Access to justice and the challenge of COVID-19

International Legal Aid Group (ILAG) Conference | June 2021

Hosted remotely by Legal Aid NSW, Australia
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**Access to justice and the challenge of COVID-19**  
International Legal Aid Group (ILAG) Conference  
Sydney, NSW  
22-24 June 2021

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One issue; two viewpoints; many questions

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- Rebecca Sandefur: Consumer-Facing Technologies for Access to Justice: Stories of Scalability and Sustainability ]
- **Anzelika Baneviciene:** Digital exclusion: The Influence of lockdown to legal aid provision in Lithuania
- **Gabrielle Canny:** Can AI help resolve family law disputes? Computer says Yes

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Technology and Access to Justice

By Roger Smith

Summary

1. The 2020s began dramatically as the Covid 19 pandemic spread around the world. The full economic and social effects are to be seen. Over the next decade, few are likely to be beneficial. Economies over the globe face a measure of dislocation with accompanying increased pockets of poverty.

2. The attainment of - or (in the case of England and Wales) the return to - a legal aid scheme that can provide lawyers for everyone, including those unable to pay their cost seems unlikely. Governments will see themselves as not having the funds.

3. Over the last decade there have been faltering steps to explore the use of technology in an access to justice context, really as a spin-off both from its more general use in society and, more particularly, commercial ‘Big law’ practice. These had, however, limited effect on services themselves. For example, it has became possible to run video clinics in outreach locations like courts far from the practice base but these did not really challenge the model of legal service delivery.

4. Courts and tribunals followed a similar trajectory. A few had already implemented digitalisation programmes before Covid 19 struck for reasons ranging from experiment to cost-saving. But all had to respond once the pandemic struck. Again, the immediate need was to be able to operate with remote staff, lawyers and users. But, as we pull out of the pandemic, a fundamental policy issue re-emerges. Is the purpose of court/tribunal modernisation to cut costs for government or improve services for users? Or to assist professional users at the expense of self-represented litigants?

5. We cannot kid ourselves. Overall, access to justice in the 2020s may face a pretty grim time. And that means that notions of universal and equal justice for all members of society are under threat. However, technology is one of the few bright sources of possibility. With sufficient backing of finance, innovation and commitment, it provides a chance of ameliorating the slide that may otherwise

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1 Roger Smith is a visiting professor at London South Bank University and an honorary one at Kent. He has worked for a number of non-governmental organisations both in the UK and other countries. He has written widely about legal aid and legal services. He is currently responsible for the website and blog law-tech-a2j.org. He was awarded at OBE in 2008.
occur to greater inequality. It is helpful to have a framework for examining its different fields of impact. Without this, an attempt to understand the totality of what is happening can get jumbled. There are five headings that might be useful in providing a framework for better understanding actual and potential developments.

1. **Transformation of internal operating systems** that facilitate delivery of old services but in new ways;

2. ‘**Modernisation of courts**’ by way of digitalisation in ways which have the potential to increase access to justice for those who are representing themselves.

3. **Legal Design.** The Legal Design movement has arisen out of the deployment of technology in the service of access to justice. It has a momentum of its own in that it generates enthusiasm for innovation. It is influencing developments across the board from court reform to forms of legal empowerment.

4. **Legal Empowerment** so that users can resolve issues without expensive individual assistance as much as possible. These can include the following and incorporate elements of new uses of technology - some of them providing potential openings for the deployment of artificial intelligence. Some of these developments will increase ‘do it yourself’ assistance: others will provide new forms of ‘blended delivery’ that incorporate DIY and traditional representation.

   1. Improvements to digital information;
   2. improvements to triage and referral
   3. interactive resolution tools like document assembly
   4. New forms of ‘Blended Delivery’

6. The future is uncertain and will be affected by a variety of factors which include:

   1. **The impact of digital exclusion and poverty;**
   2. Leadership in the use and evaluation of technology
   3. The attitude of governments;
   4. The energy, imagination and effectiveness of providers

7. The issues of poverty, technology and access to justice will affect all jurisdictions. Responses will be dependent on particular factors for each jurisdiction. Technology makes an international approach vital.
Context

1. The 2020s began dramatically as a global pandemic spread around the world from a market in Wuhan. The full economic and social effects are to be seen. Few will be beneficial. Some countries, ironically led by China, may become richer or more powerful as a result. Many, however, will become poorer and less powerful - among them the former powerhouses of the West like the UK. Within these, existing economic and social inequalities are likely to be ruthlessly exposed and increased. Without remedial action, people who are poor and marginalised will find it harder to attain justice and fair resolution of their legal issues.

2. This paper examines how technology might help over the next decade - both for reasons of improving analysis but also to encourage action. During this period, governments will be grappling with the lingering social and economic effects of Covid 19. Large numbers of newly impoverished people are likely to be precipitated into the what has become known in the US as the ‘justice gap’ where they cannot afford legal assistance with any legal problem that they have. This is already huge and global in its impact. The World Justice Project estimates that 5 billion people over the globe have unmet legal needs. In 2008, the UN Commission on Legal Empowerment considered that 4 billion people were effectively excluded from the rule of law as a result. In 2019, the US Legal Services Corporation estimated that 57.3m Americans were eligible for federally funded civil services but only 1.8m served. A joint survey of the Law Society and Legal Services Board, carried out by YouGov, found that ‘An estimated three in 10 respondents had an unmet legal need for a contentious legal issue, where either they did not receive any help or wanted more help to resolve their issue’.

3. Individual countries will approach this question within their own distinctively national and political cultures. But the core issues of technology, the pandemic and the justice gap are transnational. It only makes sense to look at these issues internationally as well as nationally. It is, after all, evident that technology, like the pandemic, knows no borders. Develop a digital solution to delivering web-based legal advice or referral in New York, London, Melbourne or Bangalore and you need only to change the underlying content to make it work anywhere.
1. Remote working and the speeding up of ‘internal digitalisation’

4. In the access to justice field (as more generally), organisations and institutions have rapidly adjusted to the pandemic and its attendant lockdowns. They relied upon existing; accelerated proposed; or implemented new ‘back office’ technological improvements such as cloud-based case management systems (largely ‘trickled down’ from the commercial sector). These kept legal services functioning so that staff and users could operate remotely. Overall, that was a massive achievement. The consequent gains in internal organisation will be consolidated after the pandemic.

5. In the 2010s, before the pandemic struck, a capacity to provide legal services remotely was seen as somewhat exotic and heralding the arrival of new entity, the ‘virtual lawyer’. “Virtual law firms” are redefining how legal practices operate and the services they offer,’ announced publishers Wolters Kluwer in a blog published in a pre-Covid January 2019. Virtual firms freed their practice from physical locations and could promise jurisdiction-wide coverage from a web presence. Despite their previous physical locations, most access to justice providers coped remarkably well with the enforced remote working imposed at speed in response to the virus and the first lockdowns. The key elements of a virtual law firm were already well established. The Legal Practice Division of the American Bar Association recounted a series of reasons for going virtual later in 2019: ‘Enhanced technology, high office rent, traffic and long commute times, work/life blend and a desire to better serve clients have resulted in the creation of a new way to practice law: the virtual law firm.’ What might have seemed desirable prior to the pandemic became essential during it.

6. Many institutions were well into digital transformation programmes in ignorance of the pandemic to come. Back in 2013, the US Legal Services Corporation published a report that made a number of recommendations ‘to broaden and improve civil legal assistance through an integrated service-delivery system that brings the knowledge and wisdom of legal experts to the public through computers and mobile devices.’ In 2016, the Legal Education Foundation announced support by way of a large grant for ‘a programme to transform the Digital infrastructure of Law Centres nationally.’ In 2017, Citizens Advice in England and Wales launched a ‘Future of Advice programme’ which included the technology ambition of investing in ‘best-in-class platforms to support a seamless customer journey, make our services more accessible and free up adviser time to help more people. And in 2018, Her Majesty’s Courts and Tribunals Service announced ‘an ambitious programme of court reform, which aims to bring new technology and modern ways of working to the way justice is administered.’
7. It might be worth identifying at this point what a commercial provider has to say about the requirements for remote working. This is from Clio, a Canadian company focusing on small and medium sized legal businesses. Its first version was published in March last year – right as the pandemic struck. These were the elements that access to justice organisations had to pull together at speed last Spring: a business plan; a virtual office or offices; thought through administrative workflows; a strong internal culture; to plan for an exceptional virtual client experience – for access to justice organisations this would include web-based materials; promotion; the following minimum software – cloud-based practice management: ‘With cloud-based practice management software like [OK. Acceptable promotion] Clio Manage, you can access, share, and collaborate on important case details from anywhere. Additionally, features like the Firm Dashboard help your firm track productivity, and you can see how individuals in the firm are performing as well'; cloud-based document storage; internal communication software; VoIP phone provider; cloud-based client relationship management software; a secure client portal; and virtual receptionist services; online payment services (not essential for most not for profits).’

8. Organisations and institutions began at different places in relation to this process and built up the required package of tools at varying speeds. Each has a story to tell of how they adapted at speed. There were endless teething problems. The director of Ontario’s largest community legal clinic in Hamilton reported a manager still had to go into the office to pick up mail during the early weeks of the pandemic. Ontario’s legal clinics, as a whole, did not have enough licences to support universal use of the necessary software. Clinic leader Lenny Abramowicz reported in April 2020 that ‘some of the software remains slow, particularly at busy times. There is often a measurable delay before you can see what you are typing.’ As a result, ‘“Many clinic staff outside of Toronto are actually going into the office because it is so difficult to use.”’ – which rather negated the point. A number of organisations felt that they had to shift from Skype, often to Zoom for a service on which they could depend.

9. Providers that relied on pro bono assistance from practising lawyers and/or the help of students faced additional difficulties. This is Tia Matt, responsible for Exeter University’s law clinic: ‘“We were due to occupy premises owned by the University in the main station in Exeter, St David’s, earlier this year just when Covid 19 struck. They were renovating a former shop for us. It is a fantastic location, very central. But, when the pandemic arrived in March, the campus closed and the students largely went home. We had to tell our clients that we were pausing. We could not even collect our mail – which comes through the university … We paused completely for about 10 days. Our students went all over the world. Some were put into quarantine: some had no communication. We made a huge effort to wrap up our caseload. We took stock of where everyone
was – in which countries and time zones. We partner students to work on cases. We had to work out where they both were … We recognised that there might be delays in communication between students. We let our students know that we, as supervisors, could take over if necessary. We didn’t want them to feel responsible if they were sick or unavailable … We had a lot of talk with the university about how we could operate. We needed extra hands on deck for supervision. The university funded us to hire a lawyer to help through the summer.’ On pro bono, LawWorks in England and Wales provided guidance on how virtual pro bono volunteering could be encouraged and supported during the pandemic. In the US, Pro Bono Net did the same.

10. Some organisations were actively well prepared for enforced remote working. They had digitalised not only their internal systems but their external user-facing ones. JusticeConnect’s Kate Fazio reported in March 2020 ‘Our online intake and referral tool, our cloud-based case management system, VOIP phone service and our Pro Bono Portal matter distribution system are helping to support service continuity with a remote workforce. While ensuring continuity of existing services, we are preparing specific, tailored services that respond to emerging issues. We have this week launched a new online legal clinic – Justice Connect Answers. The platform aims to provide a space for people to ask discrete legal questions and receive quick, confidential legal answers from our pro bono network. We have used the same base code (Free Legal Answers) that Law Works and various US organisations have used to set up a similar clinic, provided generously by Baker Donelson. We have also released a new self-help resources hub for individuals, with resources covering employment law issues, government exercise of emergency powers, court closures and a range of resources for tenants.’

11. This flags a key question considered later. The pandemic encouraged a redefinition of the working arrangements under which services are provided. Clinic, firms, law centres, legal aid and service providers around the world have done amazing things to keep their organisations running. But it seems inherently unlikely that this effort will be limited to the internal and will spread to affect, as Ms Fazio reports, new ‘specific, tailored services that respond to emerging issues.’ not just by subject matter but also by delivery mechanism.

12. We can identify a number of examples of how the internal digitalisation of services bleeds into transforming those services themselves. There is a grey frontier between the internal and the external. First, Citizens Advice in England and Wales has produced world-beating data on the use of its website during Covid. Second, People’s law School in British Columbia has shifted its face to face outreach educational work to zoom and increased its numbers. Third, those
working in the field received unprecedented levels of support, training and collaboration through digital support like those provided by the Self Represented Litigants Network in the US and the (recently renamed) Network for Justice. Fourth, a capacity to work remotely means not only that staff can work from home but that office-services can be development remotely. A good example of that is the outreach work of University House which is based in Bethnal Green, London but delivers video-based services into sparsely served areas of the West Country.

13. However, there is a distinct cluster of innovative provision that focuses on the use of technology to improve internal systems but not inherently to alter the services that are delivered. The examples above show that technology can improve reporting; support outreach educational; help internal liaison and training; extend the use of video rather than in person communication. They are not altering the services delivered as such.

2. Digitalisation and the Courts: Modernisation and the search for ‘quantum leaps’

14. Just as Covid 19 accelerated existing trends towards internal digitalisation re-organisation by some providers, it did the same in relation to courts and tribunals. In England and Wales, a global leader in the race to court digitalisation, the process was well under way before Covid 19 struck. The main emphasis was for the potential to attain the Holy Grail of improved services and reduced cost. But, in addition, there was a strand of argument that digital services could offer improved access to justice. Lord Briggs (as now he is) wrote the seminal paper on what might be done. He argued, as we will see, for ‘the quantum leap’ possible through the imaginative use of technology in relation to self-represented litigants. He based his position specifically on lessons learnt in the Civil Resolution Tribunal in British Columbia - which he visited.

15. Covid 19 produced a global impetus towards reform in the direction of remote courts and the digitalisation of court procedures. In the words of one of the rising judicial stars the court modernisation movement, Chief Justice Bridget Mary McCormack of Michigan, “This pandemic was not the disruption any of us wanted. But it might be the disruption we needed to transform the judiciary into a more accessible, transparent, efficient and customer-friendly branch of government.” The UK LawTech Delivery Panel, effectively an arm of the UK government, supports a project, led by Richard Susskind, to bring together global experience. A recent front page of its website (15 March 2021) alone contains details of developments in around 20 countries from India to Turkey.
16. It is worth noting, however, that the impetus for change in the courts came from a number of different directions – not entirely compatible with each other – whose potential contradiction continues to present difficulties in the post-Covid expansion of digital processes.

17. First was the proposition that technology could revolutionise the efficiency of the courts. This was the core of Richard Susskind’s argument in 2019: ‘Even in countries that claim to have the most advanced legal systems, it costs too much and takes too long to pursue civil cases, and the process is intelligible only to lawyers … Hardly anyone can afford to pursue legal action in public court systems. Significantly, the conventional court system is increasingly unaffordable for major businesses …’

18. Second, the benefits of this efficiency could be taken by government and the courts in savings to cost and head count. This was very much the hope of the specific reforms originally introduced in England and Wales. Her Majesty’s Courts and Tribunals Service reported in 2018: ‘By March 2023, HMCTS expects that 2.4 million cases per year will be dealt with outside physical courtrooms and will employ 5,000 fewer staff. HMCTS expects to save £265 million a year from these changes, which will come from lower administration and judicial costs, fewer physical hearings and running a smaller court estate. These savings are expected to contribute around half of the total savings the Ministry of Justice committed to in the 2015 Spending Review. Covid has thrown these estimates out of the window. But the intent was clear. The court modernisation programme was intended to provide a major way in which its sponsoring department would meet its share of austerity cuts.

19. Third, there is the argument that court digitalisation could increase access to justice by means other than cost reduction and ease of access. This was always a strong strain in Richard Susskind’s position: ‘Two major benefits should flow from the introduction of online courts … an increase in access to justice through a more affordable and user-friendly service, and substantial savings in costs, both for individual litigants as well for the court system.’

20. There is a separate argument in relation to access to justice: digital courts could facilitate digital resolution of disputes. The way forward was shown by the iconic Dutch Rechtwijzer. It provided an online process by which users, overwhelmingly in family disputes, could be guided towards an agreed settlement which was then approved by a lawyer and presented to a court. It was, thus, online assistance with dispute resolution rather than online resolution itself. The Rechtwijzer was developed by the Dutch Legal Aid Board and the basic idea has been taken up
by other legal aid and assistance providers, notably with MyLawBC provided by Legal Aid BC. However, the idea of online pre-determination guidance on dispute resolution has been attractive to some courts. In the pre-Covid analogue world, various US courts – notably California – assume the role of providing non-partisan, party neutral assistance to self represented litigants.

21. The leading example of a new digital approach was the Solution Explorer developed by the Civil Resolution Tribunal of British Columbia. This interposes the possibility of an initial step of attempted settlement before the lodging of a claim: ‘Our Solution Explorer is the first step in the CRT application process. It’s free, anonymous, and confidential. The Solution Explorer asks simple questions about your dispute. It gives you free legal information and tools based on your answers. It also classifies your dispute and gives you the appropriate online application form. To apply, choose “Make a claim with the CRT” when asked what you’d like to do about your dispute. Click a dispute area below to get started! Before making a CRT claim, you should read about limitation periods and what they mean. The limitation period will be counting down while you use the Solution Explorer.’

22. This idea of court-provided pre-issue assistance was taken up by a committee chaired by Richard Susskind that reported in 2015: ‘This could be the legal world’s ‘fluoride moment – ‘just as putting fluoride in the water in the 1950s radically reduced the need for dental work on tooth decay, then, similarly in law, appropriate investment in containment and avoidance should greatly reduce the number of cases coming before our courts. Prevention should be better than cure. We propose two online techniques for this purpose: online facilitation to support dispute containment; and online evaluation to support dispute avoidance. These will complement the work of online judges but will generally be invoked before judges become involved. ‘Dispute avoidance was to be ‘tier one’ of a new online structure. Its function ‘will be to help users with grievances to evaluate their problems, that is, to categorize their difficulties, and understand both their entitlements and the options available to them. This will be a form of information and diagnostic service and will be available at no cost to court users. This part of [the online court] will be shared with or will work alongside the many other valuable online legal services that are currently available to help users with their legal problems. For example, systems developed by charitable bodies or provided by law firms on a pro bono basis will either sit within [the online court] or be linked to the service. The broad idea of online evaluation is that the first port of call for users should be a suite of online systems that guide users who think they may have a problem. It is expected that being better informed will frequently help users to avoid having legal problems in the first place or help them to resolve difficulties or complaints before they develop into substantial legal problems.’
23. Lord Briggs took up this idea in his ‘Civil Courts Structure Review’: “The main feature of the proposed Online Court which sets it apart … is its stage 1 interactive triage process. It is this which (if it works) would provide a quantum leap in the navigability of the civil courts by those without lawyers on a full litigation retainer. Without it, the blank sheet (or blank screen) approach of the existing systems would leave the court as un-navigable as before.’

24. So, there we have it. Technology gives – like Goldilocks – three choices to policy makers in courts and government. Emphasis could be placed on overall increased efficiency for all users. Or governments could take their winnings and leave the table. Alternatively, they could invest in increasing access to justice and follow Professor Susskind’s analogy of adding fluoride to the water. The technology is neutral: the choices are political. Different jurisdictions will choose differently.

25. We wait in eager anticipation and some uncertainty as to the weight to be given to access to justice in the current reforms in England and Wales. The signs are not helpful This was the assessment of the National Audit Office:’ HMCTS did not develop plans to evaluate the overall success of reform from the start and there was no dedicated funding or strategy to guide its approach. In early 2019, HMCTS proposed creating an evaluation plan supported by better monitoring of outcomes for different groups. It also proposed developing clearer definitions of its core objectives (‘proportionate’, ‘openness’ and ‘access to justice’) and is developing its performance measurement framework. The Ministry of Justice told us [that] It expects to produce an interim report in 2021-22, with a final evaluation report in 2024-25. The extent to which learning from this evaluation will be able to influence the implementation of the reform portfolio is unclear.’

26. The absence of goals for access to justice is likely to be critical. Just imagine how Amazon or IKEA might tackle the problem. Someone was given the problem of designing a lightbulb that could retail for a profit at 99p. To follow that process in the courts, you would begin with your price point (let us say a low £10 in GBP for a money claim). You would estimate numbers (forming a view as to how much you could increase throughput) and calculate costs per case in various bands of user numbers. Then you would start the difficult job of honing down the offering. That is how Geoff Bezos would do it. It has not been the approach of Her Majesty’s Courts and Tribunals Service which is apparently still formulating - after the fact - its access to justice objectives. These will be retrofitted to a scheme that has already been implemented. This is not how commerce works.
27. It seems unlikely that anything like Lord Briggs’ quantum leap will emerge in England and Wales towards greater access to justice led by the courts. Let us hope that other jurisdictions can show us the way forward.

3. Legal Design

28. It is perhaps worth recognising as a stand-alone concept one of the most exciting products of the current period of technological innovation: the idea of legal design. This is not a ‘what’ in itself, a product, but a ‘how’, a process. But it merits serious examination because it seeks to put the user at the centre of any reform and is an important - and newly articulated, if not new - element in the possibilities of legal empowerment.

29. Legal design has been articulated as a force for about a decade. The digitalisation of the courts has given it an enormous boost as procedures have been reviewed - particularly in the US. Stanford University’s D. School and Legal Design Lab were both founded in 2013. The development of Legal Design has very much been spearheaded, on the one hand, by the energy and commitment of Margaret Hagan, current head of the latter. On the other, the outstanding Dutch Rechtwijzer site provided an early illustration of its potential in action - particularly in its revised version of Rechtwijzer 2.0 launched in 2012.

30. Legal design has proved that it can unleash enormous energy in building legal reform around the world. And that raises the interesting question of how far we can take the idea. Could it attain the status of the status of ‘gamechanger’ as identified by the Rechtwijzer’s original creator, the Hague Institute for Innovation of Law: one of the ‘justice innovations that provide scalable and sustainable opportunities (products, services and models) to enact the (local) solutions most responsive to people’s justice needs.’? That was its hope a decade ago for the Rechtwijzer.

31. Legal Design as a concept can be a little slippery to define. A helpful compilation of approaches comes from Legal Geek which brought together a number of definitions in promoting a conference on the topics couple of years ago. Margaret Hagan contributed, ‘Legal Design is an innovation approach — that means focusing on the humans within the legal system to understand where the crucial breakdowns in the system right now exist — and to make the creative leap to define what a better system might be. It means a priority on who the ‘users’ of the system are — whether it be people who are ‘lay’ outsiders trying to use it to solve problems, or the ‘professionals’ who work inside it. A legal design approach has us talk to these people, observe them, co-create with them, and
test with them — so that we can make a system that actually solves problems, and does so in the most usable, useful, and engaging way possible.’ Legal tech entrepreneur Richard Mabey said it ‘is a mindset as much as a discipline’. Consultant and coach Emma Jelley declared it as ‘a movement to make law more accessible, more usable, and more engaging. Its building blocks are plain language and attractive visuals (perhaps even haptics) all intended to enhance user experience. Legal design embraces but goes beyond technology.’ Information designer Stefania Passera contributed another version, "Legal design puts the needs of citizens, consumers, and businesses before those of lawyers. Its ultimate goal is preventing legal problems from arising and empowering the end-user. Systems, processes, and documents must be useful and usable outside of court, in everyday scenarios.' 'Futurist 'Meera Sivanathan pulled it all together, ‘Legal design is an human-centered approach to legal problem solving and legal innovation. It combines the lawyer’s legal expertise with the designer’s mindset and methodologies and technological potential to create legal systems, services, processes, education and environments that are more useful, useable, understandable and engaging for all."

32. Let’s sum this up. Legal design is a distinctive approach with the following attributes: it sees law as a process not a product – so that, for example, a legal design approach to divorce would be less concerned with divorce statutes then how someone actually attains a fair and workable separation. The approach involves beginning with what the user wants and then rigorously analysing the process from their point of view, re-conceiving it through multi-disciplinary collaboration, visualisation and a whole range of techniques that help to bring to bear new approaches to old problems.

33. Characteristic of the legal design process are wider design techniques like ‘design sprints’, ‘being agile’ and ‘scrum’. Design sprints show the process well. Behold this example: ‘The big idea with the Design Sprint is to build and test prototype in just five days. You’ll take a small team, clear the schedule for a week, and rapidly progress from problem to tested solution using a proven step-by-step checklist. It’s like fast-forwarding into the future so you can see how customers react before you invest all the time and expense of building a real product. But the Design Sprint is not just about efficiency. It’s also an excellent way to stop the old defaults of office work and replace them with a smarter, more respectful, and more effective way of solving problems that brings out the best contributions of everyone on the team—including the decision-maker—and helps you spend your time on work that really matters.

34. Agile methodology is now so mainstream that it now merits its own page on the UK government’s website. It is a good place to go if you are for ever confusing
scrum, kanban, and lean approaches. The UK encourages the ecumenical: ‘You don’t have to work with just one method, you can choose tools and techniques from several to meet your team’s needs. Each method has its own language for describing basic tools and techniques, the important thing is to understand: why you’ve chosen a tool or technique [and] ‘its agile objective’.

35. Peep through the door of a Ministry of Justice in agile mode and the picture is likely to be of walls covered with different coloured post-its, white boards, draft descriptions of typical users, statement of aims. The slightly stale air will be redolent of crisps, red bull and coffee mixed with energy, excitement and a slight sense of desperation to get to the goal on time. You would get the same in a non-government setting – except that there might be beer. There is the hint of an evolved hackathon.

36. In the US, Stanford has been particularly active in legal design projects and a website helpfully states both its four overall themes (justice innovation, a better legal internet, smart legal tools and a public interest tech pipeline) and gives examples of its work. This has involved collecting together interventions in the eviction process for tenants over the country and interactive information, specifically, for those threatened by eviction in Arizona.

37. So, there is no doubt that legal design represents a new – and potentially transformative – process in law reform. It has proved itself in a myriad of projects in a range of countries. And, if you take the example of the structure of legal aid assistance in England and Wales, you can see how valuable it might be in redesigning a system which has been influenced by its history and the relative powerfulness of various interest groups.

38. Is legal design a game changer? The answer, if you accept HiiL’s definition, probably remains ‘yes’. It is, indeed, a ‘justice innovation that provide[s] scalable and sustainable opportunities (products, services and models) to enact the (local) solutions most responsive to people’s justice needs. ’It might also come within the online Cambridge Dictionary definition of ‘something or someone that affects the result of a game very much’. But, it has the limitation of not being, of itself, necessarily transformative in the way that we would like. After all, even the concept of ‘user-centredness ’is not unproblematic. Landlords and governments are just as much users as tenants and refugees – and, indeed, have legitimate interests to be considered.

39. We can test the power of legal design as a concept. Imagine a demonstration outside a Ministry of Justice of your choice. The protestors demand an
improvement in the position of the poorest in society. They hold up pictures of the downtrodden of their jurisdiction – the asylum-seekers and immigrants, the unemployed, tenants living in unfit conditions and being evicted from fit ones, the homeless. And, there – just out of sight – is a banner with words. The crowd obscures your view. You strain to make out the whole thing but it begins ‘We want…’ This sentence is unlikely – as the slogan comes fully into sight – to read ‘user-centred legal design’. It is going to be something like ‘equal justice’, ‘access to justice ’or just ‘justice’.

40. Many aspects of our legal systems need a makeover on legal design principles. These can – and should – be applied to the whole and to its constituent parts. Legal design is a genuinely exciting and innovative tool. But it does not disprove the concept at all to say that it needs to be tempered by other considerations. These include the need for sustainable and defensible solutions and an overall commitment to justice for all.

4. Legal Empowerment

41. Technology has brought new prominence to – and new opportunities for – an old idea: legal empowerment. The Engine Room consultancy defined this in a global review (a must read if you are interested in the topic):‘ legal empowerment is an approach that focuses not on directly resolving people’s problems for them but on explaining to people how the law affects them on a day-to-day basis, improving their ability to access formal justice systems, and empowering people to change the law.’

