services in Australia, and may affect policies for the provision of legal aid.<sup>97</sup>

In this context, there is also important Australian research about the strengths and challenges of integrated legal service delivery. For example, the state government in Victoria adopted a framework to address the “causes and consequences of disadvantage,” which specifically addresses the need to improve access to justice, help disadvantaged groups access services, and localize service solutions.<sup>98</sup> And although there has been some success in integrating

the delivery of legal, health and welfare services, Mary Anne Noone has also identified some of the challenges of integration: a number of different funders with differing priorities; different professionals with differing roles and professional responsibilities; and the need for protocols for resolving organizational issues.<sup>99</sup>

## **New Zealand**

Overview: Pursuant to the *Legal Services Act 2000*, most legal services in New Zealand were provided by private practitioners, who acted for paying clients as well as for those eligible for legal aid.<sup>100</sup> However, there have been several changes. In 2004, for example, the Public Defence Service was introduced as a pilot project, and following an evaluation in 2008, the Minister of Justice authorized its continuation on a permanent basis.<sup>101</sup> In addition, the *Legal Services Amendment Act* of 2007 implemented changes to eligibility and debt establishment and repayment. Finally, in 2008, the Legal Services Agency introduced a streamlined approach to the administration of legal aid in family cases: the change means upfront approval of maximum grants at a level sufficient to cover 80% of family legal aid cases through to conclusion.<sup>102</sup> It appears, however, that client representation by Community Law Centres is negligible, because of the need for the Centres to show “unmet need” for representation in their communities and to obtain an exemption from the local law society to offer representation services.<sup>103</sup> A Law Commission report in 2004 also described the initial assistance, advice and representation services offered in criminal proceedings by the Duty Solicitor scheme, services available to all defendants regardless of means, but often curtailed in practice as a result of time pressures on the part of participating solicitors.<sup>104</sup>

Law Commission recommendations: The 2004 Law Commission report made a number of recommendations to improve legal aid services. First, the Commission noted the requirements of the New Zealand Bill of Rights: that a person charged with an offence has a right to consult and instruct a lawyer, and to receive legal assistance without cost if the interests of justice so require (and the person does not have sufficient means to obtain that assistance),<sup>105</sup> and that a defendant has a right to a fair and public hearing by an independent and impartial court.<sup>106</sup> In this context, the Commission concluded that there was evidence in New Zealand of a “need for initiatives to increase access to representation in courts, to expand legal advice for those who are unrepresented through necessity and to improve assistance to those who wish to self-represent.”<sup>107</sup> Among others, the Commission’s recommendations included creation of an obligation on the part of police to inform people in custody of the Police Detention Legal Assistance Scheme<sup>108</sup> and minimum standards of representation and advice for people charged with a criminal offence;<sup>109</sup> the Commission also recommended reforms to the Duty Solicitor scheme,<sup>110</sup> opportunities for representation on the part of Community Law Centres,<sup>111</sup> and the creation of law clinics by university law schools.<sup>112</sup>

**Ideas for Ontario: From an Ontario perspective, of course, many of these initiatives are already in place. However, the Commission’s report made two additional recommendations which bear further examination in Ontario:**

1. A “lead agency” for providing legal information and advice: The Commission’s extended analysis of current arrangements for providing legal information and advice resulted in recommendations for substantial reforms. In particular, the Commission recommended that “a state agency should have lead responsibility for developing an integrated and

*coordinated legal information strategy” to assist the whole community in relation to the court system.*<sup>113</sup>

In this context, the Commission also argued that the enactment of new legislation creating public rights and duties should always be accompanied by information to assist the public to understand their rights and duties.<sup>114</sup> Although recommendations in a number of jurisdictions have tended to encourage more legal advice and information services in recent years, the NZ Law Commission’s analysis is particularly detailed; moreover, the idea of connecting such services to governmental responsibilities to provide information about newly-enacted rights is interesting. These recommendations reflect some of the concerns in the Trebilcock Report about the need for more, more accessible, and better coordinated legal information.<sup>115</sup>

2. The use of “community” courts for high volume, less serious matters: A second recommendation concerned the need to create a new Community Court, with jurisdiction to deal with high volume, less serious criminal and civil cases, and using its own principles, style and processes, developed in consultation with community representatives.<sup>116</sup> The Commission recommended that Community Courts be designed to be accessible and responsive to their communities, particularly indigenous communities, and be a “portal for general information and advice” for all court jurisdictions.<sup>117</sup>

Although these NZ recommendations may not focus expressly on legal aid, they illustrate how any process of defining priorities must be assessed within a broader context, one that includes accessible information about law and legal processes, and which may need to involve new arrangements for courts and other legal processes to meet access to justice goals. *In this way, the NZ Law Commission proposals reveal how an understanding of legal aid priorities necessarily occurs in the context of other initiatives and legal processes concerning access to justice.*<sup>118</sup>

## **United Kingdom (England and Wales)**

Background: Legal aid arrangements in the United Kingdom have been historically influential in Ontario, where the *Legal Aid Act* of 1966 was expressly modelled on legislation enacted in the UK in 1949 pursuant to the recommendations of the Rushcliffe Committee.<sup>119</sup> As in the UK, Ontario’s legal aid program was initially based on a *judicare* system, which reimbursed lawyers for services provided, and it generally offered legal aid to impecunious persons in matters for which lawyers regularly provided advice and assistance to paying clients.

Recent reforms: the *Access to Justice Act, 1999*: By the 1980s, however, the British government was increasingly concerned about legal aid costs, and after several initiatives to reform the system, the government enacted the *Access to Justice Act* in 1999, exactly fifty years after the “Rushcliffe” statute. Pursuant to the 1999 *Act*, there are two main schemes for legal aid services: the Criminal Defence Service and the Community Legal Service. As critics such as Michael Zander argued, the 1999 statute was a milestone in legal aid services, but a very different kind of milestone from the 1949 *Act*: “[While] the 1949 *Act* was an opening of the door to justice for citizens, ... the 1999 *Act* has in effect erected a large notice over that door entitled ‘Restricted Entry....’” According to Zander, the government’s reforms did not spring from a desire

to improve access to justice, but from the Treasury's need to control the budget.<sup>120</sup> As Zander's comments suggest, these recent legal aid reforms in England and Wales have generated considerable controversy.<sup>121</sup>

Legal aid and governmental policies of "social exclusion": In addition, these reforms have fostered a good deal of research by academics and policy makers.<sup>122</sup> As a number of the research studies suggest, however, it is impossible to examine legal aid reforms without also taking into account the political impact of "social exclusion" initiatives introduced by the Labour Party a few months after its election in 1997.<sup>123</sup> More specifically, the new Labour government established a Social Exclusion Unit, which defined social exclusion, not just in terms of low incomes, but as also including "all those linked-and-reinforcing problems that can act to prevent effective social engagement."<sup>124</sup> According to Ruth Levitas, the idea of social exclusion originated in French social policy and then spread throughout the European Union.<sup>125</sup>

However, even as the concept of "exclusion" became an increasingly prevalent term for government policy makers, Levitas noted that "there were competing discourses of exclusion within individual countries, as well as within Europe."<sup>126</sup> According to Levitas, there were three possible discourses in Britain:

- a "redistributionist" discourse situated in critical social policy, in which social exclusion is intertwined with poverty;
- a "moral underclass" discourse which uses cultural rather than material explanations of poverty; and
- a "social integrationist" discourse which sees inclusion primarily in terms of labour market attachment (getting a job).

As Levitas argued, these meanings of "social exclusion" have been deployed in different ways in political projects, so that "social exclusion is an essentially contested concept."<sup>127</sup>

"Social exclusion" and research about "justiciable problems": Although the concept of "social exclusion" continues to be contested, it has significantly influenced legal aid policies in the past decade, particularly for civil matters in England and Wales. Thus, as Buck, Balmer and Pleasance argued, a primary responsibility of the 1999 *Act's* Community Legal Service is "helping people out of social exclusion and preventing them from experiencing social exclusion in the first place."<sup>128</sup> In this context, research has attempted to define relationships between "social exclusion" and the prevalence of "justiciable problems," that is, problems for which there is a potential legal remedy (whether or not an individual identifies the problem as "legal"). For example, research conducted by the Legal Services Commission (in 2001, 2004 and 2007) explored people's responses to justiciable problems and the success of procedures adopted to resolving them.<sup>129</sup> In general terms, the research suggests that low income is not the only factor affecting "social exclusion;" factors such as age, disability, homelessness, and single parenthood may also contribute significantly to experiences of social exclusion.<sup>130</sup>

New legal aid arrangements: Concepts of "social exclusion" have also contributed to new legal aid arrangements;<sup>131</sup> specifically, the idea of entitlement to civil legal aid is being replaced by "a scheme of prioritising cases and resources (rationing) as a way of meeting the needs of the general public within a limited budget."<sup>132</sup> In this context, there are two significant strategies:

Emphasis on information and advice: One strategy involves emphasis on the provision of



more and better information and advice about law, a strategy designed to prevent problems, to enable individuals to take responsibility for resolving problems more efficiently, and to reduce the need for access to courts. For example, a 2005 report suggested that “The promotion of earlier and more effective resolution of disputes is part of the Government’s vision of empowering people and communities to achieve a fair and decent society with opportunity and security for all in a changing world.... Unresolved disputes and legal challenges can act as barriers that stop people fulfilling their talent and can limit the opportunities that should be available to every part of society.”<sup>133</sup> In implementing this goal, the structure of legal aid services was revised to include better advice and information about legal problems, including partnerships with community organizations such as Citizen Advice Bureaux;<sup>134</sup> as a result, individuals are expected to take responsibility for understanding legal rights and obligations and to inform themselves about options for resolving problems,<sup>135</sup> just as they must embrace other measures (including finding paid work) to overcome problems of “social exclusion.” As Hilary Sommerlad argued, the result of this primary emphasis on the provision of information is that “‘access to services’ becomes an alternative to just outcomes, even if [the] service is simply a ‘hit’ on a legal advice website.”<sup>136</sup>

New arrangements for legal service providers: The second strategy focuses on new arrangements for legal assistance. The Commission introduced a system of preferred suppliers (solicitors’ firms) through franchising, and new efforts to achieve quality control through a Quality Mark, with exclusive contracts for providing identified services to clients.<sup>137</sup> As Richard Moorhead argues, such “contractualism (the heightened use of contract in determining relationships between governmental organisations and providers of public services) grew alongside ‘new public management’ (NPM) techniques which draw heavily on quality assurance, management and auditing approaches....”<sup>138</sup> Not surprisingly, critics have expressed concerns about the ways in which these new arrangements challenge traditional ideas about legal professionalism: the danger is that “the audit rather than the legal aid client assumes central importance.”<sup>139</sup>

**Ideas for Ontario: These developments in the UK may have some significance for the process of understanding and comparing legal aid priorities in Ontario:**

1. Research about “justiciable problems” and “social exclusion”: First, it is clear that ideas of “social exclusion” may also resonate in Ontario, even though the content of this phrase may be just as undefined as in Britain and elsewhere in Europe; the concept seems to have created renewed interest in *defining needs for services*, and there is already some Canadian research concerning clusters or cascades of “justiciable problems” in the civil law context.<sup>140</sup>

2. Emphasis on provision of legal information: More significantly, the emphasis on “social exclusion” in British political discourse, along with concerns about the cost of legal services, have resulted in priorities for strengthening community advice services, thus reinforcing ideas of *individual responsibility* for seeking help and solving problems.

3. Changes in the provision of lawyers’ services: Finally, to some extent at least, the use of contracts and franchising for the provision of legal aid by solicitors may also suggest that

legal representation is to be undertaken on a more routinized basis, and only after other efforts to solve problems outside the courts have been exhausted. Along with management tools for ensuring *quality and accountability*, such arrangements not only define priorities for legal aid, but may also redefine traditional relationships between lawyers and legal aid clients.

*Significantly, the overall context in England and Wales seems to present a paradox:*

On one hand, the emphasis on providing legal information and substantial efforts to create “routinized” legal services are based on a “model citizen” who is responsible, articulate, and thus able to “solve her own problems” with just a bit of advice. Yet *at the same time*, research conducted by the LSRC’s legal needs and justiciable problems studies confirms that the most vulnerable clients suffer multiple and cascading problems that require more than a bit of advice. As Sommerlad concluded:

[The social] model of law is undermined by the discourse of marketisation, contractualisation and individualisation;... a condition of the poor’s poverty is their effective exclusion from democratic and legal and governmental process, other than as objects, and hence from the imagined community of civil society.... [T]he discourse of inclusion is disingenuous when it is part and parcel of projects to residualise welfare and its recipients.<sup>141</sup>

### **Europe: A Note on Selected Jurisdictions**

Legal aid and related initiatives have also been established in the civil law jurisdictions of western Europe. Indeed, an American lawyer described the Dutch legal aid scheme in 1989 as “one of the best in the world: probably the best.”<sup>142</sup> As Tamara Goriely explained, the Dutch system “succeeds in offering legal assistance about a wide range of problems to a large number of people at a reasonable price,” although it too experienced pressures in the 1990s in relation to rising costs. Interestingly, Goriely concluded that the existence of a system of *Buros Voor Rechtshulp*, in which lawyers paid at civil service rates provided advice and assistance, made legal services accessible and open; and since these law services competed with lawyers in private practice, they also helped to hold down the remuneration paid to private lawyers.<sup>143</sup>

However, the Dutch system for legal aid was revised substantially in 1994, pursuant to the *Legal Aid Act*. There are two arrangements for the provision of legal aid: the Legal Services Counters, which provide front line services; and the availability of private lawyers or mediators if these services are required. If a matter requires more than three hours of service, it is necessary to make an application to the Legal Aid Board, and eligibility for legal aid depends on income and assets available to the client.<sup>144</sup>

In addition, about one-quarter of Dutch households had legal expense insurance by 2006.<sup>145</sup> Belgium also introduced legal expense insurance in 2007,<sup>146</sup> and it seems that legal services in Germany rely on legal expense insurance (LEI) more than on legal aid. As Matthias Kilian and Francis Regan argued, however, legal aid and legal expense insurance are “two sides of the same coin, different responses to the same problem of the failure of the market for delivering legal services to all.”<sup>147</sup> In an examination of LEI in Germany and

Sweden, however, the authors concluded that although legal aid and LEI might operate well together to provide greater access to law, LEI by itself could not replicate legal aid for the poorest clients, both because of its limited scope and also because poor clients may not be able to purchase such insurance.<sup>148</sup> Although the Trebilcock Report similarly recommended consideration of legal insurance as a means of furthering access to justice, the Report did not specifically focus on this relatively limited impact for poor persons.<sup>149</sup>

**In the context of this brief overview of developments in other jurisdictions, it seems that the problems are similar for both common law and civil law jurisdictions. Unfortunately, as the Trebilcock Report similarly concluded, “there is no panacea.”<sup>150</sup>**

### **Summary: Ideas for Further Exploration in Ontario**

This summary of recent developments in other jurisdictions suggests a number of possible strategies to be considered in developing legal aid priorities in Ontario:

As in the US, it is important to examine the usefulness of technology in the provision of legal information and advice, while nonetheless recognizing the challenges of using it with respect to the most vulnerable individuals and communities; and the need to develop technologies that can be connected to larger and more integrated databases that include lawyers and the courts.

In addition, it will be important to maintain a “watching brief” with respect to developments in civil legal aid in the US; and to follow carefully the expansion of Access to Justice Commissions in the states, as they implement measures to integrate the delivery of services, including legal aid.

As in Australia, it is useful to explore more fully the possibility of using concepts of “special circumstances,” in defining legal aid priorities; particularly in the context of the federal government’s Social Inclusion agenda, such factors may offer important opportunities for (re)conceptualizing the basis for the provision of legal aid to individuals and communities, and the use of different kinds of legal services.

As in New Zealand, the idea of LAO as a “lead agency” with responsibility for coordinating access to legal information for the public offers a significant opportunity to (re)imagine LAO’s responsibilities in terms of both the provision of services and the coordination and integration of social and legal services. In this context, it may also be important to follow the use of community courts as a means of providing more access to justice.

As in the UK (England and Wales), there is a need for serious and critical reflection about the concept of “social exclusion” and its (paradoxical) relationship to research about “legal needs” and “justiciable problems.” In this context, it is critical to examine how useful is an emphasis on providing legal information alone, particularly for the most vulnerable individuals and communities; it is also important to take note of the impact of new arrangements for the provision of lawyers’ services to legal aid clients, assessing both the

advantages and disadvantages.

As in Europe, it may be important to consider the expansion of arrangements for legal expense insurance, as noted in the Trebilcock Report. At the same time, it is important to understand LEI and legal aid as related and complementary arrangements; LEI will never replace legal aid for the most disadvantaged individuals and communities.

Several of these options will be considered in more detail in Part IV.

### **3. The Charter and LAO Responsibility for Providing Legal Aid**

The right to publicly-funded legal representation is an evolving area of law. In spite of the failure of the framers of the *Charter* to include the right to legal aid in the *Charter*, the courts are recognizing that, in a free and democratic country, publicly-funded legal representation may be necessary in both criminal and civil law cases to ensure that the principles of fundamental justice are respected. *The judgment is made on a case-by-case basis.*<sup>151</sup>

As this conclusion from the CBA study in 2002 explained, there is no general constitutional right to legal aid in criminal or civil law cases in Canada.<sup>152</sup> Although a number of judicial decisions have defined rights to publicly-funded legal aid in specific circumstances, no court has held that there is a general, entrenched constitutional right to legal aid. As the CBA study suggested, however, “common law, case law, statutes, the constitution, the *Charter*, and the rule of law that is the underpinning to our democracy all offer the grounds for individuals to claim a right to legal aid in certain circumstances;” in this context, it is also necessary to take account of obligations in international conventions with respect to access to legal processes.<sup>153</sup>

In Canada, however, courts have recently denied broad and general claims for publicly-funded legal aid services in *British Columbia (AG) v Christie*<sup>154</sup> and in *Canadian Bar Association v British Columbia*.<sup>155</sup> In this context, entitlement to legal aid continues to reflect a piecemeal approach in specific circumstances,<sup>156</sup> rather than a general entrenched constitutional right.<sup>157</sup> In practice, moreover, the circumstances defined by courts as attracting *Charter* protections are primarily focused on representation in court proceedings, rather than information, advice, and assistance in proceedings other than in courts.

