



Osgoode Hall Law School of York University  
**Osgoode Digital Commons**

---

Articles & Book Chapters

Faculty Scholarship

---

1998

## From Crisis to Reform: Legal Aid Policy-Making in the 1990's

Mary Jane Mossman

*Osgoode Hall Law School of York University*, [mjmossman@osgoode.yorku.ca](mailto:mjmossman@osgoode.yorku.ca)

### Source Publication:

Windsor Yearbook of Access to Justice. Volume 16 (1998), p. 261-270.

Follow this and additional works at: [https://digitalcommons.osgoode.yorku.ca/scholarly\\_works](https://digitalcommons.osgoode.yorku.ca/scholarly_works)



This work is licensed under a [Creative Commons Attribution-Noncommercial-No Derivative Works 4.0 License](https://creativecommons.org/licenses/by-nc-nd/4.0/).

---

### Recommended Citation

Mossman, Mary Jane. "From Crisis to Reform: Legal Aid Policy-Making in the 1990's." *Windsor Yearbook of Access to Justice* 16 (1998): 261-270.

This Article is brought to you for free and open access by the Faculty Scholarship at Osgoode Digital Commons. It has been accepted for inclusion in Articles & Book Chapters by an authorized administrator of Osgoode Digital Commons.

# FROM CRISIS TO REFORM: LEGAL AID POLICY-MAKING IN THE 1990'S

by

Mary Jane Mossman\*

*When money was more readily available, discussions about legal aid concentrated on meeting needs. Now discussions focus on controlling costs...<sup>1</sup>*

Although this comment about legal aid services in Canada was made back in 1979, it identifies the beginning of a more conservative shift in legal aid policy-making that is now clearly evident in *From Crisis to Reform: A New Legal Aid Plan for Ontario*,<sup>2</sup> a report funded by the Donner Canadian Foundation. The authors state their objectives directly: to provide practical recommendations, compatible with the "fiscally conscious 1990's",<sup>3</sup> for provincial policy-makers to improve the current system.<sup>4</sup> Accordingly, their Report focuses on the current crisis in legal aid funding in defining the issues for legal aid services in the 1990s, and on the need to control costs in recommending solutions. Indeed, even though the quotation above shows that concerns about legal aid costs are not new, the Report graphically reveals how a focus on "controlling costs" rather than "meeting needs" may fundamentally re-shape the policy-making process.

Essentially, the authors make three recommendations: a new form of governance to replace the Law Society's responsibility for legal aid services, "fixed budget" funding rather than the "open-ended" system envisaged by the *Legal Aid Act, 1967*,<sup>5</sup> and the development of staff lawyer models for

---

\* Professor of Law, York University, Osgoode Hall Law School

1 Avrim Lazar "Legal Aid in the Age of Restraint" (Canadian Institute for the Administration of Justice Conference on the Cost of Justice, Toronto, 1979)[unpublished] at 1. The quotation continued:

"But the objectives of legal aid have not changed — they still relate to meeting needs. What has changed is the resources available to legal aid. This, like our newly heightened interest in the costs of justice, is a result of government financial restraint."

As the quotation suggests, issues of financial restraint in legal aid services in Canada have existed for decades, and not just in relation to Ontario's Plan.

2 F.H. Zemans & P.J. Monahan (Toronto: York University Centre for Public Law and Public Policy, 1997)[hereinafter "the Report"]. The Report states that the book, "was funded by the Donner Canadian Foundation. However, the views expressed herein do not necessarily reflect the views of the Foundation." The Report does not include a copy of the research mandate for the study, nor any information about the costs of the study. The research studies for the Report are also being published as a separate volume.

3 *Ibid.* at 1.

