THE NATURE AND EXTENT OF UNMET NEED FOR CRIMINAL LEGAL AID IN CANADA

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Introduction

Legal aid is the primary institution for providing access to criminal justice to the poor. To a significant degree the integrity of the criminal justice system depends on the availability of publicly funded legal aid for the poor. The importance of criminal legal aid lies in the nature of the criminal justice system. The Canadian criminal justice system, like other Common Law countries, is adversarial in nature. In one view, the effective functioning of an adversarial criminal justice process depends on having a trained advocate on each side, one representing the Crown that lays the charge and the other representing the accused person. If this is not the case the system may not function well[1]. Some of the lawyers interviewed in the research discussed below identified several negative consequences that may occur when people accused of criminal offences appeared un-represented in court.

- The "audit function" that the criminal justice process serves over police conduct is weakened
- *Charter* arguments are not developed and therefore the treatment that people receive may not be consistent with their Constitutional rights
- Judges and Crown prosecutors may be forced to step out of their normal roles in the court process, thus effecting the normal functioning of the court
- The public may be left with the impression that there is one justice system for the rich and one for the poor

Most of all, individuals may not be treated fairly in a process that has important consequences on the lives of the accused and possibly for their families or others who depend on them.

The importance of legal aid as a component of the criminal justice system has grown from modest beginnings in the mid-1960's and early 1970's to become an integral part of the criminal justice system. However, over the past decade the Canadian legal aid system has strained under the grim fiscal realities of constraints and cutbacks in government funding. The ability of the legal aid system to meet the needs of the poor for legal representation has become a matter of concern. The level of need for criminal legal aid service in the more generic sense has never been examined prior to this research.

[1] Regina v. Joanisse, OCA, 102 C.C.C. (3d) at p. 57: "the adversarial process operates on the premise that the truth of a criminal allegation is best determined by 'partisan advocacy on both sides of the case' (U.S. v. Cronic, 104 S. Ct. 2039 (1984) per Stevens J. at p. 2045.) Effective representation by counsel makes the product of the adversarial process more reliable by providing an accused with the assistance of a professional trained in the skills needed during the combat of a trial."

At the same time, the unmet need issue has been complicated by changing concepts about the nature of justice and of access to justice. Over about the past decade restorative justice, therapeutic courts and reparative strategies in justice have come to occupy an increasingly important place in the theory and practice of justice in Canada. These changes toward a more rehabilitative approach to criminal justice interventions has given rise to critical thinking about the nature of the needs legal aid clients.[2] The needs of criminal legal aid clients are most fundamentally driven by the criminal charge and by the court process. The courts increasingly attempt to take into account the specific disadvantages and disabilities of accused more than in the past. The changes that are occurring in the criminal justice system challenge legal aid to reconsider what is required to meet the needs of legal aid clients. This challenge for the legal aid system is arising at a time when a decade of fiscal constraint has strained the capacity of legal aid to meet its traditional mandate and changing perspectives about access to criminal justice and meeting the needs of legal aid clients that extend beyond its traditional mandate.

The Research

This paper examines the nature and extent of unmet need for criminal legal aid in Canada. Determining the nature and extent of unmet need for criminal legal aid was the principal objective of a program of research that was developed and carried out by the federal Department of Justice in collaboration with the provinces and territories between April 2001 and November 2002. The research was part of a two-year policy initiative to develop a renewed approach to federal policy for criminal legal aid in Canada.[3]

The criminal legal aid component of the program of research on which this paper is based included eight separate studies. These included four studies of a general nature: a study of un-represented accused in nine courts across the country, a study of legal advice provided to persons arrested and detained by the police, a study of financial eligibility guidelines for receiving legal aid and a study of legal aid needs in rural and remote areas of the provinces. In addition, four studies focused on particular segments of the legal aid clientele: Aboriginal people, speakers of either of the two official languages (English or French) in minority situations, women and immigrants, refugees and visible minorities. Aboriginal people and immigrants, refugees and visible minorities were chosen for more detailed study because the experience of legal aid plans in several regions of the country indicated that meeting the needs of these groups presented special difficulties. Speakers of English or French who live in areas of the country where they constitute minorities may experience language barriers similar to other linguistic groups. In addition, the Canadian Constitution guarantees legal rights in both official languages. This was a compelling reason to examine the extent to which the criminal legal aid needs of speakers of both of Canada's official languages are being met. Although women typically make up only about

[2] A. Currie, Riding the Third Wave: Notes on the Future of Access to Justice, in Expanding Horizons: Rethinking Access to Justice in Canada, Proceedings of a Symposium Organized by the Department of Justice, Ottawa, 2000.

[3] Since 1972-1973 the federal government has contributed to the provision of criminal legal aid services in the provinces and territories through a series of agreements administered by the Department of Justice.

twenty to thirty per cent of criminal legal aid clients, it was felt that women make up a minority among legal aid clients. The needs of women may be different from those for men because of the gender-determined aspects of their lives.

Overall, the research employed a wide variety of methodologies including analysis of court data, court observation, interviews with key informants, focus group studies and literature reviews. As well, the research attempted to take into account the views not only of the experts; judges, lawyers and legal aid providers but also of stakeholder groups representing the clients of legal aid.[4] Most of the research projects were carried out in the ten provinces. The geographic and socio-economic context in the three northern territories was considered to be sufficiently different that a separate research project addressing criminal and civil legal aid issues was carried out in each of the three territories. A number of pilot projects were also funded and evaluated as part of the legal aid initiative. The context for this research is described in more detail in a paper presented at the fourth International Legal Aid Group Conference held in Melbourne, Australia.[5] The contracted research studies and pilot projects are listed in Appendix One.

Unmet Needs That Relate to the Accessibility of Legal Aid Services

As this program of research was being developed, the concerns raised by the judiciary, by the legal profession and by the public discourse that informed the initial thinking about the research focused on the numbers of un-represented accused in the criminal courts. One of the unexpected outcomes of the research was the emphasis that emerged in interviews with respondents on accessibility of legal aid and the needs of accused for access to legal aid services.

Two major areas of emphasis on improving accessibility were on the major rationing mechanisms normally used by legal aid plans to keep demand within the scope of their budgets. These are financial eligibility guidelines and coverage provisions. A third area of emphasis was on the characteristics typical of the legal aid clientele, both in general terms and with regard to particular groups within the overall legal aid clientele.

Financial Eligibility Guidelines and Accessibility

All legal aid plans have financial eligibility guidelines of some form or other to limit the numbers of people who receive service. Respondents in the study of legal aid needs of Aboriginal people[6] and in the study of legal aid needs and barriers to accessibility among immigrants, refugees and visible minorities[7] suggested that in their experience restrictive

[4] Because of the methodological difficulties involved in interviewing criminal accused, and the probable value of the information as against the cost of obtaining it, the research generally did not attempt to interview individual criminal accused.

[5] A. Currie, The Emergence of Unmet Need as an Issue in Canadian Legal Aid Research, Fourth International Legal Aid Conference, Melbourne, Australia, 2001

[6] Mark Dockstater and Don Auger, Study of the Legal Aid Needs of Aboriginal Men, Women and Youth, Aboriginal Research Institute, 2002

[7] Spyridoula Tsoukalas, Ekuwa Smith and Laura Buckland, A Study of the Barriers to Criminal Legal Aid Access for Immigrants, Refugees and Visible Minorities, Canadian Council For Social Development, Ottawa, 2002.

financial eligibility guidelines placed significant limitations on the accessibility of legal aid for members of their constituent groups. A large number of lawyers who were interviewed in the court site study [8] suggested that restrictive financial eligibility guidelines were partly responsible for the numbers of un-represented accused they observed in the courts.