**Clearly, legal aid priorities must take account of statutory provisions and judicial decisions that mandate legal protection in defined circumstances. However, in addition to these obligations, the *Charter* may apply to legal aid priorities in two ways:**

Charter values: First, Legal Aid Ontario has an obligation to take into consideration *Charter* rights, and *Charter values*, in the process of assessing current priorities and in formulating new approaches to priorities; in these contexts, it is also necessary to consider how to implement these obligations most effectively in legal aid delivery systems.

LAO role: In addition, Legal Aid Ontario has a primary responsibility, as a state actor, to design a principled and coherent system for the provision of legal aid. Indeed, it is arguable

that the failure on the part of courts to recognize a constitutionally entrenched right to legal aid *requires* that LAO fulfill this responsibility, as a governmental agency with statutory responsibilities, in accordance with principles of democracy and the rule of law.

In this context, LAO plays a fundamental role in achieving access to justice for the most vulnerable individuals and communities in Ontario. Both these obligations must be addressed carefully.

### **Charter Values and Equality Goals**

First, taking account of *Charter* rights and *Charter* values in defining priorities for legal aid requires attention to the duty to ensure equality and non-discrimination pursuant to section 15. As the Supreme Court of Canada declared in *G(J)*:

All Charter rights strengthen and support each other ... and s 15 plays a particularly important role in that process. *The interpretive lens of the equality guarantee should therefore influence the interpretation of other constitutional rights where applicable, and in my opinion, principles of equality, guaranteed by both s 15 and s 28, are a significant influence on interpreting the scope of protection offered by s 7.*<sup>158</sup>

Thus, if the overall purpose of section 15 of the *Charter* is to promote substantive equality, this purpose requires that legal aid programs be designed to remedy social disadvantage. In this context, a legal aid program that gives priority to equality interests must choose its priorities for service to achieve this goal of remedying social disadvantage: for example, in relation to aboriginal and racialized minorities who experience disadvantage in the criminal justice system, or in relation to women who experience disadvantage in family relations as a result of family breakdown.

In addition, the need to take account of equality values in the *Charter* may necessitate a review of traditional principles about legal aid, particularly where cases have tended to grant priority if the state is one party to the proceedings, on the basis of inequality of power for an unrepresented litigant. As David Dyzenhaus argued persuasively, power imbalances *per se* should attract this priority; and as a result, inequality between private parties also necessitates representation. As Dyzenhaus suggested:

[O]ne's position of inequality is worsened when one is contesting the law with another private actor who is vastly more powerful than oneself. *What should matter is not the source of the power which worsens one's situation of inequality before the law, but the fact that the situation is worsened.*<sup>159</sup>

Family law is a prime example of an area of "private" law in which there may be an inequality of power, but others include employment, tenancy, and human rights laws; in all these cases, an unrepresented litigant may be required to challenge a corporate employer, a corporate landowner, or a government or private sector employer.

In addition to its relevance for challenging the lack of funds for family law matters, by contrast with criminal law cases,<sup>160</sup> equality principles may necessitate legal aid services for persons with mental and physical dis/abilities, and persons claiming immigration or refugee status. These persons may need legal aid to access

a variety of income support benefits, to confront discrimination in employment, housing and other facilities, or to challenge legal proceedings concerning committal or involuntary treatment. In this way, the negative liberty test may need to be expanded beyond criminal law to other contexts, including involuntary institutionalization, deportation, and the removal of children from parental custody.

In addition, interpreting the protection for life in section 7 through an equality lens may include interests related to the quality of life: basic material necessities, such as food and shelter, and basic necessities of social citizenship, such as effective opportunities to participate in the social and political life of the community. In this way, legal aid priorities should be designed to achieve the goal of creating meaningful equality of access to legal services, questioning which individuals and groups benefit from choices about priorities, how such choices foster access to justice in relation to law, and what social interests are protected by these choices?

### **The State's Obligation to Promote "Access to Justice: A Primary Role for LAO**

In addition to the equality lens, this paper argues that the existence of governmental intervention in the regulation of social relations requires provision of legal aid in accordance with *Charter* values, and that these services must be provided beyond the requirements of negative liberty.<sup>161</sup> This argument claims that even if the state is not a party to the proceeding, *statutory regulation of social relations* on the part of governments means that the proceedings no longer constitute merely "private" action. As the Supreme Court of Canada stated in 2001, quoting Dean PW Hogg, there is no *a priori* definition of what constitutes the "private sphere;" rather, "the boundaries ... are marked ... by *the absence of statutory or other governmental intervention*.... If, by investigating the effects of a statute that regulates this sphere, this Court is imposing 'positive' obligations on the state, that is only because such imposition is justified in the circumstances."<sup>162</sup> Thus, in regulating social relations through statutory rights and obligations, the state has a duty to ensure that those affected are equally able to engage effectively with the legal processes for enforcing their rights and discharging their obligations. This state obligation has been assigned by the *Legal Aid Services Act* to Legal Aid Ontario.

Recognizing a broader range of social interests warranting the benefit and protection of legal aid, and taking account of the values of equality, liberty and life, increase the scope of priorities for legal aid funding. In addition, this approach necessitates recognition of the principles of fundamental justice. In judicial interpretation of this requirement, courts have adopted a test that focuses on the nature of the interest at stake, the seriousness and complexity of the proceeding, and the ability of the person involved to represent themselves effectively in the absence of state-funded counsel.<sup>163</sup> This test suggests a focus on the overall context, requiring an assessment of the concrete impact on the individual with respect to the social interest affected, in addition to recognition of inequality of power between the parties to the legal process.

### **Ideas for Ontario: The overall impact of the *Charter* in relation to legal aid**

Overall, this assessment of the impact of the *Charter* suggests that judicial decisions must be taken into account in defining legal aid priorities, but that these requirements represent only a starting point.

1. *The statutory creation of governmental programs such as legal aid must meet a higher,*

*proactive, and more comprehensive standard* than that developed by the courts in an incremental fashion. 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. In this way, the courts' *Charter* decisions about legal aid services provide only a minimal set of requirements for legal aid priorities.

2. In this context, the values of equality, liberty, life and the right to participate in proceedings that are fundamentally just, values that are embedded in the *Charter*, establish a *responsibility for Legal Aid Ontario to implement measures to accord with these values in order to discharge governmental responsibility for intervention in the regulation of social relations.*

Thus, in implementing its responsibility, LAO should ensure that *Charter* values are achieved in designing processes for choosing priorities, in identifying the content of these priorities, and in implementing them with appropriate delivery methods.

### **PART III GOALS FOR LEGAL AID PRIORITIES**

#### **1. Understanding Legal Aid in the Legal Services (Justice System) Context**

[A] new model for priority-setting within the legal aid system should be based on consultation, environmental scanning of needs, a blending of system-wide and local strategic planning for the system, and the integration of a range of service-delivery models into priority-setting exercises.... *[The] range of considerations taken into account in setting priorities needs to be less dominated by a focus on the liberty of the subject and to be more inclusive of the variety of other interests that create serious needs for legal services....* [The] system should enhance its capacity to determine its priorities strategically in order to achieve the greatest impact possible with available resources. Finally, we have noted that priority-setting must be subject to revision in the light of experience and the changing social and legal environment.<sup>164</sup>

In recommending this model for defining legal aid priorities, the *Blueprint* report articulated a more proactive approach than in the past, both in terms of seeking information about the range of needs for legal aid services and in terms of assessing the factors to be taken into account. In addition, the report identified the significance of experience in the provision of legal aid services and of changing social and legal environments, and the need for ongoing revision of priorities in the light of these factors. In this way, the report envisaged a process for defining legal aid priorities that would be active rather than passive in efforts to define the need for legal aid, that would take into account broader developments in legal and social services, and that would create systems for monitoring the relationship between needs and services, and revise them as necessary.

Clearly, such a process for defining priorities also creates new and different responsibilities for Legal Aid Ontario in managing its funds effectively.

## A Broad View of Law in Society

This model for defining legal aid priorities starts from a broad view of the law, including processes for enacting statutes as well as for enforcement and dispute resolution.

Although a formal hearing in a court represents the traditional model of the adversary system, law and legal processes are used in administrative decisions, negotiated or mediated settlements, restorative justice and diversion programs, tribunal hearings, and other settings that do not involve formal hearings in courts. As a result, it may be necessary to consider the nature of different kinds of legal proceedings where legal aid might be provided, and to assess how they work in practice.<sup>165</sup>

In addition, individuals or groups become involved in legal proceedings in different ways: sometimes, they choose to engage in legal action, but in other cases, they become involved because of the initiative of someone else.

Significantly, the ability of individuals to engage with law and legal processes is often directly related to their economic circumstances. As Janet Mosher argued, rights may be unenforceable because of lack of knowledge and because of the lack of means to enforce them; in addition, “rights also go unenforced because they are disregarded by bureaucracies charged with their implementation.”<sup>166</sup>

On this basis, an assessment of legal aid priorities requires an understanding of the role of law in society, and the particular ways in which law may impact on poor or vulnerable individuals for whom legal aid may be critical. In this context, there are several features that have contributed to greater complexity for law, with a consequential impact on those who are most vulnerable and disadvantaged:

### Increasing legalization and criminalization

One important factor affecting law’s role in society is increasing legalization, and particularly criminalization, of social relations. Clearly, if new legal rights or responsibilities are created by legislatures or judicial decisions, the need for legal aid may also increase. As Marc Galanter explained in relation to a comparison of the legal world in the 1960s and in the late 1980s, “there are now more lawyers, more claims, more strategic players of the law game, and more expenditure, both absolutely and proportionately, on law.... and more rules and standards are being applied by more participants to more varied situations....”<sup>167</sup> Similarly, David Wall compared the number of statutes and regulations enacted in the period from the 1950s to the 1990s in the United Kingdom; although he concluded that the numbers had remained fairly constant, the *length* of statutes and regulations had tripled. In practice, therefore, procedural complexity increased considerably, thereby increasing the need for legal assistance with respect to rights and duties for individuals, including legal aid.<sup>168</sup>

In Ontario as well, the *Blueprint* report in Ontario documented legal changes that necessitated increased legal aid services as a result of federal amendments to the *Immigration Act* which changed the refugee determination process;<sup>169</sup> as well, changes in entitlement to provincial social assistance resulted in an increase in the number of social assistance recipients, and thus increased the pool of potential legal aid applicants.<sup>170</sup>



Moreover, significant changes in provincial family laws have continued to create increased levels of need for family law services, for legal aid clients as for others involved in relationship breakdown.<sup>171</sup> In the same way, statutory amendments providing for more legal intervention in matters of child protection affect the numbers of such cases before the courts; and for parents who are poor, such changes also create needs for legal aid.<sup>172</sup> Thus, the expansive use of law in recent decades has created quantitative changes with respect to the nature and volume of legal aid which may be needed.

A particular issue is the use of the criminal law to respond to societal problems. As Wall pointed out in the UK context, “state-driven prosecution policies largely determine the size of the demand for criminal legal aid.”<sup>173</sup> Although he reported that prosecution rates were tempered in the early 1990s as a result of the use of diversion processes, successive waves of reform statutes then created new needs for advice.<sup>174</sup> In Ontario, Alan Young suggested that there has been a noticeable pattern of criminalization in the past century: “the discovery of a new social problem has tended to result in the criminalization of the conduct without consideration of whether the problem could be solved, or contained, through other methods of state control.”<sup>175</sup>

The *Blueprint* report specifically identified the impact on criminal legal aid of a number of changes in criminal law and procedure: expansion of the Crown’s duty to disclose evidence to an accused (resulting in the need for additional preparation time for defence counsel), court rulings effectively requiring the provision of twenty-four hour duty counsel, new standards for admissible evidence in sexual assault cases, increased prosecutions of sexual and domestic assault and impaired driving, zero tolerance for school disputes, increased street-level drug enforcement, and procedural and substantive amendments to the *Criminal Code* relating to persons found unfit to stand trial.<sup>176</sup>

In this way, governmental decisions to use criminal law and enforcement processes may directly impact on the need for legal aid services. In this context, Doug Ewart recommended consideration of needs for legal aid in the design of criminal law measures:

[We should think about considering] all the financial costs of using the criminal sanction. Thus, ... the approximate cost per prosecution for various types of routinely prosecuted cases could be determined on an all-in basis - police investigation and processing time, Crown time, court and judicial time, probation and incarceration and parole time *and* defence time. Once this was known in even general terms, a rough sense of the cost of using the criminal justice system to respond to various kinds of problems could be used to help assess priorities within the justice system, and indeed between it and other responses to that particular social problem.<sup>177</sup>

Such an approach reveals how legal aid services are part of the overall justice system. Moreover, in Ewart’s view, Legal Aid Ontario’s expertise should be utilized to identify alternative ways of dealing with social problems outside the justice system, and it should offer advice on the restructuring of the justice system to reduce the need for legal representation and its cost. In this way, he argued that Legal Aid Ontario should play an active role in the design of legal processes to reduce the need for legal aid. Although he was writing in the midst of severe budget constraints in the mid 1990s, his suggestion that Legal Aid Ontario take the initiative in proposing changes in legal processes to improve the justice system remains persuasive, particularly because it seems that needs for legal aid will almost always be greater than available resources.

### Increasing numbers and roles of legal actors

A second factor relating to broader issues about legal services, and their impact on legal aid, concerns changes in the roles and personnel involved in the provision of legal services. Although early analyses of legal aid identified its transformation from “charity” to “entitlement,” characterizing the earlier development of lawyers’ *pro bono* services as insufficient and ultimately demeaning,<sup>178</sup> the reduction in available legal aid services in Canada and elsewhere has resulted in an increasing reliance on *pro bono* services once again.<sup>179</sup> As a number of commentators have suggested, the number of unrepresented litigants has been increasing; some of these litigants choose to represent themselves (the self-represented), but for many others, legal aid is unavailable (the unrepresented).<sup>180</sup> Nonetheless, in both cases, the presence of unrepresented litigants may thwart the efficient processes of courts. Indeed, as a study of the impact of unrepresented litigants in the Family Court of Australia reported, “matters might have been resolved with help from lawyers, documents would have been better presented, and matters would not have taken as long.”<sup>181</sup>

In such a context, it is arguable that professional *pro bono* schemes may be particularly helpful. However, such schemes may depend on ideas about legal professionalism in a context in which, as some commentators in the UK have argued, such ideas are undergoing major transformation as a result of new governmental policies for delivering legal aid.<sup>182</sup> In an assessment of the rise of *pro bono* services as a result of decreases in state funded legal aid, for example, Regan argued that *pro bono* “enhances the role of the profession in society, allows young lawyers to gain experience and can have a positive impact on the profitability of a firm;” it may also increase public confidence in lawyers and in the legal system. At the same time, he noted limits on the reach of *pro bono* services: they may not address all kinds of needed services; and they tend to be inadequate for servicing the high volume, routine services needed in criminal, family and civil courts on a daily basis. In Regan’s view, therefore, the solution is to design legal aid and *pro bono* services to complement each other, recognizing that the primary responsibility for ensuring access to justice remains with government.<sup>183</sup> In this context, there is clearly a role for Legal Aid Ontario in designing methods to coordinate *pro bono* services and legal aid.

In addition to such changes in lawyers’ services, moreover, legal services are being transformed to include other personnel.<sup>184</sup> In the Ontario legal aid context, Ewart argued that the introduction of limited state funding necessitates the effective use of diverse skills, including those of paralegals, community legal workers, researchers, investigators, solicitors, law reform specialists, litigators and others: “the paradigm would not simply be the dedicated lawyer with a brief to prepare and argue as he or she thinks best.”<sup>185</sup> In this way, new developments in the providers of legal services, as well as professional participation in *pro bono* services for poor clients, may affect the range of legal aid services as well as their modes of delivery.