4 *Ibid.* at 8. Although the Report clearly states that the authors "have placed the legal aid client at the centre of [their] analysis", their extensive consultations do not appear to have included legal aid clients (although some "client representatives" were included.) For an analysis of some clients' perceptions of legal services, see W.A. Bogart & N. Vidmar "Problems and Experience with the Ontario Civil Justice System: A Preliminary Report" in A. Hutchinson, ed., *Access to Civil Justice* (Toronto: Carswell, 1990) at 1; and other papers in this collection.

5 S.O. 1966, c. 80. See now R.S.O. 1990, c. L-9, as amended by S.O. 1993, c. 16, s. 1; S.O. 1993, c. 27, Sched.; and S.O. 1994, c. 38, s. 37.

services currently provided by private practice lawyers with legal aid certificates. For those who have followed legal aid debates in Canada in recent decades, none of these recommendations represent fundamentally new ideas, especially since these or very similar arrangements have been in place in other Canadian provinces, sometimes for many years. In this way, the Report may disappoint those who had hoped that the Report would address more fundamental issues, such as principles for defining the kinds of legal aid services that should be available to clients in the 1990s or factors relevant to deciding how to allocate scarce legal aid resources more fairly among competing needs for them. Instead of confronting these difficult questions, the Report leaves them to be decided by the Board of the proposed new agency, Legal Aid Ontario. Yet, in practice, since choices about these fundamental issues may constrain other choices (including decisions about the appropriate composition of the governing Board or the effectiveness of particular kinds of delivery systems, for example), the Report's failure to address fundamental principles makes its other recommendations much less persuasive.

In addition to this practical problem, the Report's failure to examine fundamental principles results in a more serious problem. It offers recommendations based on the use of one main objective, "controlling costs", an objective that primarily reflects the short term interests of the provincial government funder. While no one disputes the relevance of controlling costs as an objective of legal aid policy-making, an effective process requires thoughtful balancing of this objective with others,<sup>6</sup> and careful assessment of fundamental principles concerning the public interest in the context of different and sometimes competing interests among funders, administrators, lawyers, and clients of legal aid services. In contrast with such an approach, the Report reveals a narrow governmental emphasis on controlling costs, thus limiting the scope of its analysis of current problems and proposed solutions. As a result, even though the Report's recommendations may appear attractive to the provincial government in the short term, they do not address all of the issues and interests fundamental to effective policy-making about Ontario's legal aid services for the twenty-first century.<sup>7</sup>

---

6 As noted above, the Report expressly identified its main focus on "practical" recommendations to improve "the current system". At the same time, the authors lamented the absence of a "macro-level review" of legal aid services since the Osler Report twenty years ago and declared their intent to "fill that gap" as well. (See Ministry of the Attorney General, *Report of the Task Force on Legal Aid* (Toronto, 1974); Hon. Mr. Justice Osler, Chair.) This recent Report, however, seems to focus on the goal of recommending changes within the current system rather than offering a more fundamental assessment. For another example of this difficulty, see *supra* note 4.

7 The conclusion that the Report reveals a primary concern for governmental interests may also raise questions about the study's independence, even though it was undertaken as academic research funded by a private foundation. As well, it may provoke concerns about the necessity, particularly in the context of the "fiscally conscious 1990's" for another government-funded study of legal aid services to be undertaken as well. As the Report noted (at page 8), "the provincial government announced [in late 1996] an independent review of the Ontario Legal Aid Plan, chaired by Professor John McCamus". Professor McCamus was requested to report by 1 July 1997. In addition to funding this research, the provincial government requested a review

