



Department of Justice
Canada

Ministère de Justice
Canada

EVALUATION DOCUMENT

LEGAL AID PROGRAM

Summary, Recommendations & Management Response

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**Evaluation Division
Policy Integration and Coordination Section**

Canada 

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1. INTRODUCTION

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 evaluation also examined the evolving federal government context in which the updated federal-provincial legal aid programs will operate. Treasury Board has made several significant policy changes since the last set of legal aid agreements was put in place. Considerable efforts have been made to improve program transparency, accountability and reporting on performance government-wide. The new agreements will be required to reflect these changes.

1.1 Scope of the Evaluation

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.

For the purposes of this evaluation, civil (meaning primarily family, but also immigration) legal aid was excluded because it falls outside these 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. 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.

2. BACKGROUND

During the 1970s, the Department's funding and related support for criminal legal aid was a 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, 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 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 work was undertaken 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.

3. OBJECTIVES OF THE LEGAL AID PROGRAM

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.

4. METHODOLOGY

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.

5. EVALUATION FINDINGS

- There is a clear and generally accepted rationale for the continuing existence of legal aid programs and for the continued involvement of the Department of Justice in their funding and interest in their performance.
- Historically Canada has chosen cost-sharing with the provinces as the most effective tool to ensure cooperation in achieving national legal aid goals, which have been consistent for a number of years and which 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.

- 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 has not developed clear policies for its program of support for criminal and Young Offender legal aid. The lack of clear objectives for the legal aid program meant that a critical antecedent to policy was absent.
- Turnovers and vacancies within Programs Branch have limited the Department's capacity to work effectively with the provincial and territorial (PT) partners in jointly developing policies on legal aid.
- The Permanent Working Group on Legal Aid (PWG) represents a serious attempt to structure the dialogue among Justice, the PT and the legal aid agencies. It is the only regular forum for discussion of legal aid issues where all three groups of stakeholders are present. The evaluation concluded that the PWG has considerable, but as yet, largely unrealized potential to contribute to an effective partnership among these partners.
- There currently exists no empirical basis for assessing the adequacy of the Department'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 Canada 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. 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 regarded by the partners as being inadequately accessible to those who need these services. Recent cutbacks in service levels in many jurisdictions mean that only people facing the most serious charges and whose financial circumstances are the direst 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).

In recent years, the legal aid 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.

6. RECOMMENDATIONS AND MANAGEMENT RESPONSE

The Programs Branch has reviewed the Summative Evaluation and fully supports the recommendations. The Branch has developed an action plan to address the recommendations as well as other issues raised both within the department and with the provinces and territories.

The Programs Branch has developed a Legal Aid Project to specifically address issues related to the legal aid program. The Legal Aid Project was initiated in April 2001 and will continue until March 2003. Both operational (\$8M) and contribution resources (\$40M) were obtained from Treasury Board to implement to renew the legal aid program.

This initiative is composed of five components including: a) a National Research Secretariat made up of federal government and other FPT partners to support a program of research; b) a national research initiative on unmet needs, legal aid pressures and other issues identified as priorities for the renewal of legal aid in Canada; c) a grant and contribution fund for pilot projects to look at service delivery issues in criminal legal aid and issues in area of civil legal aid, including family and immigration services; d) a legal aid policy review on federal objectives; and, e) FPT Negotiations with respect to research, policy development and funding issues.

As part of the request for interim funding, Programs Branch was required to develop a results-based management and accountability framework (RMAF). The RMAF describes the proposed activities to be undertaken, the outputs, and the immediate, intermediate and ultimate outcomes for the project. The specific performance measures, data source and data collection methodology, and report timeframe are also outlined in the document. The performance data will not only provide information about the ongoing progress of the Legal Aid Project over the course of the two years, but also will feed into the overall evaluation of the Project following the second year. The lessons learned over the two-year Legal Aid Project will guide the renewal of the Legal Aid Program and funding agreements.

6.1 Role of the Department of Justice

There has been a growing lack of clarity with respect to the Department's role in criminal and Young Offender legal aid. When legal aid was first being introduced in the provinces and territories, the Department of Justice played a key role 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 Justice Canada no longer seems appropriate. In terms of the financial support it provides, 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.

In this context, the provinces and agencies were asked whether 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 Justice Canada beyond its financial contribution. Among the roles which 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 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."

It is recommended that:

The Legal Aid Unit, Programs Branch clarify the role of the Department of Justice with respect to criminal and Young Offender legal aid.

