



LEGAL AID  
RESEARCH SERIES

THE UNMET NEED FOR  
CRIMINAL LEGAL AID: A  
SUMMARY OF RESEARCH  
RESULTS



# The Unmet Need for Criminal Legal Aid: A Summary of Research Results

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*The views expressed in this report are those of the authors and do not necessarily reflect the views of the Department of Justice Canada.*





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## Introduction

This paper examines the nature and extent of unmet need for criminal legal aid in Canada. Determining the nature and extent of unmet need for criminal legal aid was the principal objective of a research program that was developed and carried out by the federal Department of Justice in collaboration with the provinces and territories between April 2001 and November 2002. The research was part of a two-year policy initiative to develop a renewed approach to federal policy for criminal legal aid in Canada.<sup>1</sup>

The vast majority of research on legal needs is in the area of civil matters. Only a very few studies have focused on legal needs in the area of criminal justice. Research carried out in Australia in the mid-1990's developed indicators of demand for criminal legal aid for purposes of developing a distribution formula for Commonwealth funding for states and territories.<sup>2</sup> A study by Paul Robertshaw is unique in having undertaken detailed research on the need for criminal legal aid.<sup>3</sup> Very much like the conclusions of this study, Professor Robertshaw rejects the narrow focus on the need for legal representation in court.<sup>4</sup> Instead, he adopts a much broader view of need for criminal legal aid analogous to a medical care model encompassing prevention, counseling and cure.<sup>5</sup>

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

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<sup>1</sup> Since 1972-1973, the federal government has contributed to the provision of criminal legal aid services in the provinces and territories through a series of agreements administered by the Department of Justice.

<sup>2</sup> Rush Social Research and John Walker Consulting Services, *Legal Assistance Needs Phase I: Estimation of a Basic Needs-Based Planning Model, Legal Aid and Family Services Division* (Australia: Attorney-General's Department, 1996).

<sup>3</sup> Paul Robertshaw, *Rethinking Legal Aid: The Case of Criminal Justice* (Dartmouth: Aldershot, 1991).

<sup>4</sup> *Ibid.*, 87.

<sup>5</sup> *Ibid.*, 215; also see the book review by Jeremy Cooper, "Rethinking Legal Aid: The Case of Criminal Justice by Paul Robertshaw," *Criminal Law Review* (London, 1993), 329.

Overall, the research employed a wide variety of methodologies including analysis of court data, court observation, interviews with key informants, focus group studies and literature reviews. As well, the research attempted to take into account the views not only of the experts, judges, lawyers and legal aid providers, but also those of stakeholder groups representing the clients of legal aid.<sup>6</sup> Most of the research projects were carried out in the ten provinces. The geographic and socio-economic context in the three northern territories was considered to be sufficiently different that separate research studies addressing criminal and civil legal aid issues were carried out in each of the three territories. A number of pilot projects were also funded and evaluated as part of the legal aid initiative. The context for this research is described in more detail in a paper presented at the fourth International Legal Aid Group Conference held in Melbourne, Australia.<sup>7</sup>

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<sup>6</sup> Because of the methodological difficulties involved in interviewing criminal accused, and the probable value of the information as against the cost of obtaining it, the research generally did not attempt to interview individual accused.

<sup>7</sup> A. Currie, “The Emergence of Unmet Need as an Issue in Canadian Legal Aid Research” (paper presented at the Fourth International Legal Aid Conference, Melbourne, Australia, 2001).



# A Framework for Understanding Needs for Criminal Legal Aid

Concerns raised by the judiciary, by the legal profession and by the public discourse that informed the initial thinking about the research focused on what was perceived to be the large numbers of unrepresented accused in the criminal courts. The body of results that emerged from the research program provides the basis for the development of a broader and more detailed framework for understanding unmet needs for criminal legal aid than had been considered before, beyond the simple presence or absence of legal representation. This framework is organized around the sources from which criminal legal aid needs flow. The sections that follow represent that framework. As well, when the results are considered within that framework, they suggest some implications for the delivery of criminal legal aid. These are discussed at the end of the paper.

## Unmet Needs that Flow from the Operations of Legal Aid Plans

One perspective that emerged from interviews with respondents was the emphasis on how need is created by legal aid providers themselves, by mechanisms that are designed to limit the accessibility of legal aid. The two major areas of emphasis on improving accessibility were on the principal rationing mechanisms normally used by legal aid plans to keep demand within the scope of their budgets. These are financial eligibility guidelines and coverage provisions.

### Financial Eligibility Guidelines and Accessibility

All legal aid plans have financial eligibility guidelines of some form or other to limit the numbers of people who receive service. Respondents in the study of legal aid needs of Aboriginal people<sup>8</sup> and in the study of legal aid needs and barriers to accessibility among immigrants, refugees and visible minorities<sup>9</sup> suggested that in their experience restrictive financial eligibility guidelines placed significant limitations on the accessibility of legal aid for members of their constituent groups. A large number of lawyers who were interviewed in the court site study<sup>10</sup> suggested that restrictive financial eligibility guidelines were partly responsible for the numbers of unrepresented accused they observed in the courts.

The quantitative study of financial eligibility guidelines<sup>11</sup> tended to support the qualitative data. That study showed that in all provinces the financial eligibility guidelines were below the

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<sup>8</sup> Mark Dockstator and Don Auger, *Study of the Legal Aid Needs of Aboriginal Men, Women and Youth* (Aboriginal Research Institute, 2002).

<sup>9</sup> Spyridoula Tsoukalas, Ekuwa Smith and Laura Buckland, *A Study of the Barriers to Criminal Legal Aid Access for Immigrants, Refugees and Visible Minorities* (Ottawa: Canadian Council For Social Development, 2002).

<sup>10</sup> Robert Hann, Joan Nuffield, Colin Meredith and Mira Svoboda, *Court Site Study of Adult Unrepresented Accused, Part I: Overview Report and Part II: Site Reports*, (Toronto: Robert Hann & Associates and Ottawa: ARC Research Consultants, 2003).

