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EVALUATION DOCUMENT

DEPARTMENT OF JUSTICE
LEGAL AID PROGRAM

Technical Report

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Evaluation Division
Policy Integration and Coordination Section

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EXECUTIVE SUMMARY

In May 2000, the Evaluation Division of the Department of Justice contracted for an evaluation of the Legal Aid Program administered by the Department. This evaluation was to "examine what has happened as a result of the most recent (Criminal and Young Offender Legal Aid) cost-sharing agreements with the provinces and to assess the extent to which national legal aid objectives have been furthered by these agreements." It was also to identify lessons learned over the period of time covered by the current agreement (1996-2001) as the Department prepares to negotiate the next set of agreements.

The principal focus of this evaluation was on the role played by the federal Department of Justice in the national 'system' (loosely defined) of criminal and Young Offender legal aid. It did not assess the services provided by the individual legal aid agencies in the provinces. The Access to the Department of Justice agreements with the territories were also excluded from the coverage of this evaluation.

The primary sources of data examined for this evaluation included interviews with officials in the Department of Justice, interviews with representatives of the provinces and the legal aid agencies, interviews with other key stakeholders, a review of program files, and an examination of available statistical data on the delivery of legal aid in Canada.

As described by Programs Branch, the Department of Justice's Legal Aid Program consists of three main components. These are:

- Development of the Department of Justice policy on criminal and Young Offender legal aid through internal policy development activities, research on legal aid issues and participation in, and support of, the federal/provincial Permanent Working Group on Legal Aid (PWG).
- Implementation of the Department of Justice policy on legal aid through the negotiation of, and making of payments pursuant to, cost-sharing agreements with individual provinces and territories, and the auditing of claims made under the agreements.

- Analysis and integration of support for criminal and Young Offender legal aid into broader departmental initiatives and priorities.

For the purposes of this evaluation, the objectives of the federal Department of Justice legal aid program were adapted from the preamble to the current cost-sharing agreement as follows:

- To make a significant financial contribution to the cost of criminal and Young Offender legal aid.
- To ensure equitable access to legal aid for economically-disadvantaged persons facing serious criminal charges.
- To maintain minimum standards of service (meaning coverage) across Canada.

While these objectives were accepted by the stakeholders interviewed for this evaluation as a reasonable basis for the evaluation, it should be recognized that formal objectives for the program have not been established.

The key findings of this evaluation of the Department of Justice's legal aid program can be summarized as follows:

- There is a clear and generally-accepted rationale for the continuing existence of legal aid programs and for the Department of Justice's involvement in their funding and interest in their performance.

- The Department of Justice has not defined a clear and coherent set of objectives for its program of support for criminal and Young Offender legal aid.

- The Department of Justice has not developed clear policies for its program of support for criminal and Young Offender legal aid.

- Turnovers and vacancies within Programs Branch have limited the department's capacity to work effectively with the provincial/territorial (PT) partners in jointly developing policies on legal aid.

- The PWG has considerable, but as yet, largely unrealized potential to contribute to an effective partnership between the Department of Justice and the PT partners in the legal aid context. Necessary preconditions to achieving the full benefits of the PWG include

development and articulation of the Department of Justice policy and program objectives for legal aid, and creation of a secretariat to support the work of the PWG.

- There currently exists no empirical basis for assessing the adequacy of the Department of Justice's financial contribution to the costs of criminal and Young offender legal aid. In part, this is due to the absence of clear and measurable objectives for the Department of Justice program. Once such objectives have been identified, and related measures of system performance have been taken, then an assessment of the adequacy of the federal contribution will be feasible.

- Efforts to integrate legal aid issues in to the broader policy development work of the department have been sporadic at best. No formal procedures are currently in place to ensure consultation between departmental policy makers and the managers of the legal aid program.

- Criminal and Young Offender legal aid in Canada are not regarded by the partners as being adequately accessible to those who need these services. Recent cutbacks in service levels in many jurisdictions mean that only persons facing the most serious charges and whose financial circumstances are the most dire are likely to receive legal aid. These cutbacks may also have exacerbated pre-existing disparities in the availability of legal aid services across the provinces.

- Data on the performance of the national 'system' of criminal and Young Offender legal aid are not currently available except in the most rudimentary sense (i.e., counts of applicants, clients and service contacts). A joint FPT effort will be required to identify a set of mutually-acceptable and comprehensive performance measures which reflect the extent to which the agreed objectives of the 'system' are being met, both in each jurisdiction and nationally. There may be a useful and important role to be played by Statistics Canada in this effort.

In recent years, the program appears to have evolved more in response to pressures for restraint and control than from evidence-based planning relating to program realities and needs. This creates both a challenge and an opportunity to develop the next set of agreements based on new (or at least refreshed) understandings respecting goals, new commitments respecting processes of collaboration and an updated financial design.

Aspects of the current operating environment that are likely to impact on the development or updating of federal-provincial programs including legal aid are:

- the evolving nature of federal-provincial relationships generally, as demonstrated by various recent intergovernmental initiatives;
- progressively expanding requirements relating to accountability, outcomes measurement and reporting, at least at the federal level; and
- evolving practices and attitudes respecting intergovernmental financial relationships, as applied to specific program initiatives.

1. INTRODUCTION

In May 2000, the Evaluation Division of the Department of Justice issued a Request for Proposal (RFP) to conduct an evaluation of the Legal Aid Program administered by the Department. The purpose of this evaluation was to "examine what has happened as a result of the most recent (Criminal and Young Offender Legal Aid) cost-sharing agreements with the provinces and to assess the extent to which national legal aid objectives have been furthered by these agreements." It was also to identify lessons learned over the period of time covered by the current agreement (1996-2001) as the Department prepares to negotiate the next set of agreements.

The principal focus of this evaluation was on the role played by the federal Department of Justice in the national 'system' (loosely defined) of criminal and Young Offender legal aid. The evaluation did not attempt to assess the services provided by the individual legal aid agencies in the provinces and territories. The Access to Justice agreements with the territories were also excluded from the coverage of this evaluation as they will be the subject of a separate effort.

In the remainder of this chapter, we briefly describe the history and operating environment of the Department of Justice legal aid program.

1.1 Historical Overview

During the 1970s,the Department of Justice's funding and related support for criminal legal aid was a key catalyst for the development of criminal legal aid services across Canada. Prior to this, such legal aid as was available was provided by lawyers acting in a voluntary or charitable capacity, often organized through law societies, local bar associations and law schools.

The first legal aid plan established by statute was the Ontario Legal Aid Plan, created by the *Law Society Amendment Act* of 1951. The remaining provinces and territories introduced formal legal aid in the 1970s, albeit with varying approaches to service delivery. The main dimension along which the various provincial programs vary is in terms of whether they adhere to a staff model, a

judicare model or a mixed model. In staff systems, legal aid is provided to eligible applicants by lawyers (and to some extent, paralegals) who are employees of the program. In judicare systems, the services are provided by members of the private bar paid by the program on a client-by-client fee-for service basis. Most jurisdictions employ mixed or hybrid systems which include elements of both staff and judicare models. Duty counsel services are provided by both staff and private lawyers on a per diem basis, depending on the jurisdiction. Given this diversity, it is only in a loose sense that there exists a national 'system' of legal aid.

Since its inception in the early 1970s, the Department of Justice's program of support for criminal and Young Offender legal aid has consisted primarily of the negotiation of the terms of cost-sharing agreements between Canada and individual provinces and territories, the payment of contributions pursuant to these agreements, and related audit and performance monitoring activities. It has also involved the maintenance of a prominent federal role at federal/provincial/territorial (FPT) meetings of officials involved with legal aid. A federal presence has also been maintained at the annual national meetings of senior staff of the legal aid programs.

Over the past twenty years, the Department has made funds available to support pilot projects and research on issues related to legal aid. As well, the Department of Justice funded a series of evaluations of individual legal aid programs in the period between 1982 and 1992. The costs of these evaluations were typically shared with the participating provinces, according to the terms of the cost-sharing agreements. For a variety of reasons, including the cost and length of these evaluations, this approach was abandoned after 1992. While the current cost-sharing agreement includes clauses related to evaluation and policy research, the only mandatory elements of these provisions refer to provincial cooperation with federal evaluation of its own program, and provision of existing provincial data which the Department of Justice requests as it assesses the achievement of federal objectives in the area of legal aid. With the exception of the current evaluation, no such research or evaluation was conducted during the 1996-2001 period. One consequence of this inactivity is the absence of historical data at the national level on the performance of the legal aid system.

1.2 The Program Environment

There are a number of significant elements of the environment in which the Department of Justice's program of support for criminal and Young Offender legal aid operates. Notable among these are the following:

- Constitutionally, the federal Parliament has exclusive jurisdiction to legislate criminal law and procedure.

- Constitutional authority for the administration of justice, including the administration of the courts, lies with the provinces. Consistent with this, individual provinces have adopted diverse approaches to the delivery of legal aid within their borders.

- The Supreme Court of Canada noted in *R. v. Brydges* (1990) that "the responsibility for the provision of legal aid is divided between the federal government under its authority in matters of criminal law, and the provincial governments under their authority for the administration of justice and for civil and property rights".

- Both current and past cost-sharing agreements have recognized the authority of the provinces and territories to establish financial eligibility criteria for legal aid. These criteria are typically tied closely to PT eligibility rules for other forms of provincially-administered social assistance.

- A similar situation exists with respect to the coverage of particular types of legal problems by individual legal aid programs. In the cost-sharing agreements in effect from 1987/88 to 1990/91 inclusive, the wording indicated that agencies responsible for legal aid **shall** authorize the provision of legal aid in relation to an indictable offence (for example). In contrast, the current agreements indicate that provinces and territories are to **give priority** to offences which are likely, on conviction, to result in a prison sentence. The shift in wording from "shall" to "give priority" is significant. Regardless of whether provinces and territories, under the older agreement, did in fact authorize legal aid to all who met the criteria at the time, use of the imperative term "shall" indicates a firmer requirement than does the wording "give priority". In addition, the agreements in effect since (at least) 1978 have allowed the provinces and territories to refuse legal aid to an otherwise-eligible applicant who has prior convictions for the same offence, or has previously received legal aid from that agency (referring presumably to chronic users of legal aid services). The foregoing conditions of the agreements related to coverage give considerable latitude to the programs.

- An additional complication arises from the fact that while most provincial programs provide some degree of coverage for family and other civil law matters, federal cost-sharing for these services does not fall under the agreements negotiated by the Department of Justice. Instead, the federal contribution to these costs in the provinces is currently made through the Canada Health and Social Transfer (CHST), and previously through the Canada Assistance Plan (CAP) as an "item of special need". Under CAP, cost-sharing for civil legal aid was open-ended, with the size of the federal contribution calculated as 50% of eligible expenditures (defined as expenditures on persons eligible for social assistance) by the province or territory on civil legal aid in a given year. Under CHST, a block-fund transfer is made to the provinces and territories to support health, post-secondary education, social assistance and social services. The contributions are a combination of cash and tax point transfers. CHST imposes no specific requirements on provinces or territories with respect to the amount or nature of their expenditures on civil legal aid. Decisions on how to allocate CHST funding across program areas are left to the individual jurisdictions. Significantly, CHST is not open-ended (unlike CAP).

- For the purposes of this evaluation, civil (meaning primarily family, but also immigration) legal aid was excluded because it falls outside the Department of Justice's cost-sharing agreements with the provinces. The presence of diverse civil legal aid programs in the individual jurisdictions is nonetheless a complicating factor in understanding the larger picture of how the individual programs are funded and operate. Federal contributions to civil legal aid appear to be pooled together with provincial government contributions in descriptions of how individual programs are funded. This is consistent with the block-fund nature of CHST in which no specific allocation is made to civil legal aid by the federal government. In the future, however, the Department of Justice may want to examine its role in relation to civil legal aid within its general goal of promoting access to justice.

1.3 Conduct of this Evaluation

Eleven sources of data were examined for this evaluation. These are:

- Interviews with the Managers in the Department of Justice's Programs Branch responsible for the Legal Aid Program.
- Interviews with other senior officials within the Department of Justice whose work has an impact on legal aid.