The quantitative study of financial eligibility guidelines[9] tended to support the qualitative data. The results of that study showed that in all ten provinces the financial eligibility guidelines were below the Statistics Canada Low Income Cut-Offs. The table below shows the proportion of individuals and families falling below the Low Income Cut-Off levels that would be eligible for non-contributory legal aid in all ten provinces combined. The table shows the range from lowest to highest percentage of the poor who would qualify under existing financial eligibility guidelines. All legal aid plans have schemes in which clients may be

Table I

Proportion of the Poor Who Qualify for Non-Contributory Legal Aid

Types of Families	Percent of Families That Would Qualify	Minimum Percent in Four of Nine Provinces
All Families	18% to 87%	below 48% in four provinces
Single Person Families	30% to 86%	below 51% in four provinces
Males 18 – 34	37% to 78%	below 72% in four provinces

required to contribute toward the cost of the legal aid they receive. However, client contribution programs are not significant with respect to criminal legal aid. Client contributions apply mainly in the area of civil legal aid.[10] This table shows that in none of the ten provinces are the financial eligibility guidelines sufficiently generous to include all of the low-income population. It is worth note that the low-income cut-offs are determined according to requirements that relate to normal living – food, clothing and shelter. The cost of legal services is considerably greater than the cost of the elements that represent low income and are, without doubt, well out of reach of those with incomes above the low-income cut-off levels.

[8] Robert Hann, Joan Nuffield, Colin Meredith and Mira Svoboda, Court Site Study of Adult Un-Represented Accused, Part I: Overview Report and Part II: Site Reports, Robert Hann & Associates, Toronto and ARC Research Consultants, Ottawa

[9] Spyridoula Tsoukalas and Paul Roberts, Legal Aid Eligibility and Coverage in Canada, Canadian Council on Social Development, Ottawa, 2002

[10] A. Currie, The Deterrent Effect of Legal Aid Application Fees and Client Contributions, Department of Justice, Ottawa, 1998

Coverage Provisions and Accessibility

All legal aid plans have coverage provisions that limit the range of legal matters and level of seriousness of the offences for which service is available. Generally, in criminal legal aid the basic criterion for determining coverage is risk of imprisonment. Some legal aid plans include loss of means of livelihood in some circumstances. The so-called "negative liberty" standard excludes from legal aid coverage many offenders who commit minor offences, especially first time offenders who are unlikely to face a jail sentence. First time offenders do, however, face the risk of receiving a criminal record. A criminal record may carry a number of important consequences including employment in occupations in which a security clearance is required, or admission to certain foreign countries. Respondents in the court site study indicated that in their view restrictive coverage provisions are an important factor contributing to the numbers of un-represented accused they observed in the courts.[11] In addition, the respondents in the Aboriginal people's study presented the view that coverage provisions are too restrictive because they reflect only the seriousness of the criminal charge and the likelihood of imprisonment and not the broader impacts of offence on the lives of Aboriginal offenders.[12]

The respondents in the study of immigrants and visible minorities also felt that coverage provisions are too narrow. Coverage that primarily takes into account only legal factors rather than the special disadvantages of immigrants, such as language difficulties, or the broader impacts, such as the implications on the an offender's refugee or immigration status fail to take account of important impacts of a criminal charge that relate to this segment of the legal aid clientele.[13]

The study of women's issues and criminal legal aid made similar arguments.[14] Compared with men, women tend to be primary caregivers for their children. The risks of a conviction fall not only on the individual women but on their children as well. Women who are involved in conflict with the law, either as perpetrators or as victims, may as a secondary consequence come under the scrutiny of social services and child welfare authorities. This may represent a threat not only to the woman but also to the children. Overall, women tend to commit offences that are less serious than those committed by men, and are therefore less likely under conventional coverage provisions to receive legal aid.

The comments of respondents in all four studies raise a similar issue related to coverage provisions. Coverage that is based primarily on legal considerations such as the seriousness of the offence and the risk of imprisonment is too narrow. Legal aid coverage ought to reflect a broader set of considerations. These include disadvantages that may be faced by accused and risks that relate to wider impacts on the lives of accused.

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[11] Robert Hann, et. al., Part I, p. 31
[12] Dockstater and Auger, p. 36
[13] Tsoukalas, Smith and Buckland, p. 46
[14] Lisa Addario, Six Degrees From Liberation: Legal Aid Needs of Women in Criminal and Other Matters, Ottawa, 2002

The Disadvantages and Disabilities of Criminal Accused and Accessibility

Both the court site study and the evaluation of a pilot project designed to provide court-based assistance to un-represented accused[15] described the criminal accused population, and by extension legal aid clients, as a very low functioning population who are generally poorly educated, with low levels of literacy and leading very disordered lives.[16] A significant proportion may experience mental disorders, learning disabilities, the debilitating effects of excessive drug and alcohol abuse and cognitive disabilities relating to fetal alcohol syndrome. Apart from experienced criminals they tend to have little basic knowledge about the justice system or about legal aid. In the experience of the court assistance workers in the un-represented accused pilot project, out-of-custody accused have a great deal of difficulty initially approaching legal aid, have problems with the application process, and with keeping subsequent appointments. Whether or not they experience some of these problems, recent immigrants may experience other barriers to accessing legal aid. They may be very unfamiliar with the Canadian legal system, with legal aid, and how to apply for legal aid. A poor facility in English or French will make the acquisition of knowledge about legal aid difficult. Immigrants often have to find a friend or relative to accompany them to make an application for legal aid. Immigrants from some countries may be deeply mistrustful and suspicious of the justice system and that mistrust extends to legal aid as a part of that system. These suspicions are often rooted in negative experiences with repressive justice systems in their countries of origin, or experiences in Canada. According to some respondents, suspicion and mistrust may result in a reluctance to reveal personal information in the application process, resulting in unnecessary delays or denial of service. It is not uncommon for immigrants and members of certain visible minorities to anticipate systemic discrimination in the justice system, including legal aid. Under these circumstances it is easy for a form of “self-fulfilling prophesy” to take hold if an individual encounters delays or problems in applying for legal aid. What is believed to be true may become true in its consequences if inability to communicate well or a reluctance to reveal personal information results in outcomes that confirm the anticipation of systemic racism.

The respondents in the study of Aboriginal people and legal aid identified similar accessibility problems for Native people. Many Aboriginal people have a poor knowledge of the mainstream justice system and of legal aid. Particularly, in some rural and remote regions many Aboriginal people may have a poor understanding of English or French. Traditional Aboriginal cultures are not paper cultures, and bureaucratic application processes may be very difficult for poorly educated and low literacy individuals. Many Aboriginal people perceive themselves as being alienated from the justice system, including legal aid, although the roots of their alienation is in the colonization experience and not similar in its original and history to the experiences of immigrants and non-indigenous minorities. However, much like non-indigenous minorities, the respondents reported that Aboriginal people may not apply for legal aid or may have difficulties when they do.

[15] John Malcolmson and Gayla Reid, Un-Represented Accused Assistance Project, Project Report and Evaluation, Vancouver, 2002

[16] Malcolmson and Reid, pp. 16 – 21 and Hann, et. al., Part I, p. E-ii

The research results suggest that many accused persons have difficulty accessing legal aid. Some of the factors that give rise to accessibility problems are disproportionately present among the criminal accused population generally. Some barriers to accessibility are more unique to particular segments of the accused population, such as Aboriginal people, recent immigrants and members of certain minority groups and women. User-friendly accessibility to legal aid is important. Respondents felt that client needs (or pre-client needs) that flow from barriers to accessibility are as much legal aid needs as are needs that flow from criminal proceedings.