<sup>11</sup> Spyridoula Tsoukalas and Paul Roberts, *Legal Aid Eligibility and Coverage in Canada* (Ottawa: Canadian Council on Social Development, 2002).

Statistics Canada Low Income Cut-Offs. The table below shows the proportion of individuals and families falling below the Low Income Cut-Off levels that would be eligible for non-contributory legal aid in all provinces combined. The table shows the range from lowest to highest percentage of the low income individuals who would qualify under existing financial eligibility guidelines. All legal aid plans have schemes in which clients may be required to contribute toward the cost of the legal aid they receive. However, client contribution programs are not significant with respect to criminal legal aid and apply mainly in the area of civil legal aid.<sup>12</sup> This table shows that in none of the ten provinces are the financial eligibility guidelines sufficiently generous to include all of the low-income population. It is worth noting that the low-income cut-offs are determined according to requirements that relate to normal living – food, clothing and shelter. The cost of legal services is considerably greater than the cost of the elements that are used to measure low income and are, without doubt, well out of reach of those with incomes above the low-income cut-off levels.

<b>TABLE I: PROPORTION OF THE POOR WHO QUALIFY FOR NON-CONTRIBUTORY LEGAL AID</b>		
<b>Types of Families</b>	<b>Percent of Families That Would Qualify</b>	<b>Minimum Percent in Four of Nine Provinces</b>
All Families	18% to 87%	below 48% in four provinces
Single Person Families	30% to 86%	below 51% in four provinces
Males 18 – 34	37% to 78%	below 72% in four provinces

### **Coverage Provisions and Accessibility of Legal Aid**

All legal aid plans have coverage provisions that limit the range of legal matters and level of seriousness of the offences for which service is available. Generally, in criminal legal aid, the basic criterion for determining coverage is risk of imprisonment. Some plans also include loss of means of livelihood in some circumstances. The so-called “negative liberty” standard excludes from legal aid coverage many offenders who commit minor offences, especially first time offenders who are unlikely to face a jail sentence. First time offenders do, however, face the risk of receiving a criminal record. A criminal record may carry a number of important consequences that can affect employment in occupations in which a security clearance is required, or admission to certain foreign countries. The court site study found that restrictive coverage provisions are an important factor contributing to the numbers of unrepresented accused they observed in the courts.<sup>13</sup>

### **The Disadvantages and Disabilities of Criminal Accused: Coverage and Accessibility**

Both the court site study and the evaluation of a pilot project designed to provide court-based assistance to unrepresented accused<sup>14</sup> described the accused population, and by extension legal aid clients, as a very low functioning population whose members are generally poorly educated,

<sup>12</sup> A. Currie, *The Deterrent Effect of Legal Aid Application Fees and Client Contributions* (Ottawa: Department of Justice, 1998).

<sup>13</sup> Robert Hann et. al., *Part I*, 31.

<sup>14</sup> John Malcolmson and Gayla Reid, *Unrepresented Accused Assistance Project, Project Report and Evaluation* (Vancouver, 2002).



have low levels of literacy and lead very disordered lives.<sup>15</sup> A significant proportion may experience mental disorders, learning disabilities, the debilitating effects of excessive drug and alcohol abuse and cognitive disabilities relating to severe and prolonged addictions. The court site study found that criminal accused falling into these categories are in need of representation regardless of the seriousness of the offence.

The respondents in the study of immigrants and visible minorities also felt that coverage provisions are too narrow. Coverage provisions that primarily take into account only the criminal offence, rather than the special disadvantages of immigrants, such as language difficulties, or the broader impacts, such as the implications on an offender's refugee or immigration status, fail to take into account the important implications that a criminal charge may have for this segment of the legal aid clientele.<sup>16</sup>

The study of women's issues and criminal legal aid made similar arguments.<sup>17</sup> As women tend to be primary caregivers for their children, the risks of a conviction fall not only on the individual women but on their children as well. Women who are involved in conflict with the law, either as perpetrators or as victims, may come under the scrutiny of social services and child welfare authorities as a secondary consequence of their brush with the law. This may represent a threat not only to the women but also to their children. Overall, women tend to commit offences that are less serious than those committed by men, and are therefore less likely under conventional coverage provisions to receive legal aid. Also the author of the study of women's legal aid needs advocates that coverage decisions should also take into account factors that are unique to women.

Respondents in most of the studies raised a similar issue with respect to coverage provisions. In their view, coverage that is based primarily on legal considerations, such as the seriousness of the offence and the risk of imprisonment, is too narrow. Legal aid coverage ought to reflect a broader set of considerations. These include disadvantages that may be faced by accused and, in their view, risks that relate to wider impacts on the lives of accused.

## **Unmet Needs that Flow from Legal Aid Intake**

In the experience of the court assistance workers in the unrepresented accused project, many out-of-custody accused suffer from the disabilities described above<sup>18</sup> and, as a consequence, may have a great deal of difficulty accessing legal aid. They have difficulty approaching legal aid offices, and they have problems with the application process and with keeping subsequent appointments.

Recent immigrants may experience other barriers to accessing legal aid. They may be unfamiliar with the Canadian legal system, with legal aid, and how to apply for it. A poor facility in English or French will make the acquisition of knowledge about legal aid difficult. Immigrants often

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<sup>15</sup> Malcolmson and Reid, 16–21, and Hann et. al., *Part I*, E-ii.

<sup>16</sup> Tsoukalas, Smith and Buckland, 46.

<sup>17</sup> Lisa Addario, *Six Degrees From Liberation: Legal Aid Needs of Women in Criminal and Other Matters* (Ottawa, 2002).

<sup>18</sup> See note 11.

have to find a friend or relative to accompany them to make an application for legal aid. Immigrants from some countries may be deeply mistrustful and suspicious of the justice system and, by extension, legal aid as a part of that system. These suspicions are often rooted in negative experiences with repressive justice systems in their countries of origin, or sometimes from their experiences in Canada. According to some respondents, suspicion and mistrust may result in a reluctance to reveal personal information in the application process, resulting in unnecessary delays in receiving service or in denial of service altogether. Respondents expressed the view that special efforts to accommodate these legal aid clients may be necessary.