- Interviews with the members of the PWG established pursuant to the most recent cost-sharing agreement.
- Interviews with representatives of provincial governments concerned with legal aid.
- Interviews with representatives of the legal aid agencies in the provinces.
- Interviews with other key stakeholders.
- Review of relevant literature and studies of legal aid conducted by the Research and Statistics Division of the Department of Justice.
- Review of Legal Aid Program files maintained by Programs Branch.
- Review of past and current legal aid cost-sharing agreements between Canada and the provinces.
- Review of minutes of past meetings of the PWG.
- Review of statistical information on legal aid compiled and reported by the Canadian Centre for Justice Statistics.

1.4 This Report

The remainder of this report comprises three chapters. Chapter II provides a description of the Department of Justice Legal Aid Program. Chapter III presents the findings of the evaluation. Chapter IV looks at how a future Department of Justice legal aid program might build on lessons learned to date in the evolving context of federal-provincial cost-sharing arrangements.

2. DESCRIPTION OF THE DEPARTMENT OF JUSTICE LEGAL AID PROGRAM

2.1 Overview

As described by Programs Branch, the Department of Justice's Legal Aid Program consists of three main components. These are:

- Development of the Department of Justice policy on criminal and Young Offender legal aid through internal policy development activities, research on legal aid issues and participation in, and support of, the PWG on Legal Aid.
- Implementation of the Department of Justice policy on legal aid through the negotiation of, and making of payments pursuant to, cost-sharing agreements with individual provinces and territories, and the auditing of claims made under the agreements.
- Analysis and integration of support for criminal and Young Offender legal aid into broader departmental initiatives and priorities.

Each of these components is described below. Before that however, we consider the objectives of the federal Department of Justice Legal Aid Program.

2.2 Program Objectives

Program documentation does not provide an explicit expression of the objectives of the Department of Justice's legal aid program. There are, however, several sources of information on what the legal aid program seeks to accomplish. We begin by referring to some general expressions of departmental objectives relevant to, but not specifically established for, the legal aid program.

As described in internal Department of Justice correspondence in 1991, "(n)ational justice objectives have been consistent over a number of years and address some of the most fundamental notions of Canadian values and citizenship. They are integral to the federal government's social and constitutional policy agenda. The(se) national objectives include:

- Implementing the rights and freedoms enshrined in the Charter. (Specifically in sections 7, 10(b), 11(d) and 15.)
- An accessible, efficient and fair system of justice which is inclusive of all Canadians.
- Fostering minimum standards of essential legal services across Canada.
- Promoting respect for rights and freedoms, the law and the Constitution.
- The protection of society.

Criminal legal aid is a good illustration of the achievement of these national objectives through federal-provincial partnership and cooperation, in the form of an agreement on cost-sharing."

A more recent expression of departmental objectives describes one of the department's performance expectations as that of providing Canadians with "(a) fair, effective, affordable and well functioning justice system that responds to public concerns about safety and security, meets the needs of a modern pluralistic society and reflects the values of Canadians."

Achievement of this expectation will be demonstrated by "(a)n equitable and accessible justice system that is responsive to the needs of an evolving and diverse population[1]". Legal aid for persons facing criminal charges who cannot afford counsel is a critical element of an equitable and accessible justice system.

Turning from general departmental objectives to objectives concerned more specifically with legal aid, it is instructive to examine the preambles to successive cost-sharing agreements.

For example, the agreement in effect in 1978 refers to Canada's desire "to ensure equality before the criminal law throughout the nation...(through)...cost sharing agreements with the provinces for the provision of legal aid in criminal matters to economically disadvantaged persons."

Ten years later, the preamble to the agreement in effect between 1987 and 1990 recognizes the following historical and practical reasons for entering into a new agreement:

[1] Sources: *Department of Justice Performance Report*, March 1999, and *A Report on Plans and Priorities* submitted in support of the 1998-99 Estimates.

- The Province has established and is maintaining a system of legal aid in criminal and young offender matters.
- Canada and the Province recognize their responsibility to provide equitable access to legal services to economically disadvantaged people in serious criminal matters and in matters relating to the *Young Offenders Act*.
- Canada and the Province want to ensure that provinces are assisted financially in providing legal aid in serious criminal matters and in matters relating to the *Young Offenders Act*.
- Canada and the Province have entered into cost-sharing agreements in the past for the provision of legal aid in criminal matters and in matters relating to the *Young Offenders Act* and wish to renew those cost-sharing arrangements.

The current agreement states the following reasons for federal and PT support for cost-sharing of criminal legal aid:

- The Province has established and is maintaining a system of legal aid in criminal and young offender matters, in respect of which Canada has made and is making significant financial contributions.
- Canada and the Province recognize their responsibility to provide equitable access to legal services to economically disadvantaged people, in serious criminal matters and in matters relating to the *Young Offenders Act*.
- Canada and the Province want to ensure that the Province is assisted financially in providing legal aid in serious criminal matters and in matters relating to the *Young Offenders Act* and that certain minimum standards are maintained in respect of these legal aid services.
- Canada and the Province have entered into Agreements in the past for the provision of legal aid in criminal matters and in matters relating to the *Young Offenders Act* and to wish to renew those arrangements on the terms set out in this Agreement.

The current agreement explicitly acknowledges two fundamental aspects of criminal legal aid in Canada:

- Existing legal aid programs rely on both federal andPT financial support; and,
- Canada and the provinces and territories share a joint responsibility to provide legal aid for economically-disadvantaged person facing serious criminal charges.

An important departure of the current agreement from earlier agreements is the reference to the maintenance of minimum standards of service, (meaning standards of coverage). Importantly, these minimum standards are not otherwise defined.

2.3 Implementation

2.3.1 Internal Policy Development Activities

Until recently, development of policy related to the Department of Justice's support of criminal and Young Offender legal aid was the responsibility of the Policy Planning Directorate of the Programs Branch. In the spring of 1999, this responsibility was transferred to a separate unit. Naturally enough, activity on some issues increases as the department prepares for the approach of negotiations on new agreements (although ongoing policy development is an intended characteristic of the current organizational model). In order for these negotiations to advance departmental objectives and priorities for the cost-sharing agreements, it is essential that a clear and coherent set of policy objectives be established.

In addition to the policy work associated most directly with preparations for cost-sharing negotiations, there is a requirement for ongoing consideration of the results of monitoring and analysis activities conducted by the Innovations, Analysis and Integration Directorate, and of research on legal aid issues conducted by the Research and Statistics Division. There is also a need to ensure that criminal legal aid issues are recognized and taken account of in other areas of activity, both within the Department of Justice and within other federal government departments (e.g., Citizenship and Immigration in regard to legal aid for refugee claimants).

2.3.2 The FPT Permanent Working Group on Legal Aid

The Permanent Working Group on Legal Aid (PWG) is a joint federal/ provincial/territorial body intended to serve as a forum to examine and address legal aid policy issues, and to be a visible and proactive mechanism for FPT co-operation. Creation of the PWG was a condition of the current legal aid cost-sharing agreement between Canada and the provinces and territories. Since its inception, the PWG has met seven times: in August of 1996 (Charlottetown), in October of 1997 (Toronto), in May of 1998 (Montreal), in December of 1998 (Toronto), in June of 1999 (Vancouver) and in March and September 2000 (Toronto). The PWG is chaired jointly by a representative of the federal Department of Justice, and a representative of one of the provinces or territories. Members include officials of the federal Department of Justice,PT Ministries of Justice or Attorneys General and individual legal aid programs.

As described in a revised draft mandate of the PWG prepared in June of 1998, its role is... "Reporting to the Committee of Deputy Ministers responsible for justice, while respecting the jurisdictional responsibilities of each province or territory, (to*)*:

- Serve as a resource on issues of criminal, family, civil, administrative and poverty legal aid; on legal aid legislation, policies and programs.

- Provide advice on legal aid cost-sharing issues.

- Advise of the potential impact on legal aid, clients of legal aid and disadvantaged persons generally of legislative or policy proposals which come before deputy ministers.

- Develop for consideration by jurisdictions possible approaches and undertake research to support the provision of accessible, efficient, high quality legal aid which is effectively coordinated with other components of the justice system.

- Identify ways to reform areas of law or justice policy or legal aid itself, that would improve the quality, cost or delivery of legal aid, applying the IDEAS instrument to areas being considered.

- Establish effective working relationships at both the FPT officials' level and at local levels with such sources of federal/provincial/territorial policy making as are noted below in order both to facilitate the provision of advice on matters being considered, and to propose consideration of initiatives which would improve the quality or reduce the cost of legal aid. Examples of groups to work with in this capacity include: the Continuing Committee of Senior Officials (CCSO), the Family Law Committee (FLC), the Civil Justice Committee (CJC), the Diversity, Equality and Justice Committee (DEJC), the Uniform Law Conference (ULC), and non-governmental organizations.

- Involve representatives of non-governmental organizations which have broad interests in the justice field in early and meaningful consultation on legal aid initiatives and on other initiatives that could affect the cost, quality or delivery of legal aid."

Among the issues which have come before the PWG during one or more of its meetings are the following:

- The basis for cost-sharing of the costs of criminal and Young Offender legal aid between the Department of Justice and the provinces and territories. In essence, these discussions were preliminary to negotiations on the next cost-sharing agreement. In the interim, they were concerned with extension of the current agreement.

- Canada's legal aid obligations under international human rights legislation.

- Court-appointed counsel, referring to cases in which the Attorney-General of a province is ordered by the court to provide legal counsel to an individual as an alternative to staying the prosecution. Often these cases involve federal prosecutions of complex drug cases. Provinces may seek federal assistance in covering the costs associated with providing legal aid in these cases.

- Uses and impacts of application fees on application rates and the accessibility of legal aid.

- Needs of legal aid clients.

- Impacts of criminal litigation policy on legal aid. An example of this was the recent hybridization of a number of criminal offences, which resulted in an increase in the number of accused who qualified for legal aid. This occurred because the plan could not know in advance whether or not the charges would proceed summarily or by indictment, meaning that the applicants fall under the current minimum coverage provisions.

- High cost cases which impose a severe burden on the resources of individual legal aid plans. At issue is whether federal assistance might be given to offset the cost of these (relatively infrequent) cases.

- Recent developments in individual provinces and territories.

The Department of Justice provides secretariat services, including meeting rooms and translation, to the PWG. The Department of Justice has also contributed the services of a senior researcher from the Research and Statistics Division to assist the PWG. Participating provincial and territorial governments cover their own travel and related costs.

2.3.3 Legal Aid Research

Looking briefly outside of the Programs Branch, the Research and Statistics Division of the Department of Justice is responsible for providing empirical socio-legal research and statistical support to assist in the development, implementation and management of policies and programs in the Department of Justice. These research and statistical activities support all stages of the development and implementation of departmental policy initiatives, and support the on-going development, management and monitoring activities related to Department of Justice programs.

Since 1978, the Research and Statistics Division has conducted basic research and research related to pilot projects in support of the Department's legal aid program. The basic research is normally carried out in response to requests by the Programs Branch, often as cooperative multilateral projects involving the Department of Justice, legal aid plans, and provincial governments. Currently, research of this type is conducted under the auspices of the PWG. Research related to pilot projects is conducted under bilateral arrangements with legal aid plans sponsoring the pilot projects. The research issues that are part of the pilot projects match broader policy research interests of the Department and of the PWG. Finally, closely related to basic research, the Research and Statistics Division responds to short-term requests by the Programs Branch for data on a variety of legal aid policy issues.

2.3.4 Negotiation of Cost-Sharing Agreements

Since the implementation of the first agreement in 1972/73, there have been nine agreements, covering the following periods:

- 1972/73-1975/76
- 1976/77
- 1977/78-1980/81
- 1981/82 (extension of the previous agreement)
- 1982/83-1984/85
- 1985/86-1986/87
- 1987/88-1991/92
- 1992/93-1995/96
- 1996/97-2000/01

It is clear from this list that past agreements have covered a relatively short period, typically only two or three years. The current agreement is atypical in that it covers five years. A significant and presumably unintended characteristic of these short agreements was that they created an almost perpetual state of negotiation. The five-year duration of the current agreement intentionally left some breathing room between negotiation periods, allowing an opportunity for both the federal andPT governments to examine and reflect on the strengths and weaknesses of the current arrangement.

To the extent that the PWG provides a forum for discussing issues leading up to the next agreement, it will fill a role which a more ad hoc body filled for the current agreement. Our understanding is that the negotiations leading up to the current agreement were conducted through a combination of face-to-face meetings and conference calls among the participating governments. Issues were negotiated multi-laterally. Prominent among the issues discussed in these negotiations were the following:

- Creation of an FPT forum for continuous engagement (i.e., the PWG).
- The definition of "minimum standards".
- Federal reporting requirements.
- Redistribution of payment amounts across jurisdictions to achieve greater equity.