Unmet Needs That Flow from Arrest and Detention

One study in the research series focused on the provision of legal advice to persons detained by the police.[17] In Canada, this is called "Brydges" duty counsel. The Supreme Court of Canada decision in Brydges[18] places the police under the obligation to inform detainees of their right to speak to a lawyer and about whatever legal aid services may be available in the particular province or territory. The Supreme Court of Canada did not impose a constitutional obligation on provincial and territorial governments to provide legal advice upon arrest.[19] However, most legal aid plans have implemented some form of service to provide advice to persons who are under arrest and may be interrogated by the police. The essence of the right to Brydges duty counsel is that a detainee must be advised of his right to retain and instruct counsel without delay because it is upon arrest and detention that an accused is in immediate need of legal advice. One of the main functions of duty counsel at this stage is to advice the individual of his or her right to remain silent and how to exercise that right. This is an important mechanism for the exercise of the right against self-incrimination.[20]

The study used a variety of methods to examine the nature of Brydges duty counsel service and its possible shortcomings.[21] Within the time frame and budget constraints of this research it was not possible to study the operations of the existing Brydges duty counsel systems in detail or to undertake an extensive study of detainees in police cells.

Seven provinces use a centralized 24-hour telephone system to provide advice to persons detained by the police. Two provinces employ systems in which a roster of

[17] Simon Verdon-Jones and Adanira Tijirino, A Review of Brydges Duty Counsel Service in Canada, Simon Fraser University, 2002.
[18] R vs Brydges 1 1990 S.C.R. 190
[19] Simon Verdon-Jones and Adanira Tijirino, p. 21
[20] ibid., p. 25. The authors cite Lamer J. in R. v. Brydges at pp. 342-343.
[21] The study includes an extensive legal analysis of Canadian jurisprudence relating to Brydges duty counsel; a review of the American experience in relation to *Miranda v. Arizona*; a review of the system for advice at arrest and detention in England and Wales; a descriptive review of the types of Brydges services available in Canadian jurisdictions; and an empirical analysis of the impact of the provision of Brydges services based on interviews with legal aid service providers (n=18), police officers (n=20), Crown Counsel (n=17), defence counsel (n=18), judges (n=16), and a very small and exploratory sample of arrested and detained persons (n=20).

available lawyers and their telephone numbers is posted in police stations. One province does not provide a formal system for providing legal advice for detained persons.

When asked for their general assessment, the approximately 90 respondents representing the judiciary, the police, prosecutors, legal aid lawyers and legal aid administrators mainly felt that the Brydges duty counsel system was functioning adequately overall. However, one difficulty reported by some respondents was accessibility of the service. The legal aid lawyers and Crown prosecutors who were interviewed indicated that Brydges service was not always available in a timely manner. Long call back times were reported for the centralized services and the roster systems. Difficulties in contacting a lawyer at all in some instances were reported for the roster systems.[22] The Brydges study recommended, as a minimum, that centralized 24-hour advice systems be implemented in all jurisdictions, that they should have adequate capacity of avoid delays in call backs and be adequately staffed with people who speak the predominant languages in the region.

Respondents representing police forces uniformly reported that detainees were always informed of their constitutional right to speak with counsel. However, according to the in-custody accused who were interviewed, 40 per cent indicated that the police did not advise them of their right to counsel.[23] Further, 55 per cent indicated that the police did not inform them specifically about the right to immediate access to Brydges duty counsel.[24] Because of the small samples, this apparent discrepancy cannot be generalized. Nonetheless, it does raise questions about the extent to which accused receive Brydges service at all.

The authors of the report raised a more basic issue regarding the ability of criminal accused to comprehend the advice provided over the telephone. Based on the literature review, the researchers observed that criminal accused suffer disproportionately from a variety of impairments that might limit their comprehension. One recent Canadian study found that 40 per cent of accused persons at the point of their arrest and detention were found to be abusers of either alcohol or drugs.[25] Other research based on studies of prison inmates indicate that inmates have high rates of mental disorders, and that these are higher than in the general population.[26] Intellectual disabilities are more prevalent among prison population than the general population[27], and therefore are no doubt more prevalent among people who are arrested. An extensive empirical study conducted in the United States demonstrated that mentally handicapped persons frequently do not understand the *Miranda* warning issued by the police.[28]

In certain parts of Canada with large immigrant populations there are larger numbers of detainees who do not speak English or French well. Lack of facility in English or French

[22] Ibid., p. 113
[23] Verdun-Jones and Tijirino, p. 121
[24] ibid., p. 122
[25] Pernanen, et.al, 2002 cited in Verdun-Jones and Tijirino, p. 86
[26] Motiuk and Porporino, 1991 cited in Verdun-Jones and Tijirino, p. 88
[27] McDonald, 2000 cited in Verdun-Jones and Tijirino, p. 90
[28] Cloud, et. al., 2002 cited in Verdun-Jones and Tijirino, p. 91

can thus present a significant barrier to the ability of a person to understand advice not provided in his or her mother tongue.[29] The study of barriers to the accessibility of legal aid services by immigrants and members of visible minority groups also pointed specifically to the problem that immigrants who do not speak English or French may have in comprehending legal advice provided by telephone.[30] Similarly, the study of legal aid needs and service delivery gaps pointed to problems experienced by Aboriginal people receiving legal advice by telephone.[31]

The authors of the Brydges study reasoned that legal advice provided over the telephone that is poorly understood or not understood at all may be more damaging to the legal position of the detained person than no advice at all. If the police fail to allow the detainee to contact a lawyer any evidence gathered in an interrogation may later be placed in jeopardy. However, a perfunctory contact with a lawyer that satisfies the formal legal requirement can work to the disadvantage of the accused. With the Brydges requirement satisfied in a purely mechanical way, the police may proceed to interrogate the accused person regardless of his comprehension of any legal advice that may have been given. As the research suggests, this may involve intoxicated persons who may have difficulty even remembering the advice provided by the lawyer. Detainees who suffer from mental disorders or learning disabilities can be highly suggestive and possibly vulnerable to persuasive interrogation techniques. [32] These vulnerabilities may be exacerbated when under arrest because of confusion, fear, and the use of physical force. This raises questions about detainees jeopardizing their right against self-incrimination and the role, if any, of Brydges duty counsel.

The Brydges study suggests changes that should be introduced to improve the system of advice for detainees. Most respondents underscored the need to implement accessible, centralized telephone-based Brydges duty counsel systems in jurisdictions where they do not presently exist.[33] In all jurisdictions, these services need to be staffed at a level sufficient to assure timely response. In areas where required access to multilingual lawyers, or possibly appropriately trained, accredited and supervised paralegals should be made available.

The manner in which the Brydges legal advice is provided should not place the client at a potential disadvantage by allowing the interrogation to proceed in circumstances that involve diminished capacities of some clients. Even using a telephone format, advice lawyers might be able to ask questions of the detained person that might allow an assessment of the person's condition and vulnerability. If the advice lawyer suspects the presence of an impairment that would jeopardize the detainee's legal position the police could be advised against interrogation until the capacity of the accused is properly assessed.