### Funding

The Report's more limited perspective is evident, for example, in its treatment of the funding issue (Chapter VI). The authors pragmatically accept the existence of the "fixed budget" funding arrangement adopted by the provincial government and the Law Society of Upper Canada in a Memorandum of Agreement in September 1994. According to this agreement, the Plan is limited to a defined allocation of funding each year, even though legal aid certificates issued in one year may not be submitted for payment until several years later, a problem that had previously resulted in the government's (formally) "open ended" commitment to pay for all approved certificates when they were submitted for payment. Although prevailing fiscal policies of government make it difficult, if not impossible, to argue in support of continuing a system of open-ended funding, the Report fails to make clear how its acceptance of fixed budget funding has implications for its other recommendations, especially those concerning a staff lawyer model of delivery. More seriously, the Report does not question the fundamental impact on access to justice goals that results when governmental choices about funding arrangements clearly constrain "choices" about other aspects of legal aid policy, an issue that must be addressed whether it is the Law Society or some other independent agency that has responsibility for administering legal aid. In the context of the Report's support for independent governance, the absence of any analysis of the implications of fixed budget funding on principled decision-making about legal aid services is perplexing.

In the Report's overview of the development of legal aid services in Ontario (Chapter II) and its description of the current crisis (Chapter III), the authors identified three main problems relating to recent developments within OLAP: increased demands for legal aid certificates, rising costs per certificate, and "caps" on federal contributions to legal aid costs after 1990. Although, as the quotation at the beginning of this review makes clear, there have been many other fiscal crises for Ontario's legal aid services over the years, the Report accepts without much analysis that the magnitude of recent problems requires substantial reform to ensure fiscal accountability. In doing so, there is no real effort to examine critically existing arrangements for block fees, tariff levels, limits on certificates, etc., thereby justifying the adoption of fixed budget funding as the only solution without really examining any possible alternatives.

The Report also accepts the existence of a "crisis" in legal aid services in Ontario. However, although the Report documents the government's determination to achieve fixed budget funding, there is less focus on other aspects of the problem. In particular, the Report does not clearly assess the impact of the move to fixed budget funding in a context where the government, at the same time, substantially reduced overall funding for legal aid services without much advance warning, leaving both plan administrators and legal aid lawyers little time to plan sensibly for such a major change in

---

of fiscal arrangements of OLAP in the fall of 1995: see *Report of the Special Advisor to the Attorney General on Legal Aid* (5 December 1995): the Beck Report [Unpublished].

funding arrangements. Thus, while the move from open-ended to fixed budget funding contributed to Ontario's legal aid "crisis", it was arguably only one aspect of a larger problem created by the implementation of governmental policies to achieve immediate targets of deficit reduction.

More fundamentally, the Report does not address at all the principles to be used to define the amount of funding that should be allocated for legal aid services each year. If the amount is not to be calculated on the basis of the total funding needed to pay for approved legal aid certificates (related, at least in some way, to the need for such services), how should this amount be defined? Despite the importance of this question, especially in the context of revised arrangements for governance and delivery systems, the Report never confronts this fundamental question in a principled way. Especially since the Report acknowledges that the number of certificates to be issued in 1997 represents the lowest number issued in the past twenty-two years, the authors' silence in relation to principles for calculating the appropriate amount of overall legal aid funding is disappointing.<sup>8</sup>

### Delivery Systems

In contrast with its analysis of funding, the Report's analysis of delivery systems (Chapter VII) is informed and thoughtful in its assessment of studies that have tried to compare the cost of delivering legal aid services using certificates and private practice lawyers, on one hand, and staff lawyers and clinics on the other.<sup>9</sup> The authors recommend experimentation with staff