42. The idea has been backed by some large international development organisations, including the UN. It established a Commission on Legal Empowerment of the Poor in 2005 as the ‘first global initiative to focus on the link between exclusion, poverty and the law.’ Professor Stephen Golub, an economist who wrote widely on the topic, was influential and the idea struck a cord internationally focused justice organisations like the Open Society Justice Initiative, Namati and HiIL. Golub was always flexible on definition (‘In some ways, legal empowerment is just a catch-all term for an array of activities and strategies that sometimes go by other names.’) but he reported himself as favouring ‘the use of law and rights specifically to help increase disadvantaged populations control over their lives’.

43. The original idea of legal empowerment was developed with little relation to technology. Its origin is sometimes cited in the work of paralegal activists in South Africa during the later days of apartheid. In his magisterial review of mid-1970s
legal services developments in the UK, Professor Michael Zander (in ‘Legal Services for the Community’, Temple Smith, 1978) – covered the topic under the somewhat less sexy heading of ‘DIY law’: ‘There is currently great official interest in the topic, partly in order to save the cost of legal aid payments to lawyers and partly to respond to the growing strength of the ‘do it yourself ’movement in the field of legal services.’

44. The Engine Room explains how technology can give new impetus to this old concept: ‘To its proponents, technology offers a more efficient means of providing legal services to a wider range of people. Specifically, they argue, technology offers the potential to expand legal advice providers ’geographic reach; allow people to help themselves more effectively; and reduce costs related to hiring lawyers and specialist providers. Legal information presented in a way that ordinary people can understand, and through readily accessible channels, also has the potential to level the playing field between legal professionals and others — and thus reduce inequities in access to justice.

45. It is valuable perhaps at this point to take a little peek into the legal services movements of the 1960s and 70s. There were voices arguing that the object of legal services should be the individual empowerment of users to solve their own problems, as Michael Zander correctly reported. However, in both the US and the UK, the main emphasis was on collective legal empowerment. This is Earl Johnson Jr, the US’s Legal Services Corporation’s second director, on ‘community organisation ’as a potential priority for the new commission (“Justice and Reform: the formative years of the American Legal Services Program”, Transaction Books, 1978). It would have involved ‘a concerted drive to organise poor people into groups that could exert pressure in the political and private economic spheres. ’For the US, this remained a road not taken in preference to an emphasis on ‘law reform’.

46. In the UK, community empowerment remained at least the publicly stated goal of law centres: ‘It is … the duty of those who seek to provide legal services in poor and working class communities to concentrate their resources on helping people of those communities to create organisations capable of helping their members with their collective difficulties. ’(“Towards Equal Justice ’Law Centres Working Group, 1975).

47. Contemporary discussion of legal empowerment omits this community orientation – which may, indeed, have been very much of its time. The Engine Room gives this list of more individualistic purposes in the use of technology for legal empowerment ‘—to help people diagnose legal problems themselves; help people assess their entitlement to benefits or legal assistance; provide people
with legal information that is easier to understand and access; give individuals legal information that is customised to their specific need; support people through processes such as representing themselves or resolving disputes; generate legal documents; connect people to organisations that can provide assistance.'

48. It might help to get a handle on the potential of technology in legal empowerment if we can illustrate its use. There are various ways in which this could be done. The Engine Room identifies the following: ‘guided pathways to legal information; guided pathways to specialised legal advisers; live chat features; document assembly; online dispute resolution; structured data collection for use in legal cases; chatbots.

49. We might actually structure things slightly differently by reference to function. Technology can bring improvements the provision of legal information – to include

1. static and dynamic websites;
2. the processes of triage and referral by which someone may be assisted;
3. interactive approaches to resolving users’ legal issues – to include document assembly and assisted case management;
4. blended ‘forms of digital and individual assistance; and data collection in the reporting and aggregating of users ‘legal issues.

**Improvements to Digital Information**

50. Services like Citizens Advice in England and Wales have poured resources into basic information websites. Citizens Advice is an interesting case because its latest set of goals now talks not of digital as a separate stream but specifically of the service aiming to provide ‘a seamless customer journey that allows people to move between online, phone and face to face support without repeating themselves’. That is an important move and allows for the use of integrated chat facilities and assistance such as chatbots. Citizens Advice success has been such that in March 2020, at the beginning of the first Coronavirus lockdown, that its website managed its “busiest week in history”, with more than 2.2 million views.’

51. The Citizens Advice website opens with a simple single question: ‘how can we help?”. You are then efficiently directed to specific topics related to your query. Illinois Legal Aid Online gives you both an open question and then nine specific subject areas as an option. JusticeConnect in Australia opens with three options:
help for yourself, refer someone and help for your organisation. Each of these three organisations could reasonably claim to be world leaders in legal information provision. There is no inherent advantage in how you do it.

52. There is a sliver of a difference between offering opening options to narrow a search and proffering a guided pathway through a problem. MyLawBC illustrates the difference. Its front page offer is: ‘Get an action plan for your legal issue. Choose a pathway, answer questions, and get your action plan. ’This heralds an automated service but one providing a series of choices for the user which guides them to a prospective approach and culminates in an individualised action plan. BC’s Justice Education Society is an example of an organisation offering a live chat facility on its website. It also provides an example of an organisation offering a variety of media including guides, help articles and videos on topics.

Assistance by way of triage and referral

53. The US has led the way in terms of developing comprehensive legal assistance ‘portals ‘that will automate the process of intake and referral. The Pew Charitable Trusts and the Legal Services Corporation, in particular, have been associated with their development. This is how Pew defined a portal in a 2019 Fact Sheet ‘A portal is an online gateway to legal resources tailored to each user’s needs. Unlike a static website, a portal uses an interactive approach to guide users through an assessment of their legal needs and connect them to relevant information and referrals for assistance and support. To be effective, a portal must include three key elements: Technology. A simple user interface that people can navigate on their own. Content. Relevant, actionable information to help users research and resolve their situations. Connection. Referrals to appropriate service providers. ’Pew see portals as using evolving technologies such as natural language processing to decode user’s questions from ordinary to legal language; automated decision-making on triage; automated communication with all parties concerned; and machine learning to improve performance.

54. The use of advanced technology such as artificial intelligence is at an early stage and we have yet to see the success of projects like Spot, developed by Suffolk University’s Legal Innovation and Technology Lab. It is a computerised issue spotter. Give Spot a non-lawyer's description of a situation, and it returns a list of likely issues from the National Subject Matter Index [NSMI], version 2'. This ‘provides a centralized, comprehensive taxonomy of topics for the legal aid community by which documents and data can be indexed.’

55. Spot may take some time to come to full fruition as an entry tool but already we can see technology making a difference to end referral. A number of
organisations, like ILAO and JusticeConnect, have automated referral programmes – ripe for AI at some stage – to ‘provid[e] a quick tool for sector colleagues to use to check whether a person they are assisting is likely to be eligible for a Justice Connect service, and then use the tool to make a warm referral of that person to Justice Connect for assistance. ‘JusticeConnect’s Kate Fazio explained the benefits back in 2018: “We have 10,000 pro bono lawyers in our network wanting to help – our challenge is processing the high number of requests for help we receive. This tool will be a game changer in linking people with free legal help. We estimate that we’ll release a further 20,000 hours of pro bono over the two years after release.’

**Interactive resolution tools like document assembly**

56. Many legal issues are advanced through documents – from benefit applications to Supreme Court cases. The US leads the world in automated document assembly in an access to justice context. And this is very much thanks to the work of the Center for Access to Justice and Technology at Chicago Kent University which launched the influential and much used A2J author programme in 2005. This is an expert system and user interface … for helping self-represented litigants complete court forms or navigate a legal process. Students, lawyers, and technologists can create A2J Guided Interviews® that ask step-by-step questions written in plain language that help self-represented litigants enter information needed on the form. Those answers can then be assembled into a completed document that the user can print and file with the court. ‘The UK has been slow to follow but we do now have three examples in relation to personal indolence payments. The potential seems enormous, both to establish automated and sequential completion of forms and to provide ‘just in time’ information on why the content is necessary and advice on how to present your claim.

‘Blended delivery’

57. An interesting development around the world is the emergence of different forms of ‘blended delivery’ which combine elements of individualised and automated digital elements.

58. One example from England and Wales is the Law for Life project combining with the leading organisation of family lawyers in England and Wales, Resolution, to provide an integrated service. ‘The model of the pilot being tested is fairly simple. Resolution lawyers provide a menu of unbundled but pre-determined services at a fixed price: Law for Life integrates their offers into its pre-existing guides – beginning with three of the most popular relevant to divorce.’

Access to justice and the challenge of COVID-19
59. A similar English collaboration is represented by Finding Legal Options for Women Survivors. This is ‘a collaboration between two existing organisations with strong track records in their fields. Rights of Women (ROW) is an organisation which does what it says on the tin. It is a well-established and well-respected organisation providing legal advice and information on, and campaigning for, the rights of women. Royal Courts of Justice (RCJ) Advice is a similar long-standing and respectable part of the Citizens Advice network. In partnership with Freshfields, it has developed CourtNav, an online tool for completion of divorce petitions linked to pro bono lawyer support and checking.’

60. New York provides a different version of blended delivery. Justfix.nyc is a not for profit housing organisation operating in New York. It provides a range of tenant services through technology. You can see a variety of videos about its work. It combines self-assembly documentation to build and file a case with linking users to community organisations that can help. One of the three co-founders, Georges Clement, explained some of the more straightforward technological objectives in an interview: One is: [tenants] actually had to present things as printed-out photos in court; and another thing that JustFix helps them do is actually pull out what’s called the “metadata” of a photo – so the exact time, date and location the photo was taken – to verify that this photo was taken in their apartment at this particular day.’

61. Project Callisto is a further example of a blended service combining individual and automated elements but with an added element using the privacy possible through digital provision. It addresses the issue of sexual assault and harassment on campus universities. The academic institutions join the project; employ counsellors; women (generally but not exclusively) are given the opportunity to record incidents which are protected by code and matched only by name of alleged perpetrator if a subsequent encoded report is made by someone else; if the names match then the counselling system comes into operation and the victims can, if they wish, be assisted. It is an interesting way of using the particular attributes of digital recording and has been followed by a number of similar projects.

62. Blended delivery can be seen as a development of unbundled legal services in which practitioner and client share the tasks to be carried out. Technology allows more sophistication in how this can be done. An example Hello Divorce is a trailblazing online family law service. It is the brainchild of family law practitioner Erin Levine. Based in California, it operates in two other states with plans for more but readers might want to consult this site not actually to get a divorce but to be inspired by the underlying business model. Ms Levine has been showered
with awards recognising her contribution from bodies including the American Bar Association and case management firm Clio. Her latest service is known as Hello Divorce. This has a number of distinguishing features which make it a leader in its class. First, this site is extremely well designed. Secondly, the design is just not fonts, colour and visuals. There is freshness to it. The process of getting the right package is transformed into a quiz. The offer is tempting: ‘Take our quiz to find out what we think will work best for you and get all the divorce info you need. No more Googling about the process or how to protect your rights. We’ve done the work for you and give our members FREE access to all the essential resources and worksheets you need. Get organized and have your questions answered.’ Third, this is not an anonymous Hello Divorce site: it is Erin Levine’s Hello Divorce site. She pops up in chat-boxes on the site to ask if you have any questions. She pops all the time if you listen to US podcasts and media coverage of technology. Fourth, there are a range of packages which nudge the potential user towards a subscription model with various bolt ons. They range from the initial basic free entry through the basic DIY divorce package for $20 a month for six months, the racily suggestive ‘divorce with benefits’ at $700 a month or the all in $4,500 co-operative divorce offering which includes a bargain unlimited mediation hours service. You can get extra additional lawyer time in three packages of 30 minutes, 1 hour and 5. Or you can pay for extra help with specific parts of the process eg advice on a post-up agreement for $1500. These are very nice presented with visuals, colour and few words. Fifth, this kind of unbundling service has developed beyond document assembly. Hello Divorce is stand alone but also is integrated with the conventional ‘bricks and mortar ‘law firm Levine Family Law Group. It has six lawyers. That has clearly set the context for the online process and the documentation assembly is linked to a case management system, Divorce Navigator, so that the user can be guided through the process over time. This walks you through the various forms you need to fill on a secure service through a Documate powered Q and A which then populates the form. You then get the choice of filing yourself or leaving it to the lawyers which can pick up the forms from the server. The easy integration is nice touch. Ms Levine is nothing if not an enthusiast. ‘The market is really changing. Users are pushing back against hourly billing,’ she told the conference yesterday. And she has a thoughtful and scaleable model. She has already expanded to two other states beyond California. One is Colorado. Family law has been where much unbundling provision starts. As an area, it has some advantages. The cases are relatively similar. The business is regular. Many users have a bit of money. So, this approach should be scaleable in family law throughout, ultimately and if Ms Levine’s energy holds out, through the States.

63. The idea of legal empowerment is likely to be a major factor in developments in the use of technology over the next decade. The idea has all the advantages and the disadvantages that existed before technology played such an increased role.
But cuts to traditional forms of legal aid; increased pressure as a result of much wider levels of poverty post-pandemic are likely to encourage a joining up of experience in developed and developing countries. With its increased deployment will come issues to be further explored below – how can a wide spread of different projects be fashioned into a coherent whole? Who or what can lead this process? And, a separate question, what will be the impact of digital poverty that might exclude some of the most needy users?

6. Key factors in further developments

64. Finally, there are key factors in how the use of technology is developed over the next decade. These will determine what develops. Nothing is certain except uncertainty. And that different countries will move at different speeds. And that it will be extremely difficult - though highly desirable - to bring together developments around the world.

Digital exclusion and digital poverty

65. The first is the extent that digital poverty and exclusion hold back access to digital services. Here, we have a question to which it is extremely difficult to give an empirical answer. On the one hand, we have digital enthusiasts like Professor Richard Susskind who often argues that only 5 per cent of the population are unable to access digital services. He is pretty critical of those who argue that this figure is really be much higher, telling a House of Commons committee ‘the critical rhetoric here does not align with empirical research.' According to the Office of National Statistics, 90% of adults in the UK in 2018 were recent internet users. If we also take ‘proxy users’ into account (grandfather is not an internet user but his grandchildren can help), the percentage of excluded adults falls well below 5%.’

66. A rather different view was given by the Citizens Advice Service: 'In February 2016 Citizens Advice undertook a survey of our face-to-face clients to learn more about their digital capability. The findings showed that our face-to-face clients are: ‘Twice as likely to lack basic digital skills as adults in the UK - 23% of adults in the UK lack basic digital skills. For our face-to-face clients this was 46%. Twice as likely to lack access to the internet as adults in Great Britain - only 61% of our face-to-face clients had internet access in their home, with a further 11% having access on a smartphone.'
67. Digital poverty and exclusion has been very much an issue highlighted in education during the pandemic. There are, of course, a number of elements - the cost of hardware and broadband, the technical skills to use the internet (often taken to be managing information, communicating, transacting, problem solving and creating). The Office for National Statistics in the UK reported ‘The Lloyds Bank UK Consumer Index 2018 (PDF, 3.16MB) uses this framework to estimate the digital skills of the UK population (for details of the methodology, see “Annex”). It estimates that the number of people in the UK lacking basic digital skills is declining, but in 2018, 8% of people in the UK (4.3 million people) were estimated to have zero basic digital skills (are unable to do any of the activities described in the five basic digital skills). A further 12% (6.4 million adults) were estimated to only have limited abilities online (missing at least one of the basic digital skills). Although there is a pattern of declining numbers of people lacking digital skills over time, in 2015, the Centre for Economics and Business Research (CEBR) estimated that 7.9 million people will still lack digital skills in 2025 (see The economic impact of Basic Digital Skills and inclusion in the UK (PDF, 1.73MB)).

68. The surest answer to the issue of digital exclusion and poverty seems to be that it does exist; on any reasonable calculation actually probably amounts to a quarter of those on the lowest income; but is constantly reducing in size as people are forced to get more experience by governments and retailers; can operationally be reduced by the number of intermediaries available to help those unable to take advantage of digital services. Nevertheless, it is pretty unarguable that digital services are not accessible by everyone and the short lesson is that we are nowhere near a point where any institution - government or not for profit - can go digital only. But many services can be delivered digitally with beneficial results as long as they do not replace the analogue alternative and as long as maximum attention is given to financial subsidy (free call numbers, pre-paid broadband charges) and other assisted services as is necessary.

Leadership

69. Legal aid administrations come in all sorts of shapes and sizes – from the minimalist sub-departments of Ministries in New Zealand and England and Wales to the independent management role of the US Legal Services Corporation (LSC). But, whatever their role, they face a situation where technology is transforming legal services so that, in the words of a recent study by the Law Society of England and Wales ‘business as usual may not be an option for many, indeed for any, traditional legal service providers’.
70. Perhaps unsurprisingly as the cradle of the technological innovation, the United States was early into discussion of a strategic approach to be adopted by the LSC. Its first 'summit' in 1998 led to the establishment of the significant Technology Initiative Grant (TIG) programme in 2000. A further summit, culminating in 2013, came up with a blueprint for further development of technology with five main components that did, in fact, subsequently serve to set the direction of the TIG programme: 1 Creating in each state a unified “legal portal” which, by an automated triage process, directs persons needing legal assistance to the most appropriate form of assistance and guides self-represented litigants through the entire legal process 2 Deploying sophisticated document assembly applications to support the creation of legal documents by service providers and by litigants themselves and linking the document creation process to the delivery of legal information and limited scope legal representation 3 Taking advantage of mobile technologies to reach more persons more effectively 4 Applying business process/analysis to all access-to-justice activities to make them as efficient as practicable 5 Developing “expert systems” to assist lawyers and other services providers.

71. The LSC has continued to provide a leadership role in funding and providing a venue to discuss new developments in its excellent annual Technical Initiatives Conference. Somehow, we need to replicate this role both within jurisdictions and, given the transnational nature of technology, internationally. Both present a pretty tall order. England and Wales, having abolished its Legal Services Corporation in 2012 legislation is particularly badly served by the absence of any government institution with an overarching legal services’ responsibility. Legal aid is administered through a very narrowly conceived Legal Aid Agency. Funding for the component parts of legal services provision comes from at least three different government departments. Where governments are absent, leadership in strategy and communication falls to voluntary bodies like the International Legal Aid Group and the Network for Justice being developed by the Access to Justice Foundation.

72. With government largely absent from a co-ordinating role, it has been left to the NGO sector to pick up the slack. And there are a number of examples of how that is happening - for example the brilliant work of the Self Represented Litigants Network in the United States or the Justice Innovation Group run by the Access to Justice Foundation in England and Wales. Both are bringing together those interested in the field - aided by the use of zoom and the ease of remote meetings - and encouraging discussion, comparison and development. However, there are evident limits to the ‘soft power’ that such co-ordinating groups can wield.
Government

73. A major determinant of how the future develops will be the role that governments are willing to play. There are signs that the Biden administration in the US will take up some of the initiatives of the Obama and Clinton years in showing a commitment to access to justice. On May 18 2020, President Biden announced that he had instructed his Attorney General to produce a plan ‘to expand [the Department of Justice] access to justice work.’ There is, by contrast, little sign of such an interest in the Conservative government of the UK. However, that might change. And it will have to do so if there is to be a significant impetus to change.

The energy, imagination and effectiveness of providers

74. And the final determinant of future developments is one over which we might have more control: the energy, imagination and effectiveness of service providers. Who knows where they will take us.

This paper has been prepared for the International Legal Aid Group conference to be held virtually in June 2021 and organised by Legal Aid NSW (New South Wales). It is largely based on papers written and work undertaken for a website and blog, law-tech-a2j.org. This was generously funded by the Legal Education Foundation.
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<td>09:00 – 10:15 am (UK)</td>
<td>• <em>Agne Limante</em>: Legal aid for children in conflict with the law in Europe: towards child-friendly legal aid?</td>
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<td>18:00 – 19:15 pm (NSW)</td>
<td>• <em>John McDaid</em>: A model family dispute resolution centre: Improving how the voice of the child is heard</td>
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“A model family dispute resolution centre: Improving how the voice of the child is heard”

By John McDaid
International Legal Aid Group
June 2021

Thank you for the opportunity to present to the Conference. I’m speaking to the theme of improving how the voice of the child is heard on account of the extensive interest that we in the Irish Legal Aid Board have in the area of family law. Our civil legal aid system operates a mixed model of service delivery. We use employed solicitors based in law centres throughout the country and we also use the judicare model – paying private lawyers who have signed up to our terms and conditions on a fee per case basis. Furthermore we provide State funded family mediation services – exclusively through the use of employed mediators. About 68% of those who seek our legal services do so in relation to a family problem, thus both the effectiveness and the efficiency of how that problem is resolved are matters of keen interest to us.

I want to start with a general observation. As a country over the last 30 years we have been good, if not indeed very good, at enacting family law legislation. When I look back to what our legislative landscape was prior to 1989 it bears no comparison to what it is now. However where we have not been so good is setting up or developing the systems to properly and meaningfully implement that legislation.

We are a country with a written Constitution that has been in place since 1937. It has been formally amended by way of referendum on 38 occasions since. In 2012, the Constitution was amended, for the 31st time, by the insertion of Article 42A, which requires that in a wide range of court cases concerning children, provision shall be made by law that the views of any child who is capable of forming his or her own views shall be ascertained and given due weight having regard to the age and maturity of the child. The requirement is mandatory. In every case where the child is capable of forming his or her own views those views must be ascertained. Age and maturity are relevant to the question of how much weight to place on those views, but do not relieve the court of the obligation to ascertain the views unless it is deemed that the child is incapable of forming their own views.

Article 42A does not specify the medium through which the views of children shall be ascertained in court proceedings, and as such, different mechanisms involving either direct participation by children, or indirect participation via a representative such as a guardian ad litem (GAL) or a solicitor, might fulfil the obligation imposed by Article 42A.

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Focusing on the private law side, legislation was passed in 2015\(^2\) to, among other things give effect to aspects of the constitutional provisions. This legislation enables the court to; (1) give such directions as it considers proper for the purpose of procuring from an expert a report in writing on any question affecting the welfare of a child or (2) appoint an expert to determine and convey the child’s views. Regulations were subsequently made on foot of the legislation\(^3\) defining who was an ‘expert’ for the purpose of ascertaining a child’s views and giving a report. The regulations also set fees which the experts can charge. On the issue of who could be an expert the regulations provide that an expert must be one of the following and have at least five years’ experience within the immediately preceding 10 years:

- A psychiatrist;
- A psychologist;
- A social care worker;
- A social worker;
- A registered teacher.

There was discussion prior to the regulations as to whether mediators should be considered ‘experts’ for the purpose of ascertaining and conveying the views of the child but it was not considered that the mediation skills-set or indeed experience in many cases, offer the requisite expertise.

In terms of the fee arrangements the regulations took the unusual approach of setting maximum fees that may be charged by an expert for the purpose of ascertaining the capacity of the child to express his or her views. The main fee is €325 which is inarguably modest in the light of what the expert is asked to do. The maximum is set regardless of whether the parents of the child in question have privately funded representation, are being legally aided, or are lay litigants. From engagements I had with the Department prior to the introduction of the regulations, some of those engagements being in the context of the Legal Aid Board being asked to fund the experts where a party or the parties were legally aided, my understanding is that the Minister for Justice was keen to ensure that interventions in relation to the establishment of the views of the child, should be ‘light touch’ and should not stray into more detailed ‘best interests’ enquiries.

What the legislation does not do is offer any particular guidance in relation to the circumstances when a ‘child’s views’ report should be obtained, if it may be more appropriate for a Judge hearing a case to speak to a child, or if there are any other means of establishing and conveying the child’s views. Furthermore the legislation does not put in place any form of regulation or oversight of child’s views experts. There is a significant missed opportunity here as there are pro-active steps being

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taken to establish regulation and oversight of guardians-ad-litem in public law proceedings, something that has been sought for some time. Oversight of guardians-ad-litem in public law cases is within the responsibility of the Department of Children, Equality, Disability, Integration and Youth while oversight on the private law side rests with the Department of Justice.

I want to move on to the question of how the voice of the child is being heard in private family law disputes and the manner in which our constitutional responsibilities are being discharged. Data is not collected on the extent to which Judges meet children although there is some evidence, albeit slightly dated, that this is a rare occurrence\(^4\). Some observations were made in a High Court case in 2008\(^5\) as to the best approach to the judicial interview to the effect that:

- The Judge should not seek to act as a child expert;
- The Judge should assess whether the age and maturity of the child are such as to necessitate considering his or her views;
- The ‘terms of reference’ if that is the right phrase, should be agreed with the parents beforehand and the interview should only take place if the parents agree; and
- The Judge should explain the nature and purpose of the interview to the child, including the fact that the child does not have a determinative say.

For the purpose of this presentation I spoke with the Judge with the most experience of family law, over 20 years, in the District (local) Court in Dublin and also with a Judge in the Circuit (regional) Court who likewise has extensive experience of family law cases. The Circuit Court Judge had very obligingly canvassed views from two judicial colleagues who had extensive experience of family law in the three court jurisdictions of first instance – the District Court, the Circuit Court and the High Court. Both Judges I spoke with conveyed largely the same messages. There is a strong reluctance on the part of the Judiciary generally to interviewing children and most judges avoid it where possible. Both judges noted the absence of training for judges in this area and expressed concern about unwittingly causing potential damage to a child in a conflict-ridden family. They also noted concerns around coaching and around the physical environment. One of the Judges noted that a previous Court President had initiated some training but it had not been sustained. One of the Judges noted that if there is a simple straightforward issue involving a 17 year old they might interview the child but that circumstance would be rare. The other Judge noted a particular experience in the past where she felt that her interviewing a child in the presence of the parents led to an inappropriate disclosure being made by one parent. She noted that now never engages with children in the presence of parents.

I asked both Judges what their experience was of getting child’s views experts. Somewhat to my surprise both noted that while the situation was far from optimal,

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\(^5\) O’D v O’D [2008] IEHC 468
experts could be found to speak with children and convey to the Court, the views of the child. This is in spite of concerns being voiced that the maximum fees set would act as a deterrent to persons with suitable qualifications putting themselves forward as experts. One Judge noted that in Dublin there were a small number of experts who had established a business model that was sustainable and his experience has been that these experts carry out the work professionally. The same Judge noted that in the absence of formal oversight and proper regulation of the experts, judges were very dependent on the bona fides of the legal professions, in order to make the system work.

Both Judges noted that reports in relation to the welfare of a child could be more challenging to obtain on account of the cost involved. They noted that the legal aid rates for ‘welfare’ reports in private law cases meant that often it was not practical to seek such an intervention. One of the Judges noted that there was some ‘misuse’ of provisions in the public law child care legislation that enable a Judge to request the Child and Family Agency (the State body with responsibility for the care of children – with equivalent functions as local authorities in England / Wales) to carry out an enquiry and satisfy itself that the child was not at risk. In other words Judges were seeking the Child and Family Agency’s assistance to get a better understanding of the family dynamic in order to help settle disputes between parents in relation to a child even where the child was not ‘at risk’. The Judge noted that this was a less frequent practice these days.

It is worth noting that both of the Judges I spoke with are largely Dublin based and the experience outside of Dublin is likely to be more mixed in terms of issues like the availability of experts.

In terms of Judges engaging directly with children I have noted views expressed by the judiciary regarding reluctance on account of the physical environment of many of our courthouses not lending itself to this form of engagement. In a survey of legal practitioners conducted in 2017, 48% stated that “the lack of a child friendly environment” was an obstacle to communicating with children, while the lower figure of 29% identified “education about talking with children” as an obstacle.6

One challenge we have is that at the moment there is no separate Court Division for Family Law and arguably family law has been the poor relation of other forms of law. While an element of speciality has arisen in Dublin and to some extent in a small number of other urban areas, it remains the case that family law matters are often heard by a local or regional Judge who will also be responsible for all other court work in the area and who will on occasion be dealing with mixed lists. There are no specific requirements of Judges, training or expertise wise, as a pre-requisite to hearing family law cases. The Government is now moving to address this and

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6 E O’Callaghan, C O’Mahony and K Burns "’There is nothing as effective as hearing the lived experience of the child’: Practitioners’ Views on Children’s Participation in Child Care Cases in Ireland” (2019) 22(1) Irish Journal of Family Law 2.
published last year a General Scheme of a Family Court Bill\(^7\) which will require Judges to be assigned to the area of family law for a minimum of three years. The Bill also has provisions obliging Judges to take such course or courses of training or education, or both, as may be required by the Judicial Studies Committee established by the Judicial Council. The Bill is a welcome development.

