Comparing and Understanding Legal Aid Priorities

a paper prepared for Legal Aid Ontario

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Executive Summary

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Executive Summary

I. Introduction (Pages 1-4)

The purpose of this paper its to contribute to discussions about priorities for legal aid in Ontario. Pursuant to the Terms of Reference, the paper explores ways of comparing and understanding legal aid priorities in the context of "hard choices" for legal aid policy decisions. The paper reflects the changes in governance arrangements, including the creation of Legal Aid Ontario, and arrangements for capped annual budgets for judicare services. Although community legal clinics have always been funded with annual allocations, the *Report of the Ontario Legal Aid Review* in 1997 [the 1997 *Report*] recommended creation of priorities for "the entire legal aid system" (including judicare services). In exploring this mandate, this paper benefited from access to the *Report of the Legal Aid Review 2008* [the Trebilcock report], and provides some comments on its recommendations. More generally, this paper envisages legal aid in broader terms than "services" to clients, recognizing a role for legal aid in confronting systemic barriers to equality.

The organization of the paper is described at pages 3-4.

II. Contexts for Defining Priorities for Legal Aid Services (Pages 5-26)

The paper addresses three contexts for the provision of legal aid in Ontario:

- 1. The historical development of legal aid in Ontario, as part of the movement for greater access to justice in the second half of the 20th century;
- 2. Recent developments in other similar jurisdictions (United States, Australia, New Zealand, United Kingdom, and selected European jurisdictions); and
- 3. The impact of the *Charter*, and principles established in Canadian statutes and in international law, relating to the provision of legal aid.

1. The history of legal aid and access to justice (pages 5-10): The paper examines claims of access to justice scholars that the legal system should be "equally accessible to all" and "lead to results that are individually and socially just;" that access to justice means more than access to legal justice; and that there are target groups in Canadian society for whom access to justice is particularly significant: persons who experience economic disadvantage, who are unrepresented in the civil justice system, who are stigmatized by criminal records, and who suffer disabilities. As noted in the Trebilcock report, moreover, a lack of access to justice often correlates to other problems.

Although some access to justice scholars have suggested that legal aid, at least in relation to the provision

of representation for indigent litigants, offers no fundamental challenge to current problems of inequality and social power, the paper argues that the history of legal aid in Ontario reveals aspirations for achieving *both* equality of access to the justice system *and also* goals of social justice and transformation of the lives of poor clients and their communities. Tracing the history of legal aid in Ontario since 1965, the paper suggests that legal aid in Ontario has historically embraced these goals of equality and social justice, and that there is considerable experience within community clinics in defining priorities for legal aid to accomplish such goals. Thus, current discussions about legal aid priorities represent part of an ongoing process of defining goals for legal aid in Ontario.

2. Experiences in other jurisdictions (pages 11-22): The paper explores recent experiences and strategies in other jurisdictions regarding priorities for legal aid. In relation to the United States, the paper reports on problems relating to the (constitutionally-mandated) provision of counsel for indigent criminal defendants; and efforts on the part of the American Bar Association and the US Legal Services Corporation to encourage more funding for indigent litigants in civil matters. Although ideological concerns and hostility to lawyers and litigation, reflected in the "civil justice reform" movement in the United States, have posed barriers to such reforms, these proposals nonetheless offer some insights for Ontario. The paper also reports on the work of the Project for the Future of Equal Justice, a project focused on improving the use of technologies to create more access to justice, and on recent initiatives to establish Access to Justice Commissions in a number of states.

Australia, which offers a mixed model of legal aid services in cooperation with the states, has published Priorities for legal aid and provided detailed Guidelines for implementing them. In general terms, the Priorities reflect legal categories of family law, criminal law, and other civil law matters, but matters not otherwise included in the Priorities may be funded if "special circumstances" exist: "special circumstances" include language or literacy problems, disabilities, geographical remoteness, a likelihood of domestic violence in a family law matter, etc. The Priorities also require an applicant to establish eligibility pursuant to a "means test" and a three-part "merits test;" and applicants may be funded for either litigation or primary dispute resolution services in accordance with the Guidelines. The Australian arrangements also include a variety of services beyond litigation services. In addition, the federal government recently adopted wide-ranging policies of "social inclusion" which may have an impact on arrangements for the delivery of legal aid.