---

8 This question is not, of course, simply one of mathematics, but necessarily involves complex political and fiscal judgements. For example, the Report's Table 7A shows 1994 comparative statistics on legal aid expenditures in Canada, noting that these statistics are the most recent available. Three features of these statistics are important. First, a number of provincial governments began the process of reducing contributions to legal aid services prior to the 1994 crisis in Ontario, and thus the Table shows only a static picture of what is really a "moving target". This conclusion is relevant for Ontario as well. For example, Table 3 shows that there was an 8% decrease in overall costs of legal aid in Ontario between 1993 and 1994, while there was an 18% increase between 1994 and 1995, that is, after the signing of the MOU. Clearly, more information is needed to assess the relative rates of provincial contributions to legal aid services than just overall total figures. Second, the "malleability" of statistics is revealed by the lack of congruity in the figures for Ontario's legal aid costs set out in Table 7A (compiled by the Canadian Centre for Justice Statistics) and in Table 5 OLAP Annual Reports 1985-1995 (Law Society of Upper Canada). Although the discrepancy is not great, it may be important to know how the figures were developed before using them to make arguments about excessive costs in Ontario. Finally, returning to Table 7A, it is interesting that the 1994 statistics on *per capita* spending in the provinces show that British Columbia (whose innovative programme for "streaming" family law cases is applauded by the Report in Chapter VII) spent substantially more per civil legal aid case in 1994 than Ontario, a feature of these statistics that also demands some more detailed analysis.

9 A comparison of the Osler Report and this more recent Report provides a fascinating study of how research and policymaking may be shaped within a particular political context. Both reports, for example, recommend a greater use of staff lawyers instead of relying only on a *judicare* system with legal aid certificates, and both provide comparisons of the costs of legal aid services provided by the certificate model and by a clinic or staff lawyer model. The Osler Report concluded that legal aid services should be expanded to include neighbourhood clinics with staff lawyers and paralegals providing expert "poverty law" services to clients, but that "divorce, matrimo-

lawyer and other delivery models<sup>10</sup> that would be cost-effective without diminishing the quality of legal aid services. Significantly, however, the Report does not recommend the use of staff lawyers on the basis of their cost-effectiveness.<sup>11</sup> Instead, the Report recommends staff lawyer models as a “counterbalance” to the certificate system, reducing “the power of the private profession to dictate the terms of legal aid delivery through an organized withdrawal of service.”<sup>12</sup> As this recommendation makes clear, the Report is less concerned about *cost-effectiveness* than about *controlling costs* for legal aid services. A staff lawyer model controls costs because the level of service provided is defined by the number of staff lawyers available to provide legal aid services, not by the needs of poor clients for legal services. By contrast, a certificate system offers services to poor clients so

---

nial work and conventional criminal and civil litigation” should continue to be provided by the private Bar under the certificate system. See Osler Report, *supra* note 6 at 55, Recommendations 10 and 36.

The Osler Report’s conclusion in 1974 arguably represented a reasonable division of responsibility for legal aid services in its own political context, both fostering the development of Ontario’s unique system of community-based clinics and, at the same time, ensuring the continued support and participation of the private Bar in the delivery of legal aid services to poor members of the community. Although the Osler Report did not ignore the issue of the relative costs of different delivery models, its recommendations reflected as well goals of efficiency and expertise in providing a wide range of different kinds of legal aid services. Although it is clear that the authors of the Report are similarly trying to ensure continued support for legal aid services among members of the practising Bar in the 1990s, their analysis does not confront this issue directly.

10 Chapter VII of the Report provides a detailed analysis of current delivery models, including the certificate programme, community clinics and duty counsel services, as well as student legal aid societies and the research facility of OLAP. The Clinic Resource Office is described in the section on community clinics.

11 *Supra* note 2, at 151. The Report documents a large amount of Canadian literature comparing the costs of different delivery models in different provincial legal aid programmes. Yet, as the Report notes, these studies have not tended to demonstrate that either model is always clearly more cost-effective:

The authors of most studies acknowledge that conclusions about the cost-effectiveness of service models are dependent on the interaction of three separate variables: the level of tariff paid to private practitioners, the salary and benefit cost of staff lawyers, and the productivity of staff lawyers. If the level of staff lawyer productivity is low, staff delivery will not be cost-effective. Similarly, if a legal aid plan is prepared to significantly reduce the level of a tariff, judicare delivery may be more cost-effective....

What these studies demonstrate is that cost-effectiveness is ultimately a function of management – it must be created, since it is not the automatic result of utilizing one form of delivery model.

*Ibid.* at 150.