Another positive development has been the enquiry by an Oireachtas (Houses of Parliament) Committee into the family law system. The Justice Committee published a Report\(^8\) in 2019 making a series of useful recommendations. Those that addressed issues in relation to the voice of the child including the following:

- A clear structured framework was required with legislative guidance for the courts with a view to ensuring that the views of the child are adequately and fairly ascertained;
- The appointment of an expert ought to be the default position, with clear stipulations as to the exceptions where this need not occur and what should happen instead;
- Greater clarity was needed in relation to the specific criteria for appointing an expert including in relation to areas of specialisation, expert accountability, accreditation and qualifications of experts and how experts are resourced;
- A State panel of experts should be available to the courts to produce reports within a reasonable timeframe – this recommendation is made in the context of the constitutional requirement to ascertain the views of the child being undermined by the inability of parents to fund the experts; and
- There is an urgent need to review the regulations that set the fees for ‘voice of the child’ experts. The fees are set by regulation for all cases, not just those where State funding is involved.

**Where to now?**

I said at the start that our practice had fallen behind our legislation and I have sought to identify some of the challenges that are being experienced in terms of the child’s views being heard in private family disputes and the child’s best interests being determined. I have noted the publication of a General Scheme of a Family Court Bill as a welcome development. I want to mention two other specific developments.

The first is the establishment by our Department of Justice of a Family Justice Oversight Group in 2020. This is something we in the Legal Aid Board were pushing the Department for. Two of the key recommendations in the Family Justice Review\(^9\)

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\(^7\) Family Court Bill General Scheme (September 2020) - http://www.justice.ie/en/JELR/Family%20Court%20Bill%20General%20Scheme.pdf


published in England / Wales in November 2011 (the Norgrove Report) were the need to address:

- Organisational structures being complicated and overlapping with no clear sense of leadership or accountability and no one looking at the performance of the system as a whole; and
- The absence of a set of shared objectives to bind agencies and professionals to a common goal and to support joint working and planning between them.

Similar issues were identified in the Review of Civil and Family Justice in Northern Ireland\textsuperscript{10}, the Group having published its Report on Family Justice in September 2017. Among the Review’s recommendations was:

- The creation of a Family Justice Board as a strategic level forum for driving significant improvements in the performance of the family justice system.

It was not difficult to see that these issues were impacting negatively on our family justice system including on how the voice of the child is heard. There was no obvious leadership body and no vision statement or strategy for how to improve the system. In fairness to our Department of Justice it has led the Family Justice Oversight Group pro-actively in the first nine months of its existence. At the moment the Group is constituted of State actors only (including Judges), a decision that has not met with universal approval, though one ‘strength’ of this approach is the relative absence of vested interests and the capacity to look at issues with a certain professional detachment. (The counter-argument might be that not enough of the Group members are sufficiently proximate to events on the ground to be able to make informed decisions in terms of charting a future direction for the system).

The Group, in addition to receiving presentations from persons with particular insights into the system, has engaged or is engaging in a three phase consultation process. The first phase involved the stake-holder bodies, a wide range of interest groups including the legal profession representative bodies who it met and invited written submissions from. An extensive number of submissions were received. The second phase was a public consultation aspect inviting submissions from persons who had direct experience of the family justice system. This aspect involved asking those persons a limited number of relatively open questions. The consultation period closed last Friday (11\textsuperscript{th} June). The third, and perhaps the most interesting phase, will take place shortly and that is direct engagement with children who have been directly involved or the subject of the family justice system. I would like to be able to say more about this aspect of the process and in particular in relation to how exactly this engagement will work but this Conference has come just a bit too soon to be able to do this.

In terms of future direction the Group is aiming to publish a Vision for a new family justice system in early 2022. Taken with the anticipated progress of a Family Court Bill this is a very promising development.

It is widely acknowledged and has been publicly stated by senior officials in the Department of Justice, that improving the family justice system - the assignment of judges to deal with family law only, dealing with family cases in better physical venues, improving the level of support services generally, better early information giving, mainstreaming mediation services, creating more structured pathways for persons experiencing a family problem that put the court as the last resort rather than an early intervention, and improving how the voice of the child is heard, - must lead to greater regionalisation of dispute resolution architecture and that it is simply not possible to have an optimum dispute resolution venue in every court area. What will happen is that a limited number of venues will be chosen as family dispute resolution centres and the choices will be based on user accessibility though also potentially on existing courthouse stock.

This leads me on to the second opportunity that I wish to mention. We in the Legal Aid Board have worked with the Courts Service to lead a Project with a two year span aimed at developing what an optimum family dispute resolution centre could look like. We chose a location, Limerick, which is Ireland’s third largest city but which also has a significant rural hinterland. In truth we also chose it as we felt that there would be strong local judicial interest in being part of the Project and that local Legal Aid Board and Courts Service staff had the ability to provide good leadership and act as agents for change among the key stake-holders. To date we have conducted four meetings with stake-holders, three of those meetings being specifically themed (sources of information, early intervention, the impact of the legal aid system on behaviours, and the court process itself) and all of the themed meetings using a video conference platform. The next meeting, scheduled for later this week, is specifically in relation to the voice of the child and how it is best heard. Again this Conference may be coming just a little too soon in terms of a future direction but already some really strong messages are becoming apparent to me from the stake-holder conversations including the following:

- Stake-holder mapping is a really valuable exercise – determining who the key players are and the extent to which they can influence the outcome of a project. This will be really important when it comes to improving how the voice of the child is heard;
- Those experiencing family problems make decisions based on information from a range of sources, some of those sources are much better than others;
- It is easy to assume that individual stake-holders are aware of how the system works and what other stake-holders do. This is an assumption that needs to be challenged. One of the almost eye opening aspects of the consultation process is the extent to which stake-holders do not know what other stake-holders do and how other stake-holders can support a person experiencing a
family problem. Without being critical of lawyers, and I was one once, I
thought this was particularly apparent among the lawyer participants in the
consultation who at times seem to be very much focused on a process and
how the process impacts on their client, rather than on a problem and how
that problem is best solved for the benefit of all who are impacted by it. I
showed a draft of what I am saying today to one of the Judges I spoke with
and she very specifically endorsed my observations on this issue. The
observation is by no means confined to the lawyers and even if this Project
achieved nothing else the stake-holder engagement has I believe helped
broadened awareness of how persons experiencing family problems can be
supported.

I’m aware that I’ve drifted a little bit from my theme of improving how the voice of the
child is heard but I believe the learning that I have just mentioned has relevance to
the conversations that we will have and the actions that we will take to improve how
the child is heard and how his or her best interests are protected. Without jumping
the gun I’d like to think that in time this Project will result in:

- A shared information platform used by all of the stake-holders;
- Much better and more systemic early intervention with a view to keeping more
cases involving the welfare of children out of court;
- Clear guidelines for how best to hear the voice of the child – through an
  expert, direct judicial engagement or an as yet unexplored alternative;
- A training programme for Judges that is focused on how to engage with
  children and how to listen to them;
- Suitable venues when it is deemed that a child should attend to express his or
  her views;
- A State supported panel of experts that can be readily called upon when
  required;
- Proper oversight of experts;
- Better oversight of timelines on cases involving the welfare of children and
  intervention where appropriate timelines are not being met.

I also realise that I’ve spoken largely to identify a problem and the actions taken to
come up with solutions rather than solutions themselves. Taking the learning from
this project, the work of the Family Justice Oversight Group, and the progress of a
Family Court Bill I would hope that the solutions will be in place and that we will be
able to report a really good system for hearing the voice of the child when this forum
next convenes in two years time.

Thank you.

John McDaid
Legal Aid Board Ireland
A Legal Liaison Project for Young People

International Legal Aid Group Paper

Dr John Anika
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Abstract

In September 2020, Legal Aid ACT commenced the College Legal Liaison Initiative, which aims to improve access to justice for young people by embedding a lawyer in ACT colleges to provide free, confidential legal advice to students and families. Legal Aid ACT previously noted the unmet demand for legal assistance among young people through programs such as the Youth Law Centre and community legal education. Young people encounter a wide range of complex legal issues, such as family violence, criminal activity and victims of crime, employment, and housing problems. Despite being acutely susceptible to these issues, most young people face significant barriers to accessing justice, such as lack of specialist legal services, a lack of awareness of their rights and entitlements, the intimidating and formal atmosphere of many legal services, and a reliance on adults to mediate their access to legal services. The Legal Liaison Unit is working to bridge this gap in access to justice, by cultivating an inclusive relationship with students, parents, guardians, and teachers that goes beyond the conventional lawyer/client relationship. Despite only having operated for a short period, the service has already seen promising engagement, providing support to over 40 students despite the school holiday break and end of year exam period. Comparable programs in Victoria and New South Wales have also exhibited positive outcomes. This project offers an invaluable pathway to providing assistance that can improve justice outcomes for young people, the courts, and the community.

I INTRODUCTION

Young people represent some of the most vulnerable individuals within the community, and experience a range of complex issues, often without sufficient knowledge to access the justice system. Barriers to justice are compounded in relation to young people, as they have limited autonomy and rely heavily on their parents or other adults for support, or more problematically, their peers and siblings.

Access to justice is a fundamental right, predicated on the protection and promotion of all human rights. Unfortunately, access by young people to legal assistance in Canberra remains a significant issue for a range of reasons. Young people are not immune to the barriers to justice encountered by adults.

Primarily, the complexity of the justice system is alienating for many young people, subsequently unaware of their rights and the manner in which they may be enforced. Even where they have sufficient knowledge of the justice system, it may continue to intimidate young people to the extent that they refrain from making complaints or seeking redress for fear of repercussions.

The assistance of a parent or other supportive adult may mitigate any issues presented by way of limited knowledge of the justice system and/or feelings of

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12 Ibid.
13 Human Rights Council (n 1) 3, para A.
intimidation. However, this solution is based on the presumption that parents and supportive adults will possess sufficient knowledge to navigate the justice system; and in other circumstances fails to acknowledge that young people can be estranged or are otherwise independent. Remaining dependent on adults for assistance navigating the justice system also becomes increasingly problematic when navigating conflicts of interest.\footnote{Ibid.} Other subsidiary issues, such as costs and geographical isolation from legal assistance services are exacerbated among young people.

The concept of access to justice for young people is intrinsically linked to the empowerment of these individuals.\footnote{Ibid.} This is why they must have access to information about their rights and the appropriate methods of protecting these rights. Whilst improving knowledge amongst young people is of primary importance, information should also be available to parents, teachers and others working with and/or for children.\footnote{Ibid.} As such, the availability of legal assistance services, increased awareness of their rights and the role of the justice system in protecting these rights should be used to empower young people to overcome these barriers.

It is in this context that the Colleges Legal Liaison Initiative (‘CLLI’) was formulated. Arming young people, and the adults they depend on, with the information needed to confidently navigate the justice system ensures that many of the barriers to justice do not preclude the observance of young peoples’ rights.

**COLLEGES LEGAL LIAISON INITIATIVE**

The CLLI, based in the Legal Aid ACT Canberra Office, is a Justice/Education partnership operating in nine Colleges that provides legal assistance to students between 16 and 19 years of age. The public Colleges provide education for students in the last three years of High Schools, and are physically separate from students in earlier years of study. By embedding lawyers in the familiar environment of a school college, Legal Aid ACT has increased the likelihood that students, parents and other relevant adults in Canberra will feel empowered to access legal assistance.

**A. Program Overview**

The CLLI involves the fortnightly deployment of a practicing lawyer, known as a Legal Liaison Officer (‘LLO’), to government funded Colleges across the Australian Capital Territory (‘ACT’). This initiative has been linked into the Youth Law Centre, a long established focus of Legal Aid ACT. Since 1 September 2020, Legal Aid ACT has deployed 3 lawyers to act as LLOs in nine Colleges. The lawyer attends the college campus from 9am-4pm on their designated day, offering services to all students (aged 16-19), their families and College staff.

When onsite at a College campus, the lawyer is on duty and available to speak with students by appointment, referral (usually by College staff who have identified the students as at risk) or on a ‘walk-in’ basis. The lawyers’ services are also available to the families of students by appointment. Having access to a lawyer on campus

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\footnote{Ibid.} \footnote{Ibid.} \footnote{Ibid.}
means that students, their families and College staff are able to obtain free, confidential legal advice within a familiar and safe environment.

Students who have engaged the services of the lawyer are provided with the acting lawyer’s email address, to facilitate ongoing legal assistance outside of the schooling context. If a student contacts a lawyer outside of the school context, the lawyer may attend the school immediately (depending on the urgency of the matter), provide assistance over the phone or arrange an appointment for the student when the lawyer will be on campus.

B. Performance Analysis of the Program

The CLLI has provided legal assistance services to a number of students, their families and College staff, across a wide array of legal issues. The primary areas of inquiry included:

- Family and domestic violence,
- Sexual assault/victims of crime;
- Employment law;
- Young people’s rights (in relation to leaving home, obtaining medical records etc); and
- Personal protection /bullying/harassment.

From its commencement on the 1st of September 2020 to May 2021, the CLLI provided services to a total 192 individuals, with over 50% of matters involving family violence indicators. The lawyers have also conducted regular Community Legal Education (‘CLE’) sessions to ensure students are aware of their legal rights and aid their identification of these issues. Indeed, within the first two months of conducting CLE sessions, we had delivered training to over 520 students across 23 sessions.

C. Case Studies

The positive relationship between the College staff and the onsite lawyers has been invaluable. Given their rapport with College staff, students will often disclose their legal issues to teachers, who are then able to refer them to the lawyer. As such, the lawyers’ presence within the College context is largely dependent on the College Staff’s willingness to embrace and utilise their services. However, it should be noted that reliance on College staff can also be problematic due to their duties as mandated reporters. The case studies set out below illustrate the effectiveness of the CLLI.

1 Case Study 1

One student who engaged the lawyer on campus was referred to the service after confiding in a teacher that her parents had demanded she return home so they could leave Australia. Whilst off-campus, the lawyer was able to provide urgent migration advice with the assistance of Legal Aid ACT’s Migration Clinic. The Community Liaison Unit was also involved to provide assistance in safety planning and connecting the student with vital support services. The ongoing presence of the lawyer on campus meant that this student had access to legal assistance in the event that her circumstances escalated once more.
2 Case Study 2

An 18 year-old male presented to the lawyer after being referred by the College’s wellbeing team. Given their age, this individual was primarily concerned with the prospect of moving out of home and any legal consequences he should be aware of. During their contact, the lawyer identified Family Violence indicators (such as emotional, physical and economic abuse) and therefore raised the possibility of applying for a Family Violence Order. The student appreciated this information but ultimately determined that moving out of home was his primary objective. Therefore, the lawyer primarily provided non-legal support, for example, writing a letter outlining the client’s circumstances for the purposes of a social-service application. The student indicated that he would return to the lawyer for further advice once he received his lease agreement.

3 Case Study 3

With the support of their college youth worker, a student presented to the lawyer prior to appearing in the Children’s Court for a number of criminal charges. The student was distressed, armed with little knowledge as to what legal supports were available. The lawyer gave the student preliminary advice in relation to Court procedures and arranged duty legal representation from a Legal Aid ACT Criminal Practice lawyer. The CLLI lawyer also assisted the student in applying for a grant of legal aid to ensure they received ongoing legal assistance from the Criminal Practice lawyer.

COMPARABLE INITIATIVES

Legal Aid ACT’s CLLI was informed by a number of similar programs offered in other Australian jurisdictions. The experience of other programs around Australia echoes what is being achieved in the ACT.

A. Victoria

1 West Justice: School Lawyer Project

In 2015, WEStjustice launched the school lawyer project, placing a lawyer full-time at the Grange P-12 College in Melbourne’s outer suburbs.17 Like the CLLI, the on-site lawyers provide services to students and their parents.18 However, the primary focus of the on-site lawyer is to provide legal advice and actual legal representation to approximately 1600 students from a diverse range of cultural and socio-economic backgrounds.19 By offering early intervention and prevention, the program aims to increase students’ legal knowledge and subsequently decrease their interaction with the justice system. Anecdotal evidence has demonstrated that this early intervention in relation to contemporary issues, such as sexting, has reduced the students’

19 Ibid.
involvement in such behaviour.\textsuperscript{20} The lawyer often hears legal issues relating to public transport fines, criminal matters, family violence and tenancy related matters and also conducts legal education sessions.\textsuperscript{21} It is also hoped that the legal assistance provided by the on-site lawyer will increase students’ engagement with the education system.\textsuperscript{22}

2 Victoria Legal Aid

Similarly, Victoria Legal Aid have been placing a lawyer once weekly at Newcomb Secondary College in Geelong, since piloting the program in 2016.\textsuperscript{23} The onsite lawyer provides assistance to students enrolled in the school, as well as their parents.\textsuperscript{24} Onsite lawyers have stated that the familiar environment of the students’ school ensures that legal assistance is easy to access and reduces any potential stress or anxiety encountered when accessing these services.\textsuperscript{25} Matters encountered include family violence, employment issues and criminal offences.\textsuperscript{26} The homogeneity of issues encountered by Legal Aid ACT’s lawyers and those encountered by lawyers in other comparable Victorian programs are indicative of the significant legal need of young people within the community.

B. NSW

In New South Wales (NSW), the Mid North Coast Community Legal Centre deploys a lawyer once monthly to the Macleay Valley Workplace Learning Centre to provide legal assistance and facilitate education sessions.\textsuperscript{27} This program places lawyers in a school catering to the needs of young people that are disengaged from the education system. The Mid North Coast Community Legal centre have also noted that placing a lawyer in the context of a school environment mitigates the barriers to justice faced by young people. Similarly to Legal Aid ACT and the aforementioned initiatives, the school lawyer often provides advice in relation to employment, family and criminal law matters. Unfortunately, this program has been put on hold due to the COVID-19 pandemic.\textsuperscript{28}

Legal Aid NSW also offers the ‘Children’s Legal Service’, catering specifically to children and young people under the age of 18 navigating the criminal justice system and provides free legal education sessions for schools across the state.\textsuperscript{29}

\begin{thebibliography}{9}
\bibitem{20} Ibid.
\bibitem{21} Ibid.
\bibitem{22} WE\textsuperscript{s}justice, School Lawyer Program: Framework (2018).
\bibitem{24} Ibid.
\bibitem{25} Ibid.
\bibitem{26} Ibid.
\bibitem{28} Ibid.
\end{thebibliography}
IDENTIFYING FUTURE LEGAL NEED

Legal Aid ACT’s mission is to promote a just society in the ACT by ensuring vulnerable and disadvantaged individuals receive the legal services they need in order to protect their rights and interests.30 Our work has a number of key drivers, including demography and matter types.

An array of strategies are in place to meet this mission, and one of these strategies - the Youth Law Centre (established in 2002) - caters to the legal assistance needs of young people aged 12-25.31 Similarly, Legal Aid ACT has been conducting CLE sessions across ACT schools for many years.32 Through these services, Legal Aid ACT became aware that there was significant need for legal assistance services among college aged students in the ACT, and our experience over the past 18 months has confirmed the effective utility of providing services within the school system. The CLLI has a growing cohort of potential clients.

The ACT has approximately 50,000 children enrolled in public schools from preschool through to year 12.33 Of these 50,000 enrolments, approximately 6,000 students are enrolled in ACT public colleges.34 This represents approximately 2% of the ACT population.35 This percentage is exclusive of the teachers, parents and carers of students.

The demand for legal assistance services within the ACT continues to grow.36 In 2019-2020, Legal Aid ACT provided 50,780 services to the ACT community, compared to 46,765 in 2018-2019 and 43,512 in 2017-2018.37 Throughout this period, applications for grants of aid from individuals below the age of 18 and demand for the services of the Youth Law Centre have remained consistent.38 The increasing demand for legal assistance services within the ACT, as well as sustained demand for services catering to young people highlighted the need for early intervention by way of legal assistance services in environments familiar to young people, such as schools.

A significant issue of concern within the ACT and nationally is the prevalence of family and sexual violence, whether perpetrated against young people or their caregivers.39 Nationally, approximately one in six women and one in 16 men have experienced physical and/or sexual violence by a current or previous partner since the age of 15.40 Similarly, one in six women and one in nine men report having

31 Legal Aid ACT, Annual Report 2002
32 Legal Aid ACT (n 17).
33 ACT Government, Census of ACT public schools (Census, 7 September 2018) 2.
34 Ibid.
36 Legal Aid ACT (n 17).
37 Legal Aid ACT (n 17) 41.
38 Legal Aid ACT (n 17), see also Legal Aid ACT, Annual Report 2018-19 and Legal Aid ACT, Annual Report 2017-18.
40 Australian Institute of Health and Welfare (n 28) ix.
experienced physical and/or sexual abuse before the age of 15.\textsuperscript{41} Moreover, in 2018, nearly 2.1 million people reported witnessing violence towards their mother by a partner and nearly 820,000 people reported witnessing violence against their father prior to the age of 15.\textsuperscript{42} Individuals who have experienced or witnessed this abuse prior to the age of 15 are at an increased risk of family and/or sexual violence as an adult.\textsuperscript{43} By embedding a lawyer in an environment that is familiar to students and parents alike, it is hoped that Legal Aid ACT will be able to offer early intervention and prevention in relation to these serious matters.

\section*{V CONCLUSION}

Although in its early stages of development, Legal Aid ACT’s CLLI has been very successful in increasing knowledge of the justice system through education sessions and providing immediate access to legal assistance services for young people, their parents and other relevant people in the familiar context of the schooling environment. In doing so, Legal Aid ACT has been able to mitigate a number of barriers to justice encountered by young people and empower them to access the justice system in circumstances where they would not normally gain access.

The key to our success is immediate availability of lawyers to students at the Colleges. Currently, it would seem that the impact of the CLLI is only limited by the frequency of lawyer presence at each College. Perhaps, the future of the College Legal Liaison Initiative could see increased frequency of lawyer presence throughout all ACT schools – both public and private - including high-schools and potentially primary schools.

\begin{footnotesize}
\footnotetext{41} Ibid.
\footnotetext{42} Ibid.
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Holistic approaches to ensure equal access to legal aid in criminal justice systems – in emergencies and beyond

Equal access to justice for all is fundamental to the rule of law. It is a key component of fair, humane, effective, inclusive and efficient criminal justice, so all groups in society can enjoy their rights. With the adoption of Sustainable Development Goal 16, the international community undertook to promote the rule of law at the national and international level, and to ensure equal access to justice for all – which is important to build societies and allow them to grow, and which is also at the heart of the equality and non-discrimination requirement and overarching objective of the 2030 Agenda for Sustainable Development: to leave no one behind. As stated by Secretary-General Guterres at the recent United Nations Congress on Crime Prevention and Criminal Justice in Kyoto, Japan: "People need an inclusive justice system that works for all and is intolerant of discrimination."

And yet, far too often, the poor and the marginalized, migrants and minorities, or persons with specific rights and needs in the criminal justice system like women, or victims of crime, are unable to seek redress, make their voices heard or defend their rights. COVID-19 restrictions were and are further perpetuating vicious cycles of exclusion and injustice.

Barriers to justice reinforce poverty and exclusion and negatively impact the economy. There are many challenges that hinder access to justice, including inadequate legislation and policies, limited financial resources, a lack of knowledge of which services exist and how to access them, and insufficient numbers of qualified justice actors to effectively deliver support, especially when it comes to addressing structural barriers and discrimination and achieving equity. When distancing measures and the closing of courts had a massive impact on pre-trial detainees, prisoners and victims of crime, the pandemic put a spotlight on the absence of strong mechanisms for accessing legal aid as a tool for accessing justice in many countries. Often, the needs of the population were unclear, as was knowledge of available resources and stakeholders to count on, such as lawyers, paralegals, mediators or social workers – which became apparent when having to deal with a rising number of cases of domestic and gender-based violence. A resort to remote hearings often impacted the rights to due process and to a fair trial, and excluded poor persons, as they did not have the means to pay for or understand how to use the required technology.

1 Prepared by susskind Holterhof, Crime Prevention and Criminal Justice Officer, United Nations Office on Drugs and Crime (UNODC), in line with a presentation delivered at the International Legal Aid Group Conference, hosted virtually by Legal Aid New South Wales/Australia in June 2021. It is based on the work experience of UNODC, as well as publications including the UNDP/UNODC Guidance Note on Ensuring Access to Justice in the Context of COVID-19.
Besides having a strong evidence-base in place to inspire action and reform, a holistic approach to service delivery is needed to empower people and enhance their capacities to seek redress for grievances and protect their rights.

In his presentation at a side event co-sponsored by ILAG at the recent 30th Session of the Commission on Crime Prevention and Criminal Justice (CCPCJ), Prof. Alan Paterson referred to holistic services in the sense that “the holistic view of legal needs and access to justice reflects the fact that people often have a cluster of related problems to resolve, only one of which may be legal. Holistic projects provide a one stop service to vulnerable clients thus avoiding referral fatigue and recognising that client centred lawyering involves focusing on the bundle of related issues that confront the client.”

“Holistic” in the sense of this short paper means that to resolve the justice problems of the population, justice sector actors in general – from judges to police to legal aid providers (such as pro bono lawyers, community paralegals, civil society organizations (CSOs) providing legal aid and others) and corrections services – need to work together to take on a people-centred approach and address a variety of issues, not only legal issues, that are relevant to a particular person or group. Second, in a specific criminal legal aid case assigned to a provider, it means that he or she should, where needed, cooperate with civil legal aid services, social and/or health workers, and other professionals to resolve as many of the needs of the client as possible.

1. Equal access to justice for all – Multilateral developments

UNODC’s approach

In line with the new strategy of the United Nations Office on Drugs and Crime (UNODC), the Office’s efforts in access to justice focus on promoting police reform, access to legal aid, restorative justice, and justice for victims of crime, while addressing cross-cutting issues like inclusion and ending discrimination. The approach is based on an understanding that, to truly realize this objective, all those affected by crime must be able to seek redress: There is need to fully safeguard the rights of alleged and sentenced offenders and their humane treatment during and after criminal proceedings; to enable people to make better use of the law and legal services in the protection of their rights; and to protect and assist victims impacted by crime.

The 2021 Kyoto UN Crime Congress

At the aforementioned recent UN Crime Congress, held in a hybrid format in March 2021 in Kyoto, Japan, Member States discussed practical approaches to
strengthen access to justice, which is truly a global issue that affects all Member States in every region and at all development levels. In fact, access to justice for all was included as an official item into the Congress’ agenda that mentioned “Multidimensional approaches by Governments to promoting the rule of law by, inter alia, providing access to justice for all; building effective, accountable, impartial and inclusive institutions; and considering social, educational and other relevant measures [...]”. In the Kyoto Declaration, adopted on 5 March, governments agreed on concrete actions to advance responses addressing crime prevention, criminal justice, rule of law and international cooperation. Member States took commitments forward at the 30th session of the Commission on Crime Prevention and Criminal Justice in Vienna in May 2021.

In the Declaration, Member States adopted language on access to justice and equal treatment before the law with a focus on legal aid, in paragraphs 48 and 49, which stress that, in promoting the rule of law, it is important to:

“Ensure equal access to justice and application of the law to all, including vulnerable members of society, regardless of their status, including by taking appropriate measures to ensure treatment with respect and without discrimination or bias of any kind by criminal justice institutions”. (Para. 48)

As the Declaration further underlines, countries need to

“Take measures to ensure access to timely, effective, adequately resourced and affordable legal aid for those without sufficient means or when the interests of justice so require, and raise awareness of the availability of such aid, including by promoting the practical application of relevant provisions of the United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems, [UNODC] tools on ensuring the quality of legal aid services in criminal justice processes and other related tools, by encouraging the development of guidance tools, as well as the collection and sharing of data on access to legal aid, and by developing a specialized network of legal aid providers to exchange information and best practices and to assist each other in carrying out their work.” (Para. 49)

Throughout, the Declaration includes areas that are closely connected to the notion of ensuring fair treatment without discrimination and equality in accessing justice. For example, under “Advancing the criminal justice system”, details on the
need for safeguarding victims’ rights and protecting witnesses and reporting persons are mentioned:

“31. Protect the rights and interests of victims of crime and make efforts to assist them at every stage of criminal justice proceedings giving due attention to the special needs and circumstances of victims, including age, gender-specific and other needs, and disabilities, as well as to the harms caused by crime, including trauma, and endeavour to provide victims with the means that may assist in their recovery, including the possibility to obtain compensation and reparation;

32. Encourage victims to report crime by providing them with adequate support, including in criminal proceedings, such as effective access to translation services;

[...]