### Alternatives to courts and the adversary system

A third factor that shapes the need for legal services is the increasing attraction of alternatives to the adversary system in courts. In this new context, individuals involved in disputes may choose, or be required to participate in, alternative methods of dispute resolution, either prior to or as an alternative to using the courts.<sup>186</sup> Thus, in addition to recognizing a legal problem and deciding to take some form of legal action, individuals must also have sufficient knowledge of procedures to negotiate a myriad of alternatives to traditional litigation. In civil law matters, there are possibilities of court-annexed mandatory mediation in family law matters and consensual arbitration in commercial disputes. An array of specialized tribunals, many of which determine individual rights, may also be available for resolving issues between individuals (in relation to tenancy matters, for example) or between the state and an individual (in relation to social

assistance, for example.)<sup>187</sup> Even in criminal law matters, governmental initiatives sometimes offer diversion schemes for young offenders or circle sentencing for aboriginal offenders, or other forms of “restorative justice.”<sup>188</sup> In this context, the need for clients to choose, or sometimes to locate, an appropriate forum for decision-making may also increase the need for legal aid. Moreover, as the research undertaken by Hunter in Australia demonstrated, at least in family law matters, there is a need for monitoring outcomes and relative costs *in practice* in relation to different methods of dispute resolution.<sup>189</sup>

### Summary

These three aspects of the larger context for legal services all contribute to the broader legal and social context within which legal aid is provided. According to the *Blueprint* report, it is Legal Aid Ontario, pursuant to its statutory obligations under the *Legal Aid Services Act*, which is in the best position to provide leadership in identifying and initiating appropriate reforms to the justice system. As the report noted, *shifts in the mix of delivery models for legal aid services might accomplish only limited goals, by contrast with substantive and procedural changes in the justice system more generally.*<sup>190</sup> In addition, the report argued that:

[T]he legal aid system occupies a unique vantage point from which to view the operation of the various elements of the broader justice system. The large volume and wide diversity of problems and clients embraced by the legal aid system provide an opportunity to observe recurring problems in the functioning (and systemic dysfunctions) of the system, and the cost to the legal aid system by promoting reforms to the underlying justice system that maximize its efficient and effective functioning. *No other institution or set of individuals in Ontario, professional or otherwise, possesses, at least potentially, this body of systemic information or this acuteness of incentives.* This combination of characteristics ideally equips the legal aid system to play a major role as a proactive change agent.<sup>191</sup>

**In the context of this paper’s concern for understanding and comparing priorities for legal aid, there is a *mandate for LAO to provide leadership in promoting reforms to the justice system as a whole, to monitor changes in justice system processes and their impact on vulnerable and disadvantaged communities, and to develop delivery systems and programs to meet access to justice goals.***

## 2. Legal Aid and Legal “Needs”

### **Research about Legal “Needs”**

Much current debate about access to justice is either mere unthinking or consciously polemical repetition of cant. If we don’t really know the legal needs of the public, and if ... we don’t even know how we might go about conducting a needs assessment, and if ... we don’t have any comparative baselines ... how can we possibly make demonstrable affirmations about the problem and its solutions? Merely gathering raw statistics is not enough. *One also needs to have a theory of what the statistics are meant to show and how*

*they should be interpreted.*<sup>192</sup>

### Defining legal aid needs: an evolution

As noted earlier in this paper, when state-funded legal aid was first established by governments in the middle of the twentieth century, most were designed on the basis that indigent clients needed the same legal services as those who could afford to pay for them. As a result, there were no large empirical studies of the the poor, nor any significant investigations about the nature of their legal problems; and policy decisions generally extended the same legal services to the poor that were already available to paying clients.<sup>193</sup> Then, fuelled by the War on Poverty in the United States, this initial view of legal aid was revised to recognize that poor clients experienced different problems, and that their problems were often multiple and interrelated; in addition, legal aid was conceptualized in terms of fostering “empowerment” of the poor.<sup>194</sup>

At least to some extent, these differing approaches to ideas about “needs” for legal aid contributed to the tensions in Ontario in the 1970s between the judicare system and community legal clinics; while judicare certificates created access for poor persons to the services available to paying clients, community legal clinics attempted to respond to the different needs of poor clients for legal services (such as social assistance, workers compensation, and tenancy matters), as well as engaging in law reform and community development activities designed to achieve *systemic* change and community empowerment. Thus, when the Ontario Legal Aid Plan agreed to fund community legal clinics, poor clients obtained access to legal aid to meet a range of different kinds of needs.<sup>195</sup>

In more recent decades, some research has focussed on identifying “needs” for legal services generally.<sup>196</sup> In the context of legal aid, some Australian studies in the 1970s suggested that services should be designed based on “social indicators” of poverty and their potential for contributing to the creation of legal problems.<sup>197</sup> In this context, the social indicators approach required policy makers to define objectives for a legal aid program and then to identify accurate and accessible indicators to measure needs for legal aid: for example, rates of unemployment, geographic isolation, ethnicity, and dependency on welfare.<sup>198</sup>

(Interestingly, a similar approach of developing “proxies” for need has been adopted more recently in relation to medical services; however, while proxies have been utilized with some success in relation to the provision of health services, they seem less useful with respect to legal services because the level of public knowledge about health is greater than about law, and people know better how to access health care than legal services: “the public may not necessarily be aware either that they have a ‘legal need’ or how to access the particular service that would be most appropriate for problem resolution.... To decide upon and then measure what constitutes ‘unmet need’ in such circumstances presents somewhat of a conundrum.”)<sup>199</sup>

In the legal context, debates about “needs” for legal aid reflect a variety of different perspectives and purposes, and are often used to justify different kinds of strategies or policy goals. Indeed, in a society in which law potentially touches everything, it is difficult to isolate a uniquely legal problem; as a result, “the concept of legal needs is a moving target and ... it’s propelled by considerations not of legal definition, but rather of pragmatic benefit and cost.”<sup>200</sup> As this comment suggests, legal needs must be understood as dynamic rather than static, and as interrelated with other kinds of problems, particularly for those who are poor. At the same time, policy makers may define “legal needs” to achieve particular political or pragmatic outcomes. Such factors contribute to the challenge of defining “needs” for legal aid, and particularly “unmet” needs. Yet, notwithstanding the difficulties, the task of defining priorities for legal aid services must

somehow confront the issue of “needs.” Moreover, it seems clear that different approaches to the issue of needs may affect both the *process* of defining priorities and the assumed *content* of legal aid priorities.<sup>201</sup>

#### “Legal needs” and “justiciable problems”

To some extent, the concept of “social exclusion” in Europe and the UK appears designed to confront multiple factors which prevent individuals from participating effectively in the community, although, as Ruth Levitas noted, the concept of social exclusion has been used in a number of different ways.<sup>202</sup> As noted earlier, the concept of social exclusion in the UK seems to have been defined in policy terms to provide more information about law to the public, with the expectation that individuals will then take *responsibility for solving their own problems*; more specifically, there is special emphasis on *using information to obtain a job*. This understanding of social exclusion was reflected, for example, in a 2004 government report, which stated:

Assisting people to resolve problems helps to remove the barriers that prevent people having the opportunity to participate fully in community life. Many people feel overwhelmed with difficulties - getting *independent* advice at the right time is a way out of the nightmare. It can be the first step towards feeling confident enough to seek meaningful training and employment and contribute to the social and economic well being of the area.<sup>203</sup>

One result of this focus on “social exclusion” is the growth in research projects in the UK, designed to document “justiciable problems,” research based on large-scale interviews about “problem-solving behaviour.” In Helen Genn’s early work, for example, a “justiciable event” was defined as “a matter experienced by a respondent which raised legal issues, whether or not it was recognized by the respondent as being ‘legal’ and whether or not any action taken by the respondent to deal with the event involved the use of any part of the civil justice system.”<sup>204</sup> As a result of research initiatives in the UK,<sup>205</sup> there is now some documentation of the ways that people may experience everyday problems, which might be resolved by legal advice or legal action. In addition, the research identifies how problems may “cluster” or “cascade” as a result of a triggering event such as losing a job, the breakdown of a family relationship, or personal injury.<sup>206</sup> In this way, the research is intended to ensure that limited resources for the provision of legal aid services are most efficiently distributed.<sup>207</sup>

A few similar empirical studies have been conducted in Canada.<sup>208</sup> In two studies undertaken by the federal Department of Justice in 2004 and in 2006, for example, almost half of the respondents reported one or more serious problems with legal aspects within the previous three years; the most prevalent problems (experienced by about 20% of respondents) were consumer, employment and debt problems.<sup>209</sup> In reflecting on the data obtained in these surveys, Ab Currie connected the presence of justiciable problems and their lack of resolution to experiences of social exclusion and poverty, disadvantage and dependency:

Empirical research has demonstrated that the prevalence of justiciable problems that are serious and difficult to resolve is high, occurring to about 45% of the Canadian population within any three year period. The research demonstrates that many problems remain unresolved after a number of years, that outcomes are frequently perceived to be unfair and that the conditions surrounding unresolved problems often become worse.... There appears to be a momentum to experiencing increasing numbers of justiciable problems,... driven in part by one problem acting as a trigger for others. The problem clusters ... include not only justiciable problems but also mental health, physical health and social problems that are

triggered by the justiciable problems. This trigger and cascade effect can bring about social exclusion, a process of falling away from the mainstream, from lives of self-sufficiency into lives of disadvantage and dependency on public support. *This cannot be demonstrated by the data in either of these studies. However, it can be seen in the life histories of the most vulnerable and socially excluded members of society.*<sup>210</sup>

Yet, while the existence of unresolved justiciable problems appears to be connected to the concept of social exclusion, this research has been used (paradoxically) in the UK primarily to justify an emphasis on delivering legal advice. As a result, the research has been primarily focussed on ways of solving *individual* problems.

Research about “justiciable problems” has been criticized by a number of scholars.

- For example, Curran and Noone concluded that data about justiciable problems does not delve sufficiently into “practical impediments for the marginalized, which can stem from *systemic* rather than individual problems;”
- In addition, these authors argued that a focus on “justiciable problems” does not “link issues of problem-solving behaviour to the notions of citizenship and human rights entitlements and the role of government and its social contract with the citizenry.”<sup>211</sup>
- Similarly, as Janet Mosher argued at the time of the *Blueprint* report, although “the poor” may all share experiences that relate to lack of income, they are not at all a homogeneous group: low income often intersects with other characteristics which must be distinguished in determining whether and how legal aid can be effectively provided: some poor persons are sole support mothers, elderly persons, mentally or physically disabled, people of colour, refugees or new Canadians, illiterate, poorly educated, or young persons without financial support who move from the street to shelters and back again.<sup>212</sup>
- Moreover, while poor persons often experience dependence and vulnerability, many of them view law as a contradictory force in their lives since it may offer support and protection, but it can also be used to intrude harshly into their lives. In addition, because the legal problems experienced by poor persons are frequently multidimensional and systemic, appropriate access to complex legal information may be difficult to obtain.<sup>213</sup>

Thus, in responding to the “justiciable problems” of the poor, there are challenges based on differences in the reasons for their vulnerability, in the need to provide complex legal information for multiple and intersecting problems, and in designing systemic approaches to overcome “social exclusion.”

### **Beyond “Justiciable Problems” to “Social Inclusion”**

If “legal needs” are defined in terms that go beyond individual problem-solving in relation to “justiciable problems,” by incorporating “notions of citizenship and human rights entitlements,” legal aid for poor citizens may be defined quite differently.<sup>214</sup> In a paper for the Laidlaw Foundation in 2002, Andrew Mitchell and Richard Shillington presented arguments about the limitations of the concept of “social exclusion,” and

proposed instead a policy focus on goals of “social inclusion.” In explaining the difference between these two concepts, the authors suggested that:

The issue is whether governmental policies should address failures in existing social and economic structures that constrain *inclusive* conditions for all citizens (a “social inclusion” approach), or, on the other hand, whether policies should merely try to integrate the marginalized into fundamentally just and sound structures (the “social exclusion” approach)? [According to the authors,] the distinction between the two [approaches] is the difference between *creating inclusion* and *preventing exclusion* - that is, *who is required to adjust*.<sup>215</sup>

Clearly, this shift in perspective is significant: when the emphasis is on “social exclusion,” governmental policies are merely obliged to provide information to individuals, and individuals are responsible for taking action to overcome their “social exclusion,” such an approach is consistent with recent governmental policies of “responsabilization.”<sup>216</sup> By contrast, goals of “social inclusion” involve a combination of state actors and participation by individuals and communities to overcome *systemic problems in social and economic arrangements that create barriers to full participation for the most vulnerable*. Thus, in understanding and comparing priorities for legal aid, goals of “social inclusion” present important challenges with respect to the definition of legal “needs;” *social inclusion goals require attention to systemic problems that prevent participation in the community, not just responses to individual problems*.

### **Rethinking the Politics of Justice “Needs”**

As is evident, ideas about legal aid “needs” raise fundamental political questions.<sup>217</sup> As Nancy Fraser argued more than a decade ago, “needs-talk has been institutionalized as a major vocabulary of political discourse.”<sup>218</sup> In her view, moreover, this “needs-talk functions as a medium for the making and contesting of political claims,” particularly as a result of the turn to neo-liberalism in the late twentieth century. In this context, ideas about the responsibilities of the state to meet individual needs have changed substantially. As Sylvia Bashevkin argued, neo-liberalism “set in motion a series of changes that ... replace the embattled social citizenship and entitlement groundings of Anglo-American welfare states with a more rigid, obligations-based orientation.”<sup>219</sup>

In the legal context, moreover, Margot Young suggested that the state’s role has changed: from making interventions to assure social justice and individual well-being to one that is responsible only for optimizing conditions under which individuals can govern themselves.<sup>220</sup> As Young and others argued, these values of neo-liberalism undermine fundamental conceptions of “justice as fairness.”<sup>221</sup> More pointedly, as Lynn Mather concluded, individual responsibility for self-help is not a panacea: “for some people and some problems, *self-help suggests abandonment, not empowerment*.”<sup>222</sup> In this way, an emphasis in legal aid policy on individual autonomy and opportunities to choose may be all too absent from the lived experiences of many poor and vulnerable persons: a critical disconnect between political discourse and social realities.

Thus, in understanding and comparing legal aid priorities, it is critical to take account of the politics of justice and the ways that different approaches to priorities may impact on the lives of individuals and their communities. Even recognizing that there are limits to the use of law to achieve social goals does not preclude the possibility that law may sometimes challenge social inequalities.<sup>223</sup> In this context, Ewart argued

that legal aid priorities must understand the impact of systemic bias against the poor, particularly when poverty is combined with other aspects of disadvantage; as he suggested, “treating legal aid clients, individually or as a group, as if they were just rich people without money, or white able-bodied males with a one-time legal problem, can result in the failure even to see, much less address, the relevant issues.”<sup>224</sup> In addition, Ewart explained the need for legal aid to choose its cases with a systemic purpose; particularly in a context of inadequate resources, services should be deployed “in a structured and strategic way”<sup>225</sup>

**Overall, therefore, even though it is necessary to choose priorities for legal aid so as to maximize the impact of legal aid funds, it is important to understand Legal Aid Ontario as the primary guardian of access to justice for the poor and vulnerable in Ontario, and to affirm LAO’s proactive role in achieving systemic goals of “social inclusion” for these clients.**

### **3. A Systemic Perspective: LAO and the Justice System**

A central tenet of the McCamus Report is that the legal aid system must be regarded as an integral component of the overall justice system in Ontario. The Report emphasized that in envisioning an improved model for the delivery of legal aid the existing justice system should not be viewed as static.... The Report concluded that for legal reform efforts to be successful, there must be an ongoing focus on incremental change through continuous design, experimentation, implementation, and evaluation exercises.<sup>226</sup>

As this quotation from the Trebilcock Report suggested, the *Blueprint* report recommended a major role for legal aid in the overall justice system in Ontario; it also recognized that legal aid services should not remain static, and emphasized a need for incremental change through experimentation and evaluation.

#### **Such recommendations provide some concrete direction with respect to legal aid priorities in Ontario:**

A conception of legal aid as an important element in the overall justice system suggests that priorities should be defined in terms of overall goals of the justice system, pursuant to fundamental values including democracy, equality, and the rule of law. Such a conception may include principles and procedures for resolving disputes and law enforcement, but it may also address broader *systemic* concerns with respect to legal and social inequality.

A conception of legal aid as dynamic rather than static also necessitates an ongoing system for measuring and evaluating the impact of choices with respect to priorities, and initiatives to respond to them more effectively. In doing so, 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.



Thus, in reflecting on service priorities, it is essential to understand that the definition of a problem in the delivery of legal aid is merely a first step; there may be a number of different responses to the problem. As a result, the process of defining priorities also involves considerations about *how to respond* in ways that are most helpful to clients and cost-effective for legal aid funds.

### **LAO and the Provision of Legal Information**

In this context, the Trebilcock report suggested a role for Legal Aid Ontario in coordinating the dissemination of information about legal rights and processes,<sup>227</sup> a recommendation that appears quite similar to the New Zealand proposal to identify a “lead agency” to provide legal information to the public.<sup>228</sup> Efforts to create and coordinate websites, hotlines and other means of providing basic information are desirable in two ways:

As the Trebilcock report noted, one benefit is that such efforts may offer legal information to the middle class who must support legal aid through their taxes;<sup>229</sup> and

A second benefit is that the availability of legal information may operate to provide early intervention in preventing legal problems, or at least in constraining the scope of their negative impact.<sup>230</sup>

In similar ways, the Legal Services Commission in the United Kingdom has focused a great deal of energy and resources on the provision of legal information to the general public, emphasizing individual responsibility for acting on this advice to overcome “social exclusion.” As Lister noted, however, the impact of British policies to overcome social exclusion remains unclear, and *there is some evidence that structural inequalities within society may preclude the success of individuals’ efforts to overcome “social exclusion.”*<sup>231</sup> In this context, the provision of legal information (and significant reliance on technology to do so, as in the US) may be of little assistance in overcoming systemic barriers for the poorest and most vulnerable individuals. For them, more proactive assistance may be necessary.

Thus, in exploring ideas about priorities for legal aid, *it is important to identify differences among potential individuals and communities*, some of whom may benefit from generic legal information available in a number of formats (brochures, websites, etc), while others may need more sustained educational programs at which the information is provided in a more interactive format.

For more disadvantaged individuals, however, advice that is engaged and fully interactive in relation to individual problems will be necessary, particularly where individuals suffer from mental illness, experience difficulty with dominant languages or writing, or where there are multiple problems (legal or other) involved.

In addition, the ability to utilize telephone or computer hotlines may differ for individuals seeking information or advice about legal problems.

### **Access to Legal Information and Addressing Systemic Issues**

In this context, the recommendation of the Trebilcock report to expand the range of potential recipients of legal aid to the middle class raises important issues about how to define priorities for the use of scarce resources, both with respect to the kinds of services to be offered and in relation to the potential clients to be served. In addition, it is important to acknowledge that both the *Blueprint* report and the Trebilcock Report focus on the provision of “legal services” in relation to law enforcement (criminal law) and private dispute resolution (family and civil law). In doing so, they do not take account of the significance of public and administrative law for many poor citizens.

The *Blueprint* report and the Trebilcock Report also do not fully recognize the well-established role of community legal clinics with respect to law reform initiatives and community development activities, features that suggest a need to consider group legal services and *initiatives designed to address systemic poverty issues*.

Example: One example of this kind of “legal service” was described by Dianne Martin in response to a number of cases being presented to a community legal clinic, in which Canadian-born children were denied access to schools and to health benefits because of their parents’ irregular or undocumented immigration status. The clinic developed a reform strategy that involved legal research, education workshops and lobbying of professionals (including health care practitioners and immigration assistance workers and organizations), education and outreach to the parents in ways that took account of their legal and social vulnerability, and political lobbying. In adopting this strategy to solve a widespread problem in the community, the clinic was able to accumulate the “evidence” that might be needed to launch a test case, but this litigation strategy was postponed until all other avenues for solving this problem had been exhausted.<sup>232</sup>

*In this context, it is critical to understand the impact of systemic “legal services,” and how the work of community legal clinics differs in both substance and process from individual law enforcement and other dispute resolution “services.”*<sup>233</sup>

Ewart’s recommendations for a systemic approach to legal aid services offers another example, beyond the role of community legal clinics, of a proactive legal aid initiative to deal with bail applications.