2.3.5 Auditing of Claims for Cost-Sharing

The current cost-sharing agreement describes the form and content of the claims to be submitted by each province and territory in October of each year of the agreement in respect of costs incurred the previous fiscal year. The claim is to include the following information:

- Amounts spent to provide legal aid by offence types covered for adults and young offenders.
- Numbers of eligible persons provided legal aid by type of offence.
- Innovations undertaken to improve the delivery of legal aid in the jurisdiction.

These statements are to be signed by thePT auditor (or equivalent) prior to submission. They are also to contain information sufficient to enable the Department of Justice to verify:

- The amount of the sharable expenditure as defined in the agreement.
- Whether the province or territory has complied with the terms and conditions of the agreement during the preceding fiscal year.

In the past, claims for legal aid cost-sharing were audited by the (now defunct) Grants and Contributions Audit Branch. Currently, reviews of claims are the responsibility of the Operations Directorate, Programs Branch, and are more financial in nature than was the case previously. The work of reviewing claims has, until recently, been done at two levels, desk reviews and field reviews. Desk reviews seek primarily to ensure that the claims are complete and that any calculations are correct. Field reviews, which used to be done on a rotating basis across jurisdictions have fallen into disuse. There is, however, an intention to reintroduce these reviews in the future.

3 EVALUATION FINDINGS

Federal government evaluations generally look at three principal issues: relevance, success and cost-effectiveness. In the current vernacular of Treasury Board Secretariat:

- Issues of **relevance** (or rationale) consider the extent to which the objectives and mandate of the program continue to be relevant to government priorities and the needs of citizens. A related question is whether the activities and operational outputs of the program are consistent with the program's mandate and plausibly linked to the objectives and any other intended results.
- Issues of **success** (or results) cover the extent to which the program meets its objectives, within budget and without causing significant unwanted results. A related question is concerned with the extent to which the program complements, duplicates, overlaps or works at cross-purposes with other programs.
- Issues of **cost-effectiveness** consider the extent to which the program involves the most appropriate, efficient and cost-effective methods to meet its objectives. Related to this issue is the question of whether there are more cost-effective alternatives to the program.

Consistent with this model, the remainder of this chapter is organized under the headings of relevance, success and cost-effectiveness. For the purposes of this evaluation, the objectives of the federal Department of Justice legal aid program were adapted from the preamble to the current cost-sharing agreement as follows:

- To make a significant financial contribution to the cost of criminal and Young Offender legal aid.
- To ensure equitable access to legal aid for economically-disadvantaged persons facing serious criminal charges.
- To maintain minimum standards of service (meaning coverage) across Canada.

While these objectives were accepted by the stakeholders interviewed for this evaluation as a reasonable basis for the evaluation, it should be recognized that formal objectives for the program have not been established.

3.1 Relevance

3.1.1 Program Rationale

In a program with a twenty-nine year history, it is natural that its expressed rationale would evolve over time. However, an examination of background documents on legal aid in Canada suggests that the rhetoric has been more static than one might expect. For example, in 1969 when John Turner was Minister of Justice, he stated that one of his three main objectives was to "move as far as we can towards equality of access and equality of treatment before the law for rich and poor alike." This statement is not at all at odds with the wording in a recent Performance Report prepared by the Department in March of 1999 in which one of the Department's goals was to promote "an equitable and accessible justice system that is responsive to the needs of an evolving and diverse population." These two statements suggest that the Department of Justice support for legal aid began as, and continues to be, part of a broader effort to promote access to justice.

In this context, it is interesting to examine the wording in the cost-sharing agreements. Whereas the agreement effective in 1973 stated that "the Government of Canada and the Government of the Province of _____ are desirous of entering into an agreement respecting the provision of legal aid…", in the current cost-sharing agreement, the wording indicates that "Canada and the Province recognize their responsibility to provide equitable access to legal services to economically disadvantaged people in serious criminal matters and in matters relating to the *Young Offenders Act*." The current cost-sharing agreement also recognizes the history of this program as follows: "the Province has established and is maintaining a system of legal aid in criminal and young offender matters, in respect of which Canada has made and is making significant financial contributions." In essence, the current wording recognizes both the historical nature of this relationship and the ongoing need for these programs, as well as their place in broader joint efforts to promote access to justice.

In 1993, a document entitled *Rationale for Continued Federal Involvement in Criminal Legal Aid and Directions for Future Policy* was prepared by the Department as part of the Shared Management Agenda process. It addressed the question of the rationale for legal aid at two

levels. The first level concerned the rationale for legal aid per se, while the second concerned the rationale for federal involvement in legal aid.

3.1.1.1 The Rationale for Legal Aid Per Se

On this point, the 1993 report noted the following:

- Criminal legal aid is a critical component of the justice system. It is an expression of the liberal democratic principle of the protection of the rights of individuals against the power of the state. In criminal cases, legal aid is also related to a number of other fundamental rights, including the right to be presumed innocent, the right to remain silent, the right not to incriminate oneself, and the right to a fair and impartial hearing.

- Criminal legal aid balances the powers of the state to investigate and prosecute offences against the rights of lay persons who cannot be expected to deal in a court of law with complex legal concepts that are strange to them.

The 1993 report also refers to the importance to the evolution of criminal legal aid in Canada of the proclamation of the Charter of Rights and Freedoms in 1982. Of particular relevance to legal aid are the following sections:

> 7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.
>
> 10(b). Everyone has the right on arrest or detention to retain and instruct counsel without delay and to be informed of that right.
>
> 11(d). Any person charged with an offence has the right to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal.

Taken together, these sections have been interpreted to establish a right to counsel both on detention, and at trial, **when such is necessary for a fair and public hearing by an independent and impartial tribunal**. Support of these rights has generally fallen to the legal aid programs for individuals whose financial circumstances are such that they cannot afford

counsel from their own resources. The enforceability of these rights has been strengthened by several judicial decisions of various courts. Notable among these decisions are the following:

- A 1988 decision of the Alberta Court of Queen's Bench in *Panacui v. Legal Aid Society* which held that the Charter creates a constitutionally guaranteed right to state appointed and paid counsel for indigent persons charged with serious offences, but not necessarily to counsel of the accused person's choice.

- A 1988 decision of the Court of Appeal for Ontario in *R. v. Rowbotham* which held that the Charter creates a constitutionally guaranteed right to state-appointed and paid counsel when such appointment is found by the trial judge to be essential to a fair trial (regardless of the accused's ability to pay). Where such counsel is not appointed, the charges may be stayed. This ruling has created situations where judges are, in effect, ordering that legal aid be given to accused persons whose applications for it were previously refused by the legal aid agency in that jurisdiction.

- A 1990 decision of the Supreme Court of Canada in *R. v. Brydges* which held that a detainee should be informed "of the existence and availability of the applicable systems of duty counsel and legal aid in the jurisdiction..." The decision included extension of this right to all individuals regardless of their financial circumstances. This ruling contributed to the development in some jurisdictions of duty counsel hotlines or 800 numbers which are often referred to as "Brydges duty counsel".

The ramifications of the Charter sections noted above, and subsequent judicial decisions flowing from them are significant for legal aid. One effect of these decisions is to broaden the array of services expected of legal aid programs, especially as they relate to duty counsel. Another effect is to increase the numbers of clients served by the individual legal aid programs.

Sections of both the *Young Offenders Act* and the Criminal Code authorize judges, in particular circumstances, to order that the services of legal counsel be provided to accused persons who are unable to obtain these services from their own resources. It typically falls to the legal aid plans to provide these services, although their costs may be paid directly byPT Ministries of the Attorney General or Justice.

Finally, in relation to the rationale for criminal legal aid per se, it is important to note that Canada is a signatory to several international agreements which guarantee a right to counsel for individuals facing criminal charges or loss of liberty, in any case where the interests of justice so

require. For example, the International Covenant on Civil and Political Rights provides a number of guarantees to persons facing a criminal charge, including the right to counsel at trial and, if he or she is unable to pay for counsel, to have it available without charge. Similar guarantees are provided under the United Nations Convention on the Rights of the Child, the Universal Declaration of Human Rights and the Charter of the OAS.

In sum, there exists a clear rationale for the existence of legal aid per se. Individuals facing criminal charges where there is a risk of incarceration have a legal right to representation. In part, this right was created by the Charter, a piece of federal legislation which has had a wide range of impacts across Canadian society.

3.1.1.2 The Rationale for the Department of Justice Involvement in Legal Aid

The bedrock justification for the Department of Justice's involvement in supporting criminal and Young Offender legal aid is the federal Parliament's exclusive jurisdiction, under the Constitution, to legislate criminal law and procedure. Efforts on the part of the Department to enact and reform criminal law and procedure have significant impacts on the demand for, and costs of providing legal aid services. As noted above, the Supreme Court of Canada ruled in *R. v. Brydges* (1990) that "the responsibility for the provision of legal aid is divided between the federal government under its authority in matters of criminal law, and the provincial governments under their authority for the administration of justice and for civil and property rights".

Given that the provinces retain exclusive authority for the administration of justice within their borders, the Department of Justice required a vehicle to promote its goals related to access to justice for all Canadians. Cost-sharing with the provinces and territories was identified as the preferred approach. As noted in the 1993 report:

“Cost-sharing for criminal legal aid must also be viewed in the wider context of social justice goals, the achievement of which is dependent on the willing cooperation of the provinces. This is true whether the priority is crime prevention, family violence, violence against women or other justice or public safety issues. Clearly, these priorities are interrelated; failure to achieve any one of these national justice goals must inevitably have an impact on other justice goals.

Historically, Canada has chosen cost-sharing with the provinces (and territories) as the most effective tool to ensure cooperation in achieving national goals. Cost-sharing has been seen as a

cost-effective way for the federal government to exercise a leadership role in the Canadian justice system, by levering the provinces to act as agents in the achievement of substantive national justice issues.

These objectives have been consistent for a number of years and address some of the most fundamental notions of Canadian values and citizenship. They include: implementing the rights and freedoms enshrined in the Charter; an accessible, efficient and fair justice system which is inclusive of all Canadians; promoting respect for rights and freedoms, the law and the Constitution; and the protection of society. Clearly the fostering of minimum standards of essential legal services across Canada through a program of criminal legal aid is an indispensable tool in achieving those objectives."

3.1.1.3 Modern Partnership

When legal aid was first being introduced in the provinces and territories, the Department of Justice played a key role as a catalyst in encouraging the development and introduction of these services. This role included both policy leadership and a financial contribution sufficient to lead to the creation of legal aid services in all provinces and territories. Given that the basic structures to provide legal aid for financially-eligible persons facing serious criminal charges and young offenders have been in place across the country for many years, a catalyst role for the Department of Justice seems no longer appropriate. In terms of the financial support it provides, the Department of Justice's current role is portrayed more as that of a partner, with the provinces and territories, in sustaining the national 'system' of legal aid.

Many of the provincial legal aid stakeholders interviewed for this evaluation regard the Department of Justice's track record over the past decade as inconsistent with this concept of partnership. In large measure, this view flows from dissatisfaction with the decreasing share of the costs of criminal and young offender legal aid paid by the Department of Justice. Whereas the Department of Justice previously paid 50% of the so-called shareable costs of criminal and young offender legal aid nationally (and more in some provinces) the proportion of these costs paid by the Department of Justice in recent years is under 40%. Among some of the provincial stakeholders "partnership means 50%". Anything less is taken by some to mean that the Department of Justice is no longer a partner, but is, instead, a contributor. True partnership brings the right to have more of a say on legal aid policy than accrues to mere contributors. In other contexts, of course, partnerships take many forms. Whatever the validity of the "partnership means 50%" perspective, its adherents also point to other data in support of their view that the Department of Justice is no longer a partner in the legal aid context.

In essence, the Department of Justice is seen to view the relationship with the provinces as predominantly a financial one, rather than one in which issues which arise are to be resolved jointly. There is not a sense among the provinces that the Department of Justice sees "your problems as our problems". To some degree, this may stem from the provincial preoccupation with financial issues and the Department of Justice's inability in the past decade to respond to these concerns with more funding. As well, the Department of Justice's failure to clearly articulate its objectives for its legal aid program has contributed to an absence of clear policy on legal aid.