Legal aid in New Zealand has traditionally been provided by private practitioners who act for paying clients as well as those eligible for legal aid. However, pursuant to the New Zealand Bill of Rights, a Law Commission report in 2004 recommended new initiatives to increase access to representation in courts, to expand legal advice for those who are unrepresented through necessity, and to improve assistance to self-represented litigants. The Commission also recommended (similar to the Trebilcock report) substantial reforms in the provision of general legal advice to citizens, including identification of a state agency with "lead responsibility" for developing an integrated and coordinated legal information strategy. In addition, the Commission recommended creation of a Community Court, with jurisdiction to deal with high volume, less serious criminal and civil cases, in order to foster greater accessibility to the justice system, especially for indigenous communities. The Legal Services Agency established a pilot project using salaried lawyers to provide criminal legal aid services; and it recently revised its eligibility guidelines and arrangements for streamlining the provision of legal aid in family matters.

The paper also assesses carefully legal aid developments in the United Kingdom because legal aid in Ontario has been particularly influenced by reforms in the UK. The *Access to Justice Act* of 1999, which

established two main schemes for legal aid, the Criminal Defence Service and the Community Legal Service, has been criticized for being motivated, not by "a desire to improve access to justice but from the Treasury's need to control the budget." These legal aid reforms were closely related to "social exclusion" policy initiatives, introduced by the Labour government after 1997, which have also been subjected to criticism. An important aspect of "social exclusion" policies is research projects that focus on identifying "justiciable problems," and assessing the success of procedures adopted to resolve them; this research tends to confirm that low income is only one factor affecting "social exclusion," while factors such as age, disability, homelessness, and single parenthood often contribute as well.

In this context, legal aid has been reconceptualized to prioritize cases and ration resources "as a way of meeting the needs of the general public within a limited budget," including partnerships with providers such as Citizen Advice Bureaux; the goal is to emphasize the provision of legal advice to enable individuals to take responsibility for resolving problems, thereby reducing the need for access to courts. The Community Legal Service also introduced a system of preferred suppliers (firms of solicitors) through franchising, and a Quality Mark in relation to exclusive contracts for identified services; these initiatives have been critiqued as signs of contractualism" and "new public management," arrangements which challenge traditional ideas about legal professionalism, and which tend to encourage the "routinization" of legal work.

Legal aid services in Europe vary considerably. The Dutch system attained a high reputation on the basis of its *Buros Voor Rechtshulp*, a system of local offices in which lawyers paid at civil service rates provide advice and assistance in accessible settings, and which also tend to control the remuneration paid to private lawyers. More recently, the Dutch system has adopted a two-tier approach, including Legal Service Counters which dispense advice, with access to lawyers somewhat more restricted. Both the Netherlands and Belgium also have arrangements for legal insurance. Similarly, Germany relies substantially on legal expense insurance, even though it does not really replace legal aid for poor clients, an issue that the Trebilcock report did not fully address. Indeed, the European experience suggests that civil law and common law jurisdictions have similar problems in relation to legal aid and access to justice: as the Trebilcock report concluded (at 113), "there is no panacea."

3. *Charter* "rights" to legal aid (pages 23-26): Although courts in Canada have held that there is no general constitutional right to legal aid in criminal or civil cases in Canada, judicial decisions have defined rights to publicly-funded legal aid in specific circumstances. Clearly, Legal Aid Ontario has an obligation to take these decisions into account in determining priorities for legal aid. However, the paper suggests that the *absence* of a constitutional right to legal aid creates a *special responsibility* on the part of governmental agencies, including LAO, to take into account fundamental democratic and constitutional values, including the rule of law, equality and liberty, in designing a principled approach to legal aid priorities.

The paper argues that there is judicial recognition of the interpretive priority of section 15 equality values. In addition, the paper suggests that by regulating social relations through law, the state and its agencies have assumed a duty to ensure that those affected are equally able to engage effectively with legal processes; and that policies will be implemented by state agencies to adjust power imbalances in proceedings involving both public and private law matters.