The respondents in the study of Aboriginal people and legal aid identified similar accessibility problems. Many Aboriginal people have a poor knowledge of the mainstream justice system and of legal aid. Particularly, in some rural and remote regions, many Aboriginal people may also have a poor understanding of English or French. Traditional Aboriginal cultures are not characterized by formal social structures and typically do not rely heavily on paper transactions. Therefore, bureaucratic legal aid application processes may be very difficult for poorly educated individuals with low levels of literacy. The respondents reported that, much like non-indigenous minorities, Aboriginal people may not apply for legal aid even though they would be eligible or may have difficulties when they do.

Overall, the results of the qualitative interviews suggest that accused persons may have difficulty accessing legal aid for a variety of reasons. Some of the factors that give rise to accessibility problems are disproportionately present among the criminal accused population generally. Some barriers to accessibility are more unique to particular segments of the accused population, such as Aboriginal people, recent immigrants and members of certain minority groups. Respondents felt that barriers to accessibility create unmet needs at the intake stage of legal aid service that are often overlooked. The respondents felt that the needs that flow from the barriers to accessibility at the intake stage are legal aid needs as much as the needs that flow from the criminal charge and court appearances.

## **Unmet Needs that Flow from Arrest and Detention**

One study series focused on the provision of legal advice to persons detained by the police.<sup>19</sup> In Canada, this is called *Brydges* duty counsel. The Supreme Court of Canada decision in *Brydges*<sup>20</sup> places the police under the obligation to inform detainees of their right to speak to a lawyer and about the legal aid services that may be available in the particular province or territory. The Supreme Court of Canada did not impose a constitutional obligation on provincial and territorial governments to provide legal advice upon arrest.<sup>21</sup> However, most legal aid plans have implemented some form of service to provide advice to persons who are under arrest and who may be interrogated by the police. The essence of the right to *Brydges* duty counsel is that a detainee must be advised of his right to retain and instruct counsel without delay because it is upon arrest and detention that an accused is in immediate need of legal advice. One of the main functions of duty counsel at this stage is to advise the individual of his or her right to remain

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<sup>19</sup> Simon Verdun-Jones and Adanira Tijirino, *A Review of Brydges Duty Counsel Service in Canada*, Simon Fraser University, 2002.

<sup>20</sup> *R v. Brydges*, [1990] 1 S.C.R. 190.

<sup>21</sup> Simon Verdun-Jones and Adanira Tijirino, 21.



silent and how to exercise that right. This is an important mechanism for the exercise of the right against self-incrimination.<sup>22</sup>

The study used a variety of methods to examine the nature of *Brydges* duty counsel service and its possible shortcomings.<sup>23</sup> Within the time frame and budget constraints of this research it was not possible to study the operations of the existing *Brydges* duty counsel systems in detail or to undertake an extensive study of detainees in police cells.

Seven provinces use a centralized 24-hour telephone system to provide advice to persons detained by the police. Two provinces employ systems in which a roster of available lawyers and their telephone numbers is posted in police stations. One province does not provide a formal system for providing legal advice for detained persons.

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

Police force respondents uniformly reported that detainees were always informed of their constitutional right to speak with counsel. However, according to the in-custody accused who were interviewed, 40 per cent indicated that the police did not advise them of their right to counsel.<sup>25</sup> Further, 55 per cent indicated that the police did not inform them specifically about the right to immediate access to *Brydges* duty counsel.<sup>26</sup> Because of the small samples, this apparent discrepancy cannot be generalized. Nonetheless, it does raise questions about the extent to which accused receive *Brydges* service at all.

The report raised a more basic issue regarding the ability of accused to comprehend the advice provided over the telephone. Based on the literature review, the researchers observed that

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<sup>22</sup> Ibid., 25. The authors cite Lamer J. in *R. v. Brydges* at 342-343.

<sup>23</sup> The study includes an extensive legal analysis of Canadian jurisprudence relating to *Brydges* duty counsel; a review of the American experience in relation to *Miranda v. Arizona*; a review of the system for advice at arrest and detention in England and Wales; a descriptive review of the types of *Brydges* services available in Canadian jurisdictions; and an empirical analysis of the impact of the provision of *Brydges* services based on interviews with legal aid service providers (n=18), police officers (n=20), Crown Counsel (n=17), defence counsel (n=18), judges (n=16), and a very small and exploratory sample of arrested and detained persons (n=20).

<sup>24</sup> Ibid., 113.

<sup>25</sup> Verdun-Jones and Tijirino, 121.

<sup>26</sup> Ibid., 122.

accused suffer disproportionately from a variety of impairments that might limit their comprehension. A recent Canadian study found that 40 per cent of accused persons at the point of their arrest and detention were found to be abusers of either alcohol or drugs.<sup>27</sup> Studies of prison inmates indicate that inmates have high rates of mental disorders, and that these are higher than in the general population.<sup>28</sup> Intellectual disabilities are more prevalent among prison population than the general population<sup>29</sup>, and therefore are no doubt more prevalent among people who are arrested. An extensive empirical study conducted in the United States demonstrated that mentally handicapped persons frequently do not understand the *Miranda* warning issued by the police.<sup>30</sup>

In certain parts of Canada with large immigrant populations, there are larger numbers of detainees who do not speak English or French well. Lack of facility in English or French can thus present a significant barrier to the ability of a person to understand advice not provided in his or her mother tongue.<sup>31</sup> The study of barriers to the accessibility of legal aid services by immigrants and members of visible minority groups also pointed specifically to the problem that immigrants who do not speak English or French may have in comprehending legal advice provided by telephone.<sup>32</sup> Similarly, the study of legal aid needs and service delivery gaps pointed to problems experienced by Aboriginal people receiving legal advice by telephone.<sup>33</sup>

The *Brydges* study argues that legal advice provided over the telephone that is poorly understood or not understood at all may be more damaging to the legal position of the detained person than no advice at all. If the police fail to allow the detainee to contact a lawyer, any evidence gathered in an interrogation may later be placed in jeopardy. However, a perfunctory contact with a lawyer that satisfies the formal legal requirement can work to the disadvantage of the accused. With the *Brydges* requirement satisfied in a purely mechanical way, the police may proceed to interrogate the accused person regardless of his comprehension of any legal advice that may have been given. As the research suggests, this may involve intoxicated persons who may have difficulty even remembering the advice provided by the lawyer. Detainees who suffer from mental disorders or learning disabilities can be highly suggestive and possibly vulnerable to persuasive interrogation techniques.<sup>34</sup> These vulnerabilities may be exacerbated when under arrest because of confusion, fear, and the use of physical force. This raises questions about detainees jeopardizing their right against self-incrimination and about the role, if any, of *Brydges* duty counsel.