Example: Based on data collected by the Commission on Systemic Racism, Ewart recommended the services of paralegals with specialized training to assist in-custody applicants for bail - to assemble information and liaise with family members and others in order to speed up the process for the client, and avoid unnecessary remands and delays in the court proceedings. Ewart also approved the Commission’s recommendation to introduce twenty-four hour bail courts in large urban centres, and suggested a greater role for technology in bail hearings.<sup>234</sup>

Such examples demonstrate how a priority setting process requires a proactive role on the part of Legal Aid Ontario, and active consideration of all the options, including the need to target systemic barriers using innovative reforms, and by monitoring results on an ongoing basis as new information and new possibilities develop.

***Thus, like the Blueprint report in 1997 and, to some extent, the Trebilcock report in 2008,***

*this paper assumes a creative and proactive role for LAO.*

## **PART IV. COMPARING AND UNDERSTANDING LEGAL AID PRIORITIES**

### **1. Introduction**

Access to the legal system is properly characterized as a systemic matter and not merely one which may be a problem for individuals. As with any right or interest, some individuals will need to claim it more than others, but it is ... fundamental to our existence as citizens.... Once lack of access is seen as a systemic “problem,” it is more likely that it will be understood that it requires a systemic solution. This does not automatically mean a particular form of legal aid, but legal access programs which deliver a variety of services as appropriate.<sup>235</sup>

This section explores three approaches to legal aid priorities. Traditionally, legal aid services were offered to eligible clients according to categories of legal claims or processes.<sup>236</sup> In this context, recent discussion about defining legal aid priorities in the context of “capped” services may be somewhat misleading. In fact, whether or not the overall legal aid budget was “capped” or “uncapped,” statutory schemes in Ontario, beginning with the 1966 statute, have always defined priorities for the services to be provided, excluding some services altogether and making others available only on a discretionary basis. In this respect at least, changes in budgetary arrangements have not altered the longstanding practice in Ontario of defining priorities for legal aid in terms of “legal categories” of entitlement.

However, using legal categories as the basis for defining priorities for legal aid may tend to allocate available funding without sufficient regard for differences among legal aid applicants and the relative impact on clients of a grant or denial of legal aid. This paper examines two other approaches to defining legal aid priorities: one approach would assess the significance of the problem to an individual client in terms of patterns of “social exclusion;” while a different, but related, approach might take account of systemic barriers and the need to foster goals of “social inclusion” for individual clients or communities.<sup>237</sup>

While these approaches must not ignore *Charter* requirements, as noted in Part II above, some approaches may better permit the use of *Charter* values to encourage a more principled approach to the provision of this significant societal resource in order to confront systemic barriers to equality.

**Thus, this Part reviews three approaches to legal aid priorities, explaining how each might lead to different ways of understanding legal aid priorities:**

- a “legal categories” approach;
- a “legal needs / social exclusion” approach; and
- a “social inclusion / systemic” approach.

## **2. A “Legal Categories” Approach**

### **“Legal Categories” as a Traditional Approach to Legal Aid Priorities**

In general, a legal categories approach offers legal aid to eligible clients for representation in proceedings before the courts. Although it is possible that clients may obtain some advice in relation to a legal problem, the main purpose of “categorical” legal aid is representation in a legal proceeding: criminal, family, or other civil matter. In this way, the legal categories approach emphasizes legal representation, rather than advice or information services; in addition, it tends to offer legal aid only at a late point in the development of a problem, rather than preventing its escalation through early intervention or education.

The legal categories approach reflects traditional goals of legal aid: to offer the same services to eligible legal aid clients that are available to paying clients, using a *judicare* model in which the same lawyers offer services to both paying clients and legal aid clients. However, the need to use scarce resources effectively in providing legal aid, and the need to ensure that legal aid clients were not receiving more than a reasonable paying client would obtain, resulted in limitations on the services offered to legal aid clients; by contrast, paying clients may have more and better access to holistic legal services.

Example #1: As research on justiciable problems has demonstrated, the dissolution of a marriage or cohabiting relationship may be a “triggering event” which leads to additional problems, such as issues about housing and debt.<sup>238</sup> However, if legal aid is available only for formal representation in family law cases, it is likely that the related legal issues of housing and debt relief may not be addressed, and that other (social) problems, such as the client’s need to find new arrangements for child care, will also be beyond the scope of legal aid services. Particularly where services are capped in terms of available hours, or provided with block funding, measures which tend to reduce the time available to respond to client needs holistically, lawyers offering family law legal aid services may not be able to offer assistance beyond achieving a settlement of the family law issues. Thus, all the client’s additional legal and social issues remain unaddressed; as a result, as the research on “justiciable problems” suggests, these problems will likely “cluster” or “cascade” into larger legal problems later on.

In this context, it would be helpful to have more data with respect to the recent evaluation report concerning the LAO Family Law Office. According to the evaluation report, FLO offices adopted different approaches to the provision of family law legal aid. Thus, while the office in Ottawa stringently limited its family legal aid services to those that were available to lawyers with certificates, the report found that the Toronto office tried to respond to the “needs” of family law legal aid clients. Unfortunately, the report did not specify the content of these additional client “needs,” but it is possible to speculate that FLO lawyers in the Toronto office may have tried to respond to “clustered” justiciable problems more holistically. Certainly, client satisfaction with the services of the Toronto FLO was higher than in other offices.

Thus, it would be useful to know what additional needs were met in the Toronto FLO, and whether its approach prevented the escalation of other legal problems that might otherwise have “cascaded.” The evaluation report concluded that the activities of the Toronto FLO raised concerns about the cost of the “enriched” service provided in its office,<sup>239</sup> but it seems clear that a more comprehensive cost/benefit analysis, taking into account the outcomes achieved, might reveal *cost savings* by avoiding “cascading” problems in the future.<sup>240</sup>

One peculiar aspect of the legal categories approach is the effort to include the work of community legal clinics (“clinic law”) in the *Legal Aid Services Act*. This characterization of clinic work ignores the fundamental nature of legal aid work in community clinics. Particularly because a clinic’s Board of Directors has responsibility for defining priorities for the work of the clinic, including both individual services and more systemic activities to promote equality for poor and vulnerable communities, the “fit” between the work of community clinics (mandated by Boards) and the “legal categories” approach in the statutory definition of “clinic law” is awkward and perhaps somewhat unworkable.<sup>241</sup> Moreover, the statute seems to go beyond defining legal categories to include definitions of the providers of legal aid services, an approach which exacerbates the problem of “silos” of legal aid services identified in slightly different contexts in the Trebilcock Report.<sup>242</sup>

### **Limitations of the Legal Categories Approach to Defining Priorities**

A focus on the category rather than the client: Clearly, the focus of a legal categories approach is the legal matter facing a client, rather than the potential impact of the problem on the client. According to this approach, eligible clients with criminal law, family law, clinic law and mental health law problems may qualify for legal aid services.<sup>243</sup> In this context, the legislation does not require an assessment of the importance of the matter for an individual client, although significantly, the statute *does not preclude* such an assessment. The possibility of assessing the impact of a legal problem on an individual client was addressed in the *Blueprint* report with respect to the principle of negative liberty which has traditionally accorded “categorical” priority for legal aid services in criminal law matters where an accused faces a risk of incarceration. As the report argued:

Example #2: “[A] young adult charged with a first offence who has difficulty communicating and for whom a conviction might result in a loss of employment and other negative consequences that may flow from acquiring a criminal record may appear to make a stronger claim for legal aid than someone who has been convicted several times before, faces an overwhelming (sic) and uncomplicated case, is able to communicate and knowledgeable about the justice system, and risks only a short period of incarceration about which he or she is not particularly troubled.”<sup>244</sup>

Clearly, this argument suggests that, in determining priorities for legal aid services, it may be appropriate not just to utilize legal categories for such services, but also to adopt measures to assess *the impact of the matter on the individual client*. To some extent, this approach reflects Australia’s definitions, using both categorical priorities and “special circumstances” in defining entitlement to legal aid.<sup>245</sup> This approach is reviewed in more detail later.

A focus on the individual rather than the systemic problem: A second limitation of the legal categories

approach to defining priorities is that it tends to individualize cases rather than recognizing systemic problems for some individuals within the justice system.

Example #3: In the criminal law context, there is evidence that many accused persons (perhaps 40%) suffer from mental illness and/or addiction. While there are now a number of specialized mental health courts, and a newly-established women's court for accused women with problems of addiction, the fact that a high proportion of accused persons suffer from mental illness and/or addiction may require a more systemic solution rather than the (repeated) provision of individualized legal aid services for accused persons whose problems result from illness rather than criminality.<sup>246</sup> Although more consultation is needed to determine the precise shape of a systemic approach to legal aid for these accused persons, data about repeat offenders in this category could provide evidence of potential cost savings with a systemic response.

Example #4: Similarly, systemic approaches may be more useful than the provision of individual categorical legal aid in relation to problems of discrimination, particularly for racialized and aboriginal persons in criminal proceedings. As was noted at the LAO consultation about this paper, the impact of conviction (perhaps even without a prison sentence) for a young aboriginal person is devastating in terms of subsequent limitations on life choices and opportunities. Similarly, Ewart argued that the impact of discriminatory conduct on the individual must be taken into account if legal aid is to address these systemic problems effectively; as he explained, a black man arrested by the police and who faces a criminal charge:

[needs] a lawyer who ... can appreciate what it is like to be denied opportunities because of your race, to be part of a frequently targeted community, to have been frequently stopped and questioned by the police, and to face a courtroom in which yours is the only black face. [This approach] is not just helpful to improving client confidence in the service being provided; it is vital for a variety of "traditional" purposes [including obtaining all relevant evidence, preparing the client to testify, etc].<sup>247</sup>

In such contexts, a "legal categories" approach to priorities for legal aid services may not respond effectively to the needs of particular kinds of clients: visible minorities, Aboriginal persons, or individuals who are mentally ill, illiterate, or who do not speak dominant languages. Moreover, more systemic approaches may offer overall cost savings, by contrast with the repeated provision of individual legal aid based on legal categories of entitlement.

Example #5: A third example was presented at the LAO consultation about this paper. It concerns the "cascading" problem of an applicant who requests social assistance, following relationship breakdown. The social assistance application triggers a claim for child support, so that the Ministry of Community and Social Services can obtain a contribution to the social assistance provided to the applicant, even though the applicant obtains no benefit from the child support order. Yet, because this process requires a court appearance (often funded by legal aid), it may increase tensions within the separating family, possibly by creating another "cascading" problem of custody and access litigation. Clearly, there is a need for a systemic

approach to the intersection of social assistance and legal aid; this problem cannot be addressed by a legal categories approach.

The impact of inadequate legal aid resources: A third limitation concerns problems with a “legal categories” approach when legal aid funds are scarce or inadequate. In this context, the combination of a legal categories approach and the fact that priority is accorded to the negative liberty principle has regularly resulted in the allocation of more funding to criminal law matters, leaving few (or no) legal aid funds available for family law and other civil law matters.

The *Blueprint* report recommendation to remove the traditional emphasis on negative liberty is reflected in the current statute, which leaves decisions about priorities to the Board of LAO. Yet, according to the recent Trebilcock Report, there has not been a significant shift in the allocation of legal aid resources from criminal law representation to other legal aid needs.<sup>248</sup> The disproportionate allocation of legal aid to criminal law cases is an important concern in a context in which LAO has a significant responsibility for the distribution of public funds in a manner that complies with *Charter* values of equality and non-discrimination.

Example #6: As numerous critics have pointed out, a disproportionate allocation of legal aid to criminal law cases means that legal aid resources are directed much more often to men (who are the primary users of criminal legal aid) than to women (who are much more often the users of family legal aid services). As Patricia Hughes argued forcefully, the effect of many current legal aid programs is that “women have inferior access to their legal rights and lack the equal protection of the law, resulting in unequal benefit of other legally sanctioned protections.”<sup>249</sup> This situation also denies women equality of access to government-provided services. A systemic approach, based on fundamental values of equality and non-discrimination requires that this disparity between legal aid in criminal law cases and in family law proceedings must be addressed.

Arguments about the need for legal aid in criminal cases frequently rely on the inequality of power for an accused person where the other party is the state. Two aspects of this problem are important:

Example #7: First, there are other circumstances in which the state is a party to the proceedings, including refugee claims, committal proceedings for mental illness, child protection matters, and social assistance hearings. If the argument is simply that the state is a party, then these matters should also attract strong support for the provision of legal aid, since the consequences of an adverse result are often just as significant as imprisonment for an accused: deportation in the refugee case, detention in a mental health facility with its loss of liberty, the loss of one’s children in child protection proceedings, and the loss of livelihood, including homelessness, in social assistance cases. In addition, it is important to take account of the fact that the Crown in a criminal case is obliged to act in the public interest,<sup>250</sup> an obligation that extends beyond the general requirements of lawyers’ professional ethics. This argument suggests that there may be some family and civil law contexts in which the presence of counsel is more necessary than in the criminal law context.

Example #8: Second, there are many situations in which the inequality of the parties may be just as significant as in cases involving the state and an accused person. Thus, if the need

for legal aid is based on inequality of power between the parties, there will be other situations that necessitate legal aid: a poor tenant who is challenging an eviction notice from a major corporate landlord; or an employee who is challenging a dismissal notice from a large corporate employer. In both cases, the resources of the corporate landlord or corporate employer may substantially exceed those of the state in criminal law matters.

Thus, the use of “legal categories” to determine legal aid priorities fails to take account of particular circumstances of individuals’ lives and the potential impact of the legal problems they experience. In this situation, it is important to explore some possible alternatives.

### **3. A “Legal Needs / Social Exclusion” Approach**

This approach to research on justiciable problems views legal problems and concepts of justice and of access to justice from the point of view of the people who experience them. This perspective locates access to justice in a broader policy framework than might be customary. The provision of access to justice services can play a part not only in alleviating or preventing justiciable problems, but also a broader range of social and health problems....<sup>251</sup>

Increasing interest in the UK, and also in Canada, in research identifying “justiciable problems” and how they “cluster” or “cascade” provides some useful information about how people actually experience the need for legal services, including legal aid. This research is also valuable in demonstrating how some problems may “trigger” additional legal and social problems. As the UK research suggested, patterns in the clusters of problems “show clearly that people experience ... linked and mutually reinforcing problems,” and that these patterns are found not only among low-income and socially excluded groups but also for those who are more affluent.<sup>252</sup> In this context, some researchers have suggested that “early and appropriate advice and action in relation to one problem might prevent individuals from going on to experience multiple problems and consequently becoming more vulnerable to ‘social exclusion;’” they also argued that this information about how justiciable problems may cluster or cascade could be used to develop diagnostic tools for advice providers and to identify vulnerable populations for whom “joined-up” or integrated legal and social services might be designed.<sup>253</sup>

In thinking about priorities for legal aid services, it is important to unpack these suggestions.

#### **Legal Advice for the Public**

The need for additional funding: Governmental and legal aid policies in the UK have increasingly focused on the need to expand advice services at an early stage so as to avert more serious and multiple problems from occurring; and there have been some good efforts to create better links and coordination among advice providers. At the same time, it seems likely that advice will often be more helpful to those who are less vulnerable individuals or groups, by contrast with those who have problems with literacy, language, mental or ill health, or cultural or geographic isolation. To repeat Lynn Mather’s critique, self-help is not a panacea: “for some people and some problems, self-help suggests abandonment, not empowerment.”<sup>254</sup>



Thus, if the Trebilcock Report is correct in concluding that more emphasis on legal advice for middle class persons would enhance political support for legal aid services in Ontario,<sup>255</sup> it seems that this recommendation, like the trend in the UK, to promote advice services could divert scarce resources from individuals and communities who are the *most* vulnerable and disadvantaged. In this way, a focus on legal needs and social exclusion in designing priorities for legal aid services suggests that the goal of enhancing middle class support for legal aid should be accomplished with *additional* funding, rather than the diversion of existing scarce legal aid funds for the clients and communities served by community clinics.

In addition, as was argued earlier in this paper, there is some evidence in the UK that the provision of enhanced and coordinated legal advice may also lead to a conclusion that those who do not avail themselves of such services are to “blame” for their problems of social exclusion. In this way, initiatives responding to the problems of legal needs and social exclusion - by the provision of legal advice - need to be monitored carefully.

Holistic and integrated services: Suggestions in the UK research with respect to using data about justiciable problems to develop diagnostic tools for advice providers, and in identifying vulnerable populations for whom more integrated legal and social services may be needed, may further enhance legal aid for existing client communities. By contrast with the UK, community legal clinics in Ontario already have sophisticated data about how legal problems may cluster or cascade for poor clients in relation to issues of social assistance, rental and low-income housing, immigration status, mental or physical dis/ability and discrimination; and many clinics have already developed specialized diagnostic tools and coordinated services to meet the breadth and variety of problems facing their clients.<sup>256</sup>

Yet, while the Trebilcock Report noted the existence of a number of “integrated service” agencies in Ontario, which offer legal and other services in one location,<sup>257</sup> the report failed to document how community clinics regularly provide referrals to other agencies, and how often they initiate and support liaison relationships with other service providers for purposes of follow up.<sup>258</sup> Indeed, a fundamental rationale for the creation of community clinics was recognition of the need for holistic legal services, a feature that has tended to be overlooked, both in the Trebilcock Report and in other initiatives of LAO. Clearly, there is clinic expertise that could be much more widely utilized in defining legal needs and overcoming social exclusion.