[29] Verdun-Jones and Tijirino, p. 18
[30] Tsoukalas, Smith and Buckland, p. 41
[31] Dockstater and Auger, p. 50
[32] Supra, footnote 27
[33] ibid., p. 17

Thinking beyond the implementation of conventional centralized telephone-based Brydges services, Verdun-Jones and Tijirino consider alternative models that might better serve the needs of detained persons. They suggest that duty counsel lawyers, possibly assisted by paralegals, could be assigned to high volume local jails to provide on-site advice services. This would allow more effective communication with detained individuals who suffer the disadvantages discussed above.[34] On-site duty counsel services at police lock-ups might have further potential. According to Verdun-Jones and Tijirino,

> If the role of duty counsel were to be expanded, lawyers could be assigned to specific police stations and lock-ups not only to provide legal advice and assistance but also to assist accused persons in contacting community services that may be of benefit to them. Such an expanded role for duty counsel would reflect a client-centered approach. Indeed, legal aid services should focus on a more *holistic* approach towards clients who are held in police custody.[35]

The Brydges study raises an important issue about the capacity of the current approach to advice for detainees to meet their needs. This hinges on assuring that advice is comprehensible, given the characteristics of in-custody accused and the stressful circumstances surrounding the arrest.

In the Evans case[36] the Supreme Court of Canada ruled that the police must inform suspects of their right to counsel in terms they can understand.[37] In that case Chief Justice McLachlin stated:[38]

> the police cannot rely on their mechanical recitation of the right of the accused, they must take steps to facilitate that understanding.

If this is the standard for the police providing information about the right to legal advice then on logical grounds, should the standard for legal aid not also insist on legal advice that is comprehensible to the detained person? If an advice lawyer is not entirely satisfied that the detainee is fully cognizant of his or her rights and fully able to exercise them, should there be some mechanism to inform the police that interrogation should not proceed? This might require special training and special questioning protocols by Brydges advice lawyers.

Brydges duty counsel can have two different objectives. One is meeting a Constitutional requirement. The other is providing substantive assistance. The implication of the Brydges study is that the emphasis in Canadian legal aid is at presently largely on the former. The Brydges study calls for more of a balance between these two objectives

[34] Verdun-Jones and Tijirino, p. 120
[35] ibid., p. 18
[36] R. v. Evans (1991) 63 C.C.C. (3d) 289
[37] Verdun-Jones and Tijirino, p. 79
[38] R. v. Evans cited in Verdun-Jones and Tijirino, p. 79

Unmet Needs That Flow From The Adversarial Court Process

The central study in the program of research was the court site study.[39] This study examined the numbers of un-represented accused[40] in nine criminal courts and explored the consequences of the lack of representation. Although the focus of criminal defence work is often on the trial, and court decisions regarding the right to counsel often refer to right to representation at trial, the study focused on representation at all stages of the criminal justice process. Only a small proportion of criminal matters are decided by a trial. Most are disposed earlier in the criminal justice process. The earlier stages of the criminal justice process are important for the cases that eventually do proceed to trial. Research shows that critical decisions are made at the early stages of the criminal justice process that can have important impacts on subsequent stages and on the outcome of the case.[41] While criminal trials may be more demanding than the pre-trial stages with respect to legal technicalities, the earlier stages are nevertheless adversarial and the court process is formal and complex.

The table below shows that un-represented accused appear frequently in the criminal courts. Table I shows the percentage of accused appearing un-represented at various stages of the criminal justice process in all nine courts combined. [42]

TABLE I

Percentages of Un-Represented Accused by Stage of Proceeding

Appearance	Per Cent Un-Represented	Minimum Per Cent in Four Of Nine Courts
First Appearance	5 % to 61 %	above 36 % in four courts
Second Appearance	2 % to 38 %	above 30 % in four courts
Third Appearance	1 % to 32 %	above19 % in four courts
Bail Hearing	3 % to 72 %	above12 % in four courts
Enter Plea	6 % to 41 %	above18 % in four courts
Final Appearance	6 % to 46 %	above 23 % in four courts

[39] Supra, footnote 6.
[40] Un-represented is not defined specifically. Accused who were counted as un-represented at some stage of the court process may have received advice or assistance at some other point.
[41] Hann, et. al., Part I, pp. 9, 10
[42] Ibid., p. 11

As Table II shows, the results of the court site study also revealed that fairly large

TABLE II

Per Cent of Un-represented Accused Convicted and
Sentenced to Jail at Last Appearance

Outcome At Last Appearance	Range of Percentages for Nine Courts Combined	Minimum Percent in Four of Nine Courts
Per Cent Convicted	43 % to 87 %	above 60 % in four courts
Per Cent Sentenced to Jail	4 % to 27 %	above 16 % in four courts

percentages of criminal accused are convicted without the benefit of counsel. Even more troubling, up to 27 per cent of un-represented accused receive jail sentences.

Who should Have Legal Representation?

The right to legal representation is not absolute. The right of accused persons to obtain legal representation in court is enshrined in the *Canadian Charter of Rights and Freedoms* in sections 7 and 11d.[43] However, the courts have ruled that accused have a right to state funded counsel circumstances where the absence of legal representation would results in an unfair trial.[44] In *R v. White*, McDonald J. outlined the criteria that should be taken into account in considering whether legal counsel is necessary to ensure a fair trial.

- The characteristics of the accused such as financial situation, language skills and education
- The complexity of legal and evidentiary matters, and
- The possible outcome, for example, the possibility of imprisonment[45]

The right to legal representation based on the needs to assure fairness that exists in law applies to representation at trial. It has been pointed out that most of what occurs in court happens before the trial stage.

The basic standard applied by legal aid plans is the risk of incarceration. If the degree of seriousness of the offence and/or the criminal background of the accused indicates that a jail sentence is likely legal aid plans will generally provide coverage. However, as we have seen above in the section on coverage, respondents in several studies felt that that the risk of incarceration standard is too narrow. The Ontario Legal Aid Review also

[43] Constitution Act, 1982, Part I, Canadian Charter of Rights and Freedoms
[44] D. Stuart, Charter Justice in Canadian Criminal Law, Carswell, 1996. p.7
[45] R v White and the Queen (1977) 32 C.C.C. (2d) 478 at 490 (Alta S.C.)

challenged the "negative liberty test" as being too narrow a standard for legal aid coverage.[46]

The criteria for legal aid coverage are narrow. The right to counsel to assure fairness that is supported in the law applies only to the trial level. Legal aid plans usually apply the "risk of imprisonment" test more broadly to encompass the pre-trial stages of the criminal justice process. Even this has been criticized in the research and elsewhere as being too restrictive. The analysis below takes an intuitive approach to the idea of fairness and extends it to all stages of the criminal justice process. The assumption adopted here is that an un-represented accused should not be placed in a position of disadvantage in a criminal proceeding, in an adversarial process with possible outcomes with serious consequences that can result disadvantages for accused.

The court site study gathered qualitative data from interviews with lawyers and judges about the ability of un-represented accused to represent themselves in criminal court. The figure below summarizes the observations made by key informants concerning the errors made by un-represented accused. These are not presented in any particular order.