In this context, the provinces and agencies were asked whether the Department of Justice's role should, in the future, be limited to the provision of financial support, and if it were, what impact this would have. Assuming that some agreement could be reached on what would constitute a reasonable amount for the federal financial contribution to criminal and young offender legal aid, most of the key informants see a significant role for the Department of Justice beyond its financial contribution. Among the roles which the Department of Justice should be playing are ensuring some degree of national standards or uniformity in terms of accessibility and levels of service, encouraging research and development on legal aid delivery models, and promotion of best practices, and more generally, providing leadership in the field. To paraphrase one of the provincial stakeholders "adoption of a purely financial role for the Department of Justice would not come at much cost relative to what the role has been lately. There is, however, an important role for the federal government to play here." These issues are discussed more fully later in this report.

3.1.2 Policy Development Within the Department of Justice Legal Aid Program

An important focus of this evaluation was on the extent to which Programs Branch has been successful in developing a clear, coherent and practical set of policies on the Legal Aid Program in order to advance departmental objectives for the program as the next cost-sharing agreement is negotiated. A number of questions related to this issue were put to the key informants for this evaluation, including:

- The extent to which the Department of Justice has developed a clear and coherent policy on its role in support of criminal and Young Offender legal aid.
- The extent to which this policy has been articulated clearly to the key stakeholders in the national system of legal aid.

- The extent to which the provincial partners regard the Department of Justice policy on legal aid as reasonable and legitimate.

With rare exceptions, the individuals interviewed for this evaluation, both within and outside the program, were unable to identify specific Department of Justice policies on legal aid of which they were aware during the 1996-2000 period. Among the exceptions to this finding were the existence of the PWG as a tangible symbol of a policy of more direct engagement with the provinces and territories on legal aid funding and other issues, and the discussions which took place at the PWG on issues such as court-appointed counsel and high-cost cases. The bottom line here, however, is that the Department of Justice appears to have largely neglected its legal aid policy development role during the 1996-2000 period.

3.1.3 The extent to which the organizational structure of the Programs Branch has contributed to the efficient and accountable implementation of the Legal Aid Program

Unfortunately it is not possible at this time to assess the suitability of the current organizational structure as it applies to the legal aid program. The reason for this is the extensive turnover among Programs Branch officials assigned to the legal aid file over the past several years. Many of the positions notionally assigned to legal aid, especially to the policy development function, have been vacant for extended periods of time. This is particularly significant for a program which is cost-shared with, and delivered by the provinces and territories.

Returning to the theme of partnership, the Department of Justice and the provinces can only be true partners in developing and implementing a national system of legal aid if the two sides are reasonably balanced in their substantive knowledge of the issues. Clearly, officials in the federal program can never be as conversant in the details of legal aid delivery as the agencies which provide these services, and, to a lesser degree, the provincial officials who work directly with these agencies. This limitation notwithstanding, there must be sufficient expertise resident within the Department of Justice program to enable a reasonable dialogue between the two levels on issues of joint concern. Within the 1996-2000 timeframe, only the senior Department of Justice researcher who works on legal aid issues has developed a high level of credibility with the provincial partners. No similar expertise has evolved within the Programs Branch proper.

On a related point, the Programs Branch has been without legal counsel for the legal aid program for some time. While legal expertise is clearly not required for much of the role played by the Branch, there are circumstances in which this expertise is likely essential, e.g., during

discussions of individual high-cost cases or cases involving court-appointed counsel. At a minimum, the Branch should be able to call upon in-house counsel to conduct discussions with legal staff of the agencies and provincial ministries. Again, the issues here are balance and credibility with the provincial partners.

3.1.4 The Sufficiency of Resources to Support the Legal Aid Policy Work of the Branch

According to information provided by Programs Branch in early 1999, the resources to be devoted to the Legal Aid Program were to be increased from previous levels. The bulk of this increase was to be concentrated on the policy development component of the Program.

As discussed above, however, little policy on legal aid was developed by the Branch during the 1996-2000 period. The Branch also lacked clear objectives for the legal aid program, meaning that a critical antecedent to policy was absent. Finally, we also noted above the high level of turnover among Branch officials assigned to the legal aid file, with the resulting gaps in the complement and limited substantive knowledge of the issues. At this point, we can only conclude that sufficient resources (in number and kind) were not devoted to legal aid policy work by the Branch during the 1996-2000 period.

3.1.5 The Role Played by the PWG

With few exceptions (notably, individual recipients of legal aid), the membership of the PWG encompasses the principal stakeholders in the national system of legal aid in Canada: the federal Department of Justice, provincial ministries responsible for legal aid and legal aid delivery agencies. As such, the PWG represents a potentially very significant element of any current or future partnership between the Department of Justice and thePT stakeholders in legal aid. This evaluation examined a number of issues related to the role played to date by the PWG, including its effectiveness as a forum for FPT discussion of legal aid issues, and its contribution to positive FPT relationships.

The PWG members interviewed for this evaluation generally support the idea of the PWG, but believe that it has not been as effective or productive as it could be. A number of factors were mentioned as contributing to this situation:

- Turnover among the Department of Justice officials assigned to the legal aid file (with the lack of commitment to legal aid this implies).
- Turnover in the position of provincial co-chair (again implying a lack of commitment to the PWG).
- Lack of coordination with/direction from the committee of Deputies.
- Short lead times for distribution of advance materials for meetings.
- Provincial/territorial preoccupation with cost-sharing issues to the neglect of other issues.
- Generally negative climate of FP relations.
- Delays in the preparation and distribution of the minutes of PWG meetings.
- Seeming inability to resolve issues discussed by the PWG.

An examination of the agendas and minutes of PWG meetings demonstrates that many of the issues discussed recur across meetings. To some extent this is because these are difficult issues and/or issues which are evolving. Resolution of some of these issues may require an injection of funding, a solution which has not been readily available to many governments in the recent past. As well, not all issues are of equal interest to all provinces and territories (although it was recognized that circumstances can change).

More generally, however, one of the structural weaknesses of the PWG to date has been the lack of resources to continue work on ongoing issues between meetings. In essence, the PWG relies on members to 'volunteer' to carry an issue forward. The PWG members occupy senior and responsible positions in their home organizations. Time spent on the PWG requires juggling of other commitments. It is likely not efficient for PWG members to do background work between meetings on issues of interest to the PWG. Exclusive reliance on these volunteers may contribute to the seeming lack of momentum on some of the issues discussed by the PWG.

One possible solution to this problem would be to establish a modest 'secretariat' for the PWG. This organization could engage (perhaps) two researchers/policy analysts in moving work forward on those issues directed to it by the PWG. Ideally, the resources for the secretariat could come from both the federal and provincial/territorial/agency sides so that a multilevel/multijurisdictional perspective could be brought to the secretariat's work. Presumably, not all issues of interest to the PWG would be suitable for the secretariat to pursue. However, the availability of the secretariat to move other issues forward would free up the time of PWG members for those issues which require their direct involvement. A supplementary role which the secretariat could play would be to identify particularly useful reports which are not available in both official languages and have them translated. This could contribute to the

identification of best practices and the development of more consistent approaches to performance reporting.

While there are a number of frustrations with the PWG and the way it has operated since its inception, there is general support for it conceptually. It is recognized as a serious attempt to structure a dialogue among the Department of Justice, the provinces/territories and the legal aid agencies. It is the only regular forum for discussion of legal aid issues where all three of these groups of stakeholders are present. It is not seen as overlapping significantly with the annual meetings of the Association of Legal Aid Plans, which are more operational in their focus, and do not include participation by government (except as observers).

3.1.6 The Amount of the Financial Contribution by the Department of Justice

The main element of the Department of Justice's involvement in legal aid has been, and continues to be the program of cost-sharing of criminal and Young Offender legal aid services. In the twenty-one year period since 1977/78, the total amount of contribution funding received by legal aid agencies from the Department of Justice rose from approximately $17M to $82M in 1998/99 (source: the Public Accounts of Canada). For 2000/01, spending on the legal aid program was projected to total $79.8M, an amount which represents approximately 12.7% of the overall departmental budget.

Exhibit III-1 presents the level of the Department of Justice's contributions to the costs of criminal and Young Offender legal aid over the first two and a half decades of the program's existence. It also expresses these contributions as a percentage of the total 'sharable expenditures' reported by the provinces and territories for criminal and Young Offender legal aid.

As this exhibit clearly shows, rapid growth in the total amount of these contributions occurred during the mid-to-late 80s, with a peak in total funding reached in 1994/95 (at $88.3M). From 1977/78 to 1989/90, the federal objective was to share national expenditures at the level of 50%. In essence, some jurisdictions were spending "50 cent (or less) dollars" on criminal and Young Offender legal aid during this period. Others were paying a higher proportion of their total expenses, but still significantly less than 100%.

Starting with the current cost-sharing agreement, the calculation of contribution amounts to individual provinces and territories is based somewhat more on population, i.e., a per capita base, and less on a fixed share of allowable expenses as defined in the agreements. A significant effect

of this shift has been to reallocate the federal contribution across the provinces and territories. Individual provinces and territories show varying patterns (rising, falling, stable) in terms of their percentage share of the total contribution from the Department of Justice to legal aid.

Exhibit III-1
Justice Canada Contributions to Criminal and Young Offender Legal Aid by Year: Absolute Amounts and As a Percentage of Total Shareable Expenditures

Year	Amount of Justice Canada Contribution ($M)	Contribution as a Percent of 'Sharable Expenditures'
75/76	$11.349	42%
76/77	$17.184	48%
77/78	$19.020	49%
78/79	$21.487	51%
79/80	$23.587	51%
80/81	$26.682	47%
81/82	$28.903	45%
82/83[2]	$0.732	1%
83/84	$41.030	47%
84/85	$43.535	50%
85/86	$49.320	51%
86/87	$54.691	50%
87/88	$63.148	51%
88/89	$76.348	51%
89/90	$86.570	52%
90/91	$86.555	45%
91/92	$86.570	35%
92/93	$87.426	33%
93/94	88.294	35%
95/96	$86.488	33%
96/97	$85.000	37%
97/98	$85.000	NA[3]
98/99	$81.912	NA

Source: Statistics Canada. Legal Aid in Canada: Resource and Caseload Data Tables.

It is important to note, that while the amount of the federal contribution rose for close to twenty years before leveling off and then declining, the federal contribution as a percentage of total 'shareable expenditures' as defined in the cost-sharing agreements has dropped sharply since 1989/90. In the early days of the program, the cost-sharing formula was designed to set the federal share at about 50% of total shareable expenditures. In 1989/90, the federal share was still approximately 51%. Since then, that percentage has declined fairly steadily, reaching 33% in 1994/95 and 1995/96, before rising slightly to 37% in 1996/97 (the most recent year for which

[2] This is not an error, but rather reflects the effect of a change by Justice from 'lag year' payment basis to a 'current year' payment basis.

[3] These data are not yet available for 97/98 and 98/99.

data are available). Exhibit III-1 presents the federal contribution as a percentage of net cost-shared expenditures from 1975/76 to 1996/97, inclusive. When the federal contribution was in the area of 50% of total shareable expenditures, the sharing of costs and responsibilities between the federal level and the provinces and territories was regarded as a 'partnership'. As the federal role in funding criminal and Young Offender legal aid shrank, some provinces came to see the Department of Justice less as a partner, and more as a co-funder entitled to only a limited say in how the funds are spent.

Undoubtedly, the most significant change to the Department of Justice Legal Aid Program over the past several years has been the diminishing federal financial contribution to the costs of providing criminal and Young Offender legal aid. This development raises a number of important questions related to the amount of federal support for these services, including whether the role currently played by the Department of Justice is consistent with its historical legal aid partnership with the provinces, and whether the amount of federal financial support for criminal and Young Offender legal aid is commensurate with federal objectives for legal aid nationally.

As discussed earlier in this report, the provinces and legal aid agencies have come to view the Department of Justice as less than a full partner in providing criminal and Young Offender legal aid services for a number of reasons. In relative terms, however, the most significant of these is the reduction in the federal financial contribution (both in absolute and relative terms) to the total costs of these services. There is unanimous agreement among the provincial stakeholders (and the Canadian Bar Association[4]) that the amount of the federal contribution is not sufficient, either to qualify as a full partner's contribution, or to meet federal objectives for the national 'system' as expressed in the preamble to the current cost-sharing agreement.