34. Provide adequate resources and training to practitioners to strengthen their capacity to provide victim-centred assistance and support that take into account the specific needs of victims.”

The Declaration then continues by highlighting the importance of mainstreaming of a gender perspective into criminal justice systems, which – particularly in the area of legal aid – has implications on funding, organization and delivery of services:

“44. Mainstream a gender perspective into the criminal justice system by promoting gender-responsive measures that address the gender-specific needs of both offenders and victims, including the protection of women and girls from revictimization in criminal justice proceedings.”

Finally, the Declaration under “Improving criminal investigation processes” speaks about the rights of suspects and accused persons:

“47. Encourage the use and sharing of good practices on legally grounded, evidence-based interviewing methods designed to obtain only voluntary statements, thereby reducing the risk of unlawful, abusive and coercive measures being used during criminal investigation processes, and enable the obtaining of best evidence, thereby improving the legitimacy and quality of criminal investigations, prosecutions and convictions, and the efficient use of
resources, as well as continue to welcome the collaboration between practitioners, experts and other relevant stakeholders on the elaboration of a set of international guidelines for non-coercive interviewing methods and procedural safeguards in this regard.”

2. Barriers to equal access to justice services exacerbated by COVID-19

Addressing COVID-19 is foremost a public health concern. However, the impact of the crisis as well as the legal and policy responses developed by States to counter the spread of the virus have much wider ramifications that affect a broad range of human rights, including the ability of people to access justice in a timely, fair, and effective manner. The crisis also presents specific justice ‘needs’, such as tackling the rise in gender-based violence and making additional institutional reforms, as the UN Secretary-General’s Policy Brief: The Impact of COVID-19 on Women from April 2020 showed a dramatic increase in domestic violence and child abuse and lack of protection for women and children due to measures requiring people to remain confined to their homes. It is vital that these women and children have and continue to have access to justice and other necessary social services.

A new UNODC report entitled “The Impact of COVID-19 on Criminal Justice System Responses to Gender-based Violence Against Women (GBVAW): A Global Review of Emerging Evidence” of April 2021 analysed data from almost a hundred countries in different regions, aiming at the widest diversity possible. Although the report includes examples from high income countries, it mainly focused on the challenges and responses found in low- and middle-income countries.

As regards legal aid services, disruptions were found both for victims/survivors and perpetrators. The pandemic contributed to adjournments and delays in legal proceedings, and in many countries, legal aid offices were closed including those dedicated to providing services in GBVAW cases. Those that remained open experienced reduced availability of personnel including specialized personnel and the challenges of providing services remotely. Detainees awaiting trial were prevented from consulting their legal representatives as no visits to prisons were allowed in many countries.

The need for legal aid on family related issues became more urgent during the lockdown and movement restriction measures. Relevant cases often connected with GBVAW, included shared custody of children, weekly visits and requests to establish communication with children through video calls. Given that victims /survivors of
GBVAW often do not disclose such violence in the context of family law cases, the lack of face-to-face meetings with family legal aid providers may prevent lawyers from identifying GBVAW and acting accordingly.

**United Nations Guidance**

In a joint Guidance Note, UNODC and the United Nations Development Programme gathered information and advice on *Ensuring Access to Justice in the Context of COVID-19*. The document discusses measures that can be taken to help justice systems in the preparation, response and recovery phases. The Note acknowledges that there may be chronological overlap across the different phases as States face differing dimensions of the crisis – including adjusting existing measures or introducing new ones when potential second or third wave outbreaks may occur.

The Guidance Note recognizes the key role that the justice system and its actors play in oversight and accountability, but also in securing the rights of those “left behind” during the crisis. Tailored approaches include:

- Strengthening of independent internal and external oversight and accountability mechanisms;
- Use of strategic litigation to address discrimination in access to services;
- Ensuring access to free legal aid for those who are being disproportionately impacted by emergency regulations or practices;
- Legal representation, advice and assistance for prisoners and detainees, including those in administrative detention, to secure release or use of non-custodial measures and alternatives to imprisonment. Along with the prosecution and the judiciary, legal aid providers, including legal aid authorities, bar associations, pro bono lawyers, assistance from other actors such as civil society and community-based paralegals, as well as national human rights institutions and ombudsman offices, have a critical role to play in this regard.

A key concern is that the economic fallout of the crisis will put many groups in society further behind, including children, women, older persons, persons with disabilities, indigenous peoples, LGBTI persons, displaced populations, stateless people, migrants, asylum seekers, victims of human trafficking, day laborers, and people living at or below the poverty line. The pandemic is making inequalities more visible, such as acute disparities in wealth, access to health, employment and livelihood, and in the ability to adopt preventive and isolation measures.
The pandemic put a spotlight on the vulnerability of groups of people that were already facing a high risk of violation of their rights in the world that COVID-19 put upside down: those detained, arrested or imprisoned, suspected, accused of, or charged with a criminal offence, and victims of crime, particularly of gender-based and domestic violence. Legal aid makes a crucial difference in these people’s lives, enabling them to navigate the justice system, which can be complicated and overwhelming, and to reduce the length of time of detention and imprisonment, the number of wrongful convictions, the incidence of bribery and the rates of reoffending and revictimization and subsequent new imprisonment. All these crucial effects gained a whole new meaning in 2020, when those already at risk of human rights violations were facing even more threats, including, for instance, to get infected while imprisoned or held in overcrowded pre-trial detention facilities.

Justice systems struggled to continue to function, including:

- to be able to ensure that the rights of victims, suspects, accused persons, prisoners and witnesses were protected;
- to overcome the barriers in relation to access to essential services posed by inequalities based on wealth, health or livelihood;
- to address the rise in gender-based violence caused by the lockdowns that are trapping victims with their perpetrators; and
- to continue to build capacity and tackle institutional reforms that strengthen the effectiveness of the justice systems in a radically shifted social context. Emergency measures must be based on the rule of law and protect and respect international human rights standards. Access to legal services and information is crucial for empowering persons and communities.

In ensuring holistic provision of legal aid in the context of the pandemic, the Guidance Note recommends applying a variety of measures, on which more details can be found in the document itself. Some are highlighted below:

- **Ensuring continued remote access to legal education.** As universities providing legal education and law clinics shut down, access to online courses and resources should be made available where possible. Training on use of online services as well as tailored courses on responding to the specific issues that may arise due to the crisis, including on how to work with community-based legal aid providers, should be provided to students and professionals alike.
- **Cooperation with bar associations and other governing bodies of lawyers and partnership with civil society.** Bar associations and other similar bodies should be involved in the development of the justice sector response to COVID-19 to ensure measures reflect and respond to lawyers’ – and their clients’ – needs. Where law enforcement officers, judges, and prosecutors are exempted from movement restrictions to participate in hearings or other proceedings, lawyers should be given the same status so they can represent their clients. Efforts should also be
made to enhance the provision of pro bono and legal aid services, including by telephone and internet, by private lawyers and legal aid CSOs. The crisis has also financially affected the legal profession and support to lawyers’ associations as well as CSOs supporting access to justice should be explored. Partnerships between government and CSOs to continue the delivery of justice services, including through provision of emergency/on-going financial support to such CSOs, should be encouraged.

- Identification of criteria for release for persons deprived of liberty. Due to the exceptional vulnerability to COVID-19 in places of detention, many countries are currently implementing emergency release measures for detainees and prisoners. Criteria for determining the eligibility for such emergency release measures must be based on a careful balancing of vulnerability of individual detainees against public safety and be accompanied by appropriate safeguards to the safety and the rights of witnesses and victims. In many cases, juveniles, pregnant and breastfeeding women, those with caretaking responsibilities, older persons, and those with underlying health issues are being considered for release. In addition, people who are considered to pose no or a very low risk to the public, such as those who have been detained or imprisoned for minor or non-violent offenses, those whose sentences that are almost complete, or who are facing relatively short sentences are also being released to reduce the population of overcrowded prisons, which heightens vulnerability to COVID-19. In addition to vulnerability, the release of people awaiting trial who have not been convicted of a crime is even more pressing, especially if the risk of flight or another sort of interference with the course of justice is low during lockdown measures. Authorities are also strongly encouraged to release people in immigration detention, in particular where that detention is arbitrary or does not comply with international standards. This includes people in pre-removal detention where deportations have been suspended due to the COVID-19 situation. In many of these cases, the grounds for their continued deprivation of liberty no longer exist. Those convicted and imprisoned for domestic violence, sexual crimes, and other violent crimes should not be eligible for emergency non-custodial measures. Lawyers and legal aid providers can assist authorities to identify potentially eligible persons, ensure their clients are included in these alternative measures, as well as to ensure that those that remain in prison or immigration detention centres receive adequate protection (i.e., sanitation and hygiene) and access to health care.

- Provision of legal aid and assistance to access basic services and social protection. Legal aid providers can represent different groups of people when they are unable to secure access to essential services, such as access to health care or social protection measures that have been put in place as part of the COVID-19 response. Community based paralegals, for example, can support legal empowerment efforts,
including by providing access to information on rights, guidance on how to access benefits, and support to fill out forms, particularly for those who are illiterate, do not speak or read the official language of the country, or cannot access online services. Civil documentation is often a prerequisite for access to basic services and social protection, but certain groups, including refugees, migrants, and stateless persons, often face challenges in obtaining this documentation. Legal aid providers can assist individuals in addressing these challenges. Strategic litigation can be pursued where access to benefits is denied to specific persons or groups of people.

**Evidence-based legal aid delivery and reform**

A significant barrier to enable holistic, client-centred legal aid services and ensure equal access for all is the absence of an evidence-base on legal aid that can serve to improve the organization, funding and delivery of services. Creating and periodically updating an evidence-base is an important tool to analyse gaps, plan and implement long-term reform measures, and, where needed, enable international organizations or bilateral partners to tailor their assistance. At the beginning of the COVID-19 emergency, when distancing measures and the closing of courts had a massive impact on suspects, accused persons, prisoners and victims of crime, even where there was political will to increase access to legal aid, in many countries no recent, trustworthy data was available on the delivery of and access to services. Often, the needs of the population were unclear, which became apparent when having to deal with a rising number of cases of domestic violence and an absence of legal support.

Already in 2016, the [UNDP/UNODC Global Study on Legal Aid](https://www.globalstudyonlegalaid.org/) found that, “To ensure sustainability of legal aid services, it is essential that States allocate an adequate budget to meet the demand for legal aid. The extent of demand and priorities can be identified through legal needs assessments, which can inform evidence-based policy making.” In the absence of evidence-based data, States are left to spend funds based on conjectures, which often leads to suboptimal allocation of resources across the country. The Study also found that “globally, a majority of Member States (62% of respondents) had not conducted any form of needs assessment. When looking at the subset of countries that reformed their legal aid system after 2005, that proportion remains unchanged. This may suggest that reforms in these countries were not necessarily triggered by a rigorous analysis of the needs emerging from such an assessment conducted prior to the reform. It may also suggest that reforms which were recently carried out have not been followed by needs assessment exercises to help inform their implementation.”
The first step to developing strategies and programmes on legal aid to enable holistic service delivery is therefore to establish a baseline and identify gaps by conducting an assessment of the current situation. The evidence base created can serve not only as a snapshot in time but can also be used to measure progress in achieving goals. Understanding how best to meet the justice needs of the population requires periodic undertaking of a comprehensive assessment, ideally by the State in cooperation with a variety of stakeholders, to ensure that all relevant information and data can be included. It can help identify where gaps and bottlenecks exist for people trying to access justice, especially for vulnerable groups, and can help inform policies to better respond to the realities on the ground. For legal aid practitioners and institutions, this information can be valuable to inform specialization on particular issue areas or to respond to priorities of specific groups of people depending on the existing demand.

To address the need for guidance, following the structure of the United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems (“UN Principles and Guidelines”) – to date the only international instrument that deals exclusively with the right to legal aid – UNODC is therefore developing a comprehensive assessment tool that can be used by legal aid experts, as well as government officials and other stakeholders, with the in-person or remote support of UN staff, and/or individually in their own capacity. After an eight-week series of consultations in late 2020 with experts from all regions, including a number of ILAG members, UNODC put together a comprehensive draft tool that includes details on various sectors of the criminal justice system and steps of the criminal justice process, to enable experts to collect data that builds a snapshot in time of the status quo in their country. The tool will be made available to Member States in the summer of 2021 on the UNODC website and will be further disseminated among policymakers, practitioners, researchers and the network of field offices of UNODC and other relevant UN agencies.

3. Interventions for victims

One group that received a lot of attention because of the impact of the pandemic on its rights was that of victims of crime. In many countries, protection of and support provided to those persons is still not comprehensive, nor is the right anchored in legislation. The concept of holistic service delivery is particularly important in this context, as victims face a variety of challenges to physically, psychologically and legally overcome their situation and enable themselves to continue to live their lives.

A fair and effective criminal justice system should respect the fundamental rights of all the parties involved in the criminal justice process, including victims, witnesses, suspects and offenders. It should strive to prevent victimization, to protect...
and assist victims of crime and to treat them with compassion and respect for their
dignity. For this reason, victims should have access to specialized assistance in
dealing with physical and emotional trauma. A fair and effective criminal justice system
should also ensure that victims have appropriate mechanisms to obtain redress and
seek remedy for the harm they have suffered. When the criminal justice system does
not recognize the right to safety, dignity, and protection from intimidation and access
to justice for victims of crime, they are re-victimized by the very system that is
supposed to protect them. In addition, justice cannot be achieved, and the rule of law
cannot be established, if victims are successfully threatened not to provide essential
information to the judicial authorities, and are not able to seek compensation,
restitution and protection.

The United Nations Declaration of Basic Principles of Justice for Victims of
Crime and Abuse of Power, which calls for measures to improve access to justice and
fair treatment, restitution, compensation, protection and assistance, defines victims of
crime as follows:

"1. "Victims" means persons who, individually or collectively, have suffered
harm, including physical or mental injury, emotional suffering, economic loss or
substantial impairment of their fundamental rights, through acts or omissions
that are in violation of criminal laws operative within Member States, including
those laws proscribing criminal abuse of power.

2. A person may be considered a victim, under this Declaration, regardless of
whether the perpetrator is identified, apprehended, prosecuted or convicted
and regardless of the familial relationship between the perpetrator and the
victim. The term "victim" also includes, where appropriate, the immediate family
or dependents of the direct victim and persons who have suffered harm in
intervening to assist victims in distress or to prevent victimization."

The Declaration further provides that victims are entitled to access the
necessary mechanisms of justice to obtain prompt redress for the harm that they have
suffered. Such mechanisms may include formal or informal procedures as long as they
are expeditious, fair, inexpensive and accessible. To make such justice mechanisms
inexpensive and accessible to victims, many legal systems extend the right to obtain
legal aid to victims of crime, especially to those victims who lack the necessary means
to afford legal services.
The United Nations Principles and Guidelines recommend this approach in defining legal aid to include advice, assistance and representation to victims. Principle 4 provides that “Without prejudice to or inconsistency with the rights of the accused, States should, where appropriate, provide legal aid to victims of crime.” Guideline 12, b (ii) recommends that the funds recovered from criminal activities through seizures or fines should be used to cover legal aid for victims.

In addition, Guideline 7, “Legal Aid for Victims” provides:

“48. Without prejudice to or inconsistency with the rights of the accused and consistent with the relevant national legislation, States should take adequate measures, where appropriate, to ensure that:

(a) Appropriate advice, assistance, care, facilities and support are provided to victims of crime, throughout the criminal justice process, in a manner that prevents repeat victimization and secondary victimization;

(b) Child victims receive legal assistance as required, in line with the Guidelines on Justice in Matters involving Child Victims and Witnesses of Crime;

(c) Victims receive legal advice on any aspect of their involvement in the criminal justice process, including the possibility of taking civil action or making a claim for compensation in separate legal proceedings, whichever is consistent with the relevant national legislation;

(d) Victims are promptly informed by the police and other front-line responders (i.e., health, social and child welfare providers) of their right to information and their entitlement to legal aid, assistance and protection and of how to access such rights;

(e) The views and concerns of victims are presented and considered at appropriate stages of the criminal justice process where their personal interests are affected or where the interests of justice so require;

(f) Victim services agencies and non-governmental organizations can provide legal aid to victims;

(g) Mechanisms and procedures are established to ensure close cooperation and appropriate referral systems between legal aid providers and other professionals (i.e., health, social and child welfare providers) to obtain a comprehensive understanding of the victim, as well as an assessment of his or her legal, psychological, social, emotional, physical and cognitive situation and needs.”
A comprehensive response to developing victim-centred policies requires an overarching framework and strategy that recognises the diverse impacts of crime on victims. Such a comprehensive approach goes beyond Ministry of Justice activities and the role of victims in criminal proceedings. Authorities responsible for health, social welfare, the interior, education, foreign affairs and other relevant authorities should incorporate victim-oriented approach into their policies, effectively “mainstreaming” victims’ issues.

For holistic service delivery, it is important to consider the wide range of stress and risk factors that victims may face along their journey. These include:

- Poorly adapted interview techniques at the reporting stage
- Possible contact with the suspect and his/her family members during the trial
- A fear of giving testimony or feelings of intimidation in court and outside court, e.g. at the police station
- The desire for privacy, or the need to be protected when testifying in court
- Unwillingness to discuss the case in public (or with strangers)
- Secondary or repeat victimisation post-trial, for example, when the offender is released.

A victim’s journey starts with the crime, however, a large number of victims never come into contact with the criminal justice system as they choose not to report the crime. A smaller proportion of the victim population opt to report the crime and attempt to navigate the formal channels of the criminal justice system. Victims do not always report the crime immediately and regarding some types of crime, such as child sexual abuse, the victims come forward even many years into adulthood. There can be various reasons for such delays, including fear of the perpetrator, reactions of authorities or family and shame. Some victims may initially fail to understand they have been subjected to a crime. Access to support services may empower victims to eventually report the crime. Accordingly, national laws and policies should be in place that enable victims to report a crime even after several years, in particular in the case of child victims and victims of domestic abuse or gender-based violence. Practitioners

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2 This fact inspired the creation of indicator 16.3.1 under SDG 16’s target 3, to measure progress on enhancing access to justice: “Proportion of victims of violence in the previous 12 months who reported their victimization to competent authorities or other officially recognized conflict resolution mechanisms.”
must also understand that delays in coming forward do not have any correlation with the truth of a victim’s statement.

Domestic laws vary with regard to legal aid for victims. According to the UNDP/UNODC Global Study on Legal Aid, globally, 65% of responding Member States indicated that crime victims were entitled to legal aid under the law. As regards female victims of violence, including victims of SGBV, only 61% of Member State respondents indicated that legal advice and court services were provided in all legal proceedings to those persons. When results are disaggregated by income level, legal aid services to female victims of violence were noticeably less accessible in lower-income countries (50%) than in higher-income countries (68%).

The recent UNODC report on criminal justice responses affecting women during the pandemic found that most of the measures adopted in the area of legal aid were related to facilitating women’s access to legal aid services, and in some cases, an increase in funding. Many of these measures are technology-based. For example, in Ukraine, legal aid NGOs have used the ‘Your Rights’ App to provide legal advice, while the Cypriot NGO One Women At A Time conducted Zoom based webinars to provide legal advice to survivors of intimate partner violence on “How to ‘Shut Out’ your COVID-19 abuser legally.” Another interesting example of wider social involvement is found in relation to legal aid in India, where the Delhi State Legal Services Authority announced specific measures such as collaboration with Mother Dairy booths (Milk Booths), pharmacists and chemists for providing information to survivors of violence and launched an app to deliver legal aid to these individuals. DSLSA has established close contacts also with ANGANWADI (rural childcare centre) and ASHA (accredited social health activist) workers who might come across domestic violence cases in their areas.

UNODC welcomes the exchange of experiences and knowledge on setting up and running legal aid services for victims of crime and encourages all ILAG members to get in touch with the Office to share examples of working with victims in their jurisdictions.

4. Addressing structural impediments to accessing justice

Finally, 2020 opened wide-spread global discussion on the rights and needs of groups in society that are discriminated against, particularly because of their race, ethnicity or membership of a minority.
United Nations Action

As stated in the Guidance Note of the Secretary-General on Racial Discrimination and Protection of Monitors, “minorities and other common targets of racial discrimination [...] have problems in accessing justice because of discrimination, language, educational and financial barriers, low confidence, and the lack of judicial facilities in regions where they live.” It recommends that UN action “include support to national justice or security sector reform plans that encourage recruitment of male and female law-enforcement officers, prosecutors, judges, lawyers and other personnel from minority groups, providing training on minority rights to such personnel, supporting revision of legislation, reviewing sentencing practices to address any discriminatory practices, providing legal aid and other assistance and services in minority languages and addressing concerns of minorities when designing reintegration programmes. Measures to guarantee an independent oversight and accountability for the police are also essential.” It further addresses that “in order to fight impunity for violations of minority rights, the UN should also provide legal assistance to review criminal legislation, including to make racial and other forms of discrimination an aggravating factor in criminal cases, support investigation, prosecution and sentencing of persons having committed racist or other discriminatory acts through mentoring and capacity-building, and support research and data gathering to inform policy.”

This call to action for UN assistance provision can inspire national measures taken to end discrimination, particularly racially motivated discrimination, and make services more accessible to persons that have long suffered rights violations without opportunities to seek redress in many cases.

Already in 2012, the Secretary-General endorsed the establishment of a UN Network on Racial Discrimination and the Protection of Monitors, to enhance dialogue and cooperation between relevant UN entities. It is coordinated by the Office of the High Commissioner on Human Rights, and brings together over 20 UN Departments, Agencies, Programmes and Funds, including UNODC. Recent activities and news can be found on the Network’s website, including a checklist to strengthen UN work at country level to combat racial discrimination and advance minority rights of March 2021. The latter contains information and guidance that can also be used by non-UN experts in determining discrimination at country or local level, including concrete questions to collect data on the treatment of specific groups or minorities, and intersectionality.

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3 This Guidance Note also includes a variety of supplementary tools, guidance and information produced by entities of the UN system.
Non-discrimination in legal aid systems

The UN Principles and Guidelines in Principle 6 on “Non-discrimination” make it clear that:

“26. States should ensure the provision of legal aid to all persons regardless of age, race, colour, gender, language, religion or belief, political or other opinion, national or social origin or property, citizenship or domicile, birth, education or social status or other status.”

Addressing structural discrimination requires mainstreaming of anti-racist and intersectional approaches into criminal justice reform efforts, including capacity building and admission and certification of professionals, in order to expose criminal justice actors – including legal aid providers – to different forms of discrimination, and to provide them with the tools to recognize and counter those in the implementation of their daily professional tasks. In reality, proving such discrimination in a specific case can be difficult unless recordings of discriminating statements or other types of evidence exist. An option could be to apply tools and approaches that are used to provide proof of the occurrence of a hate crime.4

Picking up on the recommendations in the aforementioned Guidance Note by the Secretary-General, legal aid services should address discrimination based on race or membership of a minority group in a two-fold manner:

First, the question is whether providers have diversity amongst them. This is key to ensure adequate representation of groups in society. Members of communities need to be given the opportunity to join legal service providers to ensure diversity and inclusion. One has to ask if members of groups who experience discrimination have access to legal education – at university and/or in paralegal training programmes? Do they complete their education? Are they then certified/admitted to the Bar? Do they have opportunities to practise and work in their chosen profession?

4 For an overview of this matter, kindly refer to the “Guide for the thematic discussion on the responsibility of effective, fair, humane and accountable criminal justice systems in preventing and countering crime motivated by intolerance or discrimination of any kind,” produced by UNODC for the 28th Session of the CCPCJ. E/CN.15/2019/6, available online at: https://undocs.org/Home/Mobile?FinalSymbol=E%2FCN.15%2F2019%2F6&Language=E&DeviceType=Desktop
Second, coming back to the approach of client-centred service delivery in individual cases, one has to look at the persons who are represented or advised, and by whom. Do specialized legal aid providers deal with cases that involve or might involve an element of discrimination based on race or minority group membership? Or is any provider dealing with such cases? Are all providers sensitized and trained on these issues? If so, are they trained once, or are their skills and knowledge periodically enhanced? Are (mandatory) trainings offered to learn about and confront unconscious bias?

Already seemingly “small” interventions can help change biases or identify discrimination. For example, in Brazil, UNODC focuses on ethnic dimensions of ensuring the rights of suspects in its collaboration with Mexico City’s Council to Prevent and Eliminate Discrimination (COPRED due to its acronym in Spanish). Among other activities, the Office produced three infographics on the topics: “What is racial discrimination?”; “What is racial profiling?”; and “Towards the eradication of racism, racial discrimination, xenophobia and other related forms of intolerance.” These materials will be distributed not only within Mexico’s City public institutions, but also among the general public with the objective of disaggregating basic concepts on the matter and reinforce the need to treat every person with dignity, regardless of stereotyped racial traits or determined backgrounds.

As stated above with reference to services for victims, UNODC welcomes the exchange of experiences and knowledge on addressing racial and other forms of discrimination in legal aid organization and delivery, and encourages all ILAG members to get in touch with the Office to share examples from their jurisdictions.
Collective litigation in Criminal Justice amidst Covid-19
Pandemic Experiences of the Brazilian Public Defender’s Offices

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Abstract

The Brazilian Public Defender’s Office has been developing new tools in the fields of strategic human rights litigation. Learning with the experience of collective litigation in civil justice, public defenders are filing collective legal actions to protect groups of vulnerable people, including those who have not had the opportunity to be formally represented by the Public Defender’s Office. These collective legal actions are particularly necessary amidst the worst (and long) period of the Covid-19 pandemic, given the enormous difficulty of direct contact with people deprived of liberty and their families. This paper shortly describes some landmark cases and the legal tools used to provide collective defense in the criminal justice system.

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Overview

Brazil has a population of 210 million people and ranks sixth among the most populous in the world. However, the country has the third largest prison population in the world (over 700,000 incarcerated people). The Federal Constitution enshrines that the State shall provide full and free-of-charge legal assistance to all in need and establishes a public institution to offer this service, the Public Defender’s Offices.

In this context, the collective legal actions - in their multiple dimensions - have emerged as another set of tools, to help promoting a more effective criminal defense for the benefit of a large number of people.

The expression “collective criminal defense” refers to a variety of lawsuits that deal with criminal law, public security enforcement, and public policies in these fields, and that must be managed in association with several other measures, such as surveys for data collection, multi-disciplinary approach, partnerships with other social actors, such as civil society organizations etc. This practice is guided by the concept of strategic impact litigation, understood as a “legal action in a court that is consciously aimed at achieving rights-related changes in law, policy, practice, and/or public awareness above and beyond relief for the named plaintiff(s)”

The main types of collective defense lawsuits employed by the Public Defender's Office in Brazil are:

1) Collective Habeas Corpus;
2) Class Actions;
3) _Amicus curiae_ (third parties) in lawsuits of unconstitutionality before the Supreme Court;
4) Representation in individual appeals before the Supreme Courts (_erga omnes_ effect);
5) Petitions to the International Human Rights System.

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These legal tools may be used cumulatively in the same case, but in different moments, as part of a broader impact litigation strategy. An example will be mentioned below on how a successful individual case can result in a binding court precedent. But to ensure that this precedent will be applied to everyone entitled to, it may be useful or necessary to file collective actions on a complementary basis.

Many collective lawsuits may also be followed by individual legal actions, especially when it is necessary to demonstrate any particular circumstance of each case or person entitled to. Therefore, we believe that collective and individual legal actions are complementary, for several reasons.