12 *Ibid.* at 151. The Report also identifies the ability to keep a “window on the industry to keep track of trends and intentions”, and to promote “beneficial competition between service providers” as reasons for developing a staff lawyer component in Ontario. It is unclear why the Report concludes that it would be impossible for staff lawyers in clinics to engage in an “organized withdrawal of services”.

Even though legal aid services have been delivered in other Canadian provinces by staff lawyers for decades, most legal aid services (other than “poverty law” services provided by community clinics) have been provided in Ontario by private-practice lawyers pursuant to legal aid certificates. This policy choice has been justified because, at least in theory, Ontario lawyers provide services to both paying clients and legal aid clients, an arrangement adopted originally with the goal of ensuring the same quality of service to both groups.

long as any private practice lawyer is available to accept a certificate, a system that makes meeting needs more open-ended, but which makes controlling costs (but not necessarily cost-effectiveness) more difficult to achieve. Moreover, the role of private practice lawyers in "creating demands" through the numbers of certificates issued or the level of services provided offers less opportunity to control costs, even though staff lawyers in clinics may sometimes thwart legal aid service policies by offering higher levels of service to some kinds of clients or cases, thereby denying service to others. Such an analysis reveals that the Report's preference for "experiments" with staff lawyer arrangements is not based on goals of cost-effectiveness and quality of legal aid services, but rather on their potential to enhance the government funder's ability to control costs.

The Report recommends three "experiments", including block contracts for some legal aid services, case management of legal aid cases, and the provision of family law legal aid services by a community clinic. Particularly in relation to the latter recommendation, the Report is disappointingly vague about the practicalities of family law disputes and the work of family law advocates. It seems important, for example, to consider differences in the role of staff lawyer services in "private" disputes such as family law, by contrast with many other areas of legal aid services where the state is a party and the state's lawyer has some duty to represent the "public interest". Such an analysis might lead, for example, to a recommendation that the staff lawyer model is more appropriate in criminal law matters than in "private" family law disputes. Especially in divorce cases, for example, women clients are likely to be disproportionately represented by staff lawyers while their husbands may be able to retain private counsel. This situation requires the allocation of sufficient resources to family law staff lawyers to ensure equality of representation for their clients where the opposing parties may be fee-paying clients, some of whom seem to have almost unlimited resources. The need for legal aid arrangements to confront the gendered disparity in economic resources and power that are so frequently evident in family law cases is not addressed simply by adopting a staff lawyer model.<sup>13</sup>

---

13 For detailed analysis of the gender issue in legal aid and family law, see M.J. Mossman "Shoulder to Shoulder: Gender and Access to Justice" (1990) 10 *Windsor Y.B. of Access Just.* 351; M.J. Mossman, "Gender Equality and Legal Aid Services: A Research Agenda" (1993) 15 *Sydney L. Rev.* 30; M.J. Mossman, "Gender Equality, Fam. L. & Access Just" (1994) 8 *Int'l J. L. & Fam.* 357; and E. Abner, M.J. Mossman & E. Pickett, "A Matter of Simple Justice: Assessing the Report of the Royal Commission on the Status of Women in Canada" (1990) 22 *Ottawa L. Rev.* 573. See also Ontario, Family Law Tariff Sub-Committee, "Equal Justice for Women and Children" (Toronto: Law Society of Upper Canada, 1992) at 3.

The role of the community clinic's Board of Directors, in relation to family law services, is not addressed in the Report. For example, if family law services are to be provided by a community clinic, what kinds of family law legal aid services will be offered, and to what extent will they be "integrated" with other services offered by the clinic under the direction of its Board of Directors? Should the Board have the power to define either the kinds of services (divorce, or just support and custody?), the kinds of clients (men or women or both, married or not, opposite or same-sex?), and the kinds of problems (abuse and violence or only economic issues?). If these decisions do not fall to the Board for decision, how should these family law services be "integrated" with those provided under the Board's direction?