The *Brydges* study suggests that changes should be introduced to improve the system of advice for detainees. Most respondents underscored the need to implement accessible, centralized telephone-based *Brydges* duty counsel systems in jurisdictions where they do not presently exist.<sup>35</sup> In all jurisdictions, these services need to be staffed at a level sufficient to assure timely

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<sup>27</sup> Pernanen et. al., 2002, cited in Verdun-Jones and Tijirino, 86.

<sup>28</sup> Motiuk and Porporino, 1991, cited in Verdun-Jones and Tijirino, 88.

<sup>29</sup> McDonald, 2000, cited in Verdun-Jones and Tijirino, 90.

<sup>30</sup> Cloud et. al., 2002, cited in Verdun-Jones and Tijirino, 91.

<sup>31</sup> Verdun-Jones and Tijirino, 18.

<sup>32</sup> Tsoukalas, Smith and Buckland, 41.

<sup>33</sup> Dockstator and Auger, 50.

<sup>34</sup> See note 27.

<sup>35</sup> *Ibid.*, 17.



response. In areas where required, access to multilingual lawyers, or possibly appropriately trained, accredited and supervised paralegals, should be made available.

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

Thinking beyond the implementation of conventional centralized telephone-based *Brydges* services, Verdun-Jones and Tijirino consider alternative models that might better serve the needs of detained persons. They suggest that duty counsel lawyers, possibly assisted by paralegals, could be assigned to high volume local jails to provide on-site advice services. This would allow more effective communication with detained individuals who suffer the disadvantages discussed above.<sup>36</sup> On-site duty counsel services at police lock-ups might have further potential. According to Verdun-Jones and Tijirino:

If the role of duty counsel were to be expanded, lawyers could be assigned to specific police stations and lock-ups not only to provide legal advice and assistance but also to assist accused persons in contacting community services that may be of benefit to them. Such an expanded role for duty counsel would reflect a client-centered approach. Indeed, legal aid services should focus on a more *holistic* approach towards clients who are held in police custody.<sup>37</sup>

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

In the *Evans* case<sup>38</sup> the Supreme Court of Canada ruled that the police must inform suspects of their right to counsel in terms they can understand.<sup>39</sup> In that case, Chief Justice McLachlin stated:

the police cannot rely on their mechanical recitation of the right of the accused, they must take steps to facilitate that understanding.<sup>40</sup>

If this is the standard for the police providing information about the right to legal advice, then, on logical grounds, should the standard for legal aid not also insist on legal advice that is comprehensible to the detained person? If an advice lawyer is not entirely satisfied that the detainee is fully cognizant of his or her rights and fully able to exercise them, should there be

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<sup>36</sup> Verdun-Jones and Tijirino, 120.

<sup>37</sup> *Ibid.*, 18.

<sup>38</sup> *R. v. Evans*, (1991) 63 S.C.C. (3d) 289.

<sup>39</sup> Verdun-Jones and Tijirino, 79.

<sup>40</sup> *R. v. Evans*, cited in Verdun-Jones and Tijirino, 79.

some mechanism to inform the police that interrogation should not proceed? This might require special training and special questioning protocols by *Brydges* advice lawyers.

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

### **Unmet Needs that Flow from the Adversarial Court Process**

The central study in the research program was the court site study.<sup>41</sup> This study examined the numbers of unrepresented accused<sup>42</sup> in nine criminal courts across Canada and explored the consequences of the lack of representation. Although the focus of criminal defence work is often on the trial and court decisions regarding the right to counsel often refer to right to representation at trial, the study focused on representation at all stages of the criminal justice process. Only a small proportion of criminal matters are decided by a trial. Most are disposed of earlier in the criminal justice process. For those cases that do proceed to trial, the earlier stages of the criminal justice process are important. Research shows that critical decisions are made at the early stages of the criminal justice process that can have important consequences for subsequent stages and on the outcome of the case.<sup>43</sup> While criminal trials may be more demanding than the pre-trial stages with respect to legal technicalities, the earlier stages are, nevertheless, adversarial, formal and complex.

The table below shows that unrepresented accused appear frequently in the criminal courts. Table I shows the percentage of accused appearing unrepresented at various stages of the criminal justice process in all nine courts combined.<sup>44</sup>

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<sup>41</sup> See note 6.

<sup>42</sup> Unrepresented is not defined specifically. Accused who were counted as unrepresented at some stage of the court process may have received advice or assistance at some other point.

<sup>43</sup> Hann et. al., *Part I*, 9, 10.

<sup>44</sup> *Ibid.*, 11.



<b>TABLE II: PERCENTAGES OF UNREPRESENTED ACCUSED BY STAGE OF PROCEEDING</b>		
Appearance	Per Cent Unrepresented	Minimum Per Cent in Four of Nine Courts
First Appearance	5 % to 61%	above 36 % in four courts
Second Appearance	2 % to 38 %	above 30 % in four courts
Third Appearance	1 % to 32 %	above 19 % in four courts
Bail Hearing	3 % to 72 %	above 12 % in four courts
Enter Plea	6 % to 41 %	above 18 % in four courts
Final Appearance	6 % to 46 %	above 23 % in four courts

As Table III shows, the results of the court site study also revealed that fairly large percentages of criminal accused are convicted without the benefit of counsel. Even more troubling, up to 27 per cent of unrepresented accused receive jail sentences.