The real cases presented below, in addition to exemplifying the experience of the Brazilian Public Defender's Office with the use of these legal instruments, also reveal the importance of managing various types of lawsuits, combined with multidisciplinary initiatives and the ability to produce or gather reliable data on the case.

1) Collective Habeas Corpus

Habeas corpus is the main instrument, in the Brazilian legal system, for the protection of the fundamental right of personal liberty. It ensures that no one can be imprisoned or prosecuted unlawfully. It also allows the Court to stop any form of illegal constraint arising from any public authority "whenever someone suffers or feels threatened with violence or coercion in their freedom of movement, due to illegality or abuse of power" (Federal Constitution, art. 5, LXVIII).

Brazilian Law, however, does not expressly provide for collective habeas corpus and, so far, it is grounded on a recent jurisprudence. The collective habeas corpus decision may benefit an undetermined number of people who fulfill or experience certain conditions. Brazilian Public Defenders’ Offices have relied, quite often, especially during the COVID-19 pandemic, on this important collective tool for the protection of fundamental rights.

Pre-trial detainees – bail waiver
In 2020, in a collective habeas corpus filed by the Public Defender of the State of Espírito Santo, the Superior Court of Justice\(^5\) issued an injunction determining the release of all pre-trial detainees, whose freedom depended only on the payment of bail.\(^6\) At first, the decision was binding only on the state of Espírito Santo. But due to an appeal presented by the Public Defender’s Office, the injunction was extended to all detainees in the entire country. One of the main grounds for the decision was the Covid-19 pandemic and prison overcrowding.

The decision also registered the necessary action of the Judiciary in light of social change, considering the great economic impact that the pandemic has had on increasing the unemployment rates, and decreasing or even extinguishing the income of many Brazilian citizens, which makes bails for people in need even more unreasonable.

Despite the order, in many cases, the release of detainees was not automatic. In most cases it was necessary to file an individual habeas corpus to ensure compliance with the decision of the Superior Court of Justice. However, the fact that there was already a decision issued by a Court with national jurisdiction almost always made the release of the beneficiaries successful in these individual cases.

This Precedent immediately became a landmark, mainly for procedural aspects, regarding the extension of an individual habeas corpus to all the Brazilian detainees in those same conditions but were not part in judicial process.

On this regard, the decision that extended the order to all detainees in the whole country pointed out that ruling in an individual process an issue that could be diluted in hundreds of habeas corpus would save time, effort, and resources. It also facilitates access to justice for vulnerable groups which, on the other hand, face a situation of inequality between those who are legally represented and those who are not.

\(^5\) In Portuguese: “Superior Tribunal de Justiça”. This is the Federal High Court immediately below the Federal Supreme Court, which is the Brazilian Constitutional Court.

\(^6\) Superior Tribunal de Justiça, Brazil. Habeas Corpus 568693 (in Portuguese): [https://processo.stj.jus.br/processo/revista/documento/mediado/?componente=MON&sequencial=108097115&tipo_documento=documento&num_registro=202000745230&data=20200031&tipo=0&formato=PDF](https://processo.stj.jus.br/processo/revista/documento/mediado/?componente=MON&sequencial=108097115&tipo_documento=documento&num_registro=202000745230&data=20200031&tipo=0&formato=PDF)
Provisional liberty – semi-open regime

At the beginning of the pandemic, the Court of Appeal of the State of Rio de Janeiro ruled that prisoners in a semi-open regime should remain free, in order to avoid bringing the virus to the (overcrowded) prison facilities. However, in October 2020, the Court ordered the return of all these people to prison. The Public Defender's Office in Rio de Janeiro filed a collective habeas corpus and obtained an injunction to extend the provisional liberty for 90 days, until the State Prison Authority put in practice an adequate plan for the safe return of these 3,000 people. It is unlikely that such a case would be successful if a solution had to be sought following the traditional logic of filing individual legal measures on a case-by-case basis. Moreover, this is the kind of case whose decision must be valid for the whole group, demanding a collective approach.7

Also in 2020, a survey conducted by the research department of the Public Defender's Office of the State of São Paulo indicated that more than 1,000 people sentenced for “simple” drug trafficking (without a record, violence nor participation in a criminal organization) were improperly imprisoned, as the law guaranteed their right to start serving their sentences in a semi-open regime. Using a collective habeas corpus, they obtained a decision of the Superior Court of Justice ordering that all these sentences should be corrected.8 It would be possible to achieve this same result through individual appeals in each of the legal proceedings. But the option of collective habeas corpus proved to be much more effective, faster, and less expensive.

2) Class Action

Police Lethality - Harm reduction policies

The state of Rio de Janeiro has a history of high rates of police lethality. According to official data produced by the Institute of Public Security of the State of Rio de Janeiro

7 Due to the spike in coronavirus cases (the “second wave”) in Brazil, the order was extended and is still valid (May 2021).
8https://www.stj.jus.br/sites/portalp/SiteAssets/documentos/noticias/08092020%20HABEAS%20CORPUS%20N%C2%BA%20596603.pdf
- ISP, since 2013, deaths caused by security agents in the state have shown a growing trend. However, the pace of the growth accelerated mainly from 2016.

![Graph](image)

**Figure 1. Historical series - Police lethality in the state of Rio de Janeiro (ISP / MPRJ).**

One of the reasons for this increase in police lethality - which mainly victimizes black and poor people – is the police raids in favelas (slums) to combat drug trafficking organizations. Throughout these years, there have been several cases of dead residents, including children, in addition to several reports of extra-legal arbitrary and summary executions, accusations that most of the time remain uninvestigated.

In 2018, the Public Defender's Office of the State of Rio de Janeiro filed a class action lawsuit against the state of Rio de Janeiro to impose the obligation of presenting a harm reduction plan in tackling human rights violations by the police in the Maré Favela Complex, which should necessarily contemplate: (a) the protection of children and adolescents, including maintaining the necessary conditions for school activities; (b) the protection of women against the gender-based violence perpetrated by state agents; (c) awareness-raising measures, so that the Civil and Military Police can confront institutional racism and comply with the protection of all residents’ human rights; (d) ensuring the mandatory presence of ambulances in all operations; (e) installing video and audio cameras and deploying satellite location systems (GPS) in police vehicles. This lawsuit was grounded on official data and many testimonies given by residents.
The State Court granted an injunction determining to the State to draw up a harm reduction plan for police operations carried out in a favela, as well as to take immediate measures to prevent violations of residents’ rights and regarding the accountability of the police. Despite of the partial adoption of some measures, the police have not effectively complied with this order, so far.

The strong mobilization of the residents’ associations, together with many other civil society organizations, opened a public debate about the mechanisms to control police raids, in order to reduce police lethality and guarantee the fundamental rights of the residents. This topic has gained even more relevance during the Covid-19 pandemic, when all residents should be confined to small houses in densely populated areas.

The State institutions are facing a deadlock in finding a solution, so the matter reached the Federal Supreme Court, in another type of collective lawsuit, as will be seen in the next section.

3) *Amicus curiae* (third parties) in unconstitutionality lawsuits before the Supreme Court

Despite the quarantine order due to the Covid-19 outbreak, the police department continued carrying out major operations for arresting drug dealers in the favelas of Rio de Janeiro, with massive use of force, armored cars, and even armored helicopters used as shooting platforms. During the clashes, there were many casualties among the residents, who were at home fulfilling the quarantine.

As the Government of the State of Rio de Janeiro was not being able to implement effective measures to protect the population in the favelas and considering that the police was not complying with the aforementioned injunction ruled by the State Court, a political party filed a lawsuit called “Argument of Non-compliance with the Fundamental Precept” (ADPF nº. 635⁹) before the Supreme Court¹⁰ against normative acts¹¹ and non-normative

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¹⁰ A small number of authorities and entities are entitled to file “unconstitutionality lawsuits” before the Brazilian Supreme Court.
ones issued by the Governor of the State of Rio de Janeiro, related to the increase in police lethality, especially in poor and African-descent majoritarian communities\textsuperscript{12}.

The main goal of the plaintiff is to impose on the Government of the State of Rio de Janeiro measures similar to those sought in the class action above mentioned. The Public Defender’s Office of the State of Rio de Janeiro and some NGOs requested and was admitted as \textit{amicus curiae} in this lawsuit before the Brazilian Supreme Court.

In June 2020, the Supreme Court Justice who was appointed as the case rapporteur granted part of the interlocutory relief requests of the plaintiff and issued an injunction determining the Government of the State of Rio de Janeiro (that is, the State Police) to restrict police raids in favelas during the Covid-19 pandemic, except for cases defined as “exceptional”, as well as to adopt all necessary precautions to protect the population from even more risks\textsuperscript{13}. While recognizing the great importance of the decision, the plaintiff appealed, claiming for the integral grant of all the interlocutory relief requested.

Since the Court ruling (through this provisional injunction), the number of deaths in shootouts in favelas has fallen. In the first month alone, deaths plummeted 72.50% and there was a 50% decrease in the number of injured, when compared to the average recorded since 2007, according to research data carried out by the “Grupo de Estudos dos Novos Ilegalismos” from Universidade Federal Fluminense. It means that more than 100 lives were spared\textsuperscript{14}. The drop was not followed by a rise in crime. In fact, property crimes were down by 40% and homicides by 48%. Researchers argue this shows that police operations are not reducing crime rates, but rather representing a high risk for the population\textsuperscript{15}\textsuperscript{16}.

Indeed, according to Professor Daniel Hirata, from Universidade Federal Fluminense, “police violence is one of the most serious and persistent public problems in

\textsuperscript{13} In August 2020, the plenary of the Supreme Court upheld the injunction of the Justice rapporteur.
\textsuperscript{14} According to the Public Defender Daniel Lozoya, in the Public Hearing held by the Supreme Court on May 2020.
\textsuperscript{15} https://www.bbc.com/news/world-latin-america-57013206
\textsuperscript{16} https://agenciabrasil.ebc.com.br/geral/noticia/2020-08/suspensao-de-operacoes-policiais-no-rio-reduz-mortes-em-mais-de-70
Rio de Janeiro. And actions in the area of public security based on police operations are part of this problem17.

The ceasefire did not last long. Since November 2020, the situation changed. The number of police operations increased and, therefore, the number of people killed by police officers soared again.

So far, the worst episode happened on May 6th, 2021, when the Civil Police carried out the most lethal operation in the history of Rio, with 28 deaths, including one police officer. The official goal of the operation was to execute 21 arrest warrants. It was the deadliest police operation ever conducted by the state police and is considered a landmark, not only because of the extreme brutality, but also because of the strong suspicious that it defied a decision of the Supreme Court18.

Accountability of the police forces19, structural racism, due process of law and compliance with judicial decisions, are some of the main issues currently being debated in Brazil. After the episode of May 6th, the Supreme Court scheduled a virtual trial to take place between May 21-28, 2021 in which the judges would decide on the plaintiff's appeal20.

On the first day of the trial, the Supreme Court Justice who is the case’s rapporteur released his opinion, granting all the requests of the plaintiffs, and ordering the state of Rio de Janeiro to prepare, within ninety days, a plan aimed at reducing police lethality and controlling human rights violations by the security forces, which contains objective measures, specific timelines and the forecast of the resources needed for its

17 Cited in Justice Edson Fachin’s opinion in ADPF 635: from the speech of Prof. Hirata in the Public Hearing held by the Supreme Court on May 2020.
18 “Rio de Janeiro’s deadliest police raid: On May 6th, the police stormed the favela, targeting one of the city’s largest drug gangs, known as the Red Command. Twenty-seven men were shot dead by the police and one police officer was killed. The police, politicians and some parts of the media called the operation a “surgical” success. Human rights activists, community leaders and residents of the favela have described it as a massacre and are now calling for justice: https://www.theguardian.com/world/audio/2021/may/20/inside-jacarezinho-favela-after-rio-de-janeiros-deadliest-police-raid.
20 This paper is being finalized, in compliance with the schedule set by the organizers of this Conference, on May 24, 2021, therefore before the date on which the closing of this judgment must occur.
implementation. The rapporteur also ordered a federal investigation on the police raid of May 6th.

4) Representation in individual appeals before the Supreme Courts (erga omnes effect)

Many efforts have been made along the last years to end the humiliating practice of strip-searching prison visitors, which involves nudity or manual contact with the intimate parts of the person being searched.

In the State of Rio de Janeiro, that practice was banned by a state law, enacted in 2017. Although, the Public Prosecutor’s Office and a state Congressman filed lawsuits of unconstitutionality on the matter. The State Court admitted the Public Defender’s Office as amicus curiae to support the complete abolishment of the practice.

At the core of the trial were the principles of protection of privacy and human dignity, conflicting with the principles of public security and public order. About this topic, an important survey carried out by the Public Defender’s Office of São Paulo, in 2012, found out that of 3,407,926 intimate searches, only 493 of them resulted in seizures, that is 0.014%. That research was presented before the Court, proving that the visitors were not substantially responsible for the entrance of forbidden items in prison facilities. In 2018, the majority of the State Court ruled to ban the strip-searches, considering it a medieval institutional violence and a violation of the principle of human dignity. The decision was binding only within the state of Rio de Janeiro.

As an aftermath of these judicial precedents, there was a debate about the illegality of the evidence obtained from the intimate search of visitors before they enter a prison. An individual case reached the Supreme Court21, which applied the regime of general repercussion, meaning that the final decision shall be binding for the whole country.

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21 Agravo em Recurso Extraordinário (Extraordinary Appeal to the Superior Court of Justice - ARE) 959620: http://portal.stf.jus.br/processos/detalhe.asp?incidente=4956054
In this case, the plaintiff is defended by the Public Defender’s Office of the State of Rio Grande do Sul. The opinion of the Supreme Court Justice who is the case’s rapporteur establishes that the vexing practice of intimate searches on visitors in establishments of compulsory segregation is prohibited, in any form – nakedness of visitors and the inspection of their body cavities are prohibited. Furthermore, it concludes that the evidence obtained from such searches is illicit and the absence of electronic and radioscopic equipment cannot be used as an excuse.

But another justice dissented, in order to admit the intimate search in exceptional cases, duly motivated, depending on the visitor’s agreement, which should only be carried out according to pre-established protocols by physicians of the same gender in case of invasive examination. The case is still pending on a final decision.

5) Petition to the International Human Rights System

An important case of collective defense of the prison population began in 2018, but it had a good part of its consequences during the pandemic. After the exhaustion of all individual domestic remedies in the domestic legal system, the Public Defender of the State of Rio de Janeiro forwarded a petition to the Inter-American Commission on Human Rights, denouncing and asking for measures, given the serious situation of overcrowding and inhuman and degrading conditions at Plácido de Sá Carvalho Prison, located in the Penitentiary Complex of Gericinó, in the city of Rio de Janeiro22.

After conducting inspections at the prison unit, the IACHR issued a Resolution prohibiting the admission of new prisoners23. In addition, it determined the double counting of each day of deprivation of liberty spent inside the facility, as a way of compensating for the degrading situation suffered.

Such a decision constituted an unprecedented scenario in Brazil and, until very recently, it had not yet been fully complied with by the Brazilian state.

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22 See: https://summa.cejil.org/en/entity/2wk41gnou8qnwikhwtiq9f6r.
Moreover, in a recent decision in an individual habeas corpus, the Superior Court of Justice granted the right to double counting of the entire imprisonment period of a man at Instituto Penal Plácido de Sá Carvalho.

In addition to being a leading case on the need for full application of the IACHR Resolution by the Brazilian state, the Superior Court of Justice also stressed – more emphatically than usual – the importance of the internal enforcement of international human rights law:

"National judges must act as inter-American judges and establish a dialogue between domestic law and international human rights law, to actually lessen violations and shorten international demands."

From that case, all sentences must be reviewed, to fully apply the double count of the jail time served at Instituto Penal Plácido de Sá Carvalho.

Conclusion

The cases reported above are just a sample of a much larger universe of collective lawsuits in which the Public Defender’s Offices in Brazil are plaintiff, third party and despite acting also in individual cases as a representative of the plaintiff or of the defendant, under the regime of general repercussion (erga omnes effect). Nevertheless, this is a recent experience and there is a lot to be learned and explored.

Cases like these are not always resolved with the outcome of the trial. Often, there are difficulties in enforcing judicial decisions or even setbacks in the implementation of the legally guaranteed rights. In general, it is a work in progress that demands more than one legal action, as well as the use of other initiatives, such as the sensibilization of the public opinion, advocacy before the legislative and executive power, among other actions.

Finally, some of the main lessons learned shall be highlighted:

1. Collective lawsuits must be used carefully and strategically, being previously planned and discussed. In certain cases, it is only through collective actions that it is possible to
effectively secure rights. In others, it is preferable to seek judicial precedents in individual
lawsuits, until the jurisprudence is more favorable to decide on collective actions;

(2) the importance of engagement with other social actors, especially with the entities
representing the people whose interests are being defended, is crucial. These
partnerships are of utmost importance as they permit a better understanding of the matter
and allow seeking appropriate solutions not only from a legal point of view, but also from
a practical one, to bring concrete relief and to cease or repair the violations of rights;

(3) it is recommended and necessary joining forces with other bodies and entities to add
a multidisciplinary perspective, such as experts and scholars from different areas of
knowledge, is also paramount;

(4) beyond solid and strong legal grounds, data and evidence-based arguments are of
substantial importance, especially when it is a hard case in which the Court has to
weigh principles enshrined in the Constitution.
Strategies for legal aid at early stages of criminal justice in India: the framework and implementation challenges during pandemic

Ashok Kumar Jain¹ & Sunil Chauhan²

1. Introduction:

The criminal justice system in India recognises the right to legal representation at all stages of the criminal justice to accused as part of a fair trial³. The Constitutional⁴ and procedural law⁵ protections to accused start from the early stages of a criminal proceeding. These procedural safeguards are necessary not only for protecting the liberty of a person, but also to ensure a fair trial for him. However, for translating these safeguards into action a robust and effective legal aid system is required, so that a person in custody is not deprived of his rights because of economic or other disabilities. Legal services authorities in India⁶ implement the Constitutional vision of access to justice, and accordingly devise various policies and programmes, focusing on providing timely and effective legal aid at all stages of criminal justice. Legal Services to persons in custody⁷ have always remained one of the focus areas of legal services authorities in the country. This is imperative as majority of arrested persons⁸, especially those from the vulnerable and marginalised communities, cannot navigate the criminal justice system. Many are ignorant of the importance of legal assistance and cannot afford engagement of lawyers so, in the said scenario, it is important to provide them timely and effective legal aid.

¹ Member Secretary, National Legal Services Authority (www.nalsa.gov.in)
² Worked as Director, National Legal Services Authority
³ In Mohd. Ajmal Amir Kasab V. State Of Maharashtra (2012) 9 SCC 1. , the Supreme Court of India held that accused has right to legal assistance. In M. H. Hoskot v. State of Maharashtra (1978) 3 SCC 544, right to free legal Services was recognised as an essential component of procedural justice.
⁴ Article 22 , Constitution of India provides for a right of the arrested person to be produced before the magistrate within twenty four hours of arrest. It also provides him a right to consult a lawyer of his choice.
⁵ Code of Criminal Procedure, 1973 provides various rights and protections to accused. Section 41 D provides to the arrested person a right to consult a lawyer.
⁶ Legal Services Authorities Act,1987 has established legal Services Authorities in India
⁷ All persons in custody are entitled to free legal aid under section 12 of the legal Services Authorities Act , 1987 irrespective of their income
⁸ Around 41 percent of prisoners are not educated even upto 10th Standard ( Prisons Statistics of India:2019) https://ncrb.gov.in/
In the year 2019, around 52,13,404 persons were arrested across the country, and 18,86,092 inmates were admitted in various jails in the country. This means that around 36% of the arrested persons were admitted in the jails, and 64% got released at the initial stage. It is possible that many arrests amongst the 64% were unnecessary and could have been avoided. The Supreme Court of India had held way back in 1994 that the existence of the power to arrest is one thing, and the justification for the exercise of it is quite another. It further held that “police officer must be able to justify the arrest apart from his power to do so”\textsuperscript{11}. In its 152\textsuperscript{nd}, 154\textsuperscript{th} and 177\textsuperscript{th} reports\textsuperscript{12} the Law Commission of India also observed the need to amend the provisions relating to arrest. Subsequently, the pre-arrest stage was introduced with the induction of Section 41 A\textsuperscript{13} in the Code of Criminal Procedure, 1973. However, still the cases of unnecessary arrests are often noticed. Legal assistance to suspects at the early stages can, not only avoid unnecessary arrests, but also provide required legal guidance, ensuring protections provided by law.

The paper outlines the salient features of the legal aid delivery mechanism in India that seeks to ensure legal assistance to persons during questioning, arrest and remand stage. It explores the right to legal representation, the responsibility of legal services authorities and their strategy to ensure the right. It also lays down the extent of implementation and current challenges faced.

2. Early stages of criminal justice in India:

The early stages of criminal justice are pre-arrest, arrest and remand stages. Pre-Arrest stage was incorporated in the Criminal Procedure Code, 1973 (Cr.P.C) under section 41A\textsuperscript{14} which spells out the procedure for interrogation of suspects at pre-arrest stage. When a person is not required to be arrested, he is summoned or a notice is issued by the police for questioning. He is called to the police station as a suspect. At this stage, appropriate legal assistance can result in avoiding unnecessary arrest of a suspect. Such legal assistance also ensure that a person get apprised of the allegations against him. The Supreme Court of India in \textit{Arnesh Kumar}
**Vs State of Bihar**\(^{15}\) directed to observe the mandate of Section 41A CrPC so that unnecessary arrests do not take place, and magistrates also do not remand the arrested person to custody unnecessarily.

Arrest stage at police station arises when a person is arrested but is yet to be produced before a magistrate. At this stage, arrested person is in a police Station. At this juncture, timely and effective legal aid result in actualization of the safeguards provided to arrested persons. In bailable offences, bail can be applied in the police station itself. The family members of an arrested person can be intimated. Legal assistance at this stage also results in protecting the arrested person from torture, and also ensures his timely production before the Magistrate. Arrested person has a right to consult a lawyer for providing him legal assistance\(^{16}\) at the police station. However, at present, the law does not provide that an investigation cannot start unless a lawyer represents an arrested person.

Remand stage is an important stage when an arrested person is produced before the Magistrate for seeking further custody\(^{17}\). Legal representation at this stage is mandatory. No remand can be given by the Magistrate unless an arrested person is represented by a counsel\(^{18}\). At this stage, illegal arrests can be challenged, bail applications can be filed and unnecessary remanding of an arrested person to police or judicial custody can be avoided. At this stage, police or judicial custody\(^{19}\) is sought by the prosecution. The custody is sought if the investigation cannot be completed within 24 hours of arrest\(^{20}\).

Thus, the pre-arrest, arrest and remand stages constitute vital pre-trial stages, where prompt and effective legal representation can impact decisions pertaining to the liberty of an individual. The presence of the lawyer can not only ensure protection of fair trial rights of the accused person, but also facilitate the court to make an informed decision as to the need to further detain the person or not.

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\(^{15}\) (2014) 8 SCC 273

\(^{16}\) Section 41D of Code of Criminal Procedure, 1973

\(^{17}\) Arrested person is to be produced before a magistrate within 24 hours of his arrest. Article 22 of Constitution of India, and section 76 of Code of Criminal procedure, 1973

\(^{18}\) Mohd. Ajmal Amir Kasab V. State Of Maharashtra (2012) 9 SCC 1

\(^{19}\) Section 167 Cr.P.C. Police custody cannot be sought for a maximum period of 15 days

\(^{20}\) Article-22 (2) of the Constitution of India stipulates that the police official making an arrest must produce the arrested person before the Magistrate within 24 hours. (Sections 55 and 76 of Cr.P.C also mandate for production of accused.)
3. Right to Legal assistance at early stages of criminal justice

The Indian Courts have contributed immensely to strengthening the right of the accused to have legal assistance at early stages of criminal justice. The judgements given by the Supreme Court of India have filled the legislative vacuum on the same. In *Sheela Barse v State of Maharashtra*\(^{21}\) the Supreme Court of India held that “whenever a person is arrested by the police and taken to the police lock up, the police will immediately give an intimation of the fact of such arrest to the nearest Legal Aid Committee and such Legal Aid Committee will take immediate steps for the purpose of providing legal assistance to the arrested person at State cost provided he is willing to accept such legal assistance.” This was an important direction, facilitating providing of legal assistance at the police station. The mandate of reporting by the police to the Legal Services Authority is not in any legislation. Thus, the direction to the police officers to give intimation of arrested persons filled up the legislative vacuum. In *Nandini Sathpaty v P.L Dani*\(^{22}\), the Supreme Court of India held that “it is fundamental to the rule of law that the services of a lawyer shall be available for consultation to any accused person under circumstances of near-custodial interrogation”. This decision has plugged the legislative vacuum as the suspects called to the police station are in circumstances of near-custodial interrogation or in custodial settings, and hence can avail legal assistance. In *D.K. Basu v. State of West Bengal*\(^{23}\), the Supreme Court held that the arrestee may be permitted to meet his lawyer during interrogation, though not throughout the interrogation.

The Constitution of India itself contains provision\(^{24}\) as to the right of an arrestee to consult a legal practitioner of his choice. Section 41D\(^{25}\) of Code of Criminal Procedure confers a right on an arrested person to meet an advocate of his choice during interrogation, though not throughout interrogation. At remand stage also, presence of a lawyer is mandatory.\(^{26}\)

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21 AIR 1983 SC 378  
22 AIR 1978 SC 1025  
23 AIR 1997 SC 610  
24 Article 22(1) of the Constitution: provides that “No person who is arrested shall be detained in custody without being informed, as soon as may be, of the grounds for such arrest nor shall he be denied the right to consult, and to be defended by, a legal practitioner of his choice”.  
25 Inducted in 2009 by way of an amendment.  
26 Supra note 1
4. Role of Legal Services Authorities

Article 39A\textsuperscript{27} of the Constitution of India enables the provision of free legal aid, and in this regard, casts a duty on the State to enact suitable legislation for the same so that justice is not denied to any citizen because of economic or any other disability. In pursuance thereof, the Legal Services Authorities Act, containing provisions for free legal aid, was enacted in the year 1987. This is the prime legislation containing the entire framework of State-sponsored legal aid system in India. It provides for the establishment of Legal Services Authorities at the National, State, District and Taluka level, and accordingly, the envisaged framework of Legal Services Authorities has been established across the country. The three NALSA’s Regulations promulgated in the years 2009, 2010 and 2011 provide the procedure and the implementation strategies for giving effect to the functions prescribed by Legal Services Authorities Act for achieving the constitutional vision of access to justice for all. These Regulations along with the Legal Services Authorities Act forms the anvil on which the entire edifice of legal aid structure rests. Legal Services Authorities have presence across the country, and work independent of government\textsuperscript{28}. These Authorities work as a unified structure with National Legal Services Authority at the apex.

Legal Services Authorities are mandated to provide legal services to all the persons in custody.\textsuperscript{29} Since its very inception, various schemes and mechanisms have been adopted by NALSA to ensure access to legal aid for persons in custody. In 1998, NALSA adopted a Model Scheme for Legal Aid Counsel in all Courts of Magistrate, which mandated the appointment of remand and bail lawyers (also known as legal aid counsels) to be attached to each magistrate court. These lawyers were expected to be present during remand hours in their designated courts to oppose remand, apply for bail and file other applications for those who need a legal aid lawyer. In 2015, NALSA amended the NALSA (Legal Services Clinics) Regulations 2011, to enable the constitution of legal aid clinics in prisons. Subsequently, in 2016 NALSA prepared the Standards Operating Procedures for

\textsuperscript{27} Introduced by 42\textsuperscript{nd} amendment of the Constitution of India.

\textsuperscript{28} Many public interest litigations have been filed by Legal Services Authorities against the government for redressing breach of rights of various marginalised sections.

\textsuperscript{29} Sec 12(g) Legal Services Authorities Act 1987.
Representation of Persons in Custody to streamline the functioning of prison legal aid clinics.