## Governance

The Report also recommends (in Chapter V) a major change in governance of legal aid services, eliminating the role and responsibility of the Law Society of Upper Canada for legal aid policy and operations. In place of the Law Society, the Report recommends creation of an independent legal aid agency, Legal Aid Ontario, with a province-wide Board of Directors to ensure more “representativeness” and with responsibility for overall policies, priority-setting and the operational delivery of legal aid services. The proposal also includes eight regional Boards with decentralized responsibilities for delivering a range of services encompassing those now provided by certificates, duty counsel and community clinics.<sup>14</sup> With some modest changes, this proposal is substantially the same as that recommended by the Osler Report two decades ago. As a result, it is perplexing that there is no analysis of the reasons why the Osler Report recommendations were not adopted.

More significantly, there is no mention in the Report of the limitations inherent in the form of governance proposed, although there continue to be differences of opinion about the merits of an “independent legal aid corporation” by contrast with control and responsibility being vested in the Law Society of Upper Canada.<sup>15</sup> Although no one argues that the Law Society’s performance of this responsibility (particularly in relation to the establishment of community clinics) has been faultless over the years, the Report’s assessment of the Law Society’s “conflict of interest” is unpersuasive in the absence of consideration of any of the limitations inherent in an independent statutory commission. It is true, of course, that many provincial jurisdictions in Canada operate with such independent commissions, but some of them have experienced problems in their relationships with government.<sup>16</sup> Indeed, the U.S. experience with an independent commission provides a particularly salutary example of the potential for governmental interference

---

14 The Report proposes that Legal Aid Ontario include representation from government, the legal profession and the community, as well as “individuals with both social service and business management expertise”, and the replacement of many (but not all) of the 51 area offices with a regional structure reflecting the 8 regions of Ontario’s judicial administration. Legal Aid Ontario would have responsibility for experimenting with staff lawyer and contracting models for providing legal aid services, and integrating the administration and funding of services now provided by duty counsel, community clinics and the judicare system. The system would have a revised (multi-year) funding arrangement with the provincial government (and Legal Aid Ontario would be required to file both strategic plans and annual business plans), and a new research and evaluation unit would be created. According to the Report, *Supra* note 2 at 6, the reforms proposed will not be “easy or painless”, but would

... result in a better use of scarce resources and bring us closer to our collective goal of achieving a more effective and strategic plan for providing access to justice for the people of Ontario.

15 Particularly in relation to community clinics, the relative levels of protection for “independent legal services” offered by the Law Society by contrast with an independent Board remains a matter of debate. For one analysis, see M.J. Mossman, “Community Legal Clinics in Ontario” (1983) 3 *Windsor Y.B. of Access Just.* 375.

16 See J. Dawkins, “Living to Fight Another Day: The Story of Dalhousie Legal Aid” (1988) 3 *J. L. & Social Pol’y* 1.



with an independent commission.<sup>17</sup> In this context, the Report's laconic suggestion that "Legal aid in the United States is sufficiently unique that a detailed review of American models would not be productive"<sup>18</sup> is perplexing. Moreover, in light of the need, in the context of recently-expressed concerns by the Law Society about its continuing responsibility for legal aid services, for a more thoughtful and detailed examination of this aspect of Ontario's system for legal aid services, the Report's analysis is disappointing.<sup>19</sup>

### Re-Thinking Legal Aid: Policies and Policy-Making

The Report provides (in Chapter IV) an overview of legal aid arrangements in other Canadian provinces and in England and Wales, concluding<sup>20</sup> that Ontario is "unique" in its community clinic system and "almost unique" (except for Alberta and New Brunswick) in its governance structure, as well as in its lack of a regional administrative structure. It is also "almost unique" because it has spent more *per capita* and provided a wider range of services than almost any other jurisdiction in the authors' survey except England and Wales. The authors suggest implicitly that OLAP is "almost unique" because it is "tilted heavily toward a judicare model" (without a staff component or a significant "market-based block contracting" arrangement). The authors define these features as their "conclusions about OLAP's comparative standing against other legal aid plans",<sup>21</sup> apparently suggesting that these features show that Ontario's legal aid system is distinctive among Canadian provinces in ways that are inappropriate or disadvantageous.<sup>22</sup> In

17 C. Menkel-Meadow, "Legal Aid in the United States: The Professionalization and Politicization of Legal Services in the 1980's" (1984) 22 *Osgoode Hall L. J.* 29.