Example #9: The Ontario Civil Legal Needs Project, designed to understand the civil legal needs of low and middle-income Ontarians, has representation from the Law Society, Pro Bono Law Ontario, and LAO.<sup>259</sup> In addition, however, this Project would benefit from direct input from community legal clinics; clinics might also be represented on the Project’s executive committee and provide advice with respect to the methodology of surveys, the organization of focus groups, and the mapping of problems with access to justice - particularly with respect to the most vulnerable and disadvantaged Ontarians.

## **Legal Aid and Client Impact**

Combining “legal categories” and “legal needs / social exclusion” approaches: Priorities for legal aid based on “legal needs / social exclusion,” like the “legal categories” approach, focuses primarily on legal representation. By contrast with the “legal categories” approach, however, the “legal needs and social

exclusion” approach requires an assessment of the impact of failure to provide services in terms of the individual’s legal and social circumstances.

Example #10: The example in the *Blueprint* report concerning the needs of a first offender for whom conviction will have serious life consequences, by contrast with a repeat offender who is not particularly troubled about a jail sentence, offers one example of the operation of this approach to priorities. It focuses attention on assessing the needs and circumstances of individual applicants, not just the category of offence with which the accused is charged.

Example #11: The American Bar Association suggested another example of this approach to priorities. The ABA argued that the test for determining a need for counsel should be “whether it can be honestly said that the litigant can obtain a fair hearing without being represented by a lawyer.” In applying this test, the ABA defined criteria to be considered, suggesting that a lawyer’s representation would not be required *only if several criteria were all met*: the law and procedures are simple, the other side is not represented, both parties have intellectual, language, and other skills to enable their effective participation, and the judge assumes a responsibility for identifying the relevant facts and legal principles.<sup>260</sup> As an American judge argued, the test for legal aid representation in family law matters, outlined in *Lassiter* (similar to the *G (J)* test in Canada) should be applied “honestly - the words of that test as they would be understood by almost anyone in this society, lawyer or layperson.... If you do, you will find a constitutional right to counsel in civil cases.”<sup>261</sup> Clearly, this approach to priorities focuses on “legal needs / social exclusion” in relation to the impact on a client, not just a legal category of entitlement, in determining whether legal aid should be provided.

Thus, the “legal needs and social exclusion” approach to legal aid priorities would necessitate an assessment of the potential impact of a negative outcome on the legal aid applicant, having regard to individual circumstances in relation to the legal problem. Although this approach requires a different kind of assessment of legal aid applications, by contrast with the “legal categories” approach, it is possible to identify checklists of criteria to be assessed pursuant to this approach.

As noted above, the Australian approach to legal aid priorities offers one way of taking account of legal needs and social exclusion in practice. Although the Guidelines define Priorities initially in terms of legal categories, 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>262</sup> In this way, the Australian Priorities combine a “legal categories” approach with a modified “legal needs / social exclusion” approach. Moreover, because the Guidelines also require both a “means test” and a “merits test,” the public interest aspect of providing legal aid is also addressed explicitly in determining entitlement. This requirement recognizes, as Ewart noted, that the provision of representation to one applicant means the denial of service to another; thus, a “legal needs / social exclusion” approach, in addition to “legal categories,” may both structure the exercise of discretion and take into account the public interest.

“Legal needs / social exclusion” per se: By contrast with an approach that combines “legal categories” and “legal needs / social exclusion,” it is important to assess the merits of using only a “legal needs / social exclusion” approach:

One advantage is that all legal aid needs will then be treated equally in the assessment process, and this process can take a more holistic view of the nature of the problem in relation to the needs of the applicant, rather than first requiring a determination as to whether the claim fits a particular legal category. In this way, eliminating legal categories might better achieve *an effective focus on client needs*.

Second, an approach based on “legal needs / social exclusion,” rather than on legal categories, may prove *more flexible in responding to new or changing needs for legal aid*. Clearly, sophisticated monitoring and evaluation processes will be required to document how requests for legal aid have been met, or not; but this data may more accurately reflect client needs, since there will be no presumptions about “categorical” entitlement or disentanglement.

Finally, it is arguable that an approach to priorities based on “legal needs / social exclusion” may result in *much greater creativity in delivery systems*, so as to meet these client needs effectively and efficiently. By contrast, legal aid priorities based on “legal categories” may tend to reflect existing legal services and service providers in particular areas of law.

Example #12: Consider, for example, how the provision of criminal law representation might be designed for accused persons suffering from mental health problems, if the focus were on the *needs* of these clients who have come into contact with the criminal law system as a result of their dis/ability? Such a focus could result in a need to decriminalize some behaviours, to develop better community support, to create specialized court or tribunal processes to respond to these needs, or other solutions.

In this context, it is important to examine an approach to legal aid priorities based on “legal needs / social exclusion” *per se*. Although it might also be combined, as in the Australian model, with a “legal categories” approach, *a primary focus on needs rather than categories may permit much greater creativity in defining priorities for legal aid*.

The limitations of a focus on services for individuals: Yet, as many of these examples suggest, both the legal categories approach and the “legal needs / social exclusion” approach focus on the provision of *services*, and primarily services to *individuals*. Thus, neither of these approaches really addresses the systemic needs of those who are poor, disadvantaged and vulnerable for many different kinds of reasons.

Example #13: The need for legal aid to engage proactively in confronting systemic problems experienced by individuals has not attracted as much attention as legal aid services to individuals.<sup>263</sup> Yet, as Shelley Gavigan pointed out so poignantly, a “successful case” on behalf of a welfare mother, or a tenant who is threatened with eviction, results in one client who is still a welfare mother and another who is still a (low-income) tenant at the end of the day. Both of them are still poor and vulnerable,<sup>264</sup> and their need for legal aid will reoccur.

#### **4. A “Social Inclusion / Systemic” Approach**

The concept [of social inclusion] goes beyond the description of deprivation to focus on the social relations and the processes and institutions that underlie it. This can represent a shift

away from looking at deprivation in terms of individual attributes, and towards a focus on mechanisms, institutions and actors that are responsible for the deprivation. That is, it explicitly makes possible a discussion of power and inequality.<sup>265</sup>

In promoting goals of “social inclusion”, Mitchell and Shillington identified five critical dimensions for promoting social inclusion:

- conferring recognition on individuals and groups (including recognition of common worth through universal programs such as health care);
- nurturing the talents, skills, capacities and choices of children and adults to live a life they value and to make a contribution both they and others find worthwhile;
- having the right and the necessary support to make/be involved in decisions affecting oneself, family and community, and to be engaged in community life;
- sharing physical and social spaces to provide opportunities for interactions, and to reduce social distances between people (including shared public spaces such as parks and libraries); and
- having the material resources to allow children and their parents to participate fully in community life.<sup>266</sup>

As these dimensions of “social inclusion” make clear, the concept reflects individuals in communities, with opportunities and capacity for meaningful participation, not simply increased levels of income.<sup>267</sup> Relying on the work of Amartya Sen, and his recognition of the importance of promoting individual “capacities,”<sup>268</sup> Mitchell and Shillington argue that “social inclusion” means “the difference between being a *consumer* and being a *citizen*.” what is needed are systemic policies that “promote people’s capacities to act as citizens with equal freedom to conduct a life they have reason to value.”<sup>269</sup>

### **Legal Aid and “Social Inclusion”**

Focusing on systems and practices that create inequality: Legal aid priorities based on “social inclusion” are similar to priorities based on “legal needs / social exclusion” in that both are grounded in individuals’ experiences of inequality and disadvantage. However, when priorities focus on goals of social inclusion, they directly focus on identifying *the systems and practices that create poverty, vulnerability and inequality, and on structures and policies for changing them.*

A first step in implementing a “social inclusion” approach to legal aid priorities is to collect information about the ways in which existing systems and practices contribute to producing poverty, vulnerability and inequality, including those of governments, social systems, and law and legal processes. At least to some extent, this approach responds to Macdonald’s observation that collecting data is not enough; one needs a theory to interpret the data.<sup>270</sup>

However, information needed for a social inclusion approach differs from recent research undertaken

concerning justiciable problems, because *a social inclusion approach is designed to understand the legal and social contexts which create justiciable problems*, it is not primarily focused on identifying “problems” and the vulnerable people who experience them.<sup>271</sup> Moreover, it is clear that community legal clinics in Ontario already have much of this information available because of their efforts to create *systemic* solutions for individual and community problems. In addition, there are government reports, commissions of inquiry, and studies undertaken by anti-poverty and other advocacy groups to augment this information.<sup>272</sup>

A transformative and holistic perspective: A social inclusion approach to legal aid priorities reflects a *transformative* perspective on access to justice, one that requires fundamental questioning of existing practices and systems that contribute to systemic problems of poverty, vulnerability and inequality. Such an approach would allocate priorities so as to combat these conditions. In this way, it is similar to Ewart’s suggestion that legal aid services should respond to “the huge systemic problems of poverty and discrimination as themselves contributing to involvement with the criminal, civil, administrative and family law systems, and ... use legal and other resources to reduce the impact of poverty on the lives of the poor.”<sup>273</sup>

Example #14: Although this approach does not preclude a case by case approach, Ewart suggested that there could be other ways to address systemic problems: test cases, negotiations with police, landlords, or local welfare administrators, law reform activities on behalf of a group of affected persons, or legal interventions in cases.

More specifically, to implement such a program successfully, legal aid administrators must be knowledgeable about the circumstances of their clients’ lives and be able to assess where the law is “hurting the most” or where it might be developed to help.<sup>274</sup>

Example #15: In the criminal law context, for example, a social inclusion approach to legal aid priorities might challenge government criminalization strategies or reliance on incarceration as a primary strategy for punishment; it might rethink the role of counsel in cases involving accused persons with mental health issues in ways that respond to an accused’s problems beyond the criminal charge; it might consider proposing alternatives to conviction for first offences on the part of aboriginal or racialized accused persons in circumstances where such convictions may “trigger” ongoing social and legal problems.

Legal aid initiatives that utilize priorities of social inclusion may involve a combination of strategies, including the provision of general advice as well as educational programs, support for lobbying efforts related to reforms of the justice system, and test case litigation. Such efforts can mobilize communities to seek systemic changes to confront the problems of poverty, vulnerability and inequality.<sup>275</sup>

Moreover, while *Charter* values may provide some direction with respect to systemic issues for legal aid priorities, a “social inclusion” approach to legal aid priorities should not be limited only to *Charter* requirements. In addition, the “social inclusion” approach can exercise creativity in methods of delivery that use scarce funds efficiently.

Example #16: For example, Ewart argued that “the choice may not have to be between bail representation and divorce, but can be exercised in favour of an economical way of meeting bail representation needs, with the savings producing enough funding to support divorce

representation, perhaps provided that the government could be persuaded to streamline that process in a way which reduced the amount and cost of the legal work it required.”<sup>276</sup>

In this way, a social inclusion approach to legal aid priorities recognizes the fundamental role of legal aid in fostering the goal of substantive and equal justice for poor and vulnerable persons in our community. In doing so, it is essential to understand legal aid in terms of initiatives that confront systemic problems of inequality within the justice system, and their relationship to other problems of exclusion in society. Responding to these problems, using a social inclusion approach, would best enable the creation of holistic legal aid services.

### **5. Conclusion:**

#### **LAO’s Proactive Role and Ideas for Further Research and Experimentation**

[M]anagement of the legal aid system cannot be approached in isolation from the broader justice system and must be viewed as an integral part of a broader strategy of progressive and incremental reform of the justice system at large. Legal aid resources should be expended in ways that facilitate more timely and more effective resolution of disputes. In turn, *reforms to the broader justice system must also be pursued that facilitate this objective.*<sup>277</sup>

This statement was the first of seven concluding themes of the Trebilcock Report.<sup>278</sup> Its significance lies in its recognition of legal aid as an integral part of the overall justice system, and of the need for Legal Aid Ontario to take a proactive role in seeking ways to improve justice in Ontario in order to discharge its fundamental responsibility for effective legal aid policies. As this paper also suggests, LAO has robust and unique roles in the context of governmental measures intended to ameliorate the legal and social problems of the poorest, and most vulnerable and disadvantaged members of our communities: in Ontario, LAO has been designated the “lead agency” for the provision of advice, information and representation.

Recognizing that resources are always scarce, this paper suggests a number of opportunities for LAO to ensure that funds are used in ways that grapple with needed reforms to the overall justice system, that target individual needs using effective methods of delivery, and that engage with systemic problems of legal and social inequality to enable all residents of Ontario to have the benefits of the rule of law and of meaningful and democratic participation in our communities.

#### **Systemic Approaches to Legal Aid Priorities**

Understanding the needs of Ontarians for legal aid requires a broad conception of the role of law, and the ways in which members of the public come into contact with it, in order to respond effectively with scarce resources. Clearly, an approach which simply identifies legal categories of entitlement is not using legal aid funds prudently, since some recipients of categorical legal aid will not have significant needs, while others who are not so entitled may have very great needs. Thus, a categorical approach may be both over- and under-inclusive in relation to need.

In this context, it is critical to look at legal processes from a systemic perspective: how might they be designed to work more holistically and more effectively? What kinds of system changes could ensure more justice from law and legal processes? How might different personnel, different procedures, different fora, different kinds of solutions enable the justice system, and legal aid as an integral part of it, to work more effectively? And how can LAO redesign its priorities to accomplish these goals?

Moreover, although a “legal needs / social exclusion” approach to priorities will provide some assistance, a systemic approach will necessitate serious consideration of a “social inclusion” approach to priorities for legal aid. What kinds of specific actions might the Board of LAO recommend at this point? Although there is bound to be much debate about these matters, a number of suggestions, derived from the literature and raised at the LAO consultation on this paper seem to be particularly compelling:

Example #17: Bail proceedings As noted at the LAO consultation on this paper, there are significant problems with current processes for bail decisions, such that many accused persons consent to release with inappropriate conditions, sometimes on the advice of Duty Counsel. Since the ultimate outcome of a criminal proceeding may be strongly affected by an initial bail decision, it seems critical to change the culture relating to legal processes for determining bail decisions. Indeed, it seems that decisions of the Superior Court on bail reviews confirm these concerns. Dealing with the bail issue as a systemic matter might thus alleviate difficulties for accused persons, and also ensure that funding for bail hearings is utilized more effectively, in the context of criminal proceedings more generally.

Example #18: Community courts In addition, the development of “community courts” in New Zealand and in British Columbia, suggest an important way of thinking about access to justice for particular kinds of communities. The recent introduction in Toronto of a criminal court for women with problems of addiction or alcoholism may be one example, and the well-established *Gladue* courts are another. To the extent that community courts can offer specialized procedures and perhaps different forms of sentencing, they may respond more successfully to the “special circumstances” of individual clients. Significantly, this kind of initiative represents a systemic response that still responds to individual problems.

Example #19: Family law proceedings Similarly, the LAO consultation on this paper identified how applications for welfare result in proceedings relating to child support in the Ontario Court of Justice; and sometimes then escalate into custody/access disputes. In addition to these family law issues, however, there are significant systemic problems with the operation of family law proceedings related to both separation and divorce. The complexity of the statutory framework, in a context in which more than 40% of marriages end in dissolution, a statistic that does not include cohabiting relationships that similarly end in dissolution, means that many Ontarians must confront the justice system in family law matters. Although this issue does not affect only legal aid clients, there are clearly problems that result from high rates of unrepresented clients, at least some of whom have not been able to obtain legal aid. In this context, careful attention to the reviews of the Family Law Offices, and the special efforts on the part of the Toronto office to deal with client “needs” deserve to be examined more carefully: to what extent did the efforts of the Toronto office ensure that its clients did not experience additional legal problems, an issue that directly engages the longer term, not merely the immediate issues, in legal services? In addition, it

may be important for LAO to examine the Australian research that suggests that early *legal* advice and intervention may be more cost-effective in the long run than ADR processes.

Example #20: Further research about Australian approaches The LAO consultation queried the application *in practice* of the Australian system of Priorities (including “special circumstances”) and Guidelines (including the “means test” and “merits test,” which invoke the public interest). Although it appears that these criteria have not been used to alter the general approach to legal aid in Australia, these concepts nonetheless warrant further examination by the LAO Board: how might they be deployed to target needs more specifically?

Example #21: Information, advice and technology The review undertaken in this paper suggests caution with respect to a significant emphasis on the provision of legal information and advice to the public, particularly with respect to enhanced arrangements for technology. The US experience suggests that clients with some education, literacy, language and other skills may be able to utilize quite successfully legal websites, interactive computer fora, and other kinds of technological developments. However, the most vulnerable and disadvantaged will not be able to do so effectively. In this context, it is necessary to be strategic, particularly when funding is scarce, and to ensure that any information or advice programs are clearly responding to a range of clients, particularly those experiencing the effect of systemic problems.

More specifically, LAO needs to take seriously the decades of experiences in community legal clinics, which have regularly provided information and advice to target populations and in relation to systemic problems: there is no need to “reinvent the wheel.” By contrast, if LAO wishes to confront the legal problems of the middle-class, it is strongly suggested that the LAO mandate to provide legal aid to the poor necessitates an *additional* injection of funding for this purpose. To be blunt, to divert scarce legal resources from the poorest and most vulnerable communities to provide legal information and advice to the middle class would be unconscionable.

Example #22: Civil Legal Needs Project There is also a need for LAO to promote significant involvement on the part of community legal clinics in the Ontario Civil Legal Needs Project. Both in the design process for surveys, and in the development of focus groups, it is critical to ensure that poor and vulnerable Ontarians are included. Both the “justiciable needs” studies in the UK and studies of legal needs in Ontario in the 1980s have often reflected legal problems encountered by the middle class; in this context, to the extent that LAO has a primary responsibility for ensuring access to justice for the poor, there is a responsibility to ensure that the poorest and most vulnerable Ontarians are included. Indeed, as noted above, the Project would be much enhanced if LAO included clinic representation on its executive committee.

Example #23: Governmental program for poverty reduction The LAO consultation also identified a role for legal aid in the newly-established poverty reduction strategy of the provincial government. In this context, LAO needs to harness the expertise and experience of community clinics to determine the extent to which legal problems are related to poverty.