In 2019, NALSA sought to streamline and strengthen the functioning of remand lawyers, and developed a protocol - *Early Access to Justice at the Pre-Arrest, Arrest and Remand Stage* for providing legal assistance to suspects and arrestees. This protocol identifies and elaborates the processes for providing effective legal assistance at early stages of legal assistance. As suspects and arrested persons come within the category of “persons in custody”, they are entitled to free legal assistance as per section 12(g) of the Legal Services Authorities Act 1987, irrespective of their income.

Legal Services Authorities through its workforce of panel lawyers and para-legal volunteers have the mandate to spread legal awareness\(^{30}\) about the rights of the suspects and arrestees to avail legal assistance, and availability of free legal aid. It has the role to conduct sensitization programmes for police officers, and train its panel lawyers in providing effective legal aid to suspects and arrestees in police stations and courts. Co-ordination is made with the police authorities for implementing the strategy of timely intimation by police to legal aid lawyers and legal services authorities in case of suspects and arrested persons. The legal services authorities have the capacities to reach out to each police station across the country, and to provide legal representation in courts at every level at early stages of criminal justice. This is for the reason as their offices are located in all the districts having judicial courts, and their workforce consisting of panel lawyers\(^{31}\) and para-legal volunteers\(^{32}\) is also present in every district of the country.

5. **The strategy for providing legal aid at early stages**

National Legal Services Authority is following a five- point strategy for effective implementation of its protocol for providing legal assistance at early stages of criminal justice. The five-point strategy consist of the following:

(a) Spreading awareness amongst people about procedural safeguards and right to legal assistance at Pre-arrest, Arrest and Remand stages.

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\(^{30}\) Section 4, Legal Services Authorities Act,1987  
\(^{31}\) 48,377 lawyers are empanelled with the legal services Authorities  
\(^{32}\) 49,285 para legal volunteers are enrolled with legal services Authorities
(b) Training of legal aid lawyers for rendering timely and effective legal assistance at early stages of criminal justice.

(c) Sensitization of police officers about the right to legal assistance at police station.

(d) Ensuring quality of legal assistance, keeping in view the performance indicators.

(e) Deputing male and female lawyers as per the perceived requirement, and sharing their contact details in advance with police stations and courts.

Awareness is spread about the procedural safeguards available to suspects and arrested persons in a systematic manner by Legal Services Authorities. Various booklets and brochures are prepared, printed and distributed amongst masses during legal awareness programmes. Legal aid lawyers are primarily deputed as resource persons in the legal awareness programmes. The booklets and pamphlets are prepared in easy-to-understand language and are translated into vernacular. Short video films are also prepared to spread awareness. The protocol of NALSA also spells out the various rights of suspects and arrestees, and advises for its inclusion in such awareness pamphlets etc. Every year thousands of such legal awareness programmes are organised. Awareness is also spread through print and electronic media including social media.

NALSA’s protocol also spells out the duties of the lawyers. The protocol spells out the various steps to be taken up by duty lawyers at pre-arrest, arrest and remand stages. These are also considered by the monitoring and mentoring committees as performance standards. These steps are the processes which have been formulated keeping in view the overarching objective of rendering quality legal aid. Legal Services Authorities conduct training programmes for their lawyers deputed for rendering legal assistance to suspects and arrestees with an objective to train them on the processes prescribed under the protocol and also legal intricacies.

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33 126,541 legal awareness camps were held in 2020-2021
34 Social media tools were increasingly used during pandemic
35 Points nos 4.1.3, 4.2.3 and 4.3.2 of the protocol spells out the duties of lawyers at different stages of criminal justice.
36 Ibid
37 1471 training programmes were conducted in the year 2020-2021
The processes\textsuperscript{38} prescribed for duty lawyers at various stages of early justice are primarily the following:

- **Pre-arrest stage:** At the pre-arrest stage, the duty lawyer shall apprise himself of the allegations against the person called for interrogation. He shall explain to the accused the alleged offence and the matter for which the person has been called for interrogation. He shall provide legal advice and assistance as sought and required in the situation. He shall appropriately advice the police, if it proceeds to arrest the suspect unnecessarily and without any basis. In this regard, he shall put the position of law before police officials keeping in view the circumstance of the case. In case the suspect is a foreigner, the duty lawyer shall inform the police to intimate the concerned High Commission, Embassy/Consulate. In case, the suspect does not understand the language then arrangement is to be made for an interpreter, the expenses of which may be borne by the DLSA from Grants in Aid. Legal aid lawyer shall ensure that women are not called to the police station or to any place other than their place of residence for questioning. In case a child has been called to the Police Station, the lawyer has to take necessary steps to safeguard his rights as provided under Juvenile Justice (Care and Protection Act) 2015.

- **Arrest stage:** At the stage of arrest, a duty lawyer shall apprise himself of the allegations against the accused and the grounds of arrest. He shall explain to the arrestee, the alleged offence and the grounds of arrest. In case of bailable offences, duty lawyer has to take necessary steps for securing the bail of the arrestee at the police station itself. Wherever necessary and feasible, family members or friends of the arrestee are to be contacted by duty lawyers through PLVs for this purpose. In case the arrestee is a foreigner, the duty lawyer is required to inform the police to intimate the High Commission, Embassy/Consulate. He is required to ensure that women arrestees are detained separately from males and that female police officer remains present during interrogation. In case arrested persons apparently appears to be a child, the lawyer is required to take necessary steps to safeguard his rights as provided under Juvenile Justice (Care and Protection Act) 2015.

\textsuperscript{38} Supra note 33
• **Remand stage:** At the remand stage, a duty lawyer shall obtain a copy of the application moved by the prosecution for seeking the remand of an accused. If prosecution does not supply the copy of an application, request is to be made to the concerned court for providing the copy of application for effective representation of the accused. Remand Advocate is mandated in every case, before representing the arrestee, to interact with the arrestee. This is done with an objective to inform an arrestee about the allegations against him and the grounds being put by the prosecution for seeking remand. It may happen that the police has arrested a person unnecessarily in a routine manner. In such a scenario, keeping in view section 41 A CrPC and other provisions, such arrest is required to be challenged by a Remand Advocate before the court. Remand advocate shall file bail applications in appropriate cases. Arrestee is to be also apprised of the bail application and the next date if the matter is postponed by the court for hearing arguments. In case of grant of bail, the Remand Advocate is required to assist the arrestee in furnishing of bail bonds. In case the arrestee or the lawyer does not understand the language in which the documents have been prepared by the police, submission is to be made before the court to provide the translated documents. If a person in judicial custody is neither produced in person nor through video conferencing on a subsequent remand then the submission is to be made before the court to give remand only on production. Whenever a person of unsound mind is produced for a remand, the Remand Lawyer shall take steps in accordance with chapter XXV of Code of Criminal Procedure of 1973. Submission for bail of such person is to be made by a panel lawyer in accordance with section 330 of the Code of Criminal Procedure.

Thus, the processes prescribed by NALSA also take care of the situations where the suspects and arrested persons are suffering from disabilities or are unable to understand language. The processes also aim at equipping suspects and arrestees about information relating to the accusations against them and about the safeguards available under the law.

Legal Services Authorities can act for providing legal assistance only when intimation is received about suspects and arrested persons from the police stations or from the suspects/arrestees. Most of the State Legal Services Authorities
reported about lack of timely and regular information about suspects and arrested persons from the police stations. In view of the same, Legal Services Authorities conduct sensitization programmes for police officials. In the protocol developed by NALSA, it is also mentioned that State Legal Services shall co-ordinate with the police department to work out the modalities.

The duty roster of panel lawyers is also prepared in advance and sent to police stations and courts by the legal services authorities.

6. Implementation Status

Legal Services Authorities across the country have started implementing the NALSA’s protocol for providing legal assistance at early stages of criminal justice. Although it is a recent initiative, but the results have started coming. In the year 2020, 36,233 bail applications were filed by legal aid counsels, and out of those 20,825 were allowed. 76087 were assisted at remand stage before the courts. Apart from this, 4313 suspects and 5031 arrested persons were provided legal assistance in the police stations.

The Legal Services Authorities through legal awareness programmes are endeavouring to increase awareness amongst people about the availability of free legal aid in police stations and courts. However, co-ordination from the side of police is also required so that timely information is received about the suspects and the arrested persons from the police stations. In one of the States, State Legal Services Authority has prepared a short film of about four minutes depicting the rights of suspects and arrested. The said short film has been circulated to all the police stations in the State, and it is shown to the suspects and arrested persons in the police stations so that they can make informed decisions for seeking legal assistance. Police officers have been sensitized to show the short film to suspects and arrested persons.

In many states, trainings and workshops have been organised with the police department, and joint standard operating procedures are being developed by legal services authorities and police departments to enable the effective implementation of the protocol.

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39 Point 3 of Nalsā’s protocol for providing legal assistance at early stages of criminal justice
40 In 2020-21, around 126,541 legal awareness programmes were held, and in many of them awareness was spread about the availability of free legal aid
41 Many State legal Services Authorities such as Bihar and Chhattisgarh have reported about not receiving information about suspects and arrestees from police stations
42 Odhisa State legal Services Authority has prepared such a film, and has circulated it to all the police stations
The protocol envisions that legal assistance to suspects and arrestees is also provided beyond office working hours, and accordingly the lawyers are also deputed for providing assistance beyond office hours.

Apart from the above, there are other methodologies being adopted by the State Legal Services Authorities which help in implementing NALSA’s protocol for providing legal aid at early stages of legal assistance with greater effectiveness. To further ensure that no person remains unrepresented during their trial, Legal Services Clinics are established in almost all the prisons in India. Through these clinics, legal representation needs of all prisoners, including pre-trial prisoners are identified and appropriate legal assistance is provided to them. There are also Under-Trial Review Committees constituted in each district of the country. These committees also identify pre-trial prisoners who are eligible for release, and accordingly, provide feedback to the State Legal Services Authorities for providing legal assistance to enable their release. Legal aid functionaries also visit prisons every month, and identify pre-trial prisoners requiring legal aid.

7. Challenges & the way forward

The emphasis on providing legal assistance at early stages of criminal justice has received impetus with the adoption of NALSA Protocol for providing such assistance at pre-arrest and arrest stage. However, such legal assistance in the police stations is still to pick up the required momentum. In this regard, some of the challenges which need to be identified and plugged consists of a timely information of the suspects and arrested persons by the police officers to the District Legal Services Authorities. There are various reasons to such lack of timely intimation. Some of the reasons are non-awareness on the part of the police officers, lack of information on the part of suspects and arrested person about the availability of the free legal services and the right to avail legal assistance in the police stations or at the remand stage in courts and lack of legislation mandating presence of a lawyer before starting an investigation. These are some of the reasons which need to be plugged for providing the requisite momentum to the strategy formulated by NALSA. These can be plugged by taking several steps such as structured sensitization programmes for police officials,

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43 1076 legal services Clinics are in prisons across the country (source: NALSA: at a glance)
44 Around 2000 meetings per quarter are held by Undertrial Review Committees in various States of the Country (NALSA at a glance)
awareness videos reflecting the rights of suspects and arrestees and putting hoardings in police stations and courts, reflecting right to legal aid and also the contact details of Legal Services Authorities.

Apart from this, Monitoring and Mentoring committees\(^\text{45}\), mandated to ensure quality of legal services, need to be strengthened to monitor legal assistance at early stages of criminal justice. At present, these Committees are primarily focusing on legal aid cases pending in the courts. NALSA's Protocol clearly specifies the performance standards i.e. the processes to be followed by duty lawyers while rendering legal assistance at early stages of criminal justice. The Monitoring and Mentoring committee can monitor legal assistance at early stages on such prescribed performance standards. Similarly, they can mentor the duty lawyers on the various aspects to ensure quality legal aid.

During survey, it was also noticed that in hilly areas duty lawyers faced transportation problems, and moreover in hilly and remote areas, very few lawyers are available\(^\text{46}\). Most of the States do not provide transport allowance. These challenges may be tackled by Legal Services Authorities by providing transport allowance to duty lawyers, and in remote areas legal aid vehicles\(^\text{47}\) may be used.

Modalities need to be worked out with the police officials in the States where intimations from police officials about suspects and arrested persons are minimum, and where arrests are quite high\(^\text{48}\). This will help in correcting the lapses on the part of police officials in timely reporting about suspects and arrested persons.

These challenges further increased amid the pandemic and subsequent lockdowns and restrictions imposed across the country. During this period, number of persons were also arrested for lockdown violations by the police. However, in police stations, particularly during lockdown, the only mode available was interaction through telephone which did not prove to be effective on some occasions. Legal Services Authorities got difficulties to know as to how many suspects and arrested persons were in the police stations and how many of them took informed decisions not to avail free

\(^{45}\) **NALSA (Free and Competent Legal Services) Regulations 2010** provides for constitution of Monitoring and Mentoring Committees

\(^{46}\) Manipur and Nagaland reported such problems

\(^{47}\) Legal Services Authorities have 84 vehicles in various States across the country. (Source: NALSA at a glance)

\(^{48}\) Uttar Pradesh, Madhya Pradesh, Bihar, West Bengal and Maharashtra have 52% of the undertrials in India( NCRB Prisons data 2019)
legal aid. This was further compounded by the fact that legal aid helplines in remote areas quite frequently became non-functional due to technical issues. Similarly, communication with pre-trial prisoners was also difficult to establish during the initial phase. Though in many places this was resolved by Legal Services Authorities by making use of video conferencing. Co-ordination was done with the prison Authorities, and accordingly Video conferencing was facilitated through the video conferencing rooms located in Judicial Complexes.

Further, monitoring of legal assistance also became difficult. This was sought to be tackled by the Secretaries of District Legal Services Authorities by personally taking inputs from the duty lawyers. However, it was done at very few places and, primarily data remained as the only parameter for assessing the performance.

The pandemic, and subsequent restrictions made it difficult for lawyers to visit their clients at police stations and prisons. Further, courts functioning was also impacted with only urgent hearings being undertaken, thus impacting the pace of justice deliver overall. This period was utilized by the Legal Services Authorities in conducting capacity building programmes for legal aid lawyers on digital platforms⁴⁹.

In the future, Legal Services Authorities need to take steps for strengthening the implementation framework. The periodical reviews by NALSA as well as SLSAs can strengthen the implementation processes, and result in protecting the rights of suspects and arrested persons.

While there are challenges, which have been further exacerbated by the pandemic, efforts are on-going to identify and address these challenges in a sustained manner. Future strategies to effectuate the implementation of the protocol, include frequent consultations among legal services authorities for addressing gaps and sharing experiences; strengthened documentation and reporting on assistance provided during the early stages; enhanced capacities of legal service providers on rights of suspects and accused; improved coordination between legal services authorities and police departments through joint trainings and workshops, and; improved monitoring over services provided.

⁴⁹ In 2020, around 10,563 webinars were conducted by Legal Services Authorities across the country, and many webinars pertained to training programmes. (Nalsa’s statistical snapshot:2020)
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Integrated-Rights Practice and partnerships with judicial services: towards a socio-legal practice?

S.Gibens¹, J. Boxstaens² & P. Vereecke³

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Introduction

In December 2018, the Flemish government decided to launch a project at the Palace of Justice Antwerp. The objective was to organise an integrated court registry, a single counter where all the documents of the various courts and divisions can be filed and inspected. Citizens often have questions but cannot always find their way around the Palace of Justice easily. That is why the idea of creating a common reception for social and legal matters at the Palace of Justice came into being. The project was initiated in May 2019 but gained momentum in September 2019. The project was initially referred to as ‘GBO-Vlinderpaleis’⁴ (where GBO stands for Geïntegreerd Breed Onthaal, i.e. Integrated-Rights Practice (IGR) and Vlinderpaleis is a nickname for the Palace of Justice Antwerp). Financed with funds from the Flemish Community, the project also included an evaluation study. Below, we discuss the general context, problem definition, methodology and results of this study.

1 General context

To explain the general context, we will first examine a number of legal frameworks which also form the basis of the various processes that are part of the GBO-Vlinderpaleis (hereinafter: GBO) project. This concerns the GBO, primary legal assistance and the powers of administration vested in the courts.

With the adoption of the revised Decree on Local Social Policy (Decreet betreffende het lokaal sociaal beleid) (2018), the Flemish government wants to focus on creating a

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⁴ In the meantime, the project has been rechristened ‘Welzijnsonthaal Vlinderpaleis’ (Welfare Reception – Palace of Justice Antwerp).
strong local basis for social policy. One of the pillars of the Decree is the organisation of a GBO partnership consisting of, at least, the local Public Centre for Social Welfare (hereinafter: OCMW), Centre for General Welfare Work (hereinafter: CAW) and Social Welfare Service of the health insurance funds (hereinafter: DMW)\(^5\) (Boost et al., 2018).

Research (Gibens, 2018) as well as the rounds of consultations organised in the context of the Proposal for a Decree on the Houses of Justice and Primary Legal Assistance (Voorstel van decreet houdende de justitiehuizen en de juridische eerstelijnsbijstand) confirm the need within the field for a holistic, integrated and welfare-oriented approach for more accessible primary support (Van Leuvenhaege, 2016a & 2016b; Serrien, 2018). The policy decision of former Minister of Welfare Vandeurzen is consistent with the above-mentioned needs. Following the transfer of primary legal assistance responsibilities to the Communities, he defined two main focus areas for Flemish policy: on the one hand, a continuation of the services, and on the other hand, more cooperation with welfare services and coordination with secondary legal assistance (Vandeurzen, 2014). In addition, the Minister emphasised the need for clear quality criteria (Vandeurzen, 2015; Gibens & Hubeau, 2016) and suggested that efforts should be made to ensure a clear reception process, targeted referrals and multidisciplinary collaboration (Vandeurzen, 2016). To bring about this collaboration, the Minister linked primary legal assistance to the GBO. By doing this, the Minister acknowledged the preventive function of primary legal assistance. Timely information and referral to alternative forms of conflict management prevents escalation. The Minister drew attention to the need for monitoring in order to assess the reach and quality of primary legal assistance. The new Decree on the Houses of Justice and Primary Legal Assistance of 26 April 2019 lays down the basis for this integrated and welfare-oriented approach. The implementation decrees have been adopted in draft form but have not yet been published at the time of writing this report.

At the federal level, the reform of the judiciary promises more autonomous powers of administration for the magistracy and a greater degree of self-organisation. Although

\(^5\) OCMW: Openbaar Centrum voor Maatschappelijk Welzijn; CAW: Centrum Algemeen Welzijnswerk; DMW: Dienst Maatschappelijk Werk.
this was not laid down by law, the various courts in the Palace of Justice Antwerp decided to put forward the idea of a joint court registry. This démarche fits into the framework of the plan for a ‘Court of the Future’ (Gibens et al., 2019). As part of this plan, the former Minister of Justice Geens aimed to introduce a system for the electronic consultation of files (Geens, 2017). A problem that arises in this context is that citizens cannot always approach the court registry for advice. The basis for this problem lies in Article 297 of the Judicial Code (Gerechtelijk Wetboek). This Article states the following: “The members of the courts, tribunals, public prosecutors’ offices and court registries may not orally or in writing conduct the defence of the parties and may not grant them a consultation.” The objective of this Article is to indicate an incompatibility between the role of a court clerk and that of a lawyer. This objective is based on the independence of the members of the courts, tribunals, public prosecutors’ offices and court registries (Cass. 29 November 1972, Belgian legal journal Pasicrisie Belge (Pas.) 1973, 310), and therefore the intention is to avoid compromising this impartiality by giving advice or granting consultations. However, Article 297 of the Judicial Code does not exclude the possibility of providing information of a procedural nature (Erdman & De Leval, 2004). As a result, litigants come up, on the one hand, against the legally enshrined limited mandate of the court registries, and on the other hand, the strictly legal interpretation of the scope of primary legal assistance. But the reality of people’s lives cannot be divided into domains or into strictly demarcated and purely legal mandates. Legal problems are always anchored within a social context. Therefore, it is essential to adopt a generalist approach to solving the socio-legal problems faced by people. Kuosmanen & Starke (2011) and Blom (2004) state that a generalist approach must start from the needs of the client that manifest themselves in the various life domains, and that organisations can facilitate this by improving internal communication and entering into partnerships with other organisations. In this way, appropriate and integrated assistance or services can be offered in the form of meaningful interventions. The GBO can make the difference in this area by serving as a bridge between the various disciplines and areas of expertise.

2 Problem definition
The above implies that a number of processes converge within the GBO project: (1) the roll-out of the GBO within a judicial context; (2) the implementation of the new provisions on primary legal assistance that have been established by decree and (3) the process relating to the proposed court registry as part of the federal ‘Court of the Future’ plan.

The intersection of these processes gives rise to the need for a socio-legal practice. We define a socio-legal practice as an area within legal and social assistance where policy, professionals and users, based on their logic and rationality, conceive of practices designed to address the socio-legal problems faced by people on a daily basis (Gibens, 2018).

In the GBO project, the partnership established by decree (OCMW, CAW, DMW) is extended to include a number of actors active within the specific judicial context: courts, public prosecutor’s office, lawyers, court registry, etc. This makes the task of setting up the proposed collaboration more complex, and even more so because the various change processes overlap with one another. In accordance with the functions of the GBO established by decree, the general objective of the project can be described as a focused effort to ensure accessible assistance and services and address the issue of inadequate protection. To achieve this objective, efforts are to be focused on setting up a partnership between the various actors involved in the field.

As stated in the introduction, a research component was also added to the GBO project. Inspired by the objectives of the GBO, as established by decree, the general research question was outlined as follows: does the new GBO partnership make it easier to access assistance and services and are the rights of clients adequately explored and implemented? In the light of this question regarding the effectiveness of the project, we set up our research design as an evaluation study based on (1) a broad view of effectiveness and evaluation (inter alia, Boost et al., 2017); (2) critical realism as an underlying philosophy of science paradigm (inter alia, Westhorpe, 2014) and (3) the CAIMeR model (Blom & Morèn, 2010) as a conceptual framework.

3 Methodology
The question regarding effectiveness is sometimes equated with the question: What works? In our opinion, this – apparently simple – question does not do justice to the complexity of social work practices. That is why we have broadened the question to: What works, for whom, why and under what circumstances? This nuanced question reveals our broad view on the effectiveness of interventions and practices and how to evaluate them. It implies that we not only take stock of what works but also look at how and why certain interventions lead to particular outcomes within a specific context (Boost et al., 2017).

To answer the above-mentioned research questions, we have referred to the CAIMeR model (Blom & Morèn, 2010; Boost et al., 2018b) to substantiate the ways in which the results of social work practices arise from specific interventions and take shape within specific contextual settings. This model has been applied in earlier research and it also provides a framework for taking into consideration other processes outside of the GBO.

The CAIMeR model offers a template for systematically unravelling social work practices into five essential components: Context, Actors, Interventions, Mechanisms and Results. In their re-conceptualisation of the model in the context of the evaluation of local social policy, Boost et al. (2017) suggest a number of guiding questions that can help in arriving at a concrete description of the above-mentioned components. These guiding questions have been reformulated in the context of the GBO project. For a further conceptualisation of the model, we refer to Blom & Morèn (2010) and Boost et al. (2017).

We collected data via observations and interviews. As a first step in our research, we decided to carry out a survey among the ‘core group’ of the GBO project. This core group includes the representatives of all the actors involved (OCMW, CAW, DMW, courts, public prosecutor’s office, court registry, lawyers) who help give shape to the project and who can therefore be considered as ‘designers’. Via semi-structured interviews, we asked these parties about (1) the objectives set by them for the GBO project and (2) the underlying assumptions for these objectives (why they think these objectives are important and what they expect to achieve). In addition, we identified (3) the existing strengths and challenges in the specific judicial context with regard to the
implementation of interventions and attainment of the set objectives. We also paid attention to context-related factors at the micro, meso and macro levels. The interviews took place during the period from September 2019 to February 2020.

For a description and evaluation of the interventions, underlying mechanisms and results, we used a mixed-methods framework. We gathered information about the interventions and mechanisms through a combination of semi-structured interviews and direct observations. In fact, scientific research shows that there is a discrepancy between (1) what the policy prescribes and what happens in practice, (2) between what practitioners say they do and what they actually do, and (3) between practitioners’ perceptions of what they do and what they do in practice with clients (Boxstaens et al., 2015). This means that, although asking questions via surveys and interviews can give an idea of how things work in practice, it is best to supplement this with direct observations of this practice in order to address the above-mentioned remarks. The working principles were analysed against the background of the Local Social Policy Decree (2018) and using the Framework Approach (Ritchie & Lewis, 2003).

For evaluating the results of the interventions, we opted for in-depth interviews. The target group (clients) was surveyed based on the registration data. We selected a number of meaningful cases and carried out an in-depth interview of these clients. In these interviews, we focused on the significance attached by clients to their experience of the GBO. According to the schedule, 10-20 GBO clients were supposed to be interviewed. But due to the coronavirus crisis and lockdown from mid-March, it was not possible to conduct face-to-face interviews. Out of necessity, it was decided to hold telephone interviews. All clients who had visited the GBO and had been willing to provide their details for a possible interview (N=44) in the period from December 2019 to March 2020 (after which the GBO was no longer operational due to the lockdown) were contacted via telephone. Only 18% of them agreed to be interviewed by phone (N=8). What was noticeable was that the most vulnerable, such as the homeless, could not be reached, which undoubtedly distorts the results.
4 Results

In this section on the results, we make a distinction between, on the one hand, the surveys involving the core actors and judicial actors based on the context analysis, and on the other hand, the observations of client conversations and telephone interviews with the clients. For this, we use the objectives established by decree and the working principles of the GBO as an analytical framework.

4.1 Results of the context analysis

A primary objective on which there is a clear consensus among the different actors in the project is *the establishment of a transversal cooperation between social and legal actors*. The collaboration between justice and welfare is innovative and offers opportunities to approach the presented questions and situations from an integrated perspective, whereby the interrelatedness of the respective life domains can be more easily visualised. The following quote clearly reflects these opportunities for innovation.

“If you work within the justice system and you want to get something done – this may involve numerous problems, relating to an invoice, a family dispute, prosecution for an offence, etc. You can take the judicial route to solve this problem, but very often we see that there is also need for a link to the field of welfare. Conversely, many people in the field of welfare see that their problems also have a legal aspect. [...] However, this is often very far beyond their scope, because they are unfamiliar with this or have had negative experiences in this regard. [...] You can hardly expect an individual judge in his courtroom to take all of this into consideration. Just as you can hardly expect a street worker to find his way here to enforce the granting of a subsistence income. You must have a meeting point somewhere where their paths cross and that’s here at the GBO.”

(Judicial actor, 14 February 2020)

A second objective is to offer a warm welcome, characterised by professional closeness and a broad focus on the welfare needs of clients. Here too, the project offers perspective:

“As a result of these joint consultation hours with the primary legal assistance services, we have already noticed that, even though people are approaching them with a legal problem, they are being able to identify the social aspects more than before, despite the fact that these aspects are not so obvious at the start. There is often a whole range of social problems in the background that remains neglected. We need to pick up on these more. [...] I think that the degree of
sensitivity among judicial actors is growing, but it is important that they tackle this jointly.” (Judicial actor, 4 February 2020).

For the GBO core actors involved (CAW, OCMW, DMW), the context of the Palace of Justice Antwerp offers the possibility of reaching vulnerable groups of people, access to whom is otherwise impossible or only possible to a limited extent. This is done by trying to identify the people, proactively and via outreach services, who may have numerous welfare needs as well as, possibly, legal problems and who either cannot be or are insufficiently detected without this approach.

“It is important to start talking to judges about the GBO, the judges that play a mediating role and are closest to the citizen. Here, I’m thinking about the justices of the peace, juvenile court judges, the family court. They are the closest to the people. Then you can surely say: go have a look downstairs and see what they can do for you. That’s where you need to start.” (Judicial actor, 20 February 2020).

Finally, the core actors of the GBO saw this as an opportunity to optimise their mutual cooperation.

As already mentioned in the introduction, the GBO project was characterised by the complexity of the different processes that run alongside and overlap with one another. Setting up a socio-legal practice at the intersection of these processes is therefore a complex matter. From the interviews with the core actors, we were able to distil a number of factors that, in fact, impeded the concrete formation of a functional partnership.