18 The Report, *supra* note 2 at 42. For some reason, the authors are also strangely silent about obvious comparisons between the proposed Legal Aid Ontario and the recently-created provincial Advocacy Commission, established by legislation as an independent commission to provide advocacy services, and then summarily terminated when the provincial government repealed the statute. See *Advocacy Act*, 1992, S.O. 1992, c. 26; repealed by *Advocacy, Consent and Substitute Decisions Statute Law Amendment Act*, 1996, S.O. 1996, c. 2., s. 1.

19 The Report does not offer any estimate of costs of the proposed system of governance. At present, of course, Benchers who are members of the Legal Aid Committee and the Clinic Funding Committee, as well as those involved in deliberations of these Committees' reports, are unpaid. The system of the proposed Board of Legal Aid Ontario, as well as the regional Boards, may well involve some additional costs. In light of the Report's emphasis on cost-saving, it is interesting that the recommendations about governance, which may *increase* overall administrative costs, are not more fully examined.

20 The Report, *supra* note 2 at 53.

21 *Ibid.*

22 In light of comments later in the Report about the need to retain the community clinic system (one of the "unique" features of Ontario's legal aid services), the exact connection between "unique" aspects of Ontario's legal aid system and the Report's conclusions about governance, funding, and delivery systems remains puzzling. Clearly, the "almost unique" nature of the Law Society's role and the Plan's substantial reliance on judicare are not beneficial, by contrast with the "uniqueness" of the community clinic system, but exactly why is never explained. The authors are also surprisingly reticent about their conclusion that Ontario has been providing a wider range of services than almost any other jurisdiction, an omission that supports the

response to this analysis, it is important to emphasize the way that underlying values shape choices about legal aid services. As Peter Hanks declared, for example, "the definition of legal services (what lawyers can, or should, do) imports broad political and narrow professional values, as well as being influenced by the class-based experience of the person offering the definition."<sup>23</sup> By contrast with Hanks (and others)<sup>24</sup> who have argued that arrangements for legal aid services inherently reflect a society's fundamental values, this Report seems to conclude that the "uniqueness" of Ontario's arrangements for legal aid services itself confirms that there is a problem. Such a conclusion eliminates (without discussion) the possibility that Ontario's legal aid arrangements may have reflected in part, at least until the recent "common sense" revolution, different values and choices about the need for legal advice and representation, in contrast with some other Canadian provinces. Such a position is debatable, of course. The point is that the Report's relentless emphasis on "controlling costs" has precluded any debate at all.

As is evident, the issues addressed in the Report are important. Unfortunately, its useful suggestions are constrained by its limited perspective and its problematic presentation of arguments, problems that make it likely that this Report will foster controversy without really informing the debate in a meaningful way. More fundamentally, the Report has not really addressed some critical aspects of legal aid policy-making in the 1990s, issues that are also important in achieving access to justice goals, including the goal of controlling costs. For example, the Report fails to examine the context of legal aid services in the 1990s and the extent of legal change that has occurred since legal aid services were initially developed in the 1960s. Although the Report briefly mentions the impact of statutory changes in family law, a serious evaluation of the need for legal advice and representation in the 1990s would surely have to take account of the large number of other provincial statutes that have been enacted *on the assumption* that people (including poor people) would have adequate access to legal advice and representation. Even more significantly, an assessment of legal aid needs in the 1990s would have to focus on the overwhelming impact of the Charter on the administration of justice in Canada.<sup>25</sup> In the context of these very substantial changes in the justice system since the 1990s, the Report's failure to assess what principles are appropriate for priority-setting for legal aid services and for the "bottom line" level of fixed budget funding to achieve these objectives seriously undermines the usefulness of its recommendations.