<b>TABLE III: PER CENT OF UNREPRESENTED ACCUSED CONVICTED AND SENTENCED TO JAIL AT LAST APPEARANCE</b>		
Outcome at Last Appearance	Range of Percentages for Nine Courts Combined	Minimum Percent in Four of Nine Courts
Per Cent Convicted	43 % to 87 %	above 60 % in four courts
Per Cent Sentenced to Jail	4 % to 27 %	above 16 % in four courts

### Who Should Have Legal Representation?

The right to legal representation is not absolute. The right of accused persons to obtain legal representation in court is enshrined in the *Canadian Charter of Rights and Freedoms* in sections 7 and 11.<sup>45</sup> However, the courts have ruled that accused have a right to state funded counsel in circumstances where the absence of legal representation would result in an unfair trial.<sup>46</sup> In *R v. White*, McDonald J. outlined the following criteria that should be taken into account in considering whether legal counsel is necessary to ensure a fair trial:

- the characteristics of the accused such as financial situation, language skills and education;
- the complexity of legal and evidentiary matters; and
- the possible outcome, for example, the possibility of imprisonment.<sup>47</sup>

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

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

<sup>45</sup> *Canadian Charter of Rights and Freedoms (Constitution Act, 1982, U.K., Part I)*, Part I being Schedule B to the *Canada Act (U.K.)*, 1982 c. 11.

<sup>46</sup> D. Stuart, *Charter Justice in Canadian Criminal Law* (Carswell, 1996), 7.

<sup>47</sup> *R v. White and the Queen*, (1977) 32 C.C.C. (2d) 478 at 490 (Alta S.C.).

standard is too narrow. The Ontario Legal Aid Review also challenged the “negative liberty test” as being too narrow a standard for legal aid coverage.<sup>48</sup>

### **Errors Made by Unrepresented Accused in the Court Process**

The qualitative data reported in this section focus on the errors that unrepresented accused make in court and how these errors may place accused at a disadvantage. It is assumed that unrepresented accused making these errors jeopardizes fairness, but this connection is intuitive rather than empirical.

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

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<sup>48</sup> *Report of the Ontario Legal Aid Review: A Blueprint for Publicly Funded Legal Services, Volume 1* (Ontario, 1997), 71.



**FIGURE 1  
MOST FREQUENTLY CITED ERRORS MADE BY CRIMINAL ACCUSED<sup>49</sup>**

Stage	Error or Problem
First Appearance	<ul style="list-style-type: none"><li>♦ not knowing when to plead guilty</li><li>♦ failing to appear and not understanding the consequences with respect to bail</li><li>♦ testing the tolerance of judges by asking for multiple postponements</li><li>♦ not being aware of entitlement to disclosure</li></ul>
Pre-Trial Release	<ul style="list-style-type: none"><li>♦ not availing themselves of counsel because “they cannot wait” to argue for their release</li><li>♦ conducting bail hearings without disclosure</li><li>♦ not understanding, or agreeing to, release conditions that are unworkable; e.g. clauses relating to contact with spouses with whom they have legitimate contact or with whom they have joint responsibilities for children</li></ul>
Diversion	<ul style="list-style-type: none"><li>♦ not being aware of diversion or not asking to be considered for diversion</li></ul>
Plea	<ul style="list-style-type: none"><li>♦ pleading guilty “just to get it over with”</li><li>♦ pleading guilty when they are denied bail, just to get out of jail</li><li>♦ pleading guilty when they have a viable defence</li><li>♦ pleading guilty before they have seen the disclosure</li><li>♦ not knowing how to assess the strength of the Crown’s case</li><li>♦ not asking for certain charges to be dropped</li><li>♦ not pleading to charges consistent with the actual behaviour</li><li>♦ not knowing the usual sentence for an offence</li><li>♦ not understanding the consequences of a conviction either for subsequent charges or with respect to impacts on employment, eligibility to be bonded, etc.</li></ul>
Trial	<ul style="list-style-type: none"><li>♦ not demanding a trial or a dismissal on court days when the Crown witnesses fail to appear</li><li>♦ not reading the disclosure or learning the Crown’s evidence against them</li><li>♦ going to trial when there are no justiciable issues</li><li>♦ deciding to testify when they should not, or assuming that they must testify</li><li>♦ making accidental and damaging admissions (“Yes I hit her but she hit me too.”)</li><li>♦ not calling the witnesses they need for an effective defence</li><li>♦ not availing them of the legal processes that can help their case; e.g. a hearing on the confession</li><li>♦ not requesting a directed verdict when the Crown has not proven the case</li><li>♦ not understanding the available defences</li><li>♦ not being aware of the relevant evidence</li><li>♦ not being able to effectively scrutinize the testimony of witnesses</li><li>♦ poor or ineffective cross-examination</li></ul>
Sentencing	<ul style="list-style-type: none"><li>♦ the Crown will not normally bargain with unrepresented accused, thus not having the advantage of a reduced sentence</li><li>♦ not knowing what arguments to make at sentencing</li><li>♦ not knowing the best arguments to make with particular judges</li><li>♦ not knowing the mandatory sentences for particular offences</li><li>♦ not mentioning salutary efforts they may have made since the offence; e.g. getting a job, undertaking counseling or treatment</li><li>♦ not being aware of and requesting certain types of sentence; e.g. a conditional sentence</li><li>♦ not arguing against unworkable sentencing conditions</li></ul>

<sup>49</sup> Adapted from Hann et al., *Part I*, Figure 5.1 and 5.4.

The informants noted that, apart from the ability of unrepresented accused to formulate and execute legal strategies, they often do not understand the social and economic consequences that may follow from a conviction and a criminal record. They may plead out without properly weighing the consequences.<sup>50</sup>

The respondents in the court site study provided anecdotal evidence of unrepresented accused either failing to raise arguments in their defence or accepting outcomes without raising arguments because they had not considered the social or economic consequences. The most frequent examples involved unrepresented accused accepting bail or sentencing conditions that would impact on the accused person's ability to fulfill family obligations. The examples included driving prohibitions or peace bonds that prevented the accused from driving children to school, and location curfews or driving conditions that affected the person's employment.<sup>51</sup> It was noted that accused might plead guilty even when they have a legal defence because they are ashamed or embarrassed and wish to minimize the shame and publicity of their offence.<sup>52</sup> This is amplified by the study of accessibility of criminal legal aid for immigrants and certain visible minority groups. The focus group participants in this study emphasized the manner in which the cultural values of minority groups often attach community stigma and personal shame to a criminal offence.<sup>53</sup> Some members of minority groups may, therefore, be especially vulnerable to the inappropriate decisions reported by the key informants in the court site study as indicated in Figure I.