Management Response:

One aspect of the Legal aid Project's legal aid policy review is to clarify the role of the Department of Justice with respect to legal aid including its leadership role with the provinces and territories, its financial resource needs, its role in providing financial assistance to the jurisdictions and how the program is situated within the policy and fiscal framework of the federal government and interests of the Departmental of Justice.

6.2 Program Objectives

One of the principal findings of this evaluation was that the Department of Justice has not defined a clear and coherent set of objectives for the criminal and Young Offender legal aid program. This oversight has had an impact on all aspects of the program and has made it virtually impossible to measure progress, develop policy or even to assess the sufficiency of federal resources allocated to the program. It is essential that in the next round of agreements that there be a shared understanding and agreement among key stakeholders of the results the Department of Justice is seeking to achieve through this program.

It is recommended that:

The Legal Aid Unit, develop results-based objectives for a renewed Department of Justice criminal and Young Offender legal aid program, in consultation with the jurisdictions.

Management Response:

As a prelude to the development of results-based objectives for the renewal of the legal aid program, the Branch has developed a results-based management and accountability framework (RMAF) for the Legal Aid Project's four main activity areas: research; pilot projects, policy development; and, funding agreements. The RMAF results will provide better and timelier information about legal aid issues, information gaps and funding priorities that will assist in the establishment of objectives for the renewal of legal aid program. Over the next two years the Programs Branch will develop results-based objectives founded on the development of a renewed role of the department in legal aid, the lessons learned from the Legal Aid Project and

the results of consultations with the provinces on federal government's policy role and funding strategy.

6.3 Performance Measurement Strategy

There is a lack of national reporting standards in this program except in the most rudimentary sense and as a result, key measures of the performance of the system are not available. Currently, 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. There was general agreement among the stakeholders that the data in these reports could not be used for either performance measurement or accountability purposes. Given the effort that goes into preparing these reports, on the parts of both Statistics Canada and the provinces and territories, it is unfortunate that they are not more useful in this way.

It is recommended that:

The Legal Aid Unit develop a performance measurement framework that will provide consistent ongoing information about the performance of the national system of criminal and Young Offender legal aid, in consultation with the jurisdictions.

Management Response:

The Programs Branch has already developed a performance measurement framework for the Legal Aid Project. Lessons learned over the next two years in implementing the performance measurement framework for the Legal Aid Project will assist in the development of a performance measurement framework for the renewal of the legal aid program and for the next five-year agreements with the provinces and territories. The current performance measurement framework will be a stepping-stone for the both the legal aid program and the jurisdictions to move towards on going results-based objectives and performance measurement.

The Programs Branch is committed to the development of a performance measurement framework that will collect information on results-based objectives for the legal aid program.

Consultation with the provinces and territories will be undertaken over the next two years to establish a performance measurement framework for the legal aid program's five-year agreements.

6.4 Minimum Standards of Coverage

The current set of agreements is distinguished from former agreements by the reference to the maintenance of minimum standards of service (meaning standards of coverage). It is important to note, however that these minimum standards are not otherwise defined.

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. A significant issue for Justice Canada 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 represents an essential element of an accountability framework for the Justice legal aid program.

It is recommended that:

The Legal Aid Unit explore, in collaboration with the jurisdictions, approaches to monitoring coverage and accessibility levels to criminal and Young Offender legal aid in Canada.

Management Response:

The performance measurement framework and the reporting requirements developed for the Legal Aid Project and interim two-year agreements will reveal some information on the extent to which federal funds were spend on coverage and accessibility levels. Based on lessons learned, the Legal Aid Section will work with the FPT Permanent Working Group on Legal Aid (PWG) over the next two years to develop the best methods of monitoring elements such as coverage and accessibility levels, which are key factors in the delivery of legal aid services and costs.

6.5 Level of Funding

The most significant change to the 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 Justice Canada 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.

There is unanimous agreement among the provincial stakeholders (and the Canadian Bar Association¹) 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.

¹ 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.

It is recommended that:

The level of funding provide by the federal government in criminal legal aid be linked to the objectives of a renewed criminal and Young Offender legal aid program and the role of the Department of Justice in that program.