Figure I

Most Frequently Cited Errors Made by Criminal Accused[47]

Stage	Error or Problem
First Appearance	-not knowing when to plead guilty -failing to appear and not understanding theconsequences with respect to bail -testing the tolerance of judges by asking for multiple postponements -not being aware of entitlement to disclosure
Pre-Trial Release	-not availing themselves of counsel because "they cannot wait" to argue for their release -conducting bail hearings without disclosure -not understanding, or agreeing to, release conditions that are unworkable; e.g. clauses relating to contact with spouses with whom they have legitimate contact or with whom they have joint responsibilities for children
Diversion	-not being aware of diversion or not asking to be considered for diversion

[46] Report of the Ontario Legal Aid Review: A Blueprint for Publicly Funded Legal Services, Volume 1, Ontario, 1997. p. 71.
[47] Adapted from Hann, et.al., Part I, Figure 5.1 and 5.4

Plea	-pleading guilty "just to get it over with" -pleading guilty when they are denied bail, just to get out of jail -pleading guilty when they have a viable defence -pleading guilty before they have seen the disclosure -not knowing how to assess the strength of the Crown's case -not asking for certain charges to be dropped -not pleading to charges consistent with the actual behaviour -not knowing the usual sentence for an offence -not understanding the consequences of a conviction either for subsequent charges or with respect to employment, eligibility to be bonded, etc.
Trial	-not demanding a trial or a dismissal on court days when the Crown witnesses fail to appear -not reading the disclosure or learning the Crown's evidence against them -going to trial when there are no justiciable issues -deciding to testify when they should not, or assuming that they must testify -making accidental and damaging admissions ("Yes I hit her but she hit me too.") -not calling the witnesses they need for an effective defence -not availing them of the legal processes that can their case; eg a hearing on the confession -not requesting a directed verdict when the Crown has not proven the case -not understanding the available defences -not being aware of the relevant evidence -not being able to effectively scrutinize the testimony of witnesses -poor or ineffective cross-examination
Sentencing	-the Crown will not normally bargain with unrepresented accused, thus not having the advantage of a reduced sentence -not knowing what arguments to make at sentencing -not knowing the best arguments to make with particular judges -not knowing the mandatory sentences for particular offences -not mentioning salutary efforts they may have made since the offence; e.g. getting a job, undertaking counseling or treatment -not being aware of or requesting certain types of sentence; e.g. a conditional sentence -not arguing against unworkable sentencing conditions

The informants noted that apart from the ability of un-represented accused to formulate and execute legal strategies, they often do not understand the social and economic consequences that may follow from a conviction and a criminal record. They may plead out without properly weighing the consequences.[48]

The respondents in the court site study provided anecdotal evidence of un-represented accused either failing to raise arguments in their defence or accepting outcomes without raising arguments because they had not considered the social or economic consequences. The most frequent examples involved un-represented accused accepting bail or sentencing conditions that would impact on the accused person's ability to fulfill family obligations. The examples included driving prohibitions or peace bonds that prevented the accused from driving children to school, and location curfews or driving conditions that effected the person's employment.[49] It was noted that accused might plead guilty even when they have a legal defence because they are ashamed or embarrassed and wish to minimize the shame and publicity of their offence.[50] This is amplified by the study of accessibility of criminal legal aid for immigrants and certain visible minority groups. The focus group participants in this study emphasized the manner in which the cultural values of minority groups often attach community stigma and personal shame to a criminal offence.[51] Some members of minority groups may therefore be especially vulnerable to the inappropriate decisions reported above in figure one by the key informants in the court site study.

The evaluation of a pilot project designed to provide information to un-represented accused characterizes the clientele of the main provincial criminal court in downtown Vancouver as being "incredibly poor, severely addicted, and whose thinking abilities are challenged, they may have alcohol-related neurological deficiencies (Fetal Alcohol Syndrome/Fetal Alcohol Effects), may be illiterate, have English as a second language, and suffer from mental illness [52] With these disadvantages, they face an unfamiliar and very stressful environment. According to one judge interviewed for the study:

> On occasion an un-represented accused will be pretty well organized. But most of them – they don't have a clue. They don't understand how a trial is conducted. They do not understand what things are relevant in relation to the charges they are facing. They don't have the advocacy skills, and whose to blame them for that? A lot of them are poorly educated people and people who are on the margins. But even people who have been generally more fortunate and better-educated do not have the advocacy skills. They

[48] ibid., p. 18
[49] ibid., p. 18
[50] ibid., p. 18
[51] Tsoukalas, Smith and Buckland, p. 23
[52] Malcolmson and Reid, pp. 15 and 16.

> don't know how to ask questions and don't know which questions to ask.[53]

On the basis of the data in this research nothing can be said specifically about the fairness of treatment of un-represented accused. The qualitative data do lead to the conclusion that virtually no accused person who appears un-represented in criminal court could represent him- or herself without making errors both of omission and of commission that place them at a disadvantage. Most matters in the criminal courts are disposed without a full trial. However, even though most of the appearances are at stages of the criminal justice process before the trial stage, the proceedings are adversarial, the un-represented accused is opposed by a trained prosecutor, and the appearance involves legal procedures and technicalities unfamiliar to lay persons. In view of the consequences of a conviction the litany of disadvantages is cause for concern about un-represented accused.

Judges and prosecutors claim that the presence of un-represented accused places a considerable strain on them because they must step outside of their normal roles to assist these people. The perception of interviewees was that this results in a greater burden on and increased workloads for the court.[54] However, contrary to expectations, the quantitative data do not support the case for an increased burden on the court. Duration of appearances was shorter and number of appearances per disposed case was shorter for un-represented accused.[55] The evidence on total elapsed time to the completion of cases was mixed. Un-represented accused required longer elapsed time compared with accused represented by staff lawyers, but shorter times compared with those represented by private bar lawyers.[56] It is possible that the efforts of the judges and the prosecutors diminish the consequences of any disadvantages experienced by un-represented accused but there is no direct evidence one way or the other.

The qualitative evidence suggests that the level of expertise required to avoid disadvantage is well beyond the capacities of virtually all un-represented accused, and this applies to all stages of the criminal justice process. In view of the qualitative evidence about the lack of advocacy skills of accused and the inability to assess appropriate courses of action and consequences, it is very difficult to conclude that fairness in any basic and intuitive sense could characterize the appearance of any un-represented person in criminal court. It is arguable that all accused should receive some level of legal representation.

[53] ibid., p. 16
[54] Hann, et. al., Part I pp. Eiii and 24
[55] ibid., pp. 26, 27
[56] ibid., p. 26-28

System-Centered and Client-Centered Perspectives on Criminal Legal Aid Needs: Meeting The Special Needs of Legal Aid Clients

The results of most of the research promote the concept that the disabilities and disadvantages of the accused should be considered to a much greater extent in determining and addressing the needs of legal aid clients. In her report on the criminal legal aid needs of women, Lisa Addario describes this as a more client-centered approach as distinguished from the conventional court-centered perspective on criminal legal aid needs. [57] In the court- centered approach legal aid needs are assumed to flow almost exclusively from the arrest, the charge and the court process. Meeting the client's needs means providing the person with legal advice or representation. This approach tends to see the criminal matter as an isolated legal issue disconnected from the disadvantages and disabilities of the accused that may be relevant to the offence or to other legal or non-legal issues that are part of the bundle of problems related to the offence. On the other hand, the client-centered perspective on criminal legal aid needs represents the view that it is important to deal with the legal issues in a way that takes into account the effects of disabilities or disadvantages that are related to the offending behaviour and/or attempts to employ reparative and preventative strategies that address the individual or systemic factors are linked to the offence. These other factors may be linked to the offence either as cause or consequence. The criminal offence is not isolated from these related issues and treating them as such is, in Addario's view, a form of tunnel vision that ignores the social realities involved in the production of criminal offending and the social consequences of employing criminal sanctions.

A client-centered emphasis on legal aid needs acknowledges a changing social role of criminal defence, a new role that appears to be the product of at least two influences. One is a cross-over of perspectives from the literature in civil legal aid that views legal problems as an integral aspect of poverty. [58] The second influence may be the increasing influence of the restorative justice movement that promotes greater reliance on preventative and reparative strategies in dealing with offenders.