The example discussed at the consultation about the ways in which social assistance rules drive people into poverty and make it harder to escape a permanent poverty status represents only one issue that might well be addressed as part of this governmental initiative. Significantly, it may also be important to consider how family dissolution contributes to poverty, an issue that might be considered by the Family Law Offices. In addition, however, there are also issues about housing problems, mental and physical dis/ability problems, race and gender issues, the lack of status for refugees or immigrants, or employment and unemployment issues in the current recession. In the context of a significant poverty reduction program of the provincial government, LAO has a major opportunity, and a significant responsibility, to provide information and recommendations. This is a matter for which the community clinics and the Family Law Offices are well-situated to provide leadership and recommendations.

Clearly, these suggestions require further discussion, analysis, research and opportunities for experimentation and evaluation.

In this context, this paper is presented to the LAO and its Board with the intent to encourage a broad view of LAO's responsibility to promote access to justice, equality before the law, and a sense of "social inclusion" for the poorest and most vulnerable members of our community.

### Endnotes

1. See *Report of the Ontario Legal Aid Review: A Blueprint for Publicly Funded Legal Services* (1997) at 67 [hereafter *Blueprint* report]; and J Douglas Ewart., "Hard Caps; Hard Choices: A Systemic Model for Legal Aid" in F Zemans, P Monahan and A Thomas, eds., *A New Legal Aid Plan for Ontario: Background Papers* (North York: York University Centre for Public Law and Public Policy, 1997) 7.
2. *Blueprint* report at 67.
3. *Blueprint* report at 88-90.
4. *Blueprint* report at 87-90.

5. *Blueprint* report at 87-88.
6. *Blueprint* report at 256.
7. Michael Trebilcock, *Report of the Legal Aid Review 2008* (Toronto: Ministry of the Attorney General, 2008) [hereafter Trebilcock Report].
8. Christine Parker, *Just Lawyers: Regulation and Access to Justice* (Oxford: Oxford University Press, 1999) at 31-32 (emphasis added).
9. Cappelletti and Garth, *Access to Justice: A World Survey* (1978); *Access to Justice: Studies of Promising Institutions* (1978); *Access to Justice: Emerging Perspectives and Issues* (1979); and *Patterns in Conflict Management: Essays in the Ethnography of Law* (1979).
10. M Cappelletti and B Garth, "Access to Justice: the Newest Wave in the Worldwide Movement to Make Rights Effective" (1978) 27 *Buffalo Law Review* 181 at 182 (emphasis added).
11. MJ Mossman, "Access to Civil Justice: A Review of Canadian Legal Academic Scholarship" in A Hutchinson, ed., *Access to Civil Justice* (Toronto: Carswell, 1990) 53 at 61-63. See also Cappelletti and Garth, "Access to Justice," at 209.
12. Mossman, "Access to Civil Justice" at 62-65.
13. M Cappelletti and B Garth, "Access to Justice as a Focus of Research" (1981) 1 *Windsor Yearbook of Access to Justice* ix.
14. Cappelletti and Garth, "Access to Justice as a Focus of Research" at xvi.
15. Parker at 31.
16. Parker at 31.
17. Parker at 34, citing Roger Smith, director of the English Legal Action Group.
18. Parker at 37-38. See also David Trubek, "Critical Moments in Access to Justice Theory: The Quest for the Empowered Self" in Hutchinson, 107 at 122; and Sally Merry, "Sorting out Popular Justice" in S Merry and N Milner, eds., *The Possibility of Popular Justice: A Case Study of Community Mediation* (Ann Arbor: University of Michigan Press, 1993). Significantly, Parker identified (at 41) a new "fourth wave" of access to justice reforms which began to appear in the 1980s and 1990s, although often without the access to justice label: competition policies that were designed to allocate access to justice resources, both formal and informal, as efficiently as possible through market institutions. She documents how the introduction of less restrictive advertising policies by law societies, as well as the elimination of lawyers' monopoly on conveyancing, resulted in lower fees for some legal services in a number of common law jurisdictions in recent decades. However, as Parker acknowledged, these "fourth wave" reforms are more likely to increase access to justice goals for middle-class persons with some discretionary resources to allocate to legal services, or to commercial litigants; they are unlikely to be of any assistance to the poor: "those without discretionary resources will be excluded from the market and therefore from participation in the legal system."
19. Parker at 174-175; and at 185.

20. Parker at 192 (emphasis added).
21. Roderick Macdonald "Access to Justice in Canada Today: Scope, Scale, Ambitions" in J Bass, W Bogart and F Zemans, eds., *Access to Justice for a New Century - the Way Forward* (Toronto: The Law Society of Upper Canada, 2005) 19. See also Macdonald, "Theses on Access to Justice" (1992) 7 *Canadian Journal of Law and Society* 23; "Whose Access? Which Justice?" (1992) 7 *Canadian Journal of Law and Society* 175; "Access to Justice and Law Reform" (1990) 10 *Windsor Yearbook of Access to Justice* 287; and "Access to Justice and Law Reform #2" (2001) 19 *Windsor Yearbook of Access to Justice* 317.
22. Macdonald in Bass *et al* at 23.
23. Macdonald in Bass *et al* at 19.
24. Macdonald in Bass *et al* at 23-26.
25. Macdonald in Bass *et al* at 26-31.
26. Macdonald in Bass *et al* at 33-56 and 56-85.
27. Macdonald in Bass *et al* at 102; see also 101-107.
28. Trubek in Hutchinson at 115.
29. Province of Ontario, *Report of the Joint Committee on Legal Aid* (1965) at 97-98 [hereafter Joint Committee Report]. The Joint Committee investigated legal aid services in other provinces of Canada and in other jurisdictions, but it appears that they were guided in particular by the legal aid scheme adopted in England on the basis of recommendations by the Rushcliffe Committee in 1949. For an account of the origins of legal aid in the UK, see Maureen Spencer, "Public Subsidies without Strings - Labour and the Lawyers at the Birth of Legal Aid" (2002) 9:3 *International Journal of the Legal Profession* 251.
30. Joint Committee Report at 98.
31. Trubek in Hutchinson at 115.
32. Stephen Wexler, "Practicing Law for Poor People" (1970) 79 *Yale Law Journal* 1049.
33. Joint Committee Report at 61.
34. Joint Committee Report at 59; the report noted (at 64) that some lawyers refused to provide legal aid services under the voluntary system, believing that most requests for divorce constituted a "luxury."
35. Joint Committee Report at 58.
36. Ministry of the Attorney General, *Report of the Task Force on Legal Aid* (1974): Part 1 at 17 [hereafter Osler Report].
37. Osler Report at 18-19: "Preventive law, in the sense of timely advice, the careful drafting of necessary protective documents and merely the simple process of advising individuals of the existence of rules of law applicable to their situation ... is the area in which most people ... require advice and assistance most often.

38. Osler Report at 19: “It may frequently take a great deal of time, and hence money, to decide and advise a poor man upon rights that may exist under legislation or private contract relating to employment, housing, welfare or other social benefits vitally important to the poor man but small in terms of absolute dollars.”

39. Osler Report at 19: The Report noted an “unprecedented” scale of social and economic changes that were also reflected in law, including the enactment of legislation concerning consumer rights, relationships of landlord and tenant, social benefits, economic and other anti-discrimination rules, immigration matters, civil rights, workmen’s (sic) compensation. Moreover, in spite of its generic terms, “a very high proportion of it affects the poor person more directly and intrinsically than a person of means or affluence; ... and more and more of these detailed regulations affect the individual and particularly the poor individual, at his work and in his life.”

40. Osler Report at 21: The Report also noted how the increasing recognition of citizens in regulating their own affairs had become “part of the fabric of our society.” As a result, there was an increasing need to assist groups and communities to engage in consultation in relation to matters affecting them. Thus, “the wide range of professional services that lawyers have traditionally provided to their clients is expected to be provided to the poor as well as the rich. The concept of Legal Aid as ‘litigation’ is now clearly seen as inadequate.”

41. Osler Report at 21: The Report also documented the inaccessibility of private lawyers’ offices, often located in downtown settings far from clients’ homes and workplaces; as well as lack of information about legal aid services.

42. Osler Report at 25; Part 2 of the Report focused on legal aid needs in rural and aboriginal communities.

43. Osler Report at 54.

44. Ministry of the Attorney General, *Report of the Commission on Clinical Funding* (1978) at 8 and 10 [hereafter Clinical Funding Report]. In relation to the scope of legal aid clinics, the Report also recognized (at 12-13) a need to define “community” as including both geographical communities as well as communities of interest.

45. Clinical Funding Report at 15.

46. According to Ab Currie, “The fact that problems are so frequent as to be nearly normal is more a cause for concern than for dismissing them as merely *the problems of everyday life*.” See Ab Currie, “The Legal Problems of Everyday Life” (Paper presented to the International Legal Aid Group Conference, Antwerp 2007) at 10 (emphasis added).

47. Osler Report at vii.

48. Richard Moorhead and Pascoe Pleasance, “Access to Justice after Universalism: Introduction” (2003) 30:1 *Journal of Law and Society* 1-2.

49. For a list of recent studies, task force reports and government documents, see the Bibliography, Part II.

50. Moorhead and Pleasance. See also Hilary Sommerlad, “Some Reflections on the Relationship between Citizenship, Access to Justice, and the Reform of Legal Aid” (2004) 31:3 *Journal of Law and Society* 345.

51. *Blueprint* report at 172.

52. *Gideon v Wainwright* 372 US 335 (1963); and see also *Powell v Alabama* 287 US 45 (1932); and *Argersinger v Hamlin* 407 US 25 (1972).

53. American Bar Association, *Gideon's Broken Promise: America's Quest for Equal Justice: A Report on the American Bar Association's Hearings on the Right to Counsel in Criminal Proceedings* (Chicago: American Bar Association, 2004) at 29 [hereafter *Gideon's Broken Promise*].
54. ABA, *Gideon's Broken Promise* at 38.
55. ABA, *Gideon's Broken Promise* at 41-45 and Appendix II.
56. ABA, *Gideon's Broken Promise* at Appendix II.
57. *Lassiter v Department of Social Services* 452 US 18 (1981).
58. Deborah Rhode, "Access to Justice: Connecting Principles to Practice" (2004) 17 *Georgetown Journal of Legal Ethics* 369 at 375. See also Laura Abel and Max Rettig, "State Statutes Providing for a Right to Counsel in Civil Cases" (July-Aug 2006) 40 *Clearinghouse Review* 245; Clare Pastore, "Life after *Lassiter*: An Overview of State-Court Right-to-Counsel Decisions" (July-Aug 2006) 40 *Clearinghouse Review* 186; and Bruce Boyer, "Justice, Access to Courts, and the Right to Free Counsel for Indigent Parents: The Continuing Scourge of *Lassiter v Department of Social Services of Durham* (2005) 36 *Loyola University Chicago Law Journal* 363.
59. Legal Services Corporation, *Documenting the Justice Gap in America: The Current Unmet Civil Legal Needs of Low-Income Americans* (Washington DC: Legal Services Corporation, 2007), 2<sup>nd</sup> edition [hereafter *Justice Gap*]. The Legal Services Corporation has national responsibility for legal aid services in the USA.
60. *Justice Gap* at 13 (emphasis in original). The exception was Vermont, but the report noted that this study had adopted an abbreviated questionnaire and interview format. By contrast, the Massachusetts report in 2003 documented an increased need in that state since an earlier study in 1993.
61. *Justice Gap* at 19.
62. American Bar Association, Report to the ABA House of Delegates, August 2006 [hereafter ABA Report]. The report detailed efforts on the part of the ABA, including its *amicus* briefs in cases such as *Lassiter* [above] to support the extension of legal aid services in civil matters. In examining a range of civil legal proceedings, the report argued that there were many that threatened "loss of basic human needs" which are equally adversarial and often more complex [than child welfare proceedings.] The report argued that counsel is necessary to ensure equality before the law for litigants and to ensure the "functioning of an effective justice system," and identified (at 7-8) a number of efforts in some states to provide such counsel.
63. ABA Report at 13. The report included an expanded description of the services envisaged in each category.
64. ABA Report at 14. The report also argued for increased expenditure on legal aid services by comparing national expenditures on medicaid (\$200 billion per year and \$4200 per eligible person) to funding for civil legal aid at \$60 to \$100 per eligible poor person; the Report argued (at 15) that legal aid expenditure represents a "minimal and justifiable investment" and is just 1.5 percent of the annual cost of lawyers in American society overall.
65. ABA Report at 13. For some recommendations about access to legal information and advice, see Julia Gordon, *Equal Justice and the Digital Revolution: Using Technology to Meet the Legal Needs of Low-Income People* (Washington DC: Center for Law and Social Policy & National Legal Aid and Defender Association, 2002); and Julia Gordon, "Technology Assisted Advocacy" (2000) 5:1 *University of the District of Columbia Law Review* 235, and other materials therein.

66. Earl Johnson Jr, "Justice and Reform: A Quarter Century Later" in Francis Regan, *et al*, *The Transformation of Legal Aid: Comparative and Historical Studies* (Oxford: Oxford University Press, 1999) 9 at 13-14.

67. Johnson Jr in Regan *et al* at 36. The ideological tenor of this claim is also shared by other access to justice scholars; for example, John Kilwein firmly asserted that the drive to cut government-funded legal aid is driven by ideology and self-interest in the United States: see John Kilwein, "The Decline of the Legal Services Corporation: 'It's Ideological, Stupid!'" in Regan *et al*, 41 at 58.

68. Alan Houseman, "Civil Legal Aid in the United States: An Update for 2009" (paper for International Legal Aid Group conference, Wellington, NZ, 1-3 April 2009) at 1. Houseman is Director of the Center for Law and Social Policy.

69. Jeffrey Stutz and Lucille Narun, *Technology in Aid of Client Services* (Report for Legal Aid Ontario, 2008) at 2. The authors reported (at 3) on responses of LAO participants at a seminar about the expanded use of technology and noted that these participants "ranked creation of a centralized, interactive website highest, equal in value to offering an online application process for legal aid." No information is available about who participated in the seminar, and the extent to which these participants were involved in front-line delivery of legal aid.

70. Julia Gordon for the Project for the Future of Equal Justice, *Equal Justice and the Digital Revolution: Using Technology to Meet the Legal Needs of Low-Income People* (CLASP and NLADA, 2002) at 2.

71. Gordon at 2.

72. Gordon at 2.

73. Julia Gordon, "Technology Assisted Advocacy" (2000) 5:1 *University of the District of Columbia Law Review* 235 at 240-241. See also John Tull, "The Technologically Enabled Legal Services Delivery System from the Perspective of Senior Management" (2000) 5:1 *University of the District of Columbia Law Review* 247; and Michael Genz, "Technology and Client Community Access to Legal Services - Suggestive Scenarios on Community Legal Education, Intake and Referral and Pro Se" (2000) 5:1 *University of the District of Columbia Law Review* 225.

74. For example, Earl Johnson Jr compared both per capita expenditures on civil legal aid services and also relative shares of the GNP invested in publicly-funded civil legal aid services in the 1990s; according to the figures presented, the United States was always the lowest on these scales among a number of western jurisdictions: see Earl Johnson Jr, "Equal Access to Justice: Comparing Access to Justice in the United States and Other Industrial Democracies" (2000-2001) 24 *Fordham International Law Review* S83 at S93-S95.

75. Houseman, at 26 ff. See also the report of the ABA Standing Committee on Pro Bono and Public Services, *Supporting Justice: A Report on the Pro Bono Work of America's Lawyers* (2004). The report surveyed 1100 lawyers in the United States, in private practice, corporate counsel, government and academic settings, and reported that two-thirds of respondents provided free pro bono services to people of limited means; 46% of the lawyers surveyed met the ABA's aspirational goal of providing 50 hours of such services.

76. Houseman at 4-5.

77. Houseman at 32 ff (emphasis added).

78. Houseman at 32-33.

79. Houseman at 33.

80. American Bar Association, *Report to the House of Delegates, Principles of a State System for the Delivery of Civil Legal Aid* (112B), 7 August 2006. See also Houseman at 33.

81. Don Fleming and Anne Daly, "The Retreat of the Legal Profession from Legal Aid: Labour Market Change in the Australian Mixed Model" (2007) 14:1 *International Journal of the Legal Profession* 21 at 24. See also Don Fleming and Francis Regan, "Re-visiting the Origins, Rise and Demise of the Australian Legal Aid Office" (2006) 13:1 *International Journal of the Legal Profession* 86; and Susan Armstrong, "Labor's Legal Aid Scheme: The Light that Failed" in R Scotton and H Ferber, eds., *Public Expenditure and Social Policy in Australia*, vol II (Melbourne: Longman, Cheshire, 1979).

82. Fleming and Daly at 24-25.

83. Fleming and Daly at 25. The authors noted that in the decade 1990/91 to 2001/02, approvals in criminal law rose by two-thirds, while the number of approvals for family law declined; however, family law applications increased in 2001/02 to 1990/91 levels.

84. See Commonwealth Legal Aid Priorities [hereafter Commonwealth Priorities]; and Schedule 1: Commonwealth Legal Aid Guidelines [hereafter Commonwealth Guidelines].

85. Commonwealth Priorities, sections 1.1 to 1.6.

86. Commonwealth Priorities, sections 1.7.1 (c); and 1.7.2.

87. The test involves a consideration of the legal and factual merits, on the basis of which the action is "more likely than not to succeed." Commonwealth Guidelines, Part 1 #4 (2).

88. The test is "met only if the Commission considers that a prudent self-funding litigant would risk his or her own financial resources in funding the proposed action." According to the explanatory note, this test "aims to put assisted litigants into an equal but not better position than private litigants without 'deep pockets' who risk their own funds." Commonwealth Guidelines, Part 1 #4 (3).

89. The test requires the Commission to assess the costs involved in relation to the "likely benefit to the applicant or, in appropriate circumstances, the community." The examples of inappropriate actions include applications to dispense with a spouse's consent to a passport to enable a parent to travel overseas with a child; and some aspects of contact and property disputes in family law where the issue is of minor significance, such as which parent will pay for taxi or bus fares for a child. Commonwealth Guidelines, Part 1 #4 (4).