It is recognized that the current amount is, to a degree, an artifact of an earlier model of cost-sharing in which the Department of Justice paid an agreed proportion (50%) of 'shareable expenditures'. Provinces which spent more got more, regardless of the performance of their program, or its comparative cost-efficiency. The transition to a per capita-based cost-sharing formula, which began with the current agreement, provides an opportunity, if not an obligation, to take a step back and consider how the amount of the federal contribution should be determined, how it should be distributed and what mechanisms should be in place to ensure accountability for these expenditures. These are issues on which the Department of Justice should have a clear and coherent policy, developed in consultation with the key provincial stakeholders.

[4] As argued in the CBA report entitled *The Legal Aid Crisis: Time for Action* (06/2000)

While it seems clear to the stakeholders that the current contribution is insufficient, there is no sense of what would constitute the 'right amount'. In part this reflects a general recognition of the fact that the potential demand for legal aid is virtually limitless. If legal coverage were broadened, or if the financial eligibility criteria were relaxed, huge increases in the uptake of legal aid would result. No one expects that the program will return to the near open-ended funding it experienced in the 1980s. Still, the question remains as to what the amount of the federal contribution should be. There is also the question 'sufficient for what?' This suggests a need for both program objectives and performance measures related to these objectives. These issues will be returned to later in this report.

3.1.7 The Process for Determining the Amount and Distribution of the Federal Contribution

The interviews with Program Branch officials and provincial stakeholders identified a number of specific points related to processes for determining the amount and distribution of the Department of Justice's contribution to the costs of criminal and Young Offender legal aid.

- Negotiation of the details, if not the principles, of future cost-sharing agreements might involve the provinces rather than the provinces and the plans. The federal contributions are paid to the provinces which then financially support the delivery of legal aid services through the plans. Perhaps these purely financial discussions would be better left to the Department of Justice and the provinces alone.

- The current claims process might usefully be replaced by some form of performance-based reporting. To some degree, the current process for making claims for legal aid cost-sharing is a holdover from the 'sharable expenditures' era. Claims require detail on amounts spent on specific expenditure items in order to calculate the federal share. Provincial stakeholders interviewed for this evaluation generally view this as an exercise in 'bean-counting'. The claims clearly say nothing about the performance of the plans in meeting either their own or the Department of Justice's objectives for legal aid. Current 'desk audit' practices are perfunctory at best. The resources directed to these activities could be better spent on monitoring and reporting the performance of the national 'system' of legal aid, once objectives are agreed to and performance measures have been developed and implemented.

- The informants interviewed for this evaluation generally favour a cost-sharing model based on population with adjustments for key drivers of legal aid costs. Such a model is seen as both fair and easily administered. This assumes that agreement can be reached on which 'drivers' of legal aid costs should be reflected in the calculation of provincial shares, and the weight attached to each of these drivers.

- Five years is generally seen as a reasonable duration for future cost-sharing agreements. This timeframe allows for efforts to be directed to other issues for two or three years before the partners become preoccupied with financial matters again. There was some support for a mid-period review to address any specific and compelling financial issues which may have arisen since an agreement took effect.

- The relationship, in principle, of legal aid cost-sharing to equalization issues should be considered. To some degree, past cost-sharing agreements have sought to enable provinces with particularly limited financial resources to provide service levels which they could not otherwise afford (e.g., by covering more than 50% of the total costs). In essence, this is a form of equalization specifically directed to legal aid. There are, of course, other more general FP mechanisms which pursue the same ends.

3.1.8 The extent to which legal aid issues are integrated into the policy work of the Department of Justice and, more broadly, into that of other federal and provincial government departments, and the effectiveness of the mechanisms that are in place to support this integration

Questions related to this issue included the extent to which the Department of Justice's policy position has been articulated clearly within other relevant areas of the Department, other federal departments and provincial departments. Consistent with the discussion above regarding the (lack of) legal aid policy development by Programs Branch in recent years, there has been little or no policy to articulate either inside the department or beyond.

With respect to raising awareness of legal aid issues within the department, we were directed to two areas deemed most likely to have been included in any such communication by Programs Branch. These two areas were Criminal Law Policy and the Federal Prosecution Service. The views expressed by these contacts were consistently that:

- They have not been kept informed on an ongoing basis of evolving legal aid issues relevant to their work.
- They would support, in principle, future efforts to highlight impacts on legal aid costs of CLP/FPS policy changes. To do so effectively will require the capacity to cost these impacts reliably.
- The Australian concept of a 'legal aid impact statement' as advocated by the CBA may offer a useful model for identifying and reporting the impacts of the Department of Justice policy changes on legal aid costs. Where such changes arise from a Memorandum to Cabinet, the requirement to identify related 'Resource Implications' could be satisfied, in part, by the legal aid impact statement (although it is not clear that the intent here is to reflect other than federal resource requirements).
- Another means to build stronger linkages between the Department of Justice legal aid program and CLP might to cross-appoint legal counsel between these two organizations. Programs Branch currently lacks in-house counsel for legal aid.

3.2 Success/Results

As noted above, this evaluation did not examine the performance of individual legal aid agencies as they provide legal aid services to individual clients. This approach was tried in the 1980s, and, for a variety of reasons, abandoned after 1992. However, the current approach, which focuses on the Department of Justice program, will leave unanswered some significant questions which are closely tied to an assessment of the Department of Justice program.

In essence, the unanswered questions are concerned with the accessibility and quality of the legal aid delivered to eligible Canadians with the financial assistance of the Department of Justice (pursuant to the cost-sharing agreements). Ultimately, it is the overall performance of the national "system" of legal aid, which will establish whether or not the Department of Justice's objectives for the Program have been met.

At the present time, however, key measures of the performance of the system are not available (due in part to the lack of national reporting standards). We understand that the Department of Justice, in collaboration with the PWG, is initiating a joint program of research which should, on completion, yield data on some key performance areas (e.g., the current level of unmet need for legal aid). Regardless of the ultimate success of this strategy, no performance information on the system as a whole will be available within the timeframe of the current evaluation of the Department of Justice program.

In the absence of national performance measures, this evaluation was forced to rely on the subjective assessments of key informants for data on the issue of the extent to which departmental objectives for the Legal Aid Program have been achieved.

The key question related to this issue is:

- The extent to which support provided under past and current agreements has contributed to the achievement of federal objectives for criminal and Young Offender legal aid across Canada.

For the purposes of this evaluation, we have taken the preamble to the current cost-sharing agreement as our source for these federal objectives. This leads us to view the key federal objectives as follows:

- Making a significant financial contribution to the cost of criminal and Young Offender legal aid.
- Ensuring equitable access to legal aid for economically-disadvantaged persons facing serious criminal charges.
- Maintaining minimum standards of service across Canada.

We present our findings related to each of these objectives in turn.

3.2.1 Making a Significant Financial Contribution to the Cost of Criminal and Young Offender Legal Aid

In light of the diminishing proportion of the costs of criminal and Young Offender legal aid paid by the Department of Justice, the key provincial stakeholders, as well as the CBA, regard the amount of the current contribution as significant, but insufficient. While it has dropped from its historic highs, it remains at around a third of 'sharable expenditures'. As noted earlier in this report, the proportion of total costs paid by the Department of Justice varies greatly across the provinces. As a result, for some provinces even a contribution in excess of 50% of costs is seen as insufficient to meet federal goals for the system.

As noted above, the respondents had no clear advice to offer on the question of how large the federal financial contribution should be. Logically, the answer should lie in the performance of

the system, especially in terms of its success in meeting the objectives set for it. To date, such key performance information is not available. This reflects a combination of factors, including:

- The lack of clear measurable federal objectives for the 'system' it supports financially and otherwise.
- The lack of a consensus among the Department of Justice and the provincial partners as to which performance areas should be tracked, and how this is to be accomplished.

In the remainder of this section, we discuss the two key performance areas identified in the preamble to the current cost-sharing agreement.

3.2.2 Ensuring Equitable Access to Legal Aid for Economically-Disadvantaged Persons Facing Serious Criminal Charges

The views of the stakeholders interviewed for this evaluation are, quite consistently, that access to legal aid is not equitable across jurisdictions. While this view cannot be empirically substantiated, it is generally accepted as accurate. The factors cited as underlying this situation include:

- Tightening of the financial eligibility criteria in some jurisdictions.
- Reductions in the types of legal matters for which legal aid is offered.
- Caps on provincial spending on legal aid which have forced rationing of services.
- Growing reluctance on the part of the private bar to do legal aid work. The primary cause for this reluctance is perceived to be the low levels of current legal aid tariffs.

In many provinces, these factors are seen to have combined to reduce access to legal aid to only those applicants whose financial circumstances are the most dire, and who face the most serious criminal charges. In some jurisdictions, the eligibility 'floor' has been set by the Charter, meaning that only accused persons facing a risk of imprisonment are likely to qualify for legal aid. This situation represents a serious step back from past years when less stringent criteria were applied.

A similar situation is seen to exist with respect to the financial eligibility criteria. Currently, only those applicants whose income satisfies provincial eligibility criteria for social assistance are seen as likely to qualify for legal aid. At this level, many people who might be described as the 'working poor' will not be financially eligible. Denial of legal aid may expose them to a range of

adverse consequences, including both financial problems, and greater risk of conviction and/or a harsher sentence than they would have faced had they qualified for legal aid.

3.2.3 Maintaining Minimum Standards of Service Across Canada

In this context, the term standards of service is taken to mean standards of coverage. As discussed above, the minimum level of legal aid coverage has been set by the Charter: financially-eligible persons facing a risk of imprisonment on conviction will be provided with legal aid. Also as noted above, there is general acceptance of the view that coverage beyond this basic level is available in some but not all provinces. In this sense, the minimum standard of coverage maintained by the cost-shared system is that imposed by Charter requirements, and no more. A significant issue for the Department of Justice and the provincial partners in legal aid to address in the future is whether or not this level of coverage is consistent with broader objectives for an accessible justice system, and if not, what should be done to remedy this situation.

While the stakeholders' perception of the current situation with respect to coverage may be accurate, it should be based on more than subjective impression. Certainly, the next cost-sharing agreement should ensure that some empirical data are available to monitor coverage and accessibility levels across Canada. Reaching agreement on what constitutes a practical and cost-effective approach to monitoring coverage and accessibility will not be easy. However, this as an essential element of an accountability framework for the Department of Justice legal aid program (and for the individual legal aid plans, for that matter).

It may be that Statistics Canada could play a useful role in supporting the development and implementation of performance measures for Canada's legal aid 'system'. As noted above, Statistics Canada prepares two documents on legal aid in Canada. One provides summary descriptions of how legal aid services are delivered in each province and territory. The second provides a statistical overview of legal aid resources and caseloads. For the most part, the data presented in the latter document are collations of data provided by the individual jurisdictions. A prominent feature of the tables of data in this report is the extent to which footnotes are required to assist in interpreting the data. This reflects the diversity of definitions and data recording practices across the provinces and territories. This diversity mitigates against efforts to present a simple picture of legal aid activity across the country. As one of our provincial contacts put it "there may only be 15 people across Canada who really understand what is in the StatsCan report on legal aid".

At a different level, there was general agreement that the data in these reports could not be used for performance measurement or accountability purposes. Given the effort that goes into these reports, on the parts of both StatsCan and the provinces and territories, it is unfortunate that they are not more useful in this way. Perhaps, StatsCan could assist the PWG in developing a new set of measures which addresses a more complete array of information needs, including accountability.

3.3 Summary of Key Findings

The key findings of this evaluation of the Department of Justice's legal aid program can be summarized as follows:

- There is a clear and generally-accepted rationale for the continuing existence of legal aid programs and for the Department of Justice's involvement in their funding and interest in their performance.

- The Department of Justice has not defined a clear and coherent set of objectives for its program of support for criminal and Young Offender legal aid.

- The Department of Justice has not developed clear policies for its program of support for criminal and Young Offender legal aid.

- Turnovers and vacancies within Programs Branch have sharply curtailed the department's capacity to work effectively with the PT partners in jointly developing policies on legal aid.

- The PWG has considerable, but as yet, largely unrealized potential to contribute to an effective partnership between the Department of Justice and the PT partners in the legal aid context. Necessary preconditions to achieving the full benefits of the PWG include development and articulation of the Department of Justice policy and program objectives for legal aid, and creation of a secretariat to support the work of the PWG.

- There currently exists no empirical basis for assessing the adequacy of the Department of Justice's financial contribution to the costs of criminal and Young offender legal aid. In part, this is due to the absence of clear and measurable objectives for the Department of Justice program. Once such objectives have been identified, and related measures of system

performance have been taken, then an assessment of the adequacy of the federal contribution will be feasible.