The client-centered perspective or emphasis is not distinct from providing legal advice and representation. The court-centered approach and the client-centered approach should not become a false dichotomy. The need for criminal legal aid is driven in the first instance by the criminal justice process; by the arrest, the charge and the court process. The client-centered dimension of legal aid needs adds a dimension to the court-centered approach and may require a change in delivery methods to deal with the special needs of legal aid clients. It does not replace it, nor does it imply that legal aid should provide a range of services beyond what a lawyer might either take into account or arrange to have provided when serving the client. It suggests a number of client characteristics that might be taken into account in providing legal representation. Taking into account the special needs of legal aid clients may be necessary to enable legal to effectively meet the more

[57] Addario, p. 4
[58] Doug Ewart, "Hard Caps, Hard Choices: A Systemic Model for Legal Aid" in F. Zemans and P. Monahan and A. Thomas, A New Legal Aid Plan for Ontario: Background Papers, Osgoode Hall Law School, 1997. p. 8

traditional court-centered needs or to provide an outcome that has stronger preventative or reparative aspects for that particular individual. This view of court-centered and client-centered needs attempts to recognize that the justice system within which legal aid operates is changing, emphasizing more reparative and preventative ways of dealing with clients. These changes in the broader justice system challenge criminal legal aid to adjust to these changes. At the same time, the core business of criminal legal aid is legal advice and legal representation.

The research suggests four main types of special needs of legal aid clients that support the argument for a more client-centered approach. These are needs that relate to the disabilities of legal aid clients; needs that relate to linguistic, social and cultural characteristics; needs that relate to overlapping legal problems experienced by legal aid clients; and needs related to systemic social factors.

Unmet Needs That Flow From the Disabilities and Disadvantages of the Accused

Both the Brydges study and the court site study pointed to the frequency of mental disorders, cognitive disabilities and learning disabilities found among the criminal accused. The authors of the Brydges study discussed the limitations in dealing with clients needs related to these issues at the Brydges duty counsel stage. The court site study observed that there are significant numbers of mentally disordered offenders in some of the courts studied.[59] This observation was in the context of un-represented accused, rather than with regard to providing representation for offenders with these disabilities. However, several factors may contribute to the inability of legal aid to even recognize many of these disabilities. One is the pace of the court process. In a part of the research that dealt with system problems caused by un-represented accused, the court site study showed that appearance times, excluding full trials, generally varied between about a minute and four minutes.[60] Second, because of the lack of resources for legal aid, legal aid lawyers were described by respondents in the court site report as being “run off their feet” and “unable to go the whole nine yards” for their clients.[61] The court site study raised the issue of mentally disordered accused as an argument for the need for legal representation. It is very likely that even if accused with these problems are represented by legal aid, lawyers may have little possibility of identifying clients with these problems unless there is adequate opportunity before the court appearance to assess client needs. Thus there may be little likelihood that the special needs of some clients are being met.

Unmet Needs That Flow from Linguistic and Cultural Barriers

The court site study reported significant numbers of Aboriginal people and immigrants in certain courts. In the case of both groups, the court site study cited language and cultural barriers that limit the ability of un-represented accused to cope with the court system. Both the study of the needs of Aboriginal people for legal aid and the study of needs of

[59] Accused were believed by informants to be mentally disordered. This observation does not imply a clinical determination of mental disorder.
[60] Hann, et. al., Part I, p. 27
[61] Ibid., p. 16

immigrants and visible minorities extended the discussion of language and cultural barriers to problems in providing effective representation to minority clients. To a large extent, the issues raised by the Aboriginal and Immigrants studies related to effective communication between clients and legal aid lawyers. The lack of ability to speak either English or French presents obvious problems. Interpreters are available in courts when required, although possibly not immediately. The impressions of respondents in both of these studies were that the lack of interpretation, especially for contacts between lawyers and clients out of court was a problem.

Both studies cited a variety of barriers to effective legal aid service that are broadly cultural in nature. For example, the Aboriginal study pointed to culturally-based communication patterns. According to some respondents, the fast pace of the court and the lack of time that lawyers have to talk to clients presents a "culture clash" with traditional Aboriginal styles of communication. Aboriginal people who are strongly rooted in traditional oral cultures will not establish a bond of trust and effective communication unless there is time for the Aboriginal client to speak at sufficient length to the lawyer to "tell his or her story". This is often not the case and, according to the study, many Aboriginal accused will not communicate critical information to the lawyer or may be inclined to enter guilty pleas when they should not, in part because of culturally-based communication barriers.

Respondents in both studies described psychological barriers relating to feelings of systemic discrimination that limit effective communication between some minority legal aid clients and lawyers. Although the perceptions of systemic discrimination arise from different histories and patterns of social relations, many Aboriginal people and members of several disadvantaged minority groups hold strong perceptions of systemic discrimination in the justice system general. This is related to feelings of mistrust and suspicion of the justice system, including legal aid.

Unmet Needs that Flow From Overlapping Legal Matters

Respondent opinions and analysis of the literature from a number of the studies observed that the "silos" that exist between traditional service delivery areas (e.g. criminal law, family law and refugee law) result in unmet need for some clients. Respondents in the immigrants, refugees and visible minorities study observed that a conviction in a criminal matter may have significant consequences for the immigration status or the refugee claim of an accused. Some respondents felt that in dealing with criminal matters legal aid lawyers tend not to take into account implications for a person's immigration status or refugee claim.[62] The study of needs of women and criminal legal aid indicated that the involvement of women in a criminal law matter, as an accused person or as a victim, can invite the attention of child welfare or social services, thus raising poverty law matters.[63] Respondents in all three of the studies dealing with legal aid in the northern territories indicated that family disputes often give rise to criminal law offences and if not resolved

[62] Tsoukalas, Smith and Buckland, p. 55
[63] Addario, p. 50

can cause repeated criminal offences.[64] Involvement in criminal legal aid cannot be separated form these connected issues. Although they may not directly become part of the actual court proceeding, legal aid should be organized to identify and deal with them to limit the impacts on the lives of people and to attempt preventative and reparative efforts.

Unmet Needs That Flow From Systemic Social Factors

Respondents in the Aboriginal study recommended that legal aid should become more involved in developing restorative justice strategies for Aboriginal clients.[65] In a similar fashion the respondents in the immigrants and visible minorities study suggested that legal aid should be more proactive in developing diversion options and sentencing alternatives to address the special circumstances related to the involvement of minorities in crime.[66] In view of the alienation from the justice system felt by Aboriginal people and suspicion about the justice system felt by many members of immigrants and visible minority groups, these expectations of legal aid area paradox, although explainable. The perspective of Aboriginal people on legal aid needs is a product of the over-representation paradigm. The interpretation of the authors of the Aboriginal study is that Native people trace legal aid needs back to the common source of systemic discrimination. This is the explanation for the view that legal aid should be addressing the systemic factors that bring Aboriginal people into conflict with the law in numbers so disproportionately greater than non-Aboriginals. In a somewhat similar manner, the perspective of the informants from immigrant and visible minority communities is a reflection of the view that immigrants and non-white minorities suffer from systemic discrimination in the justice system. It is a paradox that both Aboriginal people, immigrants and members of visible minorities were reported to be suspicious and mistrustful of legal aid, along with the justice system generally but, at the same time respondents from these minority groups expressed the expectation that legal aid should champion minority accused against systemic discrimination. The expectations relating to this type legal aid need not only reflect the views of respondents. They are firmly rooted in Canadian law. The alternative measures provision of the Criminal Code encourages the use of alternatives to incarceration.[67] The case law also provides that systemic social factors should be taken into account in developing sanctions for both Aboriginal people[68] and, more recently, for Afro-Canadians.[69] Proactively developing alternative measures of these types would no doubt benefit legal aid clients.