Management Response:

The Branch has launched the Legal Aid Project with increased resources to undertake research, pilot projects, policy development and FPT consultations to support the renewal of the legal aid program. Over the next two years the Legal Aid Section will study research, pilot project and policy reports and consult with the provinces and territories to determine the linkages between the role of the legal aid program and the level of financial resources needed to support these roles. The renewal of the legal aid program will examine expanding its role beyond financial assistance and financial accountability to include the policy interests of the federal government and Department as well as those of the jurisdictions. The development of results-based policy objectives will be explored within the context of those interests.

6.6 Integrated approach to legal aid policy within the Department of Justice

The evaluation looked into 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. Interviews were conducted with representatives from Criminal Law Policy (CLP) and from the Federal Prosecution Service (FPS). These respondents reported that they had not been kept informed about evolving legal aid issues relevant to their work on an ongoing basis. Moreover, they indicated that they would support in principle, future efforts to examine impacts on legal aid costs brought on by CLP/FPS policy changes. Ideally, the resource implications to the national system of legal aid should be considered concurrently with any

contemplated changes to criminal law policy or legislation. The Australian concept of a 'legal aid impact statement' as advocated by the Canadian Bar Association may offer a useful model for identifying and reporting the impacts of Justice policy changes on legal aid costs.

It is recommended that:

The Legal Aid Unit work with other stakeholders within the Department of Justice to develop a methodology to assess the resource implications of changes to criminal law policy on the national system of criminal and Young Offender legal aid.

Management Response:

As part of the policy agenda for the Legal Aid Project, the Legal Aid Section will engage in research, consultations and intra-departmental working groups to determine what areas of the federal law policy have an impact on the delivery of legal aid services. Based on these findings, FPT discussions will be undertaken to see to what extent changes in federal law, and particularly the *Criminal Code*, impact on the direct delivery of services. Further work will be subsequently undertaken to determine if an assessment mechanisms can be developed to gauge the potential costs of legal aid of new federal legislation.

6.7 Accountability for Results

No formal requirement to evaluate the legal aid program was built into the most recent cost-shared agreements. As a result, no resources were allocated to do this work or to undertake ongoing performance measurement. The only formal requirement built into these agreements was that the provinces were obliged to support a federal evaluation of its own program. This study represents the only evaluation of the federal legal aid program since the program began.

With respect to audit, 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. 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 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 although there is an intention to reintroduce these reviews in the future.

It is recommended that:

The Legal Aid Unit build greater accountability and transparency into a renewed criminal and Young Offender legal aid program through ongoing audit and evaluation.

Management Response:

The Program Branch has already started on establishing greater accountability and transparency through the development of the RMAF and risk-based audit framework (RBAF), as well as the development of an evaluation framework for the legal aid project. These lessons learned will inform the development of greater accountability and transparency for the renewal of legal aid program and the five-year contribution agreements with the jurisdictions. In addition, the Programs Branch will review its current procedures with regard to financial audits and the role and usefulness of departmental audit program. Further, the renewal of the role of the Department in legal aid, the development of legal aid program results-based objectives the renewal of the funding formula and the development of a performance measurement framework are critical components for developing a more comprehensive audit plan that would go beyond financial accountability.

6.8 Role of Permanent Working Group

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. 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 Justice officials assigned to the legal aid file;
- turnover in the position of provincial co-chair;
- 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.

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. Exclusive reliance on these volunteers may contribute to the seeming lack of momentum on some of the issues discussed by the PWG.

Over the next two fiscal years, the Department of Justice is undertaking, in cooperation with Citizenship and Immigration Canada and the PWG, a project called the Legal Aid Project. The purpose of this project is to engage both federal and provincial/territorial governments in joint research and development activities to address the long-term legal aid issues (many of which have been identified in this evaluation). The PWG will be playing an active role in the Project, supported by a Legal Aid Unit and Research Secretariat. This cooperative effort will provide an opportunity to examine the effectiveness of the PWG in a more integrated and supported policy role than was possible in the past.

It is recommended that:

The Legal Aid Unit examine the role of the PWG in Legal Aid Project to determine how to more fully integrate and support the policy work of the PWG in a renewed criminal and Young Offender legal aid.

Management Response:

The Branch has already moved forward in this area by engaging the PWG in the Legal Aid Project with respect to research, development of pilot projects and the renewal of interim agreements. To date, the involvement of the provinces and territories has been constructive and feedback from the jurisdictions very positive. The Branch will continue to engage the provinces and territories in discussions on issues related to research, policy, funding issues and support for provincial participants. The lessons learned over the next two years will provide the basis for a renewed longer-term FPT approach that will establish a more cooperative and better functioning PWG.