- Efforts to integrate legal aid issues in to the broader policy development work of the department have been sporadic at best. No formal procedures are currently in place to ensure consultation between departmental policy makers and the managers of the legal aid program.

- Criminal and Young Offender legal aid in Canada are not regarded by the partners as being adequately accessible to those who need these services. Recent cutbacks in service levels in many jurisdictions mean that only persons facing the most serious charges and whose financial circumstances are the most dire are likely to receive legal aid. These cutbacks may also have exacerbated pre-existing disparities in the availability of legal aid services across the provinces.

- Data on the performance of the national 'system' of criminal and Young Offender legal aid are not currently available except in the most rudimentary sense (i.e., counts of applicants, clients and service contacts). A joint FPT effort will be required to identify a set of mutually-acceptable and comprehensive performance measures which reflect the extent to which the agreed objectives of the 'system' are being met, both in each jurisdiction and nationally. There may be a useful and important role to be played by Statistics Canada in this effort.

4. LOOKING AHEAD

In light of the findings presented in the preceding chapter, it is useful at this point to switch to a forward-looking stance. Clearly, the Department of Justice Legal Aid Program has not performed up to its potential over the past several years, from several perspectives. Despite a strong commitment in principle to the fundamental goals of legal aid, the department appears to have 'lost its way', in the sense that the original goals of promoting the development of new legal aid services across Canada, and the processes of intergovernmental collaboration have not been updated to reflect either the increasing maturity of the 'system' or the changing environment in which it operates.

Similarly, the financial nature of the program appears to have evolved more in response to pressures for restraint and control than from evidence-based planning relating to program realities and needs. All of this creates both a challenge and an opportunity to develop the next set of agreements based on new (or at least refreshed) understandings respecting goals, new commitments respecting processes of collaboration and an updated financial design.

Significant aspects of the current operating environment that impact on the development or updating of federal-provincial programs include:

- the evolving nature of federal-provincial relationships generally, as demonstrated by various recent intergovernmental initiatives;
- progressively expanding requirements relating to accountability, outcomes measurement and reporting, at least at the federal level; and
- evolving practices and attitudes respecting intergovernmental financial relationships, as applied to specific program initiatives.

The remainder of this chapter, supplemented by appendices, presents an overview of this evolving landscape and identifies potential implications of it for the future of the Department of Justice's program of support for legal aid.

4.1 The Policy and Accountability Environment

4.1.1 Overview

The last six years or so have witnessed increasing efforts to examine the relationships between federal and provincial programs. In 1994, First Ministers signed so-called "Efficiency of the Federation" agreements. Among other things, these agreements were to "ensure that financing arrangements related to a specific program or service [were] fair and appropriate for both [the province] and Canada." More recent initiatives have focused on what have been referred to variously as collaborative partnerships or alternative delivery arrangements in public administration. A cursory examination of Canadian literature on this trend, and its reflection in elements of the so-called Social Union Framework Agreement (SUFA) suggests that it may have significant implications for future funding and delivery of legal aid in Canada.

A variety of documents have created a "policy momentum" toward enhanced use of partnership arrangements, including more active intergovernmental collaborative activity. Some examples (for expanded references, see Appendix A):

- The 1995 *Framework for Alternative Program Delivery* (Treasury Board) emphasizes cooperative partnership arrangements between governments as well as between departments and with the private sector.
- The 1997 *Report Getting Government Right: Governing for Canadians* underlined the desirability for alternative service arrangements to minimize potential overlap and duplication, improve service efficiency and effectiveness, and demonstrate the value of intergovernmental cooperation.
- The 1999 *Report of the Auditor General of Canada* noted the government's commitment to greater use of collaborative arrangements, but raised concerns about potential risks. "These include the risk of poorly-defined arrangements, limiting the chances for success; partners not meeting commitments; insufficient attention to protecting the public interest; insufficient transparency; and inadequate accountability."

Thus the evolving challenges for accountability, as partnerships and other forms of shared decision-making and administrative oversight grow in both numbers and variety, has become a growing theme affecting modern public management and reporting.

4.1.2 Treasury Board Policy Developments

There has been increasing attention to development of appropriate policies towards accountability, whether between participating partners, from governments to their legislatures, or from collaborating partners to the public at large. Recent draft discussion or policy papers from the Treasury Board include the following:

- *Performance Accountability and Reporting Frameworks* (2000) advocates a "new generation of evaluation frameworks" to provide better information tools for policy making as well as program management. How one influences one's partners, and through what collaborative processes, are identified (along with better data on program performance) as desirable elements of improved accountability.

- *Alternative Delivery (AD) Accountability Expectations and Approaches* (04/2000) and Horizontal Management: Trends in Governance and Accountability (11/2000). These two documents draw together a number of intersecting threads (including SUFA) as they relate to accountability for federal-provincial collaborative programs. Both documents contain the same proposed Checklist of issues "… that can be practically applied to all forms of partnership arrangements" for identifying results, measuring performance and reporting. (This "tool" is reproduced in Appendix B.)

- *Treasury Board Policy on Alternative Service Delivery* (Draft 01/2001). This recent draft policy statement is wide-ranging, with application to the considerable variety of new service delivery mechanisms. It includes in its scope intergovernmental ventures, and mentions specifically the SUFA, "..[which] recognizes that reform is [often] best achieved in partnership among provinces, territories and the Government of Canada."

- *Policy on Transfer Payments* (Treasury Board; Revised 06/2000). This Policy defines the required (or accepted) modalities for virtually all forms of transfer payments, including intergovernmental. Thus this policy would cover, and provide detailed requirements for the construction and administrative mechanisms of a renewed and/or changed Legal Aid agreement with the provinces and territories. It replaces previous versions of the policy, so that any new provisions or changes (in the Policy) will need to be examined as new agreements are developed.

4.1.3 Recent Intergovernmental Developments

Several federal-provincial-territorial developments have occurred over the past several years, and together they create patterns and expectations that any new or updated arrangements will likely need to take into account. Several, beginning with the key "Social Union" agreement, are worth noting:

- The broad-based *Social Union Framework Agreement* (SUFA) provides "rules of engagement" for intergovernmental initiatives in the social program sphere, in particular where federal funding in areas ofPT jurisdiction is involved. It sets out a variety of "undertakings" and "desiderata" for federal-provincial-territorial collaboration, including provisions for outcome measurement and reporting, information sharing and public as well as intergovernmental accountability.

- The Treasury Board document *SUFA Accountability Template 2000: Guide to Federal Government Reporting* deserves mention. It offers a "..systematic approach to documenting essential information that is related to the government's commitments," and puts forward "(a)n approach for developing agreements with other governments on shared accountability arrangements for new Canada-wide social initiatives and program investments…"

- *The National Child Benefit (NCB) and Employability Assistance for People with Disabilities* (EAPD). These two programs have been recently developed, within the new "social union" context. The Auditor General's 1999 Report provided the results of a review of these programs, with an emphasis on accountability, but covering much of the programs' characteristics including the processes used in developing them. Accountability, results measurement, and audit and evaluation aspects are important in both programs, as elsewhere. So are the processes used to develop agreement and for the partner governments to collaborate.

- The current federal-provincial-municipal *Infrastructure Program* has received considerable attention with respect to how the activity leading to the agreements was planned and conducted, and how the program is structured and managed. Infrastructure Canada's *Governance and Accountability Framework* (Draft; 11/2000) lays out all the key aspects of the intergovernmental relationships and program management. The Infrastructure documentation and experience may be useful to the Department of Justice, as it seeks to adapt other "best practices" to its own program development requirements.

Appendix C provides additional information on the above programs, further illustrating the context within which legal aid discussions will take place. The process of developing agreements, the commitments to results-based information, analysis and reporting, and the overall accountability requirements associated with collaborative programs have attracted the Auditor General's attention, just as they have motivated Treasury Board development of relevant policies. Lessons can be learned from these developments, with adaptation to the legal aid context.

4.2 Intergovernmental Transfers: Concepts and Current Environment

4.2.1 Nature of Fiscal Arrangements: General Concepts

In a federal system, various general or theoretical rationales are offered for the national government to transfer resources to sub-national governments. One is to bring sub-national resources into better line with their expenditure mandates (so-called "vertical equity" argument), in which case block grants or redistribution of tax revenues have typically been utilized. Resources flow to all jurisdictions, in recognition that "on average" their direct access to taxes and other own-source revenues fall short of their expenditure needs.

Another rationale has to do with disparities in the capacity of sub-national governments to meet their obligations and responsibilities. In this case differential transfers are employed, so as to help "even out" fiscal capacity, especially by bringing up the level of the poorer sub-national jurisdictions. This is the "horizontal equity" concept. In Canada, the Fiscal Equalization Program is structured precisely on this rationale, and is mandated explicitly in Section 36(2) of the *Constitution Act*.

These general considerations have usually led to general, non-conditional transfer payments. More focused rationales, often leading to more specific, program-related transfers, usually have to do with so-called "spill-over effects" or with "meritorious goods or services" arguments.

The "spill-over" idea is that services or benefits provided in one jurisdiction also benefit, directly or indirectly, citizens in other, neighbouring jurisdictions as well. If each jurisdiction only provided a level consistent with its own needs, the wider value to the total (e.g., national) community would not be adequately recognized, and the service would be "under-supplied" from that broader perspective. Thus, transfers designed to stimulate "greater-than-otherwise" overall service levels would be appropriate, consistent with an "efficient" provision of public goods or

services from the national perspective. Some environmental protection, public health, and law enforcement measures can be seen in this light.

The "meritorious public service" idea refers to public provision of services that are generally accepted as needed, deserving of priority, and may be inadequately or inequitably provided if left either to private markets or to local jurisdictions. National priorities in pursuit of national values and goals - or sometimes as collective responses to calamities - can often be seen in this light.

In both the above areas, national strategies and specific programs that involve sub-national government action (e.g. due to jurisdiction and/or administrative competencies) may be stimulated or enhanced by conditional transfer payments designed for the specific purpose at hand. Canadian experience on this front has varied widely, from highly specific open-ended cost-sharing (e.g. 50% or more of whatever the sub-national jurisdiction decides to spend), to broad-based block transfers to which only very general (and flexible) requirements are attached.

4.2.2 Evolution of Cost-Sharing in Canada

The use of "open-ended cost-sharing" has a long history in Canada, and has been associated with the development of many of our valued social systems and programs. Hospital care and various medical services, post-secondary education, and the myriad of social programs under the former Canada Assistance Plan are major examples. There have been numerous smaller programs and initiatives over time, as well.

The traditional cost-sharing approach has gradually been supplanted by more constrained (less open-ended) variants, for several reasons:

- The longer-term relative growth and development of Canada's sub-national governments, whose increasing role in provision of services and broader perspectives and sophistication have increased their desire for independence from financing arrangements that distort their priorities.

- As the major social programs developed and became "mature", the need for continuing special stimulus was deemed unnecessary (as well as inflexible and distorting). These were converted to block-funding arrangements: hospital/medical and post-secondary education in 1977/78 with the creation of Established Programs Funding (EPF); and later when the Canada Assistance Plan was combined with EPF to form the new Canada Health and Social Transfer (CHST) (1990s).

- Periods of fiscal restraint in all governments, with commensurate need for tighter controls and accountability, have reduced the interest - at least in Finance and Treasury ministries - in offering (by the federal government) or confronting (by provinces) expenditure-stimulating "50-cent dollars".

- Related to the point above, during the 1990s several federal cost-shared programs were forced to control their "exposure" by placing caps on the total amounts that could be claimed. This rationing has led, inevitably, toward a form of "conditional block-funding" where provincial "drawing rights" are offered, subject to rules about appropriate provincial spending.

Thus, however attractive and effective in stimulating the faster development of any targeted program area, the traditional cost-sharing approach is no longer in favour, and would be a very "hard sell" in the federal government, unless there were very compelling reasons and the financial exposure was very limited.

On the other hand, sharing of agreed costs in pursuit of agreed objectives, in a way that stimulates greater program development than would otherwise occur, is still a valid concept, consistent with enduring public policy values and with transfer payment rationales. Many recent programs (Infrastructure Canada, EAPD, ….) utilize cost-sharing constructs, precisely because there has been agreement to combine the resources of governments to stimulate activity in priority areas of national interest.