Firstly, there are the differences in organisational culture between the three core actors. Three independent players in the primary care landscape are being asked to achieve a unity of effort (Lawrence & Lorsch, 1967). This implies that the core actors must not only formulate a common goal-oriented approach but must also develop a common governance (Raeymaeckers & De Corte, 2016). This is not an easy process, since each organisation has its own way of working and applies its own principles. Strict adherence to its own organisational logic may potentially obstruct the development of
common governance. In addition, there may be differences in vision between the operational level (the work floor) and the policy level, with regard to the way in which the unity of effort should be achieved. We could also deduce this from the flow-through figures of the GBO, where referrals were made primarily to the CAW services and to a much lesser degree to the OCMWs and DMWs.

The interviews with the core actors revealed that they felt a great need for **a closer tie-up with all judicial actors involved**, but this was not so easy to achieve. Here too, they encountered a number of **barriers** similar to the potential hurdles to mutual cooperation between the GBO core actors. Firstly, there are cultural differences between welfare actors and judicial actors. A welfare logic is not necessarily consistent with a judicial logic, and here too there may be differences between the operational and policy levels. For example, there is the issue of the more hierarchical structure inherent within the judicial world. The welfare actors are the ones who are required to step into this world of justice with its very specific structure and organisation. This confrontation with the unknown leads to both objective (e.g. hierarchical organisational structure of the court, the role of the President of the Bar) and subjective perceptions (e.g. respect for judicial authority among social workers, the dominance of legal professions) of power differences. According to the judicial actors, these are often based on stereotyped images. According to them, these stereotypes can be broken only through actual meetings and collaboration. Secondly, there are also substantial differences in the mandates, which has an impact on the sharing of information. Professional secrecy must be respected by the two sectors. As a result, judicial and welfare actors cannot simply consult each other about client situations. In addition, judges must abide by the legally enshrined general legal principle of independence (Section 151 of the Judicial Code).

In the context of the GBO, it is considered important for the core actors to jointly focus on developing the competencies of the care providers involved. It is essential that these providers possess the competencies needed for taking the necessary actions within a networking model. At the level of the partnership, this means that the respective core
actors must have sufficient knowledge of each other’s operations and range of services. From the interviews with the core actors, it appears that contacts between the actors with regard to the GBO are limited to active participation in the steering committees. Introduction of initiatives that allow operational employees to sit together and discuss matters may help create an environment in which they can discover each other’s organisational cultures and potentially conflicting or converging visions. Moreover, all the core actors did not have a visible presence in the field and nor did the local government assume a leading role at that time.

To proactively implement rights, there is a need for concrete data on vulnerable people, both in the legal case files as well as outside of those. For this, both internal (from judicial actors, e.g. courts) and external (e.g. from community teams) inflows are important.

The Decision of the Flemish Government concerning the Local Social Policy (Besluit van de Vlaamse Regering betreffende het lokaal sociaal beleid) dated 30 November 2018 also identifies a number of specific working principles that social workers should incorporate in their interactions with users. At the GBO, social workers proactively talk to the people. They do this at the reception desk, at the entrance and exit of the Palace of Justice Antwerp, etc. In this way, they try to identify vulnerable persons with potential welfare needs. However, these outreach efforts have only succeeded in reaching a relatively limited number of people. It was therefore unclear how this method could lead to an increased inflow of users.

In their contacts with users, the social workers involved wanted to adopt a generalist approach. Structured observations of the conversations between social workers and users revealed that, on the one hand, users are approached in an open, respectful and committed manner, which means that a ‘warm’ reception is provided. It is difficult to assess the extent to which a relationship of trust has been developed, since the interactions between social workers and users in the context of the GBO are usually brief and one-off interactions. This also means that there is no question of real outreaching, where people are repeatedly approached. In the vast majority of cases,
there was no follow-up trajectory: the social worker made a referral, after which he was no longer involved. On the other hand, it remains important to maintain this generalist perspective. Due to the specific legal context, the clarification of questions seems to be limited to merely providing a legal solution for the needs of users, whereas the GBO aims to explore, identify and implement rights within a broader social context.

Most of the observed interactions between the social worker and the user were prompted by a concrete question from the user. During the conversation, the main focus was on clarifying the question, after which – depending on the question or the problem – either a referral was made (e.g. to the CAW Community Team (wijkteam CAW)) or an actual solution was provided (e.g. a pro bono procedure).

To summarise: this initial analysis of the collected qualitative data revealed that the core actors of the GBO project saw many opportunities of developing a socio-legal practice that could definitely add value to working at the interface between welfare and justice. On the other hand, certain impeding factors were also revealed that could potentially hamper the success of the project and its structural embedding after the project phase.

When we compared the principles of the GBO with the observations in the field, we found that the conceptual framework of the GBO had not been immediately translated into practice, in terms of effective knowledge-sharing and collaboration between the three core actors of the GBO. We noted that, essentially, a new reception had been installed at the Palace of Justice Antwerp, where social workers, lawyers and magistrates tried to interface with each other. The cooperation between the social workers and the lawyers was what mainly emerged as a common thread throughout the study. In that sense, we had to conclude that it was more a question of a social reception and a legal reception, both of which have their own function and which at the same time try to approach each other so as to provide a broader reception to the citizen, while the GBO remains present in the background as a concept (Gibens, 2018). The two movements are certainly not contradictory; on the contrary, together they lay the foundations for a broad reception to serve the needs of citizens. But the question arises whether this reception can and may be labelled as ‘integrated’.
4.2 Results of the observations and telephone interviews

The specific context of the Palace of Justice Antwerp, the various actors, the types of interventions and mechanisms, and finally, the results show that, in order to find the answer to the research questions of what works, for whom, why and under what circumstances, one needs to understand the area of tension in this project. The area of tension is between, on the one hand, the principles of the GBO, and on the other hand, the reality of a physical social and legal reception that are also trying to integrate their services based on cooperation. We have elaborated the results further based on the aforementioned objectives and working principles.

A primary objective on which there was a clear consensus among the different actors was **the establishment of a transversal cooperation between social and legal actors**. The aim of transversal cooperation is to achieve multidisciplinary cooperation. This cooperation requires breaking down the boundaries between each other’s fields of work in order to arrive at an integrated, and therefore joint, approach to the tasks and services within the field of legal and social assistance, without necessarily denying or underestimating the individuality of each professional group (Gibens, 2018). To visualise such a collaboration, we started from two concepts, i.e. the social reception and the legal reception. The social reception is the GBO where the core actors themselves give shape to this form of reception. In addition, there is the legal reception at the Palace of Justice Antwerp involving lawyers and court clerks. Given their position, it is difficult to place magistrates at a reception. But they do play a role by making referrals. The court registry also serves as a reception, albeit a rather limited one in terms of information, where its main purpose is to refer people to the appropriate service. The information desk at the Palace of Justice Antwerp is mainly a functional reception that helps people find their way to the right courts. However, this reception plays an important role in terms of the referring clients to the legal or social reception. The social reception is based on welfare ethics and the legal reception on legal ethics. Each professional operates within his field, where the legal professional is playing on home turf and therefore feels stronger. The legal professional assumed a dominant position while the social professional was less visible, sometimes simply making himself inconspicuous. The literature confirms these attitudes, which go back to the distinction
between professions and occupations. In contrast to professionals who constantly want to see their professional identity confirmed, social workers have image problems stemming from stereotypes about their work. As a result, social workers develop coping mechanisms due to which they tend to place themselves in the background (Leegood et al., 2015), while legal professionals project themselves very strongly based on their identity. This statement sheds light on some of the observations we will make below about certain actions and behaviours of the social worker at the Palace of Justice Antwerp.

Some clients assumed that the social worker was the lawyer's trainee, because he contributed almost nothing during the conversation. Since the lawyer immediately took charge of the conversation, it immediately took a legal turn. In almost all the observed situations, the legal professionals failed to take the social or welfare elements into account. Observation of non-verbal behaviour revealed that the social worker listened to the story by making eye contact to make the client feel at ease, by nodding and by occasionally smiling encouragingly. Sometimes, the social worker also escorted the clients on their way out. Several clients reported that the social worker said to them on the way to the exit that they were “always welcome to come back, if the problem did not get solved”.

In concrete terms, at a certain point we saw the social worker’s role at the GBO being reduced very drastically to that of a limited referrer, and even then not within his own social reception. In a few cases, referrals were made but rarely to the GBO actors, such as DMWs or OCMWs. The most frequent referral channels were the CAW services (especially the Community Teams) and the Tenants Association in case of rental conflicts. For general welfare issues, the social worker referred the client to the family doctor. A former prisoner, for example, became very emotional when he talked about his difficult search for official work without a clean sheet. He saw no way out except to either return to a life of crime or kill himself. The social worker referred the man to a Community Team and to the family doctor, in view of the risk of suicide. In the majority of cases, a request for a pro bono lawyer was formally submitted. There was no further
follow-up, although the social workers did indicate that clients could come back in case of further problems.

Since the social worker only had a limited input in the conversations, everything depended on how the lawyer chose to interpret the discussion (see also Gibens, 2020). This concerns the balance between relationship and rationality. The social reception works on building a relationship, tries to create a connection and focuses on the person. The legal reception is rational, businesslike and objectifies the facts within the judicial context. In a socio-legal practice, communication is an important element for connecting the two concepts. The organisation and the professionals are transformation agents (Albiston & Sanedefur, 2013) who help connect the life-world and system world (Zifcak, 2014; Galowitz, 1999). Based on the empirical material gathered from the observations and interviews, we can tentatively conclude that there is no evidence of cooperation between social and legal actors.

A second objective formulated by the core actors is about offering a warm welcome. Interviews with clients show that most of them found their way to the GBO easily because the receptionist at the Palace of Justice Antwerp called up the social worker, who then usually came to collect the client. In many cases, the social worker and lawyer did not introduce themselves to the client, as a result of which the client assumed that ‘the most talkative one was the lawyer’. Since most of the lawyers asked legal questions very quickly and purposefully, clients did not experience the interaction as warm or welcoming, but rather as ‘correct and businesslike’. Even though the social worker did not contribute much, most clients experienced their interaction with the social worker as welcoming and warm. When the social worker works alone with the client, he feels more autonomous and can fully apply his social work practices for the benefit of the visitor.

A third objective for the GBO core actors involved is to reach vulnerable groups of people, access to whom is otherwise impossible or only possible to a limited extent, in the context of the Palace of Justice Antwerp. Unfortunately, we were unable to access the most vulnerable clients during this study. Due to the lockdown during the coronavirus crisis, we had to conduct the interviews by phone. Therefore, homeless people or people living in poverty proved difficult to reach. Nevertheless, the
observations did provide some indications of reduced barriers. The social workers of the GBO were present in every corner of the Palace of Justice Antwerp. They waited for people after court sessions and actively spoke to them when they could tell from their non-verbal behaviour that they were struggling. They stood at the reception at the entrance and could therefore sometimes pick up on questions from visitors. They also went to the entrance hall and to the waiting room of the Legal Aid Office (Bureau Voor Juridische Bijstand, BJB) at regular intervals, and on the request of the single court registry, filled in the interpreter’s statement together with the litigants. In this way, the GBO probably reached people who would otherwise not approach the GBO.

Finally, the GBO actors also see the project as an opportunity to optimise the mutual cooperation between judicial actors and GBO actors. There is a need for a change in culture in order to evolve towards a culture of cooperation or consultation, since many judicial actors are used to working very autonomously.

In addition to the objectives, the Local Social Policy also sets forth a number of working principles. The first working principle is the exploration of the request for assistance and the offer of assistance. It is notable that the social workers at the GBO often interpret the request for assistance in legal terms, while their job is to look at the broad context of a request for assistance and take a generalist approach, whereby all life domains are explored.

The second working principle is the fulfilment of the assistance and service relationship. A crucial element of the provision of assistance and services is the problem analysis. Here we see that the problem-oriented approach that is often used in the legal context is different from a client-oriented approach that is more often used in social work. Social work is typically based on ‘practical wisdom’ (Boxstaens, 2019; Tirions et al., 2019; Trevithick, 2008; Platt, 2008), it assumes a working alliance and has its own process logic. The social worker acts more as a transformation agent between the client’s life-world and the system world, where the law is part of the latter world. He anticipates the time when this transition will be possible (moment of transition). As a generalist, the social worker’s knowledge of the law ranges from rather limited to non-existent (Gibens, 2020). The lawyer is typically more detached. He tends to be more
problem-oriented. He views problems mainly from a rational and static perspective. After hearing the client’s story, he extracts only that which is legally relevant, interpreted as atomistic. Based on the above, we consider an alignment between a problem-oriented and client-oriented approach as essential within the context of a socio-legal practice.

To ensure cooperation between the various professionals with their specific characteristics, distinct fields and powers of influence, the social worker must act as more of a ‘broker’ in the GBO setting. Brokerage creates social capital and leads to innovation. Someone who is able to bridge the structural gaps between the various institutions and processes through his extensive network, establish connections and relationships from within the different settings, and develop a vertical and horizontal network around these (Burt, 2004). Instruments for this include the sharing of knowledge and setup of socio-legal practices. We observed that steps were being taken in this direction, but the social workers were too diffident to further develop this knowledge-sharing process and establish these connections. Instead they retreated to safe ground and remained social professionals within their created safe space inside the Palace of Justice Antwerp, therefore resulting in a social reception that appears hermetic to other actors, such as magistrates and lawyers.

Even though the social workers do not contribute much to the conversation, they make sure that clients feel better and that they feel at ease more quickly. In this respect, respondents mainly referred to the non-verbal signals given by social workers, such as nodding, smiling and looking friendly. Moreover, the fact that people were collected and then escorted back to the exit was experienced as a strong sign of involvement. Nevertheless, various respondents mentioned that “social workers are failing to do their job”, because they hardly ever intervene and do not provide any information. The scope is therefore determined from the outset by the lawyer. The lawyer’s answers are often full of legal jargon. Therefore, there is a lack of coordination with the client to check whether he has understood everything. The social worker usually does not intervene to make any adjustments in this regard. In any case, no efforts were made to find out about key figures within the client’s network.
Since there is no follow-up by the GBO, people often receive no solution for their problem and end up feeling disappointed with the assistance and services provided. These respondents came across as discouraged and often had no desire to return to the GBO. They also found it annoying that they were not given the name or phone number of a contact person at the GBO. This reduces the level of confidence in the assistance received. **Confidence in the judicial system is also sometimes remarkably low** among the interviewed respondents. The GBO does not appear to restore this confidence in any way.

The third working principle is **outreach assistance and proactive assistance and services**

Apart from the client’s request for assistance, there are few indications of a proactive exploration of other possible problems. Only one lawyer tried to do this, which immediately brought a lot of other issues (related to the initial registration problem) to the surface. The social workers made no extra efforts in this regard.

However, there were many opportunities to do this. For example, in a particular case, a woman felt unjustly targeted by a judge who had to decide regarding her daughter’s residence and visitation arrangements. The lawyer followed a goal-oriented approach and allowed little room for feelings or perceptions, which meant that her grievances and wishes (underlying her request to the judge) were not addressed.

“**I see very little consideration for the social context in that courthouse. Those judges have to pronounce judgments sitting in their ivory towers, but they have such a large impact on people’s lives. The ones who speak the loudest at such a hearing, get their way. You enter that courtroom feeling stressed and then there is the counter-intuitive reaction of ‘I have to defend myself and become angry, while actually I am feeling very hurt’. That judge literally said to me: ‘Ma’am, you are just one of the papers on my pile.’ For me, all of this is very stressful, but for him it’s just administration. And at the hearing itself, when I am defending myself, he says ‘stop playing the victim’, but that’s exactly how I feel. I feel extremely misunderstood.”** (GBO client)

The fourth working principle is the **provision of participatory assistance and services**. This is about giving the client a greater right to decide on the course of assistance. This is only provided for to a limited extent at the GBO. Lawyers as well as
social workers often skip a few steps on the road to change. Almost no attention is paid to the agogical aspect, i.e. prompting change by first and foremost forming a common vision of the problem. Only a few elements are extracted from a story or a described problem, after which usually a legal solution is hastily provided. The capacity of the client to deal with the solution is also not taken into account.

Finally, there is the collaboration with other service or care providers. The GBO does not stipulate any active collaboration with any judicial partners other than the lawyers at the Legal Assistance Committee (Commissie voor Juridische Bijstand, CJB)/Legal Aid Office. The independence of the judges is indicated as a significant obstacle in this regard, but the great respect that social workers have for the judges also means that they perceive them to be ‘inaccessible and unreachable’. A closer acquaintance could help in reducing the perceived barriers. Although there is daily contact with the reception staff, which means that referrals to the GBO take place quickly and smoothly, there is only minimal contact with the other GBO actors, i.e. the DMWs and OCMWs.

5 Conclusion

The GBO project is the first important step towards organising a broad reception within a judicial setting. The project occupies a central place in the world of law and justice with its well-known professionals, such as court clerks, magistrates and lawyers. It is certainly not an easy task to set up a GBO in this environment. It is quite a challenge to coordinate the different aspects with one another. This coordination takes time.

The GBO as conceived in the Local Social Policy Decree has not been achieved in the GBO at the Palace of Justice Antwerp. However, a sui generis concept of a broad reception has been devised that has been given the form of a physical reception. In itself, this physical reception does not rule out the further development of a GBO. But a physical reception perhaps seems to be a condicio sine qua non for the concretisation of the GBO concept.
If we compare the objectives of the GBO with our observations, we notice a tension between the social and legal reception that arises due to different ways of working. These different ways of working involve the application of care ethics on the one hand and legal ethics on the other. Every professional applies his specific competencies and skills in his field and domain. In itself, this is more than understandable, but the coordination between the two types of reception requires more insight into the process logic and rationality of the various professionals, if they are to achieve a real and close collaboration. A transversal cooperation implies that the different competencies must be shared in a versatile and correct manner. Such a sharing of knowledge and skills is a long-term process that will eventually lead to change, provided that this process is guided and managed by a 'broker'. A broker is a person who develops social capital by bridging structural gaps in and between organisations as well as by building an internal and external network to facilitate the bridging of these gaps. This broker or bridge-builder can connect the different worlds. He can ensure that the professionals get to know each other, discover each other’s strengths and overlaps, and he can also help bridge the gap with external partners. The combination of the welfare logic and the legal logic can lead to a new logic, in which the strengths and unique characteristics of the various disciplines can be used to develop a meticulous approach to problems, eventually resulting in what we call a ‘socio-legal practice’. As part of this socio-legal practice, the legal issues are first identified and then, together with the client, a solution is sought that anticipates and takes into account contextual factors. After all, legal problems do not occur in a vacuum, but rather they arise among and between people against the background of a complex society. In this collaboration, none of the disciplines should allow themselves to be pushed aside; instead they should focus their efforts in the necessary areas in the interest of the client. This also involves a continuous balancing act, something that is essential in a hybrid partnership such as this.

The presence of a broker is required not only to help achieve the objectives of a GBO reception, but also for the implementation of the working principles. A broker who is in charge of things and who sets out the course of action in consultation with the actors. At
present, we mainly see different types of reception: the court registry, the information desk, the social and legal reception. The information desk and the court registry as well as the social reception are almost always available, whereas the legal reception only operates in the morning. There is little or no knowledge-sharing or multidisciplinary cooperation, let alone intra-disciplinarity, i.e. the incorporation of skills and competencies from other disciplines.

Nevertheless, the GBO project has served as a place for the first forms of experimentation. Firstly, attempts have been made to set up the GBO by involving the core GBO actors, specifically in a judicial context. The complexity of the initiative was soon recognised and a phased approach was proposed and partly incorporated (see interim report). Secondly, we see the – fairly organic – development of a social and legal reception at the Palace of Justice Antwerp, where the assistance and services offered by each need to be better coordinated with one another and also, preferably, defined in terms of scope. The question that arises is how the various professionals can work together in the best possible manner. Each reception has a reason for existence independent of the other. Training of professionals, peer reviews, supervision, knowledge-sharing afternoons, internships etc. are instruments for bringing about a process of cooperation/exchange. Thirdly, we also see that referrers play a crucial role, but such referrals are only possible if the referrers are aware of what each reception represents.

References


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<td>• Alan Paterson: Peer Review and Revalidation on a Global Stage</td>
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<td>• Amrita Paul &amp; Madhurima Dhanuka: Towards improving mechanisms that enable provision of quality legal services across India</td>
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Assessing the Quality Gap in the Indian Legal Aid Framework

~ Amrita Paul & Madhurima Dhanuka*

I. Introduction

Giving strength to the constitutional guarantees of fair trial and due process, the Indian legal polity enacted the Legal Services Authority Act, 1987 (hereby referred to as “the Act”) which established the legal aid system in India. The Act, effectuates the guarantee through the National Legal Services Authority (NALSA) which regulates the provision of legal aid, devises schemes for its delivery and monitors implementation. The legal aid delivery system has gradually evolved over the years, with strategic initiatives having been piloted to respond to challenges faced by a myriad range of beneficiaries. However, an underlying concern in the legal service delivery has been of ensuring quality of services provided. Despite efforts to strengthen monitoring over legal services, quality continues to be key challenge.

The last decade has witnessed a commendable pace of development, with various regulations and guidelines being introduced to streamline processes aimed at improving both access to and quality of legal aid. The NALSA (Free and Competent Legal Services) Regulations 2010 which deal with the appointment of legal aid providers and their monitoring\(^1\); and NALSA (Legal Services Clinics) Regulations, 2011 which deals with setting up of legal aid clinics in crucial geographical settings\(^2\) have been instrumental to shape the growth of the legal aid delivery system in India. The 2010 Regulations founded the framework for monitoring legal aid cases through the constitution of monitoring committees [now renamed as monitoring and mentoring committees (MMCs)].\(^3\) This could be labeled as a rudimentary attempt to oversee the assurance of quality lawyering.

The 2010 Regulations were amended in 2018, to strengthen and streamline the functioning of the MMCs. The amendments introduced the idea of mentoring of legal aid lawyers in addition to monitoring the pace of the legal aid cases and laid down parameters to assess performance of lawyers in a bid to assure quality lawyering.\(^4\) In 2019, NALSA prepared guidelines for the functioning of the MMCs, which can be perceived as a step towards institutionalizing, assessing and ensuring access to quality legal aid to legal aid beneficiaries.

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* Amrita Paul is a Senior Programme Officer and Madhurima Dhanuka is the Programme Head with the Prison Reforms Programme of the Commonwealth Human Rights Initiative.


3 Regulation 10 Supra note 1.

4 Regulation 10, 11 & 12 Supra note 1.
Are the MMCs functioning effectively at the end of a decade of their being? This paper attempts to analyze available information on the MMCs to assess the status of their functioning. The paper will first outline the concept of quality legal aid in the India; assess existing quality measures against international standards; and then analyze the functioning of the MMCs; and lay down key priority areas for strengthening the MMCs.

II. India: Legal service delivery & quality

The Act envisages the constitution of legal services authorities at the national, state, district and taluk (subdivision) levels across the country, with a central body i.e. NALSA at the helm. For effective legal representation before the High Court and the Supreme Court, Supreme Court and High Court Legal Services Committees have also been established. These legal services institutions (LSIs) are mandated to provide free and competent legal services to the weaker sections of society, in order to ensure that opportunities for securing justice are not denied to any citizen by reason of economic or other disabilities. Section 12 of the Act lays down the criteria for eligibility for legal aid services.5

NALSA, in exercise of the powers conferred on it under Section 4 and Section 29 of the Act, brought out the 2010 Regulations to enhance the quality of legal services. Among others, the Regulations focused on two important aspects, firstly the appointment of legal aid lawyers (Reg 8) and secondly, constitution of monitoring committees (Reg 10). The Regulations stated that legal practitioners with more than three years of experience at the bar can apply to be empanelled as panel lawyers. It further stated that separate panels for different types of cases may be prepared, and that the honorarium will be paid to lawyers as per the respective State regulations.6 Further, the Regulations envisaged the constitution of Monitoring Committees at every level - Supreme Court, High Court, District and, Sub-Division. This was done to ensure the quality of legal aid services provided by the legal services authorities and for regular review of on-going legal aid cases.7 Thereafter, NALSA’s National Plan of Action 2012-2013,8 directed the DLSAs to monitor the activities of legal aid clinics and verify the records kept by the clinics at least once a month. The emphasis was to devise a social audit system on legal services, aimed at gathering feedback from the community towards improving the functioning of LSIs. NALSA has been cognizant of the relevance of ensuring delivery of quality legal services, and has made efforts to streamline the functioning of the MMCs. The amendments to the Regulations 2010 and adoption of the Guidelines for Monitoring and Mentoring

6 Regulation 14.
7 Regulation 10.
Committees in 2019 (hereinafter referred to as 2019 Guidelines), are steps in that direction.

At present, a Monitoring and Mentoring Committee (MMC) is to be established at each level – Supreme Court, High Court, District and Taluk (sub-division) level, translating into 2987 Committees. The 2019 Guidelines lays down the framework for the constitution of MMCs; the modalities for their functioning; and the performance standards of working by legal aid lawyers vis-à-vis an evaluation criterion to be adopted by them. The composition is typically a 3-member committee; comprised of a serving judicial officer from the state higher judicial services, the secretary of the respective legal services institution and a retired judicial officer or an advocate of 15 years’ experience. The periodicity of the meetings is to be every 15 days. Each meeting is to be convened by the secretary of the respective legal services institution.

**Performance Standards: P-R-A-C-T-I-C-E**

*(Based on the 2019 Guidelines)*

<table>
<thead>
<tr>
<th>PROFESSIONALISM:</th>
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<tbody>
<tr>
<td>- Should possess the necessary competence to apply the correct law to the facts disclosed.</td>
</tr>
<tr>
<td>- Should be able to prepare the pleadings to best serve the interests of the client.</td>
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<tr>
<td>- Inform the litigant about the facts pleaded and left out, in vernacular.</td>
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<tr>
<td>- Filing must be completed at the earliest. Delay must be communicated to the client and the DLSA concerned.</td>
</tr>
<tr>
<td>- Expected to be fully prepared and sincere in discharge of duties.</td>
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<tr>
<td>- Expected to cooperate and coordinate with paralegals.</td>
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**Evaluation Parameter:**
Random checking of pleading, cross-examination, arguments advanced; observing behavior in Court by members of the Committee.

<table>
<thead>
<tr>
<th>REPORTING:</th>
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<tbody>
<tr>
<td>- Promptly report the proceedings of the day, next fixed date of the legal aid case at the Front Office and to the Client.</td>
</tr>
<tr>
<td>- Reveal to the litigant all proceedings and orders passed against him.</td>
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<tr>
<td>- Guide the litigant about the next course of action.</td>
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<tr>
<td>- Update the cases regularly on the NALSA portal.</td>
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**Evaluation Parameter:**
Check the records submitted; information uploaded on the NALSA Portal, or seek feedback from the litigant.
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<tr>
<th>ATTENTIVE:</th>
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<tr>
<td>- Should account for the queries of the litigant and respond to them.</td>
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<tr>
<td>- Should orient and record observations as to the local problems prevalent.</td>
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<tr>
<td>- Should be observant of the level of legal knowledge and whether awareness programmes are being conducted or not.</td>
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**Evaluation Parameter:**
Check records submitted to DLSA; seek feedback from the litigant/ client.

<table>
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<tr>
<th>COMPETENT:</th>
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<tbody>
<tr>
<td>- Should keep himself/ herself abreast of all latest developments in law.</td>
</tr>
<tr>
<td>- Should draft pleadings keeping the best interests of his/ her client.</td>
</tr>
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<td>- Should attend capacity building training programmes wherever nominated.</td>
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</table>

**Evaluation Parameter:**
Check records submitted to DLSA; seek feedback from the litigant/ client; data maintained by LSI in respect of training conducted and *effectively* attended by lawyers.

<table>
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<tr>
<th>TIMELY:</th>
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<tr>
<td>- Should be punctual in attending court hearings.</td>
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<tr>
<td>- Should not seek an adjournment unless absolutely necessary.</td>
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<tr>
<td>- Should file pleadings on agreed/ set dates.</td>
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**Evaluation Parameter:**
Check records submitted to DLSA; seek feedback from the litigant/ client.