> Overall, legal aid priorities should be designed to achieve the goal of meaningful access to legal services, a goal which necessitates asking who benefits from choices about legal

aid priorities, how such priorities foster access to justice in relation to law, and what social interests are thereby protected? Such an approach requires a broad analysis of the requirements of sections 7 and 15 of the *Charter*, and an assessment of the principles of fundamental justice in terms of the impact on individuals' ability to participate in law and legal processes. Thus, LAO has a responsibility to exercise creativity and accountability in its processes for choosing priorities, in the content of these priorities, and in delivery methods adopted to implement them.

III. Goals for Legal Aid Priorities (Pages 27-38)

The paper explores three aspects of legal aid priorities:

- 1. Legal aid as a component of the larger legal services context;
- 2. Ideas about legal "needs" in relation to defining legal aid; and
- 3. The role for LAO in confronting systemic barriers to access to justice.

1. Legal aid and the legal services context (pages 27-30): As the 1997 *Report* suggested, LAO has responsibility to engage actively in defining legal aid priorities, taking account of broader developments in legal and social services, and creating monitoring processes to revise priorities to respond to changing needs. In this context, the paper explores the role of legal aid within a broad view of law, including a range of contexts in which legal rights and duties are defined and interpreted, and the variety of ways in which individuals or groups engage with law, often with different kinds and levels of needs and abilities. The paper documents the expansion of legal rights and responsibilities since the middle of the 20th century, and examines how a more expansive use of law has created quantitative changes in the nature and volume of legal aid needs. For example, the paper reviews how a governmental policy of increasing criminalization in response to societal problems may create new demands for the justice system and for legal aid. Reiterating the recommendations of the 1997 *Report*, the paper emphasizes LAO's active role in monitoring the justice system and in proposing changes to improve it.

The paper also examines changes in the roles and personnel involved in the provision of legal services, including *pro bono* legal services, and recommends that LAO seek to ensure that legal aid and *pro bono* legal services are complementary, and that other legal service personnel are used effectively. In addition, the paper identifies a wide range of legal services that may be required, beyond formal representation in judicial proceedings, and recommends the adoption of procedures for monitoring outcomes and for assessing relative costs *in practice* in relation to different methods of dispute resolution.

Overall, the paper reiterates the conclusion of the 1997 *Report* (at 91) that "*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* ..." to maximize the efficient and effective justice system in Ontario; LAO is ideally suited to play "a major role as a proactive change agent."

2. Legal aid and legal "needs' (pages 31-35): The paper reviews the challenges of defining legal "needs,"

having regard to their dynamic qualities and their interrelationship with other kinds of problems; in addition, definitions of legal "needs" may serve both political and pragmatic objectives. The paper recognizes that the creation of the judicare program in Ontario initially adopted a view of legal needs that reflected the needs of fee-paying clients; however, this conception was later expanded through the funding of community legal clinics to take account of the particular needs of the poor, and to foster empowerment for disadvantaged and vulnerable communities.

These developments occurred in the context of research efforts in a number of jurisdictions to identify legal needs. More recently, ideas about legal "needs" have been influenced by the concepts of "social exclusion," initially developed in Europe, and then adopted in the UK to promote policies for expanding access to legal information, so that individuals can take responsibility for solving their own problems. Large-scale research projects have also documented "justiciable problems," so that there is now considerable data about how people experience problems that might require legal advice or legal action; the research (including a few projects in Canada) has also identified how problems may "cluster" or "cascade" as a result of a triggering event such as loss of a job, so that legal aid funds can be used most efficiently. However, critics have argued that the "justiciable problems" approach tends to focus too much on problems as "individualized" rather than "systemic," and that it may tend to focus on the disadvantaged as a homogeneous group, precluding measures to target legal aid in accordance with different kinds of needs.

By contrast, ideas about legal "needs" have also been addressed using a "social inclusion" approach, one that requires cooperation between state actors and individuals and their communities to overcome systemic problems in social and economic arrangements that create barriers to full participation. Thus, rather than providing information and expecting disadvantaged persons to take responsibility to use it effectively on their own, the social inclusion approach requires collective action to address more fundamental barriers. As some proponents argue, social inclusion means "the difference between being a *consumer* and being a *citizen*.

In exploring these differing ideas about legal "needs," the paper suggests that these are fundamentally political questions, and they clearly reflect differing views about the limits of law and of state intervention; at the same time, it is clear that self-help is not a panacea: "for some people and some problems, self-help suggests abandonment, not empowerment." Even recognizing that there are limits to the use of law to achieve social goals, however, need not preclude the possibility that law may sometimes challenge social inequalities.