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[64] T. Roberts, Study of Legal Aid in the Yukon, Focus Consultants, 2002; T. Roberts, Study of Legal Aid in the Northwest Territories, Focus Consultants, 2002; Dennis Paterson and IER Research and Planning, Nunavut Legal Services Study, Toronto, 2002

[65] Dockstater and Auger, p. 47

[66] Tsoukalas, Smith and Buckland, p. 49

[67] Criminal Code of Canada, Section 718(e), "all available sanctions other than imprisonment that are reasonable on the circumstances should be considered for all offenders, with particular attention to the circumstances of Aboriginal offenders.

[68] R vs Gladue (1991) SCC

[69] R v. Hamilton (2003) O.J. Ontario Superior Court of Justice

A Caveat on the Client-Centered Perspective

The need for legal aid is triggered by detention by the police or by a charge and appearances in court. Thus needs driven directly by the justice system are fundamental. The client-centered needs argument is that the effective provision of legal aid is affected by range of client characteristics that give rise to needs related to effective communication with the legal aid lawyer or give rise to needs for dispositions or resolutions that take into account the clients disadvantages and disabilities. With respect to the latter these quite possibly reflect the same factors that may be related to the legal aid client's having committed the offence to begin with. This is not an empirically-based argument like analysis of the proportions of un-represented accused, the percentages being convicted, the percentages being sent to jail and the related qualitative data. The substance of this perspective on client needs derives largely from the apparent fit between the comments of various respondents and the conclusions of some researchers about the problems experienced by legal aid clients and the conceptual framework comparing client-centered needs and court-centered needs articulated in the report by Addario on the legal aid needs of women. The concept of client-centered needs seems sensible on intuitive grounds. However, there is no careful observational evidence describing how a client-centered might work as a dimension of a delivery model, nor is there empirical evidence about the benefits.

Conclusion and Discussion

The need for criminal legal aid is strongly driven by the criminal justice process. Thus the central focus and the starting point for this research was on un-represented accused in the courts. [70] The results of the research show that a large proportion of accused in criminal courts are un-represented. Many of these people are without representation at critical stages in the criminal justice process, at bail and at the sentencing appearance. In four of the nine courts, more than 60 percent of un-represented accused at final appearance were convicted without the benefit of representation. At least 16 percent of un-represented accused at final appearance received jail sentences, again, without legal representation.

Who among the un-represented accused should receive legal representation is open to question. The approximately 16 percent of the un-represented accused who received jail sentences fit the risk of imprisonment standard with certainty. Some of the respondents interviewed in the court site study said that legal aid coverage should be expanded at least to include first time offenders who face conviction and a criminal record. Casting the net farther, judges and lawyers were interviewed to determine how well un-represented accused are able to defend themselves in court. The overwhelming point of view from respondents was that un-represented accused lack the ability to defend themselves properly in the adversarial and technical environment of the criminal courts. Apart from

[70] Less attention was placed on legal advice at arrest and detention, although that is also driven by the justice system. The main focus of the public debate about problems in legal aid was on large numbers of un-represented accused in the courts.

the absence of advocacy skills and legal training, the pace of the court process itself leaves little time for the inexperienced and untrained person to consider options and courses of action. Indeed, some respondents indicated that many accused are processed through the courts and receive a disposition without understanding what has happened to them. It could be argued on the basis of the data concerning the mistakes that accused make that jeopardize their position that all accused persons require some representation in criminal court. Finally, respondents observed that many accused persons suffer from disabilities such as mental disorders or very low literacy levels, or language or cultural barriers, and that these people should receive legal representation

Respondents proposed a number of responses to the un-represented accused problem. Respondents in the court site study suggested that greater resources should be dedicated to duty counsel services, especially the expanded model of duty counsel that attempts to remove as many of the less complex cases from the docket as early in the process as possible. This is consistent with another recommendation that emerged from the court site study, that legal assistance should begin as early as possible in the criminal justice process.

Other recommendations for reducing the numbers of un-represented accused were to relax the traditional rationing mechanisms for legal aid, financial eligibility and coverage. The research showed that in every province the financial eligibility guidelines used by legal aid plans fall below the Statistics Canada Low Income Cut-Offs. Many respondents related low financial eligibility guidelines to the large numbers of un-represented accused in the courts.

The recommendation to relax coverage provisions focused largely, but not entirely, on increasing access to service for offenders who do not face the risk of imprisonment, but face the risk of a criminal record. Respondents felt that the consequences of receiving a criminal record were sufficiently great that first time offenders not facing the risk of imprisonment should receive legal assistance. Other recommendations relating to relaxing coverage provisions came from the perspectives of respondents who spoke for Aboriginal people, immigrants and visible minorities, and for women an expansion of coverage provisions would take into account risks to offenders in these groups that extend beyond issues relating only to the charge and the court process.

Relaxing financial eligibility guidelines and coverage provisions would place greater pressure on legal aid. However, placing a greater emphasis on expanded duty counsel could be viewed as a partial alternative to relaxing the guidelines and coverage. If financial eligibility guidelines and coverage provisions were ignored for expanded duty counsel, the numbers of clients would increase to include those who would otherwise be denied service.[71] As well, expanded duty counsel would tend to reduce the portion of the caseload going to the private bar in a mixed system thus reducing pressure on the full service or certificate component of the delivery system. If expanded duty counsel ignored normal financial eligibility guidelines and coverage provisions a partial universality of

[71] A. Currie, The Legal Aid Manitoba Expanded Duty Counsel Project: An Evaluation, Department of Justice, Ottawa, 1996

service would be created for the less complex cases. The main impact of more generous financial eligibility guidelines would fall on the smaller number of more complex cases for which full staff lawyer or private bar certificate service would be required because a lengthy trial would be involved.

These legal aid needs summarized in the paragraphs above and the solutions proposed are what might be termed *court-centred*. In addition to these needs a strong body of opinion emerged within the research emphasizing a more *client-centered* approach to legal aid needs. The research findings placed a great deal of emphasis on the need for efforts to assure greater accessibility of legal aid. Respondents in the court site study, observations from the un-represented accused pilot project and the literature review in the Brydges study characterized criminal accused as a low functioning population typically with low levels of literacy, low educational levels, and disproportionately high levels of learning disabilities, mental disorders, cognitive limitations and impacts of chronic drug and alcohol abuse. The court site study, the Aboriginal report and the immigrants, refugees and visible minorities study indicated that courts in some regions have large numbers of immigrants or Aboriginal people who may experience language and cultural barriers, possibly in addition to other disadvantages and disabilities. The research suggests that more effort needs to be placed on improving the awareness of legal aid, application procedures, and the role of legal aid through the use of public legal education and information programs. Public legal information of this sort might be directed at individual accused possibly by means of court-based approaches or aimed ay more general target populations through community groups that represent minority group constituencies. Many legal aid applicants and clients may need a considerable amount of hands-on assistance as well as information. This has implications for the use of technology-based approaches to improving application procedures and the provision of information. Although these approaches are implemented in the interest of cost-effectiveness, their appropriateness for the legal aid client population needs to be considered carefully. Various segments of the legal aid clientele may, for various reasons, have difficulties absorbing information and using computer-based information sources and processes that are not accompanied by more direct assistance.

The Brydges study, the Aboriginal study, the immigrants, refugees and visible minorities study and the three studies in the northern territories all emphasized the difficulties experienced by accused persons in understanding legal advice provided over the telephone. The Brydges study recommended that at a minimum centralized telephone advice services should be established everywhere in Canada and that they should be resourced at a level that would eliminated call-back delays and would provide immediate access to speakers of official languages where a minority exists and languages other than English or French in areas where required. The Brydges study proposed that on-site advice services might be established in high volume courts in order to overcome the inherent disadvantages of telephone services. This would allow the early identification of clients with mental or other disabilities who should be referred for appropriate assistance. This approach might better assure that any advice provided is both comprehensible to the detainee and does not work to the disadvantage of clients who might be interrogated following “perfunctory” provision of advice over the telephone. While the police station

option may be a viable option for improving advice services in larger urban areas, similar strategies would be problematic in small urban, rural and remote areas. It is possible that telephone advice services could be developed to screen for situations that might lead to problems for detainees and pursue appropriate follow-up actions.