The evaluation of a pilot project designed to provide information to unrepresented accused characterizes the clientele of the main provincial criminal court in downtown Vancouver as being “incredibly poor, severely addicted, and whose thinking abilities are challenged, they may have alcohol-related neurological deficiencies (Fetal Alcohol Syndrome/Fetal Alcohol Effects), may be illiterate, have English as a second language, and suffer from mental illness”<sup>54</sup> With these disadvantages, they face an unfamiliar and very stressful environment. According to one judge interviewed for the study:

On occasion an unrepresented accused will be pretty well organized. But most of them – they don't have a clue. They don't understand how a trial is conducted. They do not understand what things are relevant in relation to the charges they are facing. They don't have the advocacy skills, and whose to blame them for that? A lot of them are poorly educated people and people who are on the margins. But even people who have been generally more fortunate and better-educated do not have the advocacy skills. They don't know how to ask questions and don't know which questions to ask.<sup>55</sup>

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<sup>50</sup> Ibid., 18.

<sup>51</sup> Ibid., 18.

<sup>52</sup> Ibid., 18.

<sup>53</sup> Tsoukalas, Smith and Buckland, 23.

<sup>54</sup> Malcolmson and Reid, 15 and 16.

<sup>55</sup> Ibid., 16,



None of the research attempted an empirical analysis of the fairness of criminal proceedings. However, the qualitative data do lead to the conclusion that virtually no accused person who appears unrepresented in criminal court could represent him- or herself without making errors of omission and of commission that place him or her at a disadvantage. Most matters in the criminal courts are disposed of without a full trial. However, even though most of the appearances are at stages of the criminal justice process before the trial stage, the proceedings are adversarial: the unrepresented accused is opposed by a trained prosecutor, and the appearance involves legal procedures and technicalities unfamiliar to lay persons. In view of the consequences of a conviction, the litany of disadvantages of unrepresented accused is cause for concern about unrepresented accused.

### **The Burden of Unrepresented Accused on the Courts**

Judges and prosecutors claim that the presence of unrepresented accused places a considerable strain on them because they must step outside of their normal roles to assist these people. The perception of interviewees was that this results in a greater burden on and increased workloads for the court.<sup>56</sup> However, contrary to expectations, the quantitative data do not support the case for an increased burden on the court. Duration of appearances was shorter and number of appearances per disposed case was shorter for unrepresented accused.<sup>57</sup> The evidence on total elapsed time to the completion of cases was mixed. Unrepresented accused required longer elapsed time compared with accused represented by staff lawyers, but shorter times compared with those represented by private bar lawyers.<sup>58</sup> It is possible that the efforts of the judges and the prosecutors diminish the consequences of any disadvantages experienced by unrepresented accused, but there is no direct evidence one way or the other.

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

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<sup>56</sup> Hann et. al., *Part I*, Eiii and 24.

<sup>57</sup> *Ibid.*, 26, 27.

<sup>58</sup> *Ibid.*, 26-28.





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

The results of most of the research promote the concept that the disabilities and disadvantages of the accused should be considered to a much greater extent in determining and addressing the needs of legal aid clients. In her report on the criminal legal aid needs of women, Lisa Addario describes this as a more client-centered approach as distinguished from the conventional court-centered perspective on criminal legal aid needs.<sup>59</sup> In the court-centered approach, legal aid needs are assumed to flow almost exclusively from the arrest, the offence and the court process. Meeting the client's needs means providing the person with legal advice or representation. This approach tends to see the criminal matter as an isolated legal issue disconnected from the disadvantages and disabilities of the accused that may be relevant to the offence or to other legal or non-legal issues that are part of the bundle of problems related to the offence. On the other hand, the client-centered perspective on criminal legal aid needs represents the view that it is important to deal with the legal issues in a way that takes into account the effects of disabilities or disadvantages that are related to the offending behaviour and/or attempts to employ reparative and preventative strategies that address the individual or systemic factors that are linked to the offence. These other factors may be linked to the offence either as cause or consequence. The criminal offence is not isolated from these related issues and treating them as such is, in Addario's view, a form of tunnel vision that ignores the social realities involved in the production of criminal offending and the social consequences of employing criminal sanctions.

A client-centered emphasis on legal aid needs acknowledges a changing social role of criminal defence, a new role that appears to be the product of at least two influences. One is a cross-over of perspectives from the literature in civil legal aid that views legal problems as an integral aspect of poverty.<sup>60</sup> The second influence may be the increasing influence of the restorative justice movement that promotes greater reliance on preventative and reparative strategies in dealing with offenders.

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

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<sup>59</sup> Addario, 4.

<sup>60</sup> Doug Ewart, "Hard Caps, Hard Choices: A Systemic Model for Legal Aid" in F. Zemans, P. Monahan and A. Thomas, *A New Legal Aid Plan for Ontario: Background Papers* (Osgoode Hall Law School, 1997), 8.

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

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

### **Unmet Needs that Flow from the Disabilities and Disadvantages of the Accused**

Both the *Brydges* study and the court site study pointed to the frequency of mental disorders, cognitive disabilities and learning disabilities found among the criminal accused. The authors of the *Brydges* study discussed the limitations in dealing with clients' needs at the *Brydges* duty counsel stage. The court site study observed that there are significant numbers of mentally disordered offenders in some courts studied.<sup>61</sup> This observation was made in the context of unrepresented accused, rather than with regard to providing representation for offenders with these disabilities. Several factors, however, may contribute to the inability of legal aid service providers to recognize many of these disabilities. One is the pace of the court process. The court site study showed that appearance times, excluding full trials, generally varied between about a minute and four minutes.<sup>62</sup> Second, due to a lack of legal aid resources, legal aid lawyers were described by respondents in the court site report as being "run off their feet" and "unable to go the whole nine yards" for their clients.<sup>63</sup> The court site study raised the issue of mentally disordered accused as an argument for the need for legal representation. It is very likely that even if accused with these problems are represented by legal aid, lawyers may have little possibility of identifying their client's problems unless there is adequate opportunity before the court appearance to assess client needs. Thus there may be little likelihood that the special needs of some clients are being met.