90. Interview with representatives of the Legal Assistance Branch, Attorney General's Department, Canberra Australia, 16 March 2009.

91. In this context, see also Australian Government, *Review of the Commonwealth Community Legal Services Program: Achieving a Just and Secure Society*, March 2008.

92. Commonwealth Priorities, section 1.2.

93. Commonwealth Guidelines, Part 2 #2.1 (2) and 2.2 (2) and (3).

94. Rosemary Hunter, "Adversarial Mythologies: Policy Assumptions and Research Evidence in Family Law" (2003) 30:1 *Journal of Law and Society* 156.

95. Australian Law Reform Commission, *Equality before the Law: Justice for Women*, Report No 69, 1994 at 4.16; and Batts J, “Challenging the Legal System’s Response to Domestic Violence” (paper delivered in Brisbane, Qld, 23-26 March 1994).

96. See Australian Government, “Social Inclusion Principles for Australia”: <http://www.deewr.gov.au/Department/SocialInclusion>.

97. Interview with representatives of the Legal Assistance Branch, Attorney General’s Department, Canberra Australia, 16 March 2009.

98. Government of Victoria, “A Fairer Victoria: Creating Opportunity and Addressing Disadvantage” (2005).

99. Mary Anne Noone, “Towards Integrated Legal Service Delivery” (Paper presented to the International Legal Aid Group Conference, Wellington NZ, 1-3 April 2009). Noone’s paper also reviews literature concerning other programs of integrated service delivery in the UK and the US.

100. Law Commission of New Zealand/ Te Aka Matua O Te Ture, *Delivering Justice for All: A Vision for New Zealand Courts and Tribunals* (Wellington: Law Commission, March 2004) at 27 [hereafter *Delivering Justice*]. The Commission noted that these statistics were obtained from the Legal Service Agency Performance Report in January 2003. However, according to a Law Commission report in 2004, legal aid in criminal cases was not generally available unless imprisonment was a possible sentence; the report also indicated that the number of refusals of legal aid services in criminal cases was about 5000 per annum since 1998, and that the numbers in family law cases had doubled to about 1000 per year since 1998.

101. See Legal Services Agency / Pokapu Ratonga Ture, “National Report: New Zealand” (paper prepared for the International Legal Aid Group Conference, Wellington New Zealand, 1-3 April 2009) at 17-18. The PDS employs a staff of 28, of whom 20 are lawyers. See also Martin Jenkins, *Evaluation of the Public Defence Pilot*, May 2008.

102. Legal Services Agency / Pokapu Ratonga Ture, “National Report: New Zealand” at 18-19.

103. *Delivering Justice* at 27-28, citing Legal Services Agency *Annual Report 2000-2001*.

104. *Delivering Justice* at 28.

105. New Zealand Bill of Rights Act, 1990, section 24(c), (d) and (f). For an overview of the NZ Bill of Rights in relation to Canada’s *Charter of Rights and Freedoms*, see Grant Huscroft, “Protecting Rights and Parliamentary Sovereignty: New Zealand’s Experience with a *Charter*-Inspired Statutory Bill of Rights” (2002) 21 *Windsor Yearbook of Access to Justice* 111.

106. New Zealand Bill of Rights Act, 1990, section 25(a). *Delivering Justice* also noted (at 25) that “the principles of natural justice may also mean that litigants [in civil cases] require representation.”

107. *Delivering Justice* at 26. The report identified the vulnerability of an unrepresented person, as well as the problems created for the administration of courts, as a result of a lack of representation.

108. The scheme was established pursuant to the *Legal Services Act 2000*, sections 50-51, but police took the position that they had no general duty to inform a person in custody of the existence of the scheme. The Commission agreed with the NZ Court of Appeal’s decision in *R v Kaiji* in 2003 that giving advice about the scheme was “integral to a fair opportunity for the person to decide whether or not to exercise the right: see CA333/03 and *Delivering Justice* at 29. The NZ Bill of Rights also provides for a right of access to legal advice: see



section 23(1)(b).

109. *Delivering Justice* at 29-31.

110. *Delivering Justice* at 30-31. The Commission also commended a pilot project on the part of the Legal Services Agency for salaried services in criminal matters.

111. *Delivering Justice* at 31-32.

112. *Delivering Justice* at 35.

113. *Delivering Justice* at 13-15. The recommendations detailed the specific obligations of the state agency with lead responsibility, and suggested a variety of delivery methods to ensure widespread access to this information.

114. *Delivering Justice* at 13.

115. Trebilcock Report at 99-109.

116. *Delivering Justice* at 119 ff. The recommendation also included abolition of the existing District Courts.

117. *Delivering Justice* at 119.

118. For another example, see New Zealand Law Commission Report 72: *Subsidising Litigation* (Wellington: Law Commission, May 2001). See also Ministry of Social Development, "Leading Social Development, Ministry of Social Development Statement of Intent 2005/06" (Wellington, 2005) and Don Gray, Min of Social Development, "Focusing on Outcomes; Monitoring Results: Developments in New Zealand" (Paper presented at the International Legal Aid Group Conference, Wellington NZ, 1-3 April 2009).

119. For a history of legal aid services, particularly focusing on services in criminal law, see Tamara Goriely, "Criminal Justice, Legal Aid, and the Defence of Liberty" in Richard Young and David Wall, eds., *Access to Criminal Justice: Legal Aid, Lawyers & the Defence of Liberty* (London: Blackstone Press, 1996) 26; for a discussion of the Rushcliffe Committee and the problems of implementing its reforms, see 41-45.

120. Michael Zander, "Justice and Access to Justice" in Zander, *The State of Justice* (London: Sweet & Maxwell, 2000) 1 at 7 and 24 (the 51<sup>st</sup> Hamlyn Lectures).

121. See also Carolyn Regan, Legal Services Commission, "National Report: England and Wales" (Paper presented to the International Legal Aid Group Conference, Wellington NZ, 1-3 April 2009). According to the figures presented in the paper, at 4, the cost of legal aid in 2007-08 was £2,058.6m, with 56% spent on criminal law and 38% on civil matters; and 6% on administration. By contrast, 40% of "legal aid acts of assistance" were provided in civil matters, and 60% in criminal law.

122. For example, see Hazel Genn, *Paths to Justice: What People Do and Think about Going to Law* (Oxford: Hart Publishing, 1999); Hazel Genn and Alan Paterson, *Paths to Justice Scotland: What People in Scotland Do and Think about Going to Law* (Oxford: Hart Publishing, 2001); and Pascoe Pleasance with Nigel Balmer and Alexy Buck, *Causes of Action: Civil Law and Social Justice* (London: Legal Services Commission, 2006) 2<sup>nd</sup> ed. In *The State of Justice*, Zander offered a trenchant analysis of the findings in Genn, *Paths to Justice*, concluding that "Whether one thinks that a person *should* involve him or herself in legal proceedings can only be answered sensibly in the context of a particular situation with knowledge of the full facts.... Trying for research purposes to evaluate someone else's decision to do nothing in pursuing a legal remedy is ... an exercise fraught with difficulties" see "Civil Justice" in

*The State of Justice*, 27 at 29-33.

123. The Labour Party, under Tony Blair, was elected in May 1997 and publicized its planned Social Exclusion Unit a few months later in August 1997. The Unit was initially set up for two years and was based in the Cabinet Office, reporting directly to the Prime Minister, Tony Blair. Its mandate was to produce “joined-up solutions to joined-up problems.” In 2002, the Unit was moved from the Cabinet Office to the Office of the Deputy Prime Minister, and more recent reports have engaged in further efforts of “mainstreaming exclusion.” See Ruth Levitas, *The Inclusive Society? Social Exclusion and New Labour* (Houndmills, Basingstoke and New York: Palgrave MacMillan, 2005) 2<sup>nd</sup> ed at 1, 193 and 219.

124. Alexy Buck, Nigel Balmer and Pascoe Pleasance “Social Exclusion and Civil Law: Experience of Civil Justice Problems among Vulnerable Groups” (2005) 39:3 *Social Policy and Administration* 302 at 303. The authors identify the definition of “social exclusion” by the Social Exclusion Unit as “a shorthand term for what can happen when people or areas suffer from a combination of linked problems such as unemployment, poor skills, low incomes, poor housing, high crime, bad health and family breakdown.”

125. Levitas at 2. The Nice Summit in 2000 specified four key objectives, including facilitating participation in employment and access by all to resources, rights, goods and services; preventing the risks of exclusion; helping the most vulnerable; and mobilizing all relevant bodies in overcoming exclusion. As Levitas points out (at 190-191), “most member states [including Britain] for the 2001 plan ... simply reorganized its existing policy and statistics under the Nice headings....”

126. Levitas at 2. For another exploration of the idea of “social exclusion,” see Amartya Sen, “Social Exclusion: Concept, Application, and Scrutiny” (Office of Environment and Social Development, Asian Development Bank, June 2000).

127. Levitas at 2-3. For some commentary on Levitas, see Stephen Driver, “Review” (2006) 40:3 *Social Policy and Administration* 330; and Finn Bowring “Social Exclusion: Limitations of the Debate” (2000) 20:3 *Critical Social Policy* 307.

128. Buck, Balmer and Pleasance, “Social Exclusion and Civil Law” at 304.

129. Buck, Balmer and Pleasance, “Social Exclusion and Civil Law” at 305-306. This research was conducted by the Legal Services Research Centre, the independent research arm of the Legal Services Commission; it includes a national periodic survey of justiciable problems. The first survey was conducted in 2001 and a follow up study occurred in 2004, and involves more than 5000 households; the most recent study was undertaken in 2007.

130. Buck, Balmer and Pleasance, “Social Exclusion and Civil Law” at 317-320; Alexy Buck, Pascoe Pleasance, Nigel Balmer, Aoife O’Grady and Hazel Genn, “Lone Parents and Civil Law: Their Experiences of Problems and their Advice-Seeking Behaviour” (2004) 38:3 *Social Policy and Administration* 253; and Pascoe Pleasance, Nigel Balmer, Alexy Buck, Aoife O’Grady and Hazel Genn, “Multiple Justiciable Problems: Common Clusters and Their Social and Demographic Indicators” (2004) 1:2 *Journal of Empirical Legal Studies* 310.

131. Richard Moorhead anticipated many of the issues in his 1998 article, “Legal Aid in the Eye of a Storm: Rationing, Contracting, and a New Institutionalism” (1998) 25:3 *Journal of Law and Society* 365.

132. Richard Moorhead, “Third Way Regulation? Community Legal Service Partnerships” (2001) 64 *Modern Law Review* 543.

133. Department for Constitutional Affairs (Great Britain), *A Fairer Deal for Legal Aid* (London: The Stationery Office Limited, 2005) at 31.
134. Department of Constitutional Affairs and the Law Centres Federation, *Legal and Advice Services: A Pathway to Regeneration* (2004). See also Lord Chancellor's Department and Law Centres Federation, *Legal and Advice Centres: A Pathway out of Social Exclusion* (2001); and National Association of Citizens Advice Bureaux, *Geography of Advice: An Overview of the Challenges Facing the Community Legal Service* (2004).
135. Such arrangements are consistent with ideas of "responsabilization" in criminology: for example, see David Garland, "The Limits of the Sovereign State" (1996) 36 *British Journal of Criminology* 445.
136. Hilary Sommerlad, "Reflections on the Reconfiguration of Access to Justice" (2008) 15:3 *International Journal of the Legal Profession* 179 at 190. Sommerlad's comments were based on legal aid arrangements in the UK prior to the Carter reforms: see Lord Carter of Coles, *Legal Aid: A Market-based Approach to Reform* (London 2006).
137. Moorhead, "Third Way Regulation" at 550.
138. Moorhead, "Third Way Regulation" at 545. As Moorhead argues, these management and auditing approaches are heavily imbued with paradigms based on accounting and economic efficiency.
139. Moorhead, "Third Way Regulation" at 560-562; Hilary Sommerlad, "Managerialism and the Legal Profession: A New Professional Paradigm" (1995) 2 *International Journal of the Legal Profession* 159; and Sommerlad and David Wall, *Legally Aided Clients and their Solicitors: Qualitative Perspectives on Quality and Legal Aid* (London: Law Society, 1999).
140. Ab Currie, "The Nature and Extent of Unmet Need for Criminal Legal Aid in Canada" (2004) 11:3 *International Journal of the Legal Profession* 191; and Currie, "A National Survey of the Civil Justice Problems of Low and Moderate Income Canadians: Incidence and Patterns" (2005) and other unpublished research.
141. Sommerlad, "Reflections on the Reconfiguration of Access to Justice" at 189-190, referring to the research studies by Pleasance, Buck and Palmer, eds., *Transforming Lives and Social Process* (London: Legal Services Commission, 2006) and Hazel Genn, *Paths to Justice* (Oxford: Hart Publishing, 1999).
142. Clinton Bamberger, "Statement to the Committee on Legal Aid in the Netherlands," cited in Tamara Goriely, "Legal Aid in the Netherlands: A View from England" (1992) 55:6 *Modern Law Review* 803 at 821.
143. Tamara Goriely, "Legal Aid in the Netherlands: A View from England" (1992) 55 *Modern Law Review* 803 at 817. See also Erhard Blankenburg, "The Lawyers' Lobby and the Welfare State: The Political Economy of Legal Aid" in Regan *et al* 113.
144. Susanne Peters, Lia Combrink and Peter van den Biggelaar, "National Report: The Netherlands" (Paper presented to the International Legal Aid Group Conference, Wellington NZ, 1-3 April 2009) at 2-4.
145. Peters, Combrink and van den Biggelaar, at 3. The percentage of households with legal expense insurance in 2006 was 28%, up from 14% in 2000.
146. Steven Gibens, "National Report: Belgium" (Paper presented to the International Legal Aid Group Conference, Wellington NZ, 1-3 April 2009) at 1.

147. Matthias Kilian and Francis Regan, "Legal Expenses Insurance and Legal Aid - Two Sides of the Same Coin? The Experience from Germany and Sweden" (2004) 11:3 *International Journal of the Legal Profession* 233. As the authors note (at 234), there is an EU directive which regulates LEI, but it sets up only a general framework; thus, LEI follows "business principles" while legal aid is generally defined in public policy.

148. Kilian and Regan at 252. For an overview of reforms of the German court system, see Konstanze Plett, "Competing Objectives in Civil Justice: the German Experience" in Hutchinson at 155. As Plett argued (at 175), goals of efficiency and access to civil courts are in conflict: there is a gap between the ideal and reality.

149. Trebilcock Report at 96-97.

150. Trebilcock Report at 113. See also Lua Kamál Yuille, "No One's Perfect (Not even Close): Reevaluating Access to Justice in the United States and Western Europe" (2003-2004) 42 *Columbia Journal of Transnational Law* 863.

151. Vicki Schmolka, *Making the Case: The Right to Publicly-Funded Legal Representation in Canada* (Ottawa: Canadian Bar Association, 2002) at 22E (emphasis added) [hereafter CBA Report]. There are numerous provisions of the *Charter* relevant to legal aid. For one assessment, see MJ Mossman, "Toward a Comprehensive Legal Aid Program in Canada: Exploring the Options" (1993) IV *Windsor Review of Legal and Social Issues* 1.

152. CBA Report at 2E to 4E.

153. CBA Report at 2E to 3E. For the scope of international obligations, see Nathalie des Rosiers, "The Legal and Constitutional Requirements for Legal Aid" in *Blueprint* report at 503 (vol 2). In addition, there are also some specific provisions in the *Criminal Code*, the *Youth Criminal Justice Act*, and the *Child and Family Services Act*, which mandate legal aid in prescribed situations.

154. [2007] 1 SCR 873; 2007 SCC 21.

155. See [2006] BCJ No 2015; [2007] 1 WWR 331 (BCSC); and [2008] BCJ No 350; 290 DLR (4<sup>th</sup>) 617 (BCCA). The CBA request for leave to appeal to the SCC was denied in July 2008.

156. For purposes of this research project, a comprehensive analysis of decisions concerning *Charter*-based claims to legal aid services was prepared as a background paper, available on request.

157. Prior to these recent judicial decisions concerning legal aid entitlements, several scholars argued for recognition of an entrenched constitutional right to legal aid services. Their arguments were usually grounded in the rule of law as a fundamental constitutional principle. For example, Patricia Hughes argued that the rule of law implies a constitutional right to meaningful access to the legal system, and a constitutional right to vindicate rights established by law: Hughes, "A Constitutional Right to Civil Legal Aid" in CBA Report at 99E. Similarly, Melina Buckley argued that a right to legal counsel "inheres in the rule of law" and that "lack of legal aid reinforces and exacerbates existing inequalities": Buckley, "The Challenge of Litigating the Rights of Poor People: The Right to Legal Aid as a Test Case" in M Young, S Boyd, G Brodsky and S Day, eds., *Poverty: Rights, Social Citizenship, and Legal Activism* (Vancouver: UBC Press, 2007) 337 at 342. As noted, however, courts have been reluctant to recognize a general constitutional right to state-funded legal counsel; as the court stated in *Christie*, the rule of law does not imply such a general constitutional right to counsel. This decision reflects a reluctance on the part of the courts to establish an abstract obligation, with potentially wide-ranging ramifications for government expenditures.

158. *New Brunswick v G (J)* [1999] 3 SCR 46; 177 DLR (4<sup>th</sup>) 124 (emphasis added).