The "horizontal equity" rationale for transfers bears further mention in the current environment. The issue is the extent to which "equalizing provisions outside of the Equalization program itself" are either acceptable or resisted. The "have" provinces including Ontario and Alberta have been taking the position that the Fiscal Equalization Program is all that's needed, and there should be no such element in any other transfer (or cost-sharing) program.

Their argument is that since Equalization provides poorer governments with a common level of fiscal capacity, the "playing field is even" and there should be no further bias in favour of poorer provinces (and against the wealthier) in any specific federal-provincial program or transfer payment.

There are counter-arguments, such as:

- Equalization does not fully equalize fiscal capacity, due to the "intermediate" level of the program's entitlement "standard," which still leaves Equalization-receiving provinces below the levels of the wealthier provinces. And an Equalization "ceiling" feature sometimes cuts into (and effectively reduces) the standard as well. Thus poorer provinces always have much more difficulty raising revenues and matching federal dollars, especially "on the margin" where program expansion is desired.
- Equalization takes no account of either relative costs or needs (incidence of target problems or caseloads), or of starting points (provinces having very uneven levels of programming and services to begin with).

Thus it would not be accidental, or necessarily due to lack of interest on their part, to find that poorer provinces have less-well-developed programs.

Many cost-sharing arrangements have had variations or features that had the effect of providing variable "de facto" sharing, depending on the initial state of a province's programs, their own priorities or on their capacity to find their share of the required money. There has traditionally been room for creativity on this front. Further discussions with Finance Canada and the PCO (Intergovernmental Branch) are warranted, in order to better understand the available "manoeuvring room" with respect to potential shared-cost formulae.

Finally, it is worth noting that equal per capita transfers (such as CHST) do themselves have some equalizing properties, in the sense that they relieve poorer provinces of greater tax burdens (if they had to find the money themselves) than richer provinces. This feature could be considered in, and possibly form a building block for, future transfers in the legal aid area.

4.3 Implications for the Legal Aid Program

4.3.1 Requirements on Accountability and Reporting

It should be acknowledged that the broad environment surrounding governments at all levels increasingly demands:

- more public input to policy making and even program design;
- more information and transparency with respect to responsibilities and practices; and

- more evidence-based analysis and evaluation as to program results and effectiveness.

This is part of a general trend toward continuing improvement in public sector practices, as is true in other sectors as well. Such advances are even more important as governments seek to recover and improve their reputations as positive agents for social progress. In Canada, there has been further stimulus for change arising out of the period of severe fiscal restraints, and of recent controversy over the handling of public funds, especially in the area of grants and contributions.

Turning to the legal aid area, several recent initiatives - some of which have been introduced in Part 4.1 above - can hold lessons for the design and conduct of new negotiations toward renewed Legal Aid Agreements with the provinces and territories.

With respect to the implications of Social Union Framework Agreement in particular, it could be argued that:

- its broad provisions are intended as guidelines only;
- they apply strictly to areas of exclusive provincial jurisdiction (thus not to legal aid, which is joint); and
- they apply only to "new" initiatives (thus not to legal aid, which will be simply "renewing" existing arrangements).

Whatever the validity of such arguments, however, and considering the evolving management policies (canvassed above) as well as the nature of legal aid programming, it seems highly desirable to seek new agreements that conform to the spirit of SUFA.

Indeed, the newly emerging Treasury Board policies, combined with recent Auditor General reviews and recommendations, seem to be adding more details and stricter requirements to the general SUFA commitments. These policies will almost certainly apply to new Legal Aid Agreements. This is more certain the greater are the changes contemplated for the program.

Thus consistency with these policies should be sought, and/or exceptions justified. In any restructuring of the Legal Aid Program, the Department of Justice should respond to the changing federal policy environment with respect to:

- Changing notions of partnerships, alternative delivery mechanisms and accountability in collaborative arrangements;

- Information gathering to support outcomes-oriented analysis and reporting, and to assist policy formation, program design and ongoing program management;
- Increased accountability and transparency to the Canadian public more generally (as active stakeholders whose inputs are desirable and whose support is needed); and
- Current practices respecting financing arrangements in general, and the policy on transfer payments in particular.

Enhanced accountability requirements are here to stay, as are the requirements for new and different information related to program outcomes and consequences. These add new dimensions to collaborative arrangements, with additional costs, particularly in any initial phase involving investments in and transition to new agreements.

4.3.2 Structures and Mechanisms for Collaboration

Several of the recent specific programs can also be examined further, in order to understand not just the evolving accountability requirements, but also "best practices" in structuring intergovernmental processes (including joint policy development and negotiation of agreements), and management structures to oversee the agreements and to report on results from them.

Such an examination is beyond the scope of the present evaluation, but it can be undertaken as part of the preparations for the new round of intergovernmental legal aid discussions. It is assumed here that the intergovernmental machinery for legal aid will need to be re-invigorated (at least), and possibly redesigned to meet the kind of changing requirements reviewed above.

4.3.3 Legal Aid Financial Transfers

The existing method for allocating funds under the Department of Justice Legal Aid Program has evolved under the pressures of fiscal restraint and other factors. It will need to be re-examined and alternative options canvassed as discussions proceed toward a new set of federal-provincial-territorial agreements.

It is beyond the scope of this Report to attempt to construct such options. The considerations in Section 4.2 above are intended to provide some context within which the work might proceed. Some addition points relating to the legal aid area itself may also be helpful.

4.3.3.1 Scope and Coverage of Program

With respect to the scope to be covered by future agreements, a question arises as to whether only criminal legal aid is to be included, or whether a broader range of closely-related services might be contemplated.

For example, civil legal aid may have been separate from criminal legal aid in the past, and "absorbed" in the CHST transfer because of its former financing under the Canada Assistance Plan. This may be worth examining, in light of the close programmatic relationships between these services, the fact that the broad rationale for the Department of Justice program might sensibly include the civil dimensions, and that future service development may be needed on both fronts without artificial borders between them.

The June 2000 study for the Canadian Bar Association, *The Legal Aid Crisis: Time for Action*, refers to issues and needs across the wider (inter-program) territory. Similarly, the federal Justice Minister's Address to the Canadian Bar Association in Halifax last August (2000) acknowledges the spectrum of services likely to be required in pursuit of the broader goals of effective access to and interaction with the justice system. Family law services are clearly part of this spectrum, if one considers preventive services and alternatives to courts in resolving conflicts. Some co-ordination with developments on the family law front seems warranted, if only to ensure that a broader perspective and possible combined initiative (for a new federal-provincial agreement) is considered.

4.3.3.2 Financial Scale and Design of Program

The possible scope of the future program along with its target objectives need to be defined (or at least options considered) in order to get a handle on the possible scale of financing to be sought. A larger program with more ambitious coverage and objectives would likely introduce different levels of requirements and approvals (more like a new program), than a more limited updating of the program as it now is.

Within the confines of criminal law only - although this would apply to the broader range of services as well - an important question is whether existing programming is considered to be "mature," in the sense of being established, ongoing, well entrenched and meeting reasonable standards? If it no longer needs expansion and further active development, then one set of

options for transferring funds might be appropriate. For example, this could imply that cost sharing should give way to formula (block) grants (of course still with conditions and/or performance commitments).

If, on the other hand, these services need significant stimulus as part of an active federal-provincial-territorial strategy relating to needed justice system development, then other financing options may be relevant. Conditionality and commitments may be more aggressive, with the financing formula structured to provide more incentives for service expansion. Also, more federal funds would likely be required.

Disconnecting from any influence of actual expenditures in a future formula would essentially abandon the marginal incentive for program expansion. The more divorced the "formula" from actual program details (and from specific program targets), the more general can be the accountability regime, and the simpler the financing formula. However, the further along this spectrum one goes, the greater the rationale for simply adding a "small block" to the CHST. Again, this direction - and risk - is really only justified if the programming is considered entrenched and mature. We assume this not to be case, but rather that pro-active service development continues to be needed, and that this will be accepted by both orders of government.

The issue of uneven performance across the country will likely surface as well. The fact that the federal government shares the jurisdiction and thus has clear responsibilities in this area may provide the Department of Justice with a strong basis to argue for special, additional assistance to areas which are lagging behind in their programming, or to recognize differential needs and costs. As mentioned earlier, this would influence the construction of financing options and the distribution of funds.

4.3.3.3 The Issue of "Federal Shares"

Provinces have complained about financial constraints that have had the effect of driving down the effective federal share of total costs. The "Partnership means 50%" argument is tough to counter, given its simplistic appeal. Moreover, it is difficult to find a rationale for declining shares over time, as long as the federal government is claiming shared jurisdiction, a need for service expansion and higher standards, and a national priority it wishes to pursue.

Parenthetically, arguments for continuing fixed shares for mature programs where provincial jurisdiction is exclusive are another matter. There, one can argue that the federal government

should support the "mature base," but let provinces decide on and pay for further (marginal) growth, relying on broad political priorities and acceptance, along with interprovincial comparisons and co-operation to maintain adequate "national standards." Pure block grants without explicit spending requirements would have these characteristics.

Combinations of fixed base amounts, shared costs over a range of expanded services, and limits on total available funds are all legitimate elements for designing future financing options. Much depends on the scope, objectives and time horizons for the revised (or new) program. Given that general open-ended cost-sharing is not expected to be an option, this means that percentage shares and their change over time should not be the focus of attention. Indeed, any agreement that has fixed minima or maxima, and where relevant programming is becoming more varied and interactive, inevitably leads to percentages that will vary over time and (probably) across jurisdictions as well. It is hoped that this can be clearly understood and accepted.

The "equality" that should be sought, over time, is that of access to the justice system by Canadians wherever they live. As in other areas, this may lead to differential programming across the country, in legitimate response to differential socio-economic and demographic patterns, costs and needs, and initial conditions. Future agreements may therefore be better constructed around agreed goals and undertakings, with appropriate performance (and financial transfer) requirements. Share ratios may be helpful as guidelines and for planning purposes rather than as a central design characteristic.

The above discussion has attempted to canvass various considerations surrounding the development of options for a future federal legal aid program, including especially its financial aspects. The goal has been to provide information and ideas that will be helpful as preparations proceed toward the next round of intergovernmental discussions and federal government decisions respecting the Department of Justice Legal Aid program.

APPENDIX A

The Policy and Accountability Environment: Relevant References

THE POLICY AND ACCOUNTABILITY ENVIRONMENT:
RELEVANT REFERENCES

1. Overview

Some recent broad-based statements help provide a context for the Legal Aid review.

From the 1995 Treasury Board Report entitled *Framework for Alternative Program Delivery*:

> The government will cooperate and develop partnering arrangements among departments and with other levels of government and other sectors of the economy. These arrangements will help it create new working relationships, exercise influence and leadership in the national interest, avoid costly duplication and overlap in services, and build on the strengths and capacity of other sectors to provide programs and services that are responsive to the client, innovative and affordable.

From a 1997 government report entitled *Getting Government Right: Governing for Canadians*:

> There are many alternatives to traditional structures for delivering programs, and the government is vigorously pursuing these alternatives….Partnerships are an important form of alternative service delivery. Partnering with other governments, voluntary organizations and the private sector helps the federal government reduce overhead costs and duplication, and bring services closer to Canadians.

From a chapter on "collaborative arrangements" in the 1999 *Report of the Auditor General of Canada*:

> More taxpayer dollars are being spent this way (through collaborative arrangements). Partly because of Program Review, the federal government has been making greater use of collaborative arrangements and has committed itself to doing still more. (Associated with this trend)…are risks that deserve attention. These include the risk of poorly-defined arrangements, limiting the chances for success; partners not meeting commitments; insufficient attention to protecting the public interest; insufficient transparency; and inadequate accountability.

The evolving challenges for accountability, as partnerships and other forms of shared decision-making and administrative oversight grow in both numbers and variety, has become a growing theme affecting modern public management and reporting. Intergovernmental arrangements have traditionally faced such problems (involving division of responsibilities, public transparency, etc.). New policies in these areas will likely place new demands on all collaborative activity, including intergovernmental.

2. Treasury Board Policy Developments

The priority for and trends toward new partnership arrangements has engendered growing concern over virtually all the modalities of such arrangements, including those respecting responsibility and accountability. The development of appropriate policies towards accountability, whether between participating partners, from governments to their legislatures, or from collaborating partners to the public at large, are all attracting increasing attention. Policies toward these evolving new arrangements are actively under change and development.