### **Unmet Needs that Flow from Linguistic and Cultural Barriers**

The court site study reported significant numbers of Aboriginal people and immigrants in certain courts. In the case of both groups, the court site study cited language and cultural barriers that limit the ability of unrepresented accused to cope with the court system. Both the study of the needs of Aboriginal people for legal aid and the study of needs of immigrants and visible minorities extended the discussion of language and cultural barriers to problems in providing

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<sup>61</sup> Accused were believed by informants to be mentally disordered. This observation does not imply a clinical determination of mental disorder.

<sup>62</sup> Hann et. al., *Part I*, 27.

<sup>63</sup> *Ibid.*, 16.



effective representation to minority clients. To a large extent, the issues raised by the Aboriginal and Immigrants studies related to effective communication between clients and legal aid lawyers. The inability to speak either English or French presents obvious problems. Interpreters are available in courts when required, although possibly not immediately. Both studies cited the lack of interpretation, especially for contacts between lawyers and clients out of court, as a problem.

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

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

### **Unmet Needs that Flow from Overlapping Legal Matters**

Respondent opinions and analysis of the literature from a number of the studies observed that the “silos” that exist between traditional service delivery areas (e.g., criminal law, family law and refugee law) result in unmet need for some clients. Respondents in the immigrants, refugees and visible minorities study observed that a conviction in a criminal matter may have significant consequences for the immigration status or the refugee claim of an accused. Some respondents reported that, in dealing with criminal matters, legal aid lawyers tend not to take into account implications for a person’s immigration status or refugee claim.<sup>64</sup> The study of needs of women and criminal legal aid indicated that the involvement of women in a criminal law matter, as an accused person or as a victim, can invite the attention of child welfare or social services, thus raising poverty law matters.<sup>65</sup> Respondents in all three of the studies dealing with legal aid in the northern territories indicated that family disputes often give rise to criminal law offences and, if not resolved, can cause repeated criminal offences.<sup>66</sup> Involvement in criminal legal aid cannot be separated from these connected issues. Although they may not directly become part of the actual

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<sup>64</sup> Tsoukalas, Smith and Buckland, 55.

<sup>65</sup> Addario, 50.

<sup>66</sup> T. Roberts, *Study of Legal Aid in the Yukon* (Focus Consultants, 2002); T. Roberts, *Study of Legal Aid in the Northwest Territories* (Focus Consultants, 2002); Dennis Paterson and IER Research and Planning, *Nunavut Legal Services Study* (Toronto, 2002).

court proceeding, legal aid should be organized to identify and deal with them to limit the impacts on the lives of people and to attempt preventative and reparative efforts.

## **Unmet Needs that Flow from Systemic Social Factors**

The Aboriginal study recommends that legal aid should become more involved in developing restorative justice strategies for Aboriginal clients.<sup>67</sup> In a similar fashion, the immigrants and visible minorities study suggested that legal aid should be more proactive in developing diversion options and sentencing alternatives to address the special circumstances related to the involvement of minorities in crime.<sup>68</sup> In view of the alienation from the justice system felt by Aboriginal people and the suspicion about the justice system felt by many members of immigrants and visible minority groups, these expectations of legal aid are a paradox. The perspective of Aboriginal people on legal aid needs is a product of the over-representation paradigm. The interpretation of the authors of the Aboriginal study is that Native people trace legal aid needs back to the common source of perceived systemic discrimination. This is the explanation for the view that legal aid should be addressing the systemic factors that bring Aboriginal people into conflict with the law in numbers so disproportionately greater than non-Aboriginals. Similarly, the perspective of the informants from immigrant and visible minority communities is a reflection of the view that immigrants and non-white minorities suffer from perceived systemic discrimination in the justice system. It is a paradox that both Aboriginal people, immigrants and members of visible minorities were reported to be suspicious and mistrustful of legal aid, along with the justice system generally but, at the same time, respondents from these minority groups expressed the expectation that legal aid should champion the rights of accused from visible minorities against systemic discrimination.

The expectations relating to this type of legal aid need not only reflect the views of respondents; they are firmly rooted in Canadian law. The alternative measures provision of the *Criminal Code* encourages the use of alternatives to incarceration.<sup>69</sup> The case law also provides that systemic social factors should be taken into account in developing sanctions for both Aboriginal people<sup>70</sup> and, more recently, for Afro-Canadians.<sup>71</sup> Proactively developing alternative measures of these types would no doubt benefit legal aid clients.

## **A Caveat on the Client-Centered Perspective**

The need for legal aid is triggered by detention by the police, by a charge and the appearances in court. Thus, there is a clear link between the justice system and the need for legal representation. The client-centered argument shifts the decision to provide legal aid to the needs and characteristics of the clients. The client-centered needs argument is that the effective provision of legal aid is affected by the range of client characteristics that give rise to needs related to

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<sup>67</sup> Dockstator and Auger, 47.

<sup>68</sup> Tsoukalas, Smith and Buckland, 49.

<sup>69</sup> *Criminal Code of Canada*, Section 718(e), “all available sanctions other than imprisonment that are reasonable on the circumstances should be considered for all offenders, with particular attention to the circumstances of Aboriginal offenders.

<sup>70</sup> *R v Gladue*, (1999) S.C.R., 688.

<sup>71</sup> *R v. Hamilton*, (2003) O.J. Ontario Superior Court of Justice, No.532.



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





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## Conclusions

The results of the research show that a large proportion of accused in criminal courts are unrepresented. Many of these people are without representation at critical stages in the criminal justice process; at bail and at the sentencing appearance. In four of the nine courts, more than 60 percent of unrepresented accused at final appearance were convicted without the benefit of representation. At least 16 percent of unrepresented accused at final appearance received jail sentences, again, without legal representation.