159. David Dyzenhaus, “Normative Justifications for the Provision of Legal Aid” in *Blueprint* report at 475 (vol 2) (emphasis added).
160. MJ Mossman, “A Constitutional Right to Civil Legal Aid in Canada” in CBA Report at 149E.
161. Dyzenhaus “Normative Justifications.” See also Francis Regan, “Criminal Legal Aid: Does Defending Liberty undermine Citizenship?” in Young and Wall at 70.
162. *Dunmore v Ontario (Attorney General)*, [2001] 3 SCR 1016, at para 29, citing *Constitutional Law of Canada* [loose-leaf ed] at 34-35 (emphasis in original).
163. *New Brunswick v. G(J)*.
164. *Blueprint* report at 139 (emphasis added).
165. Patricia Hughes and Mary Jane Mossman, “Re-Thinking Access to Criminal Justice in Canada: A Critical Review of Needs and Responses” (2002) XIII *Windsor Review of Legal and Social Issues* 1.
166. Janet Mosher, “Poverty Law: A Case Study” in *Blueprint* report 913 at 925 (vol 3).
167. Marc Galanter, quoted in David Wall, “Legal Aid, Social Policy, and the Architecture of Criminal Justice: The Supplier Induced Inflation Thesis and Legal Aid Policy” (1996) 23 *Journal of Law and Society* 549 at 556-557.
168. Wall at 557.
169. *Blueprint* report at 25.
170. *Blueprint* report at 22-23. The report also identified (at 23) social changes, particularly rising levels of unemployment, which resulted in more eligible clients on the basis of income guidelines.
171. Brenda Cossman and Carol Rogerson, “Case Study in the Provision of Legal Aid: Family Law” in *Blueprint* report at 773 (vol 3). The duration of marriages has also continued to decline: see Vanier Institute of the Family, *Profiling Canada’s Families II* (Ottawa: Vanier Institute of the Family, 2000) at 48 and 52.
172. The *Child and Family Services Act* was amended to create authority for earlier and swifter intervention to remove children at risk, following the report of the Panel of Experts on Child Protection (Ontario), *Protecting Vulnerable Children* (Toronto: Ministry of Community and Social Services, 1998): the standard for intervention was changed from “substantial risk of harm” to “likelihood of risk of harm.”
173. Wall at 557.
174. Wall cited (at 557) the *Criminal Justice Act 1991*, the *Criminal Justice Act 1993*, and the *Criminal Justice and Public Order Act 1994*.
175. Alan Young, “Legal Aid and Criminal Justice in Ontario” in *Blueprint* report 629 at 666 (vol 2).
176. *Blueprint* report at 26. See also *R v Askov* [1990] 2 SCR 1199.
177. Ewart at 11.

178. For example, see M Cappelletti, “The Emergence of a Modern Theme” in M Cappelletti, J Gordley and E Johnson, eds., *Towards Equal Justice: A Comparative Study of Legal Aid in Modern Societies* (New York: Ocean Publications, 1975) at 25-26.
179. Francis Regan, “Legal Aid Without the State: Assessing the Rise of *Pro Bono* Schemes” (1999-2000) 33 *University of British Columbia Law Review* 383. See also Robert Granfield, “The Meaning of Pro Bono: Institutional Variations in Professional Obligations” (2007) 41:1 *Law and Society Review* 113.
180. Rollie Thompson, “No Lawyer: Institutional Coping with the Self-Represented” (2002) 19 *Canadian Family Law Quarterly* 455; Rollie Thompson and Lynn Reiersen, “A Practising Lawyer’s Fieldguide to the Self-Represented” (2002) 19 *Canadian Family Law Quarterly* 529; Margaret Trussler, “A Judicial View of Self-Represented Litigants” (2002) 19 *Canadian Family Law Quarterly* 547; and Anne-Marie Langan, “Threatening the Balance of the Scales of Justice: Unrepresented Litigants in the Family Courts of Ontario” (2004-2005) 30 *Queens Law Journal* 825.
181. B Smith, *1998 Study of the Effects of Legal Aid Cuts on the Family Court of Australia and its Litigants: Final Report* (Melbourne: Family Court of Australia Publications Unit, 1999) at 2; quoted in Regan, “Legal Aid without the State” at 390.
182. Hilary Sommerlad, “Criminal Legal Aid Reforms and the Restructuring of Legal Professionalism” in Young and Wall at 292. See also Sommerlad, “‘I’ve Lost the Plot’: An Everyday Story of the ‘Political’ Legal Aid Lawyer” (2001) 28:3 *Journal of Law and Society* 335; Michelle S Jacobs, “Full Legal Representation for the Poor: The Clash Between Lawyer Values and Client Worthiness” (2000-2001) 44 *Howard Law Journal* 257; and Stuart Scheingold and Anne Bloom, “Transgressive Cause Lawyering: Practice Sites and the Politicization of the Professional” (1998) 5:2/3 *International Journal of the Legal Profession* 209.
183. Regan, “Legal Aid without the State” at 398-399; see also New South Wales Law Foundation, *Future Directions for Pro Bono Legal Services in New South Wales* (Sydney: Centre for Legal Process, Law Foundation of New South Wales, 1998).
184. Parker at 39.
185. Ewart at 9.
186. According to Macdonald, the alternative dispute resolution movement occurred in the second half of the twentieth century in Canada, with a variety of initiatives designed to “dejudicialize” justice: see Macdonald in Bass *et al* at 21-22. See also Laura Nader, “The ADR Explosion - The Implications of Rhetoric in Legal Reform” (1988) 8 *Windsor Yearbook of Access to Justice* 269.
187. Macdonald in Bass *et al* at 21-23; and *Blueprint* report at 100-103.
188. See B Galaway and J Hudson, eds., *Restorative Justice: International Perspectives* (New York: Criminal Justice Press, 1996); Law Commission of Canada, *From Restorative Justice to Transformative Justice: Discussion Paper* (Ottawa: Law Commission of Canada, 1999); and Adam Crawford, “Alternatives to Prosecution: Access to, or Exits from, Criminal Justice” in Young and Wall at 313.
189. Hunter, “Adversarial Mythologies.”
190. *Blueprint* report at 91 (emphasis added).

191. *Blueprint* report at 91 (emphasis added). Significantly, the report also argues that, by taking up this leadership role, LAO would acquire a new legitimacy and rationale with residents and taxpayers. In addition, the report noted (at 91-92) that many justice reforms (such as diversion measures and case management processes) will work more effectively if litigants are represented; in this way, LAO's input is critical to these new developments.

192. Macdonald in Bass *et al* at 103 (emphasis added).

193. For example, see the Joint Committee Report in Ontario (1965).

194. E Cahn and J Cahn, "The War on Poverty: A Civilian Perspective" (1964) 73 *Yale Law Journal* 1317.

195. Clinical Funding Report at 1-3: "What was needed was a system which could take a more comprehensive approach to the problems of the poor." See also *Blueprint* report at 53.

196. For summaries of some of these studies, see Curran and Noone; Mossman, "Toward a Comprehensive Legal Aid Program" at 6-14; and *Blueprint* report at Chapter 4.

197. An early study was Peter Hanks, *Social Indicators and the Delivery of Legal Services* (Canberra: Australian Government Publishing Services, 1987).

198. Hanks at 49. See also J Handler and L Trubek, *Poor Clients without Lawyers: What Can be Done* (New York: Clearinghouse Review, 1985).

199. Deborah Baker and Stephen Barrow, "Proxy Models of Legal Need: Can they Contribute to Equity of Access to Justice?" (2006) 35:2 *Journal of Social Policy* 267 at 269.

200. E A Dauer, "A Wider Notion of Unmet Legal Needs" (New Orleans: Conference on Access to Justice in the 1990s, 1989) at 4-5.

201. For an overview, see Liz Curran and Mary Anne Noone, "The Challenge of Defining Unmet Legal Need" (2007) 21 *Journal of Law and Social Policy* 63

202. Levitas at 2-3.

203. *Legal and Advice Services: A Pathway to Regeneration* (2004) at 27 (emphasis in original).

204. Genn, *Paths to Justice* at 12.

205. Genn and Paterson, *Paths to Justice Scotland*; P Pleasance, A Buck, T Goriely, J Taylor, H Perkins and H Quick, *Local Legal Need* (London: Legal Services Research Centre, 2001); and Pleasance with Balmer and Buck, *Causes of Action*.

206. For some examples, see Buck, Balmer and Pleasance, "Social Exclusion and Civil Law;" and Pleasance, Balmer, Buck, O'Grady and Genn, "Multiple Justiciable Problems."

207. Curran and Noone at 74.

208. For example, see Ab Currie, "National Survey."

209. Currie, "National Survey" at 1-2.

210. Currie, “National Survey” at 10 (emphasis added); the quoted material makes reference also to Currie, “Justiciable Problems and Social Exclusion” (Peyresq, Working Group on the Legal Professions, Research Committee on the Sociology of Law, 2006). See also Currie, “The Legal Problems of Everyday Life” (2007); at 13, Currie identified four vulnerable groups who were likely to fail to resolve problems because of access barriers to assistance: immigrants, Aboriginal people, people without high school education, and people with incomes less than \$25,000.
211. Curran and Noone at 75. As the authors note, such surveys are also very expensive to conduct, so that there have been few efforts in Australia to duplicate the research undertaken in the UK.
212. Mosher “Poverty Law” in *Blueprint* report at 914-923. See also Janet Mosher, “Welfare Reform and the Re-Making of the Model Citizen” in Young *et al* at 119; and Buck, Pleasance, Balmer, O’Grady and Genn, “Lone Parents and Civil Law.”
213. Janet Mosher “Poverty Law” in *Blueprint* report at 914-923.
214. See Margot Young, “Introduction” in Young *et al*, 1 at 16: “The struggle to make Canada a more just and equitable country is not only for the benefit of those living in poverty. Canada’s success or failure to achieve social and economic justice also affects the quality of life for all who live here.” See also Francesco Francioni, *Access to Justice as a Human Right* (Oxford: Oxford University Press, 2007); and Andrew Ashworth, “Legal Aid, Human Rights and Criminal Justice” in Young and Wall, 55.
215. Andrew Mitchell and Richard Shillington, *Poverty, Inequality and Social Exclusion* (Toronto: The Laidlaw Foundation, 2002) at 13 (emphasis added).
216. For examples, see Christine Harrington, *Shadow Justice: The Ideology and Institutionalization of Alternatives to Courts* (Westport: Greenwood Press, 1985); and David Garland, “The Culture of High Crime Societies” (2000) 40 *The British Journal of Criminology* 347.
217. See Richard Abel, “Law Without Politics: Legal Aid under Advanced Capitalism” (1985) *UCLA Law Review* 32.
218. Nancy Fraser, “Talking about Needs: Interpretive Contests as Political Conflicts in Welfare-State Societies” (1989) 99:2 *Ethics* 291. See also Fraser, “Women, Welfare and the Politics of Need Interpretation” (1987) 17 *Thesis Eleven* 88; and Fraser and Linda Gordon, “Contract versus Charity” (1992) 22:3 *Socialist Review* 45.
219. Sylvia Bashevkin, *Welfare Hot Buttons: Women, Work, and Social Policy Reform* (Toronto: University of Toronto Press, 2002) at 133. See also Brenda Cossman and Judy Fudge, eds., *Privatization, Law, and the Challenge to Feminism* (Toronto: University of Toronto Press, 2002).
220. Young in Young *et al* at 8.
221. Ken Norman, “The *Charter* as an Impediment to Welfare Rollbacks: A Mediation on ‘Justice as Fairness’ as a ‘Bedrock Value’ of the Canadian Democratic Project” in Young *et al* at 297. See also Tamara Goriely, “Making the Welfare State Work: Changing Conceptions of Legal Remedies within the British Welfare State” in Regan *et al*, 89.
222. Lynn Mather, as quoted in Moorhead and Pleasance, “Access to Justice after Universalism” at 8.



223. For example, see Harry Glasbeek, “Looking Back toward a Bleak Future for Lawyers” (2001) 19 *Windsor Yearbook of Access to Justice* 261; Bruce Porter, “Claiming Adjudicative Space: Social Rights, Equality and Citizenship” in Young *et al*, 77; and Melina Buckley, *Transforming Women’s Future* (Vancouver: West Coast LEAF, 2001)
224. Ewart at 9.
225. Ewart at 9.
226. Trebilcock Report at 11.
227. Trebilcock Report at 95-96.
228. *Delivering Justice* at 13-15.
229. Trebilcock Report at 75-82.
230. The Trebilcock Report (at 87-96) reviewed arrangements for advice centres and other methods of providing basic legal information to the public.
231. Lister at 229; see also Curran and Noone.
232. Dianne Martin “A Seamless Approach to Service Delivery in Legal Aid: Fulfilling a Promise or Maintaining a Myth” (Ottawa: Department of Justice Canada, 2002) at 15-16.
233. The systemic role of legal aid services in community legal clinics must be taken into account in assessing the recommendation of the Trebilcock Report to change the clinics’ mandate so as to make them the entry point for legal information, advice and referrals; clearly, in the absence of significant *additional* funding, such a change in mandate would preclude this creative legal activity on behalf of some of the most vulnerable individuals. See Trebilcock Report at 108.
234. Ewart at 24-25.
235. Patricia Hughes, “*New Brunswick v G (J)*: En Route to More Equitable Access to the Legal System” (2000) 15 *Journal of Law and Social Policy* 93 at 113.
236. Joint Committee Report.
237. Ewart at 16-19. See also Mitchell and Shillington.
238. Currie, “National Survey;” Genn, *Paths to Justice*.
239. *Evaluation of Legal Aid Ontario, Pilot Project Staff Family Law Offices* (2002) at 113.
240. Trebilcock report at 99-108 and 114.
241. *Legal Aid Services Act*, section 2. The statute creates a new category of “clinic” legal services, defined as “areas of law which particularly affect low-income individuals or disadvantaged communities,” and including a number of legal matters such as housing, income maintenance, social assistance, human rights, health, employment and education. Note, however, the definition of “legal services” in section 2, which may encompass “other” services

as well.

242. Trebilcock Report, at 103-109.

243. Section 12(2).

244. *Blueprint* at 71. Note that this example also uses ideas about “early intervention” in the criminal law context.

245. Commonwealth Priorities, sections 1.7.1(c); and 1.7.2.

246. Hon Beverley McLachlin, CJ “The Challenges We Face” (presentation to the Empire Club, Toronto, March 2007) at 10-11; published in (2007) 40 *University of British Columbia Law Review* 819 at 826-827. Note also the recent creation of a Woman’s Court in Toronto, focusing on gender and addiction.

247. Ewart at 15.

248. Trebilcock Report at 76-77.

249. Patricia Hughes, “The Gendered Nature of Legal Aid” in Zemans, Monahan and Thomas, 29 at 52. See also Hughes, “Recognizing Substantive Equality as a Foundational Constitutional Principle” (1999) 22 *Dalhousie Law Journal* 5; MJ Mossman, “Gender Equality and Legal Aid Services: A Research Agenda for Institutional Change” (1993) 15 *Sydney Law Review* 30; and Mossman, “Gender Equality, Family Law and Access to Justice” (1994) 8 *International Journal of Law and the Family* 357.

250. Law Society of Upper Canada, *Rules of Professional Conduct*, Rule 4.01(3): Duty as Prosecutor.

251. Currie, “The Legal Problems of Everyday Life” at 37.

252. Pleasance, Balmer, Buck, O’Grady and Genn, “Multiple Justiciable Problems;” and Pleasance with Balmer and Buck, *Causes of Action*.

253. Pleasance *et al*, “Multiple Justiciable Problems” at 326.

254. Mather, as quoted in Moorhead and Pleasance, at 8.

255. Trebilcock Report at 77-82.

256. Michele Leering “Community Legal Clinics of Ontario: Promising Practices” (Presentation the International Legal Aid Group Conference, Wellington NZ, 1-3 April 2009).

257. Trebilcock Report at 104-108.

258. See Leering “Community Legal Clinics of Ontario: Promising Practices.”

259. “Law Society, PBLO and LAO launch Ontario Civil Legal Needs Project” (Winter 2008) *Ontario Lawyers Gazette* at 50.

260. ABA Report at 14.

261. Earl Johnson Jr, “Equal Access to Justice” at S102, quoting Judge Robert Sweet, “Civil ‘Gideon’ and Justice in the Trial Court (The Rabbi’s Beard)” (1997) 42 *The Record* 915 at 924. This comment reflects the difference between Lamer, CJ’s comments in the majority decision in *G(J)*, by contrast with those of L’Heureux-Dubé, J in her concurring decision, with respect to how often the test would require provision of state-funded counsel in child protection cases: see *New Brunswick v G(J)* [1999] 3 SCR 46.
262. Commonwealth Priorities, sections 1.7.1(c); and 1.7.2.
263. Sommerlad, “I’ve Lost the Plot.”
264. Shelley Gavigan, “Poverty Law, Theory, and Practice: The Place of Class and Gender in Access to Justice” in E Cormack, ed., *Locating Law: Race/Class/Gender Connections* (Halifax: Fernwood Publishing, 1999) 203. See also Lauren Snider, “Legal Aid, Reform, and the Welfare State” in S Brickey and E Comack, eds., *The Social Basis of Law: Critical Readings in the Sociology of Law* (Toronto: Garamond Press, 1997).
265. Mitchell and Shillington at 10.
266. Mitchell and Shillington at ix.
267. In addition, Mitchell and Shillington emphasized (at 15) the limits to inclusion through work, arguing that recent declines in the level of unemployment have had no appreciable impact on levels of poverty.
268. Sen “Social Exclusion.”
269. Mitchell and Shillington at 22 (emphasis added).
270. Macdonald in Bass *et al* at 103.
271. See Curran and Noone.
272. For example, see National Council of Welfare, *Justice and the Poor* (Ottawa: Min of Public Works and Government Services, 2000); and Martha Jackman and Bruce Porter, “Women’s Substantive Equality and the Protection of Social and Economic Rights under the Canadian Human Rights Act” in *Women and the Canadian Human Rights Act: A Collection of Policy Research Reports* (Ottawa: Status of Women Canada, 1999).
273. Ewart at 16.
274. Ewart at 18-19.
275. Janet Mosher, “Welfare Reform and the Re-Making of the Model Citizen” in Young *et al* at 119.
276. Ewart at 20.
277. Trebilcock at 177 (emphasis added).
278. Others included raising financial eligibility criteria, providing some services without means-testing, overcoming the “silo” approach by better integrating legal and other services, experimenting with innovative forms of service delivery, increasing the tariff and the salaries of duty counsel and clinic lawyers, and the infusion of additional funding for legal aid to overcome chronic under-funding problems.