---

conclusion that their primary concern is one of "controlling costs" rather than "meeting needs".

23 P. Hanks, *Social Indicators and the Delivery of Legal Services* (Canberra: Australian Government Publishing Services, 1987) at 50.

24 See R. Abel, "Law Without Politics: Legal Aid Under Advanced Capitalism" (1985) 32 *UCLA L. Rev.* 474; and D. Hoehne, *Legal Aid in Canada* (Toronto: Edwin Mellen Press, 1989).

25 For one example, see M.J. Mossman, "Toward a Comprehensive Legal Aid Program in Canada: Exploring the Issues" (1993) 4 *Windsor Rev. Leg. & Soc. Iss.* 1 at 27 - 47.

In addition to these concerns, the Report's characterization of client needs suggests a lack of understanding of legal aid services. For example, the authors identify a special category of clients with "multifaceted legal aid problems".<sup>26</sup> Although it is probably the case that some clients have only one legal problem at a time (perhaps, for example, some persons charged with a criminal offence), legal aid clients are notorious for having multiple legal problems. Indeed, legal aid clients who have *only one problem* are probably the exception rather than the rule. The fact that provincial legal aid services have traditionally failed to address all aspects of poor clients' engagement with the law dramatically underlines the Report's limitations in conceptualizing how the law should respond to these clients. Since a traditional criticism of judicare services is their lack of cost-effective responsiveness to the multi-layered nature of poor clients' problems, it is surprising to see the Report's recommendations for staff lawyer models and, at the same time, the perpetuation of traditional judicare categories of client "problems".

More seriously, in the context of its own emphasis on controlling costs, the Report completely fails to acknowledge how pursuit of the narrow goal of controlling costs of legal aid services may result in *increased* costs for the overall administration of justice (because courts and officials cannot be as efficient), and in a *diminished quality* of justice, a cost that is real even if not easily quantifiable. These costs, moreover, spill over to government, other parties in the justice system, and other private citizens. By focussing so narrowly on controlling costs within the current system, the Report fails to examine issues that are fundamental for "controlling costs" and also for "meeting needs" in relation to legal services in the 1990s and beyond. In doing so, the authors fail to address fundamental issues about legal aid services in Ontario, issues embedded in the simple question posed a number of years ago by legal aid evaluators:

The reductions [in legal aid services] forced by restraint have ... re-opened the issue of whether legal aid is provided under a state responsibility to ensure justice, or is seen simply as a social need which may or may not be filled.<sup>27</sup>

---

26 The Report, *supra* note 2 at 154.

27 Canadian Bar Association, "An Evaluation of Legal Aid in British Columbia" by P.L. Brantingham & P.J. Brantingham (Ottawa: Department of Justice, 1984). The Canadian Bar Association's study of legal aid declared that legal aid "is the expression of the basic, democratic principle of the protection of the rights of individuals against the overwhelming power of the state" and that it is an essential service "to ensure equal access to justice in our society". See National Legal Aid Liaison Committee, "The Provision of Public Legal Aid Services in Canada: Report to the National Council" (Ottawa: Canadian Bar Association, 1985) at 1. This Report's emphasis on controlling costs, moreover, contrasts sharply with the conception of the Osler Report two decades ago. According to the Osler Report, legal aid services were necessary:

in recognition of the fact that equality before the law, one of the proudest boasts of nations within the Anglo-American system, was a meaningless phrase if access to the machinery of the law was denied to a substantial proportion of the population by reason of their inability to pay for it.

Osler Report, *supra* note 6 at 17.