Meeting the both the court-centered and the client-centered needs suggested by respondents would have implications for delivery models. Two elements of an improved approach to meeting the needs of legal aid clients were already suggested above based on comments from respondents in the court site study. One suggestion was the greater use of expanded duty counsel as a way of meeting the needs of the un-represented accused at the earlier stages of the court process. A second suggestion was intervention on behalf of accused as early as possible in the process in order to avoid problems that may occur because of the lack of representation early on that may impact on what happens at later stages. The early intervention proposal was made by respondents in the court site and was intended to apply to the court process. However, some of the implications above would imply intervention at even earlier stages in the legal aid process. The paragraphs below speculate about some of the implications for delivery models raised by the ideas about legal aid needs suggested by this research.

In order to become more client centred legal aid delivery may have to become more vertically integrated. Identifying and dealing with the needs of clients that flow from their significant disadvantages would require a capacity to do so early in the legal aid process. The process of dealing with client needs could possibly begin at intake or even further back in the justice process. As Verdun-Jones and Tijirino suggested, with special needs being identified at the stage where advice is provided to detainees. If the needs of clients were assessed early in the process this opens up the possibility of a type of “continuum of service” approach in which appropriate levels and types of service are provided based on the needs of the client, and continuity could be maintained as clients proceed through the criminal justice process. It was suggested by respondents in the court site study that Native court workers or other paralegals might be linked more closely with legal aid in a vertically integrated delivery model assisting lawyers with tasks such as scheduling and providing information to clients, gathering evidence and assisting with the development of sentencing plans. [72]

Legal aid delivery could be made more horizontally integrated. [73] Respondents representing immigrants, Aboriginal people and women indicated that there is a need for linkage between criminal matters and related problems in other areas of law such as refugee and immigration law, family law or poverty law. Legal problems in other areas of law should be identified, assuring that these needs are met within the overall legal aid system. The related legal problems might be relevant to the criminal matter. Alternatively,

[72] The implications for delivery models suggested here are similar to the framework for the delivery of criminal legal aid services proposed by John McCamus and his colleagues in the Report of the Ontario Legal Aid Review: A Blueprint for Publicly Funded Legal Services, Volume 1, Ontario, 1997. p. 151

[73] I would like to thank Keith Wilkins for suggesting the concepts of vertical and horizontal integration, and both Keith and Ted McNabb for many helpful comments on the paper.

they might be addressed separately, at least in part. From the client-centered point of view problems that might otherwise be seen as distinct legal matters are treated holistically as the interdependent set of problems affecting the client's life.

A fifth implication is the possible need for greater external integration. Respondents in the court site study, in the Aboriginal study and in the immigrants and visible minorities study suggested that greater external integration with community groups would be beneficial. The resources of community associations might be useful to lawyers in developing alternative measures or support for bail conditions. Community associations might be ideal intermediary groups for developing public legal information related to legal aid. Finally, community groups could provide a source of information about group cultures and social patterns that may be relevant to providing legal advice and criminal defence services.

The research has produced a wealth of empirical data about the extent of un-represented accused appearing in criminal courts and qualitative data about their experiences in the courts. The research results make a strong case that un-represented accused face daunting problems in the courts. However, the concept of *need* has a very large normative component. The views of lawyers, judges and spokespersons for client groups captured in this research suggest that the extent of unmet need extends beyond the level of service currently provided. This research will hopefully provide the basis for discussion by policy makers about the degree to which conditions described by the research represents *needs that should be met.*

The research also raises broader questions about what is expected of legal aid in the criminal justice system. Should legal aid meet the basic standards set out in the law of providing service for those who are in custody or who accused of serious crimes are at risk of imprisonment? Should there be universal access to legal representation at some or all levels before the trial stage? It has been pointed out long before this research that "[h]aving a lawyer for a court appearance in a criminal charge is widely thought of not as a right, but a necessity."[74] Finally, should legal aid play some role in achieving broader justice system objectives of preventative and reparative strategies, efforts that might be in the best interests of the legal aid client? Again, these are mainly normative rather than than empirical questions.

[74] James L. Wilkins, Legal Aid in the Criminal Courts, University of Toronto Press, 1975. p. 52

APPENDIX I

Forthcoming Reports in the Legal Aid Research Series

Criminal Legal Aid

1. Robert Hann, Joan Nuffield, Colin Meredith and Mira Svoboda, Court Site Study of Adult Un-Represented Accused, Part I: Overview Report, Robert Hann & Associates, Toronto and ARC Research Consultants, Ottawa, 2002.

2. Robert Hann, Joan Nuffield, Colin Meredith and Mira Svoboda, Court Site Study of Adult Un-Represented Accused, Part II: Site Reports, Robert Hann & Associates, Toronto and ARC Research Consultants, Ottawa, 2002.

3. Simon Verdon-Jones and Adanira Tijirino, A Review of Brydges Duty Counsel Service in Canada, Simon Fraser University, 2002.

4. Spyridoula Tsoukalas and Paul Roberts, Legal Aid Eligibility and Coverage in Canada, Canadian Council on Social Development, Ottawa, 2002.

5. Prairie Research Associates, Legal Aid and Official Languages in Canada, Winnipeg, 2002.

6. Spyrodoula Tsoukalas, Ekuwa Smith and Laura Buckland, A Study of the Accessibility of Criminal Legal Aid For Immigrants, Refugees and Visible Minorities, Canadian Counsel on Social Development, Ottawa, 2002.

7. Mark Dockstater and Don Auger, Study of the Legal Aid Needs of Aboriginal Men, Women and Youth, Aboriginal Research Institute, 2002.

8. Joan Nuffield, Legal Representation in Criminal Cases Rural and Isolated Areas of Canada's Provinces, Robert Hann and Associates, Toronto, 2002.

9. Lisa Addario, Six Degrees From Liberation: Legal Aid Needs of Women in Criminal and Other Matters, Ottawa, 2002.

Legal Aid in The Northern Territories

10. Tim Roberts, Study of Legal Aid in the Yukon, Focus Consultants, 2002

11. Tim Roberts, Study of Legal Aid in the Northwest Territories, Focus Consultants, 2002.

12. Dennis Paterson and IER Research and Planning, Nunavut Legal Services Study, Toronto, 2002.

Civil Legal Aid

13. Lorne D. Bertrand, Joanne Paetch, Nicholas Bala and Joseph P. Hornick, A Profile of Family Legal Aid Services in Canada, Canadian Research Institute for Law and the Family, Edmonton, 2002.

14. Michael Goldberg, Immigration and Refugee Law Services in Canada, Social Planning and Research, Council of British Columbia, Vancouver, 2002.

15. John Frecker, Immigration and Refugee Legal Aid Cost Drivers, Legistec Inc., 2002

16. John Frecker, Representation for Immigrants and refugee Claimants, Legistec, Ottawa, 2002

17. Therese Lajeunesse, Study of the Legal Services Needs of Prisoners in Federal Penitentiaries in Canada, Ottawa, 2002.

18. Prairie Research Associates, Study of the Legal Services Provided to Penitentiary Inmates by Legal Aid Plans and Clinics in Canada, Ottawa, 2002

General

19. Don Fleming, The Purchaser-Supplier Approach in Legal Aid, Centre for Socio-Legal Studies, Oxford, 2002