Most respondents felt that legal aid should be accessible to a much larger number of criminal accused. Interviews with lawyers and judges indicated that virtually all unrepresented accused make mistakes in court that jeopardize their legal position. The overwhelming point of view of respondents was that unrepresented accused lack the ability to defend themselves properly in the adversarial and technical environment of the criminal courts. Thus it may be argued that nearly all unrepresented accused require legal representation in order to assure a fair hearing.

It was also observed by a number of respondents that the unrepresented accused problem is produced by financial eligibility guidelines that are too low, thus excluding too many people who must appear in court. This is consistent with quantitative results showing that financial eligibility guidelines are for the most part below accepted poverty levels. Finally, some respondents proposed that first times offenders, not at risk of imprisonment but at risk of receiving a criminal record, should receive legal representation. This proposal would effectively make legal aid a universal service.

Respondents proposed a number of responses to the unrepresented accused problem. Respondents in several of the studies suggested that greater resources should be dedicated to duty counsel services, especially the expanded model of duty counsel. Expanded duty counsel is a disposition model of duty counsel that is intended to remove cases from the docket early in the criminal justice process. Given that most criminal cases are relatively straightforward and most are disposed before the trial stage, this proposal by respondents may be a viable solution to the unrepresented accused problem. Another suggestion from respondents was the need for legal service as early as possible in the criminal justice process to avoid mistakes made early on by an unrepresented accused from magnifying later in the process. Expanded duty counsel could be viewed as the means by which early intervention might be achieved.

A strong body of opinion emerged within the research emphasizing a more *client-centered* approach to meeting the needs of legal aid clients. Respondents in the court site study, observations from the unrepresented accused pilot project and the literature review in the *Brydges* study characterized criminal accused as a low functioning population typically with low levels of literacy, low educational levels, and disproportionately high levels of learning disabilities, mental disorders, cognitive limitations and impacts of chronic drug and alcohol abuse. The court site study, the Aboriginal report and the immigrants, refugees and visible minorities study indicated that courts in some regions have large numbers of immigrants or Aboriginal people who may experience language and cultural barriers, possibly in addition to other disadvantages and disabilities. Accused who fall into these categories require special forms

of assistance starting at the legal aid intake stage through to legal representation. Many respondents emphasized the need for public legal information so clients can understand the charges they are facing, the criminal justice process that they will experience and role of legal aid in that process.

The *Brydges* study, as well as the Aboriginal study, the immigrants, refugees and visible minorities study and the three studies in the northern territories all emphasized the difficulties experienced by accused persons in understanding legal advice provided over the telephone. A key observation in the *Brydges* study is that the “perfunctory” provision of advice that is poorly understood may satisfy the formal legal requirement to advise the detainee of his or her rights, but it may work to the disadvantage of clients who do not understand their rights and do not exercise them in subsequent police interrogation.

## Implications for Legal Aid Delivery

Two elements of an improved approach to meeting the needs of legal aid clients that were suggested by respondents have already been noted in the conclusion. These were the greater use of expanded duty counsel and the closely related suggestion regarding early intervention. This final section of the paper discusses several implications for legal aid that are suggested by the research. They are not based directly on the results of the quantitative or qualitative data.

In order to become more client-centered, legal aid delivery may have to become more *vertically integrated*. Identifying and dealing with the needs of clients that flow from their significant disadvantages would require a capacity to do so early in the legal aid process. The process of dealing with client needs could possibly begin at intake or even further back in the justice process with *Brydges* duty counsel. If the needs of clients were assessed early in the process, it would open up the possibility of a type of “continuum of service” approach in which appropriate levels and types of service would be provided based on the needs of the client, and continuity could be maintained as clients proceed through the criminal justice process. It was suggested by respondents in the court site study that Native court workers or other paralegals might be linked more closely with legal aid in a vertically integrated delivery model assisting lawyers with tasks such as scheduling and providing information to clients, gathering evidence and assisting with the development of sentencing plans.<sup>72</sup>

Legal aid delivery could be made more *horizontally integrated*.<sup>73</sup> Respondents representing immigrants, Aboriginal people and women indicated that there is a need to make the necessary linkages between criminal charges and related problems in other areas of law such as refugee and immigration law, family law or poverty law. Legal problems in other areas of law should be

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

<sup>73</sup> I would like to thank Keith Wilkins for suggesting the concepts of vertical and horizontal integration.



identified, assuring that these needs are met within the overall legal aid system. The related legal problems might be relevant to the criminal matter. Alternatively, they might be addressed separately, at least in part. From the client-centered point of view, problems that might otherwise be seen as distinct legal matters are treated holistically as the interdependent set of problems affecting the client's life.

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

### **Problems and Legal Aid Needs**

The research has produced a wealth of empirical data about unrepresented accused and qualitative information about their experiences in the criminal courts. However, transforming these results into conclusions about needs is not a straightforward exercise. Whether the conditions described by the research represent *unmet needs* remains open for discussion. The question of whether a situation is *a need that should be met* is, in large measure, a normative issue.

### **The Role of Legal Aid in the Criminal Justice System**

Based on the range of quantitative and qualitative data drawn from the various studies, this paper presents a broad framework for understanding criminal legal aid needs. In doing so, the research results raise equally broad questions about the role that legal aid is expected to play in the criminal justice system. Should legal aid meet the basic standards of providing service for those who are in custody or at risk of imprisonment? Should there be universal access to legal representation at some or all levels before the trial stage? Should legal aid play some role in achieving broader justice system objectives of preventative and reparative strategies for the accused? To what extent do we expect legal aid to mitigate the disabilities and disadvantages of individual accused? It has been pointed out long before this research that “[h]aving a lawyer for a court appearance in a criminal charge is widely thought of not as a right, but a necessity.”<sup>74</sup> However, there are possible social justice objectives for legal aid that are integrally connected with the appearance in court but, at the same time, go beyond the strictly legal aspects.

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<sup>74</sup> James L. Wilkins, *Legal Aid in the Criminal Courts* (University of Toronto Press, 1975), 52.