> In such a context, it is important to understand LAO as the primary guardian of access to justice for the poor and vulnerable in Ontario, with a fundamental responsibility to adopt a proactive role in achieving systemic goals of social inclusion for them.

3. A Systemic Perspective: LAO and the Justice System (pages 36-38):

In reflecting on legal aid priorities, the paper emphasizes the leadership role for LAO in the overall justice system in Ontario, having regard to fundamental values of democracy, equality and the rule of law - values that may define principles and procedures for resolving disputes and law enforcement, but which may also address broader societal concerns with respect to social inequality. It also identifies the importance of ongoing evaluation and monitoring in this broader context to ensure goals of effectiveness and efficiency, and to propose systemic changes in the justice system to meet these goals. While this role

might include initiatives to provide information about law to the wider community, it may also be necessary to offer information in different forms for different communities, and to provide greater intervention and assistance in communities that are the most vulnerable. As well, LAO has a role in relation to law reform initiatives, community development activities, and other measures that address systemic problems in the justice system.

IV. Comparing and Understanding Legal Aid Priorities (pages 39-53)

The paper identifies three primary approaches to defining priorities for legal aid: the "legal categories" approach; the "legal needs/social exclusion" approach; and the "social inclusion (systemic)" approach. In addition, responding to *Charter* and other legal requirements concerning the provision of legal aid, the paper argues that LAO has a duty to develop a principled approach to the provision of this significant societal resource.

The "legal categories" approach: This is the traditional approach to the provision of legal aid, and generally focuses on representation in proceedings before the courts; it emphasizes representation rather than advice and information, and is usually available at a later stage in relation to problems, rather than preventing escalation through early intervention. Legal aid is often confined to specific legal categories (eg, criminal, family or "clinic" legal services in the Ontario statute), even though the client may have other "clusters" or "cascades" of legal problems. Particularly where funding is capped in terms of hours, or is available only as "block funding," the funding arrangements may affect how the legal aid service is provided, as well as foreclosing efforts to address related problems.

There are significant limitations to a "legal categories" approach. First, this approach may limit the possibility of addressing the potential impact of the problem on an individual client. As the 1997 *Report* illustrated, there may well be situations in which a criminal charge fits the "legal category" approach, even though the alleged offender may be quite able to provide self-representation; at the same time, if the "legal category" approach refuses assistance to first time offenders, the impact on the alleged offender may be more significant. The paper reviews the Australian system of Priorities, which melds the "legal category" approach with discretion to consider "special needs," as well as utilizing a "means" test and a "merits" test, an approach which might alleviate some of the problems of a pure "legal categories" approach.

A second problem is the extent to which a "legal categories" approach tends to individualize cases, and is less able to respond to problems of systemic discrimination in the justice system; for example, it may not address problems of alleged offenders who suffer from mental illnesses or who are racialized, Aboriginal, illiterate, or without necessary language skills. In addition, a third issue for the "legal categories" approach is the impact of scarce funds on the provision of legal aid. As the 1997 *Report* noted, the negative liberty principle has traditionally resulted in the allocation of more funding to criminal law matters, and the *Report* recommended a departure from this practice, since it has often directed a larger proportion of legal aid funds to men (the primary users of criminal law funding) than to women (the primary users of family law funding), a situation which may offend fundamental equality values in the provision of government services. The paper also reviews concerns that issues about inequality of resources are more often recognized in "public law" matters than in those involving only "private" parties. The paper suggests that there may be family and other civil cases in which the presence of counsel is more important than in criminal cases, and that these concerns suggest a need to consider

alternatives to the "legal categories" approach to defining legal aid prioritie

The "legal needs /social exclusion" approach: Research on "justiciable problems" provides useful information about how people experience the need for legal advice, assistance, and other services; in addition, this research identifies how one problem may "trigger" additional legal and social problems. This data suggest a need for early intervention to prevent individuals from becoming more vulnerable to "social exclusion," and to foster more integrated legal and social services for vulnerable populations. In this context, however, the paper recommends taking account of the concrete circumstances of target populations in designing information services: persons who are challenged by issues of literacy, language, mental or ill health, or cultural or geographic isolation need different kinds and forms of information. Moreover, responding to the Trebilcock report, the paper emphasizes that any effort to utilize community legal clinics in the provision of legal advice to the middle class must be accomplished only with *additional* funding and with great care in designing these structural reforms; it is critical to ensure that clinics can continue to target their resources to the most vulnerable individuals and communities in Ontario.