Recent draft discussion or policy papers from the Treasury Board, with indicative quotes from each, include the following:

- *Performance Accountability and Reporting Frameworks* (2000)

> …federal departments and the Treasury Board Secretariat have started developing a new generation of evaluation frameworks that are more consistent with the notion that performance information needs to be adapted to the requirements of the various decision-makers, including both program managers and policymakers. The approach has been developed primarily for interdepartmental initiatives, but should be transferable to other types of collaborative arrangements and to departmental programs in general.
>
> ….the task [of performance measurement and federal accountability] is complicated by the fact that departments must often achieve their objectives by influencing the way partners from the public and the private sectors deliver products and services to the general public. When this is the case, federal departments should meet their reporting requirements by demonstrating how they influence their partners, and by further developing collaborative arrangements that ensure adequate performance accountability and reporting by the partners themselves.

- *Alternative Delivery (AD) Accountability Expectations and Approaches (04/2000); Horizontal Management: Trends in Governance and Accountability* (11/2000)

  These documents draw together a number intersecting threads (including SUFA) as they relate to accountability for federal-provincial collaborative programs. Both documents contain the same proposed Checklist issues "… that can be practically applied to all forms of partnership arrangements"….for: Identifying Results, Measuring Performance and Reporting. This "tool" is found in Appendix B.

  The second document discusses the following topics: "Defining Partnerships; Defining Governance and Accountability; Ministerial Accountability - the Vertical Dimension; Multiple Accountabilities of Partners - the Horizontal dimension; Accountability to the Citizen - the Citizen Dimension; Risk, Responsibility, Accountability; Bringing Together Vertical, Horizontal and Citizen-centred Accountability; Creating an Accountability Comfort Zone; and Key Features of a Results-based Management Framework."

  This document provides a useful review of current thinking about accountability in the context of partnerships, and could well form the basis for enhanced governmental reporting requirements in the future.

- *Treasury Board Policy on Alternative Service Delivery* (Draft 01/2001)

  This 25-page recent draft policy statement is wide-ranging, with application to the considerable variety of new service delivery mechanisms. It includes in its scope intergovernmental ventures, and mentions specifically the SUFA, "..[which] recognizes that reform is [often] best achieved in partnership among provinces, territories and the Government of Canada." In terms of Policy Application:

  > This policy applies to all organizations named in Schedules I, I.1 and II of the *Financial Administration Act* that are engaged in the delivery of federal programs and services, unless specifically exempted by an *Act of Parliament.* More specifically, this policy applies to the creation or the renewal of the following types of transformations for the provision of programs and services:
  >
  > - Partnering and collaborating with other sectors and levels of government for the delivery of its programs and services to Canadians;

- Program and service delivery through third party deliver organizations;
- Contracting-out federal programs and services to the private and not for profit sector; and
- Creating new organizations…

3. *Policy on Transfer Payments* (Treasury Board, Revised 06/2000)

This Policy defines the required (or accepted) modalities for virtually all forms of transfer payments, including intergovernmental. Thus:

- Transfer payments are transfers of money, goods, services or assets made from an appropriation to individuals, organizations or other levels of government, without the federal government directly receiving goods or services in return….
- Contribution - is a conditional transfer payment to any individual or organization for a specified purpose pursuant to a contribution agreement that is subject to being accounted for and audited.
- Grant - is a transfer payment made to an individual or organization which is not subject to being accounted for or audited but for which eligibility and entitlement may be verified or for which the recipient may need to meet pre-conditions.
- Other transfer payments - are transfer payments based on legislation or an arrangement which normally includes a formula or schedule as one element used to determine the expenditure amount; however, once payments are made, the recipient may redistribute the funds among the several approved categories of expenditure in the arrangement. Examples of other transfer payments are transfers to other levels of government such as Equalization payments as well as Canada Health and Social Transfer payments.

Thus this policy would cover, and provide detailed requirements for the construction and administrative mechanisms of a renewed and/or changed Legal Aid agreement with the provinces and territories. As such it is simply the modern version of (and replaces) previous policies under which Legal Aid agreements have been designed in the past. Any new provisions or changes (in the Policy) will need to be examined as new Agreements are contemplated.

APPENDIX B

Principles for Constructing Partnership Agreements

PRINCIPLES FOR CONSTRUCTING PARTNERSHIP ARRANGEMENTS

From Treasury Board's *Alternative Delivery (AD) Accountability Expectations and Approaches* (04/2000); and *Horizontal Management: Trends in Governance and Accountability* (11/2000)

Identifying Key Results

Partners understand and agree on:	Partners should:
Overall objectives and key results commitments	• Define key results commitments, clearly state what they are and show links to objectives • Publish results, eligibility criteria and service level commitments
Strategic priorities and goals	• Focus on outcomes (rather than on process, activities and outputs)
Roles and responsibilities	• Define what each party is expected to contribute to achieve the outcomes • Publicly recognize and explain the role and contribution of each partner • Identify and assess potential risks • Respect public sector values and conflict of interest issues
A balanced approach to performance expectations	• Clearly link performance expectations to the capacities (authorities, skills, knowledge and resources) of each partner to ensure that expectations are realistic

Measuring Performance

Partners understand and agree on:	Partners should:
A performance measurement strategy	• Identify appropriate review tools (e.g. indicators, evaluations, audits, etc.) • Use common databases where possible and share information • Factor in performance information from external sources (e.g. societal indicators, for broader context) • Invest necessary resources into Information Management/ Information Technology systems and technical solutions
A set of indicators for short, medium and long-term	• Identify indicators to measure progress on objectives and results ("indicators" means specific quantitative measurement tools and evidence as well as more general qualitative statements that demonstrate and judge success) • Develop comparable indicators where possible • Include societal indicators where possible to add a quality of life dimension and to track broad trends in society
Dispute or conflict resolution mechanisms for partners	• Establish an approach in the event of non-performance or if responsibilities are not fulfilled by partners involved
An appeals/complaints system for citizens	• Make eligibility criteria and service commitments publicly available • Establish a mechanism for citizens to appeal unfair administrative practices and complaints about access and service

Reporting

Partners understand and agree on:	Partners should:
Provisions for balanced public reporting	• Identify the reporting strategy early in the initiative • Consider incorporating performance information into existing reports (e.g. Departmental Performance Reports) rather than creating new ones • Include adequate access to information provisions • Report publicly on citizen's appeals and complaints, ensuring that confidentiality requirements are met
Reporting will be transparent open, credible and timely	• Use all forms of performance evidence to support reporting • Provide easy public access to information • Link costs to results where possible • Use independent assessments (e.g. external audits, third party assessment)
Sharing lessons learned and best practices	• Track lessons learned and good practices and make them publicly available • Establish mechanisms for improvements and innovations

APPENDIX C

Recent Intergovernmental Developments: Relevant References

RECENT INTERGOVERNMENTAL DEVELOPMENTS:
RELEVANT REFERENCES

1. Social Union Framework Agreement (SUFA)

In this Agreement, each government has agreed, in relation to "achieving and measuring results," to the following:

- Monitor and measure outcomes of its social programs and report regularly to its constituents on the performance of these programs.
- Share information and best practices to support the development of outcome measures, and work with other governments to develop, over time, comparable indicators to measure progress on agreed objectives.
- Publicly recognize and explain the respective roles and contributions of governments.
- Use funds transferred from another order of government for the purposes agreed and pass on increases to its residents.
- Use third parties, as appropriate, to assist in assessing progress on social priorities.

The Treasury Board document SUFA *Accountability Template 2000: Guide to Federal Government Reporting* is also relevant. The overall "Commitment to Canadians" that introduces this document reads as follows:

> "The accountability provisions of the Social Union Framework Agreement (SUFA) commit federal and provincial governments to increase transparency and accountability to Canadians. This means that government will work to ensure that there are appropriate mechanisms for Canadians to participate in identifying social priorities and reviewing outcomes, to register complaints and to apply for appeals to decisions. Governments have also committed to make the eligibility criteria and service commitments of their social programs publicly available. In all, the SUFA commitments require governments to monitor, measure and publicly report on social policy outcomes, share best practices, use third-party help to assess progress, and explain their respective roles and contributions regarding social initiatives. In this way, Canadians can accurately assess the performance of their social programs."

This Template offers a "..systematic approach to documenting essential information that is related to the government's commitments." Further "…the Template applies to both new and existing social initiatives and provides federal departments and agencies with broad direction and guidance on…."

- The mechanisms required to meet the federal government's SUFA commitments with respect to accountability;
- Ways to ensure that the SUFA principles and commitments are reflected in departmental as well as joint initiatives; and
- An approach for developing agreements with other governments on shared accountability arrangements for new Canada-wide social initiatives and program investments, as outlined in Section 5 of the SUFA [on federal spending power]."

Once again, a new legal aid arrangement may need to describe its relationships to these commitments. This may be especially true to the extent that any new agreements depart from (e.g., expand) the scope and/or financing provisions relative to past versions.

2. The National Child Benefit (NCB) and Employability Assistance for People with Disabilities (EAPD)

These two programs have been recently developed, within the new "social union" context. The Auditor General's 1999 Report provided the results of a review of these programs, with an emphasis on accountability, but covering much of the programs' characteristics including the processes used in developing them:

> "The National Child benefit (NCB) is an innovative arrangement that combines federal tax expenditures and provincial programs…. Provincial premiers and the Prime Minister have referred to the NCB as a positive example of how social programs can be delivered collaboratively in a social union.
>
> Employability Assistance for Persons with Disabilities (EAPD) is also cited as an example of a social union program. It is a relatively more traditional form of federal cost-sharing in provincially delivered programs. Its aim is to help people with disabilities overcome the barriers they face in the work force by helping them to prepare for, obtain and maintain employment."

Accountability, results measurement, and audit and evaluation aspects are important in both programs, as elsewhere. So are the processes used to develop agreement and for the partner governments to collaborate. Between the two programs, the EAPD is closer in nature and construct to the legal aid area, so further examination of that program's development seems useful. The Auditor General's Report characterized their examination of the program as follows:

> "This case study focuses on the accountability arrangements of EAPD and the elements to be included in future reports on its results, particularly the performance indicators that have been identified and the challenges implicit in designing and using these indicators….
>
> The first order of business [for governments, having agreed on this priority area] was to develop a mutually acceptable multilateral framework that would guide the negotiations of subsequent bilateral contribution agreements between the federal government and the provinces and territories. Three informal task teams worked in tandem to develop an accountability framework, proposals for changes to the funding allocation formula and policy framework for EAPD…. HRDC held formal consultations with representatives of the community of people with disabilities in April and June 1997. Provinces also incorporated the input from their own consultations into the work of the Federal-Provincial-Territorial Working Group….
>
> The process by which the two levels of government arrived at the bilateral agreements for EAPD contains many worthwhile elements that illustrate the precepts outlined in Chapter 5 of this Report, *Collaborative Arrangements: Issues for the Federal Government*. The degree of co-operation and collaboration involved in reaching these agreements deserves praise. However, in the final analysis, the success of EAPD will be judged not by what is in the agreements but by the results they generate…."

Thus, once again, both the process of developing agreements, and the commitment to results-based information, analysis and reporting attract the Auditor General's attention, just as these attributes are important in the Treasury Board's development of relevant policies. Lessons can be learned from these other program development, with adaptation to the legal aid context.

3. The Infrastructure Program

This current intergovernmental program is different in many respects from the continuing, evolving legal aid program. However, it has received considerable attention with respect to how it structured, planned and pursued the intergovernmental activity leading to the agreements, and in its management of them.

INFRASTRUCTURE CANADA's *Governance and Accountability Framework* (Draft; 11/2000) lays out all the key aspects of the intergovernmental relationships and program management.

> "Governance and accountability structures are an essential part of program management. In the federal government, they ensure that the prescribed purpose, objectives and scope of the program are respected. This governance and accountability framework ensures that both public and parliamentary accountability are secured while establishing clear and comprehensive governance structures; and that program results and their impact on local communities are openly and publicly reported, not only to Parliament, and Ministers, but also to Canadian citizens.
>
> The collaborative nature of Infrastructure Canada provides numerous benefits and opportunities. By maximizing the expertise of all three levels of government, the program can develop more cohesive and co-ordinated approaches to the challenges facing Canadians."

The Infrastructure program documentation and experience may be useful to the Department of Justice, as it seeks to adapt other "best practices" to its own program development requirements. The Auditor General, among others, has pointed to this program as having used effective methods for achieving agreement and having developed good oversight and review processes.