The paper suggests that there is already a substantial amount of data in community legal clinics in Ontario about the nature of "clusters" and "cascades" of legal problems for vulnerable groups, and the "triggering" events that create them. As this data emphasizes, the problems of the poor are seldom just *individual* problems; they almost inevitably involve *systemic* barriers to equality. In this context, the provision of individual legal aid services does little to alter the circumstances of the welfare recipient who wins an appeal or the low-income tenant who avoids eviction: both are still poor, disadvantaged, and "socially excluded."

On this basis, the need for *systemic legal aid* initiatives to overcome social inequality is critical, an approach that has always been evident in the work of community legal clinics in Ontario. Yet, even in the context of individual representation in legal proceedings, the focus of a "legal needs/ social exclusion" approach allows greater discretion in the selection of cases than a "legal categories" approach; for example, it might result in more representation for women in family law proceedings.

A "legal needs / social exclusion" approach also necessitates an assessment of the potential impact of a negative outcome on the legal aid applicant, having regard to individual circumstances. In this context, one question is whether it would be more useful to use a "legal needs / social exclusion" approach without regard to "legal categories" at all - since any award of legal aid will necessarily require the exercise of discretion (and procedures for structuring it effectively); and such an approach may be much more flexible in responding to new challenges. All the same, this approach (like the "legal categories" approach) tends to focus mainly on individuals and on individual problems, rather than addressing the systemic needs of those who are poor, disadvantaged, and vulnerable in the justice system.

The "social inclusion (systemic)" approach: This approach, like the "social exclusion / legal needs" approach is grounded in individuals' experiences of inequality and disadvantage in society. However, this approach focuses directly on *the systems and practices that create poverty and inequality*, and on ways to change them. Although this approach also focuses on collecting data about these problems, it differs from research about "justiciable problems" because it is designed to understand the legal and social contexts which *create* justiciable problems, rather than just identifying them and the vulnerable people who experience them. Clearly, community legal clinics, as well as government reports,

commissions of inquiry, and studies undertaken by anti-poverty and other advocacy groups have already contributed to our understanding of these systemic issues.

A "social inclusion" approach to legal aid priorities reflects a transformative perspective on access to justice, requiring serious questioning of existing practices and systems that contribute to systemic problems of poverty, disadvantage and inequality. Although this approach does not preclude a case-by-case approach, it may also require other initiatives: test cases, negotiations with police, landlords and local welfare administrators, law reform activities on behalf of a group of affected persons, or proactive intervention in legal cases. As one critic suggested, successful implementation of such a program would require legal aid administrators to be knowledgeable about their clients' lives so that they could assess where the law is "hurting the most" or where it might be developed to alleviate these problems, for example, by challenging governmental criminalization strategies.

More generally, a "social inclusion" approach might involve different kinds of strategies, including advice and educational programs, support for lobbying activities relating to reforms of the justice system, and test case litigation. Although *Charter* requirements can provide a baseline for such activities, a "social inclusion" approach necessitates a broader approach to legal services, including creative delivery methods. In this way, this approach seeks to recognize the fundamental role of legal aid in fostering goals of substantive justice for poor, disadvantaged and vulnerable people in Ontario. Such an approach could also further the goal of "holistic legal aid" recommended in the Trebilcock report.

Conclusion: LAO's proactive approach and ideas for further research and experimentation: This section provides a number of examples of systemic approaches to legal aid priorities, in accordance with LAO's responsibility to deliver effective legal aid services in Ontario. The examples include rethinking legal aid in bail proceedings, the creation of community courts, new arrangements for family law proceedings, careful analysis of the usefulness of technology for poor and vulnerable clients, involvement of clinics in the Civil Legal Needs Project, and creative responses to the government's poverty reduction strategy.

> While all these examples require further research and discussion, they represent options for consideration by LAO and its Board in discharging their statutory responsibilities to promote access to justice, equality before the law, and a sense of "social inclusion" for the poorest and most vulnerable members of communities in Ontario.

Endnotes (pages 54-72)

Bibliography