<table>
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<tr>
<th>INNOVATIVE:</th>
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<tr>
<td>- Show disposition for innovative arguments in the best interests of the clients.</td>
</tr>
<tr>
<td>- Should regularly communicate with their clients to be thorough of the facts of the case.</td>
</tr>
<tr>
<td>- Should seek assistance of members of the Committee or law students towards research which would assist in placing a well-rounded legal argument.</td>
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**Evaluation Parameter:**
Discussions with the members of the Mentoring and Monitoring Committee.

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<tr>
<th>COMMUNICATIVE:</th>
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<tr>
<td>- Should respond quickly to the assignment of the case, fix a meeting (preferably within 24 hours and maximum within 7 days of assignment). If unable to meet in person, then a telephonic briefing. Upload information on NALSA Portal after the briefing.</td>
</tr>
<tr>
<td>- Should communicate any updates, decisions and orders passed in the matter to the client and DLSA.</td>
</tr>
<tr>
<td>- Should be courteous to clients. Treat them at par with their private matters. Be patient, compassionate, tolerant and respect.</td>
</tr>
<tr>
<td>- Should inform them no fees are accruable as they would be borne by DLSA.</td>
</tr>
</tbody>
</table>

**Evaluation Parameter:**
Check records submitted to DLSA; seek feedback from the litigant/ client.
In terms of procedures, an intimation of the appointment of a legal aid lawyer, is to be communicated to the MMC in a pre-decided format (Form II). During the life-cycle of the legal aid case, the MMC is required to regularly assess the progress of the case in close discussion with the legal aid provider; extend mentorship; and also provide guidance on the management of their case load. Formats for documenting and reporting have also been made available, to aid in recording the progress of cases. The MMC is required to submit bi-monthly reports, comprising an assessment of the progress of every legal aid case monitored, as well as the assessment of the performance of the legal aid lawyer. The report is to be submitted to the Chairman of the legal services institution. Lastly, feedback is also to be sought from the beneficiaries to assess the performance of the lawyers. This process intends to create documentation on progress in cases, quality of services delivered, identify gaps and guide future priorities.

Thus, the MMCs, seek to foster efficiency in legal aid lawyers through regular scrutiny of their work. The MMCs may, where it perceives that the progress of the case is not satisfactory, direct a change of lawyer or take other appropriate measures. The next chapter will assess these various measures of quality in view of the guidance laid down by the UN Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems 2012 and the UNODC Handbook on Ensuring Quality of Legal Aid Services in Criminal Justice Processes.

III. India’s Quality Framework & International standards

The United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems 2012 (hereinafter referred to as UNPGLA) aims to provide guidance to States on the fundamental principles on which a legal aid system in criminal justice should be

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9 Regulation 11(1).
10 Regulation 11(4), 11(5) and 11(7).
12 Regulation 12(1).
based and to outline the specific elements required for an effective and sustainable national legal aid system, in order to strengthen access to legal aid. They emphasize on the need for ‘effective’ service delivery, inviting member states to adopt and strengthen such measures. Principle 2 outlines the responsibilities of the state, and affirms that states should enact legislations to ensure that the legal aid system is accessible, effective, sustainable and credible. Principle 7 seeks for the provision of effective legal aid at all stages of the criminal justice process. It further describes effective legal aid to include unhindered access to legal aid providers for detained persons, confidentiality of communications, access to case files and adequate time and facilities to prepare their defence.

In order to facilitate the delivery of quality legal aid services, institutional measures and standards need to be in place to guide and oversee their work. Some of these measures are explicitly outlined in relevant international standards and others are based on best practices and good management schemes. The structure of the national legal aid system may also play an important role in shaping the quality of services provided, in particular when it facilitates easier supervision and monitoring of individual providers.

The UNPGLA leave the task of ensuring the delivery of ‘effective’ legal aid to each national or state body. They highlight the need for establishing a national legal aid body, and for the body to work independently. Guideline 11 provides for the establishment of a national legal aid system or a specialized body which would be responsible for administration of access to legal aid, quality assurance and monitoring. It provides guidance to states for ensuring the effective implementation of nationwide legal aid schemes, including the establishment of a national legal aid body to provide, administer, coordinate and monitor legal aid services. It further emphasizes that the legal aid body should have necessary powers to provide legal aid, including the power to,

- Appoint dedicated personnel;
- Designate legal aid services to individuals;
- Establish a criterion for accreditation of legal aid providers, including training requirements;
- Monitor legal aid providers including of establishment of independent bodies to handle complaints against them;
- Assess the legal aid needs nationwide; and
- Develop its own budget.

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14 Ibid at Pg 8.
15 Ibid at Pg 10.
16 Guideline 11, Rule 59.
In the Indian context, there exists a national legal aid body, and along with it a hierarchy of institutions have been established to reach to the smallest sub-division in the country. The institutions are empowered to appoint dedicated personnel, including lawyers and para-legal volunteers for legal aid delivery. An eligibility criterion\(^{17}\) has been carved out, designating the individuals who are eligible for legal services. At present the only criterion employed by the LSI when empaneling lawyers solely rests on the number of years of experience at the bar, though efforts have been made to strengthen their training and capacity building over the last few years. Towards monitoring, as previously discussed, a MMC is to be constituted, however its ‘independence’ and ability to handle complaints is limited. Statutorily it is encouraged to report instances of corruption and bribery in addition to grounds of incompetence in representation when filing complaints. Though there is no separate independent body established to resolve such grievances.

NALSA has adopted schemes and strategic initiatives to ensure legal aid for a large number of beneficiary groups. For instance, amid the pandemic, the LSIs provided assistance to a large number of beneficiaries, having extended the application of the eligibility criteria to include all in face of a disaster.\(^{18}\) The beneficiaries included victims of domestic violence, migrant labourers, persons denied wages, senior citizens, persons in custody among others. In terms of budgets, the central government allocates funds to NALSA. Section 14 of the Act states that ‘the Central Government shall, after due appropriation made by Parliament by law in this behalf, pay to the Central Authority, by way of grants, such sums of money as the Central Government may think fit for being utilised for the purposes of this Act.’ Therefore, there is a dependence upon the central government to grant funds, which has over the years, seen a decline – limiting activities of NALSA and its LSIs.

The UNPGLA also highlights the need for the legal aid body to be free from undue political or judicial interference, be independent of the government in decision making related to legal aid. There is a clear link between the independence of legal aid providers and legal aid bodies, such as public defenders, and the quality of services they are able to provide.\(^{19}\) While different jurisdictions may opt for different models for administration and delivery of legal aid services, the structure should always maintain independence in order for lawyers to be able to act zealously on the behalf of their clients. In addition to the legal aid body being independent in its working, independence of individual legal aid provider is equally crucial. This finds emphasis in the Basic Principles on the Role of Lawyers.\(^{20}\)

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\(^{17}\) Sec 12 of the LSA Act 1987.

\(^{18}\) Sec 12 (e) of LSA Act 1987.


The first duty of legal aid lawyers is towards their clients; therefore, they should be free from any interference in order to provide quality legal aid assistance. It is vital to ensure that lawyers be able to advise and represent persons charged with a criminal offence in accordance with generally recognized professional ethics without restrictions, influence, pressure or undue interference.\textsuperscript{21}

In India, there are no direct provisions that seek to ensure the independence of the legal services institutions or legal service providers. Both the Act and Regulations are silent on this aspect. However, in practice, all legal services institutions are helmed by judicial officers, who are independent from the government. Further, NALSA is empowered to prepare its own programmes and policies, and is not required to consult or seek approval from the government towards this. Lawyers too are dutybound to adhere to the rules on professional standards\textsuperscript{22} of the Bar Council of India, which places a duty on the advocate to protect the interest of the client.

The Global Study on Legal Aid\textsuperscript{23} identified improving the quality of legal aid services as the number one priority, and recommended that the state authority responsible for delivery of legal aid should consider enhancing the quality of legal aid services by developing performance and qualification standards for all legal aid providers. Additionally, the UNODC’s Handbook on Ensuring Quality of Legal Aid Services in Criminal Justice Processes 2019 suggests\textsuperscript{24} four principal sets of measures for assessing quality of work of legal service providers:

\begin{itemize}
  \item \textbf{Input measures} refers to the experience and resources of the legal aid provider such as education, qualifications, skill set and training etc.
  \item \textbf{Structural Measures} refers to management of inputs i.e case management system, record keeping, supervision, mentoring and complaints procedures, that ensure an environment where the legal service provider is able to provide a quality product for the client.
  \item \textbf{Process Measures} focus on the performance of the legal aid lawyer right from the assignment of the case, documentation, reporting and handling of the case. These are indicative of the lawyer’s competence, from fact gathering and legal analysis to client handling, advice and assistance and practice management.
  \item Lastly, \textbf{Outcome Measures} look at the outcome of the legal process. However, outcome variables are hardest to measure satisfactorily, primarily because it would
\end{itemize}

\begin{footnotesize}
\textsuperscript{21} Human Rights Committee, CEDAW General Comment No. 32, Para 34.
\textsuperscript{22} http://www.barcouncilofindia.org/about/professional-standards/rules-on-professional-standards/.
\textsuperscript{23} https://www.unodc.org/documents/justice-and-prison-reform/LegalAid/Global_Study_on_Legal_Aid_-_FINAL.pdf.
\end{footnotesize}
be difficult to establish what constitutes a ‘good’ outcome or that the outcome was not influenced by other factors such a poor opponent, weak judge and was a result of the lawyer’s efforts alone. Some additional outcome measures include case cost, time taken, success rates and client satisfaction.

In India, of the abovementioned four measures, though there are provisions to guide and regulate input, structural and process measures, but none on outcome measures. In terms of input measures, in pursuance of the NALSA Regulations 2010, there has been a consistent effort to empanel lawyers and select volunteers possessing a high level of dedication and qualification. For structural measures, efforts have been made to streamline case management through linkages with front office\(^{25}\) of LSIs; though a dedicated and effective case management system for legal aid cases is yet to be developed. As explained in the previous chapter the supervision and mentoring of legal aid providers rests with the MMCs. Efforts are constantly made to improve monitoring and supervision of legal aid lawyers through regular interaction and mentoring support.

For process measures, in 2020 NALSA adopted a Handbook of Formats\(^{26}\) in an attempt to standardize documenting and reporting by legal aid providers and institutions. The aim was to achieve a minimum benchmark in the documentation and reporting throughout the life cycle of a legal aid case. Further, guidelines\(^{27}\) have been developed outlining performance standards for legal aid providers, focused on aiding legal aid providers in their work. In terms of outcome measures, there is probably no mechanism in place to record legal service delivery in terms of outcome. Existing information collated by NALSA only captures data on number of beneficiaries and cases where assistance was provided, but not on the outcome in each case. There is some data\(^{28}\) which captures the outcome on cases where assistance was provided at the remand stage, but that is a minor percentage of the total number of cases dealt with by LSIs.

The UNODC Handbook further outlines\(^{29}\) some crucial institutional measures and standards required for ensuring quality legal aid services, which include:

- **Employment of appropriately qualified staff:** The legal aid service provider must employ appropriately qualified staff and assign cases to them that are commensurate with their qualifications, knowledge and experience.

- **Conditions of service:** The legal aid institution should endeavour to provide conditions of service (salary, pension, benefits etc.) that are, at a minimum,

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comparable to those available in the prosecution service and commensurate with the services they provide in order to ensure that it is able to attract and retain high-calibre staff.

# Supervision and support: Personnel must be routinely supervised by a person with the necessary qualifications, knowledge and experience to provide such supervision, and other appropriate mechanisms for supporting staff must be provided. Supervision should include a review of a selection of cases worked on.

# Training: Mechanisms must be in place to determine the training needs and appropriate training should be provided on a regular basis. This includes the need identify, develop the knowledge and skills necessary to providing legal aid at the early stages of the criminal justice process, including children and other persons with special needs.

# Case files: A procedure must be in place to store case files for specified period of time to enable file retrieval in case of ‘repeat clients’ or to identify ‘conflict of interest’.

# Caseload: Mechanisms should be in place to ensure that legal aid providers do not have responsibility for an excessive number of “live” cases, taking into account their qualification, experience, complexity and seriousness of cases.

# Quality of case work: Mechanisms should be in place to assure and monitor the quality of work performed in individual cases.

In India, of the abovementioned institutional measures, while there are efforts to employ qualified staff, the conditions of services are largely unsatisfactory. Payment for legal aid lawyers has often been criticized, and with lawyers being assigned cases, they are not entitled to pension or other benefits. Institutional staff too, is inadequate and insufficient specially and often contractual at the taluka/sub-division level and at the High Court and Supreme Court Legal Services Committees. Efforts on supervision, support and training are present, though varying across regions and are largely dependent on the leadership role displayed by person heading the LSI. Case file management as shared previously, is not very efficient, and measures to regulate caseloads are also not available. Toward

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ensuring quality of work performed, the MMCs are constituted, though their efficacy and functionality need much improvement. The next chapter, will delve into an analysis of the MMCs functioning based on available data and information.

IV. Analysis of the working of the Monitoring and Mentoring Committees

In 2018, a national study\(^32\) conducted on access to legal services, highlighted the dismal functioning of the monitoring and mentoring committees (MMCs), which were then known as the monitoring committees. It stated that at the district level the committees were constituted in only 60% of the districts which provided information.\(^33\) Further it provided, that even though the committees should have been setup in 2010, more than half of them were constituted only in 2015 and 2016.\(^34\) It further highlighted that in only 25 districts separate staff was available, and only 42 (23%) maintained separate registers. In terms of submission of reports from lawyers, not even 1% of the reports that should have been submitted, were complied with. In terms of complaints, the figures indicated that LSIs received 256 complaints, a majority of which were from Delhi (179). However, the number of complaints received are not even a fraction of the total legal aid cases across the country, thus indicating the inadequacy of the grievance redressal process.

Subsequent to the report findings and recommendations, the Regulations 2010 were amended, and NALSA also prepared guidelines for streamlining the functioning of the MMCs in 2019. NALSA’s Annual Report 2019 laid emphasis on the efforts to strengthen the MMCs, and reiterated that quality can be enhanced by periodic capacity building and mentoring, and can also be measured and evaluated. It stated that such an evaluation and continuous monitoring is especially required at the district level and more so where the number of legal aid cases is substantial. However, official statistics on the constitution and functioning of the MMCs are not available.

In 2020, an assessment report\(^35\) on the changes in legal aid delivery between 2016 to 2020, highlighted that of the 14 states (comprising 208 districts) that had provided information, the MMCs were constituted in all districts i.e. indicative of 100% compliance. However, information regarding their functionality was not documented in the report. Similar conclusions have been drawn in previous studies conducted on the functioning of


\(^{33}\) 293 of 579 districts responded to the request. Only 179 of 293 districts had established the Monitoring Committee. Pg 49 of Ibid.

\(^{34}\) 98 of the 179 Committees were established in 2015 and 2016. Pg 50 of Supra Note 32.

these committees. For instance, in a micro-study conducted in West Bengal\textsuperscript{36} in 2017 across five districts, only 4 committees were functional. While the committees comprised three members as per the mandate, the tenure of the members was not fixed. No dedicated staff was appointed to work for the committee, and only three among the four LSIs maintained registers. There was no regularity in the periodicity of the meetings and bi-monthly reporting was complied with in only two LSIs. No complaints or grievance redressal mechanism were in existence to resolve complaints received from beneficiaries. Another study conducted in Rajasthan\textsuperscript{37} in 2015, had highlighted similar concerns. Of the 33 districts reviewed, only 8 had constituted the committee. Registers were hardly maintained, and staffing was a concern. Documentation too was not standardized and reporting was poor. Thus, one can safely conclude that over the years, not much has changed in the functioning of these committees.

To assess the current status of compliance for this paper, information provided from seven State Legal Services Authorities, in response to a questionnaire shared\textsuperscript{38} in April 2021 has been analyzed. The information was sought from the State Legal Services Authorities, regarding the constitution of the MMCs in all districts within that state. Additionally, reporting and record management practices of any two districts in the state were also sought. These details including the availability of staff exclusive to the MMC, the available infrastructure and compliance with reporting mandates. Scanned copies of registers, and reports received from panel lawyers were also sought.

The information was received from seven states, viz. Himachal Pradesh (situated in north India), Madhya Pradesh (situated in central India), Telangana (situated in south India), Maharashtra (situated in western India), Goa (situation in western India), Tripura and Mizoram (both states situated in eastern India). These states comprise of 124 districts i.e. 124 district legal services authorities are constituted across these states.


\textsuperscript{38}Generally information is sought through filing Right to Information requests under the Right to Information Act 2005, however due to the pandemic, e-mails were sent instead. Further, several SLSA’s stated inability to send information due to lockdown situation in the state or because of staff being infected.
The information received reflects some interesting insight into the MMCs. Firstly, of the 124 districts, information was received for 104 districts. Of these MMCs were constituted in 102 districts, which does indicate a high compliance limited to establishing the Committees. The members were in compliance with the Regulations 2010 i.e. comprised a judicial officer, the secretary, DLSA and an advocate. As previously also noted, the
periodicity of meetings varied from fortnightly\textsuperscript{39} to monthly\textsuperscript{40} to sometimes even once in two months\textsuperscript{41}. The information indicates that there continues to be a lack of dedicated staff for the MMCs, and the reporting and documenting procedures appeared inadequate. The latter was deduced from the lack of uniformity in the responses received regarding number of reports submitted by lawyers, bi-monthly reports submitted by the committee and the scanned formats received of the registers maintained. Admittedly, with existing staff already overburdened, additional work allocation would only lead to lack of prioritization of tasks, thus impacting the efficacy of the MMCs.

It is difficult to make a definitive assessment of the functioning of the MMCs based on the little information that is available on this crucial mechanism. Yet, of the information available, one can construe that much remains to be achieved in terms of ensuring the effective functioning of the MMCs in India. An improved understanding of the functionality of the MMCs; strengthened documentation and reporting procedures and effective monitoring of their performance by NALSA and SLSAs are vital to enabling the MMCs to achieve their mandate.

V. Bridging the Quality Gap: What lies ahead?

The legal service delivery system in India has evolved in many ways in the last decade. The emphasis has been to increase outreach, enable equal access to services and ensure that a wide range of beneficiaries are provided legal services. Yet, without ascertaining optimum levels of quality in services provided, all such efforts are meaningless. The efforts made to strengthen input, structural and process measures through amendments in existing provisions, adoption of guidelines and standardizing documentation are indeed a step in the right direction. However, there continues to be a dire need to focus on understanding quality and its assessment parameters.

Quality is directly linked to the concept of effective legal defence, and also to meeting goals of the service and the needs of citizens.\textsuperscript{42} Peoples’ lack of confidence in the quality of legal aid services is one of the significant challenges faced by poor and vulnerable groups in accessing justice.\textsuperscript{43} The mere presence of a lawyer in court is not sufficient, but the lawyer must be trained, skilled, and experienced, and one who follows best practices and contributes to a just outcome.\textsuperscript{44}

\begin{thebibliography}{99}
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\bibliography{references}
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The Monitoring and Mentoring Committees in India are expected to track the day-to-day proceedings in legal aid cases. The committees, mandated to be constituted at each legal services institution, are a unique locally based mechanism that can closely monitor and mentor legal aid lawyers in effectively representing their cases. However, their mere constitution means little, if they are not provided adequate staff to efficiently track and document lawyer’s performance and progress in each case. This necessitates that NALSA prioritize efforts to bridge the quality gap and ensure implementation of the Regulations 2010 and guidelines for MMCs in letter and spirit.

The following steps are suggested towards streamlining the functioning of the MMCs with the aim to ensure quality of services provided:

- NALSA should conduct a country-wide study to assess the existing infrastructure, human resources, workload, documentation requirements and practical difficulties for MMCs. Based on the findings, corrective action should be taken at the earliest.
- NALSA should ensure that on-going efforts to ensure quality services, are duly reported in its Annual Reports – this will enhance confidence among public towards legal services.
- NALSA should streamline procedures for receiving, and redressing complaints received from legal aid beneficiaries.
- SLSAs should periodically conduct webinars with the legal services functionaries and legal aid providers towards enhancing their understanding of quality legal services, assessment parameters, performance standards and functioning of the MMCs.
Abstract

Legal services institutions are often criticized due to their unsatisfactory performance and lack of adherence to profession standards. It is vital, for legal services to be synonymous with credibility and quality, that standards are intricately built into the framework. The Indian legal aid system, when conceptualized in 1987, did not delve much on quality. In 2010, deliberations regarding quality led to the adoption of the NALSA (Free and Competent Legal Services) Regulations 2010 which conceptualized the constitution of Monitoring Committees. Yet, a decade later, quality services remain a concern highlighted by experts, practitioners, academicians and beneficiaries.

Conversations to improve quality have in the last couple of years emerged and in 2019, efforts were made to strengthen the functioning of monitoring committees through adoption of guidelines. In 2020, efforts were made to strengthen procedural compliances and documentation through the adoption of Handbook of Formats by the National Legal Services Authorities. Thus, the proposed paper seeks to discuss existing frameworks, procedural standards and implementation gaps in ensuring quality services in the Indian legal aid system. The paper would also study such other applicable standards and mechanisms as suggested in the UNODC Handbook on Ensuring Quality of Legal Aid Services in Criminal Justice Processes and ponder over their applicability in the Indian context. It would then put forth practical recommendations and guidance towards improving mechanisms that enable provisioning of quality legal services across the country.

Keywords: Quality, Legal Services Institutions, NALSA
Towards a modernised legal aid system in the Netherlands

Susanne Peters¹ and Corry van Zeeland²

Introduction

Access to justice is essential for citizens, because the sooner problems are identified, tackled and resolved, the better. The 2019 OECD report³ points out the negative social, economic and health impacts of untreated legal problems and disputes. Moreover, it emphasises the added value of effective access to justice in tackling inequality and promoting well-being and inclusive growth for people and societies. Being able to obtain legal aid, subsidised if necessary, is an integral part of access to justice and is of great importance for people who do not have sufficient knowledge, skills and resources to handle and solve legal problems themselves.

In the Netherlands, legal aid provided by lawyers and mediators is available to citizens who are eligible to legal aid. Approximately 36% of the residents are entitled to legal aid. The Dutch Legal Aid Board (hereinafter: LAB) is the independent administrative body responsible for legal aid, which is organised through zero, first and second tier services. The zero tier entails the provision of online information, advice and other services including self-help tools such as www.rechtwijzer.nl and www.uitelkaar.nl, the online divorce platform provided by Justice42⁴. The first tier includes face-to-face and telephone services by the Legal Services Counter and other providers such as social-legal counselors. In particular, they offer information and advice and early interventions such as pre-mediation and, in case of complex problems, referral to second tier services. Lastly, second tier services involve the specialised assistance of lawyers and mediators.

Legal aid under construction

Since 2018, the Dutch legal aid system has, again, been under construction, with as spot on the horizon a renewed and learning system in 2025. Subsequent advice commissions⁵ made a number of recommendations, which are now being implemented. Central in the current reform is the main focus on citizens and their need for help. To specify, the reform firstly puts a strong emphasis on early conflict resolution by the zero and first tiers, including earlier, better and sustainable problem solving. Secondly, the use of specialised legal aid and mediation in the second tier should be targeted to complex legal problems, and both quality and efficiency of the services should be more at the forefront. Thirdly, the system should lead to higher fees for lawyers, as was

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² Researcher and coordinator at the Knowledge Centre at the Dutch Legal Aid Board.
⁴ https://justice42.com.
advised by the Advice Committee Van der Meer, which provided clear evidence that fees have lagged behind in most fields of law.

The reforms and innovations are currently developed and tested in numerous pilots including initiatives from the field, which have been supported by a subsidy of 10 million euros.

The LAB, one of the key players in the reforms, together with the network partners, is currently working on a number of justice journeys and legal aid packages for frequently occurring legal problems. These justice journeys and packages, on which we will elaborate in detail later on, are taking a people-oriented perspective: they should be focused on citizens and their needs and problems, and on achieving working and sustainable outcomes. In addition, the quality of services and value for money are important too in designing the journeys and packages. In order to understand what constitutes quality and how quality services can be organised efficiently and sustainably, the Knowledge Centre of the LAB conducted extensive desk research into national and international literature on the quality of legal aid and the way(s) in which this can be organised.

In this paper we present our findings and report on current experiences in designing justice journeys and legal aid packages and on ways in which Dutch legal aid organisations and professionals are working towards a renewed, evidence-based legal aid system.

**What constitutes a high quality legal aid system?**

Extensive desk research into national and international literature on quality in public legal aid has yielded a wide range of quality criteria. Criteria regarding legal quality of the service and service provider are, of course, important. However, legal quality is not the only relevant criterion we found in the literature. In recent years, a paradigm shift can be seen from the, once dominant, institutional perspective on access to justice and legal aid (= access to lawyers, courts and legal outcomes) to a people-oriented perspective on access to justice and legal aid (= access to support, processes and remedies that focus on people’s needs, inclusive processes and fair and sustainable solutions to problems).

The desk research has identified five overarching themes encompassing the quality criteria we found: (1) quality assurance; (2) person-centered, (3) integrated perspective; (4) what works and (5) efficiency (see figure 1).
Firstly, ‘good’ legal aid should involve **Quality Assurance**. Quality assurance not only entails the traditional take on legal quality of services and service providers (legal knowledge and skills); it also includes the non-legal quality of services (for example communication and accessibility) as well as professional ethics. The service provider should provide quality, the system should guarantee quality and the citizen should experience quality and be able to rely on it.

Worldwide, three other themes important for quality of legal aid can be distinguished. Secondly, the general opinion is that the person seeking help should be central (**Person-centered**). In recent years, there has been a paradigm shift from an institutional perspective on access to justice and legal aid to a people-oriented perspective on access to justice and legal aid. The services provided should be people-
oriented and solution-oriented, any underlying problems should be addressed, citizens should be included, and, if problems can be prevented, this should be preferred. Thirdly, and related to the above, more emphasis is placed on an Integrated Perspective: a holistic view of the person, the problem and the request for help, in order to ensure appropriate and inclusive problem-solving. Problems should not (only) be dealt with legally, but also from an integral perspective, and support can be provided through various channels. Fourthly, it is considered important to have a system that is based on evidence, ‘What Works’. Parties responsible for the system should have strategies in place for monitoring and evaluating the interventions, processes and outcomes of legal problems. Data (qualitative and quantitative) play a pivotal role, because it can be used to substantiate (proven, practice based evidence) what works and what does not work in the services and processes provided by the legal aid system. Build-in feedback loops, for example, can help to stimulate shared learning, inform necessary improvements and encourage innovation.

Finally, the fifth theme found in the literature is Efficiency. Society demands an efficient use of public money. An efficient system should be transparent and accountable. Continuity in the provision of legal aid should be ensured and the system should be based on effective price incentives.

How can quality of legal aid be organised?

Part of the reform towards a renewed and learning legal aid system is the design of justice journeys and legal aid packages for frequently occurring legal problems. The concept “justice journey” refers to the total “journey through a conflict resolution process” that a citizen with a certain problem takes using one or more tiers. The concept “legal aid package” is that part of the journey in which the resolution of a conflict requires a specialised service by a lawyer, mediator or combination of service providers.

The idea underpinning both concepts is that frequently occurring problems, such as separation/divorce and dismissal, are suited for a modular approach with fixed prices and if needed, customization to particular needs. A legal aid package could include modular services such as advice, negotiation, mediation and litigation in court. A justice journey with one or more legal aid packages can also contain add-ons for clients with conflicts in which individual particularities and complexities play a role (such as the need for psychological support for parents and underage children in an acrimonious divorce). For an integrated approach, legal and non-legal service providers may work together in the package whenever this is indicated. The legal aid packages also aim to improve quality by setting quality criteria in advance. Quality assurance of specialist services is

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thus better guaranteed and also priced. Moreover, it makes the services transparent for citizens looking for help; they know in advance what to expect in terms of service, quality and costs.

In the coming years, the LAB and its partners, will continue with the development of justice journeys and legal aid packages for frequently occurring legal problems. The first justice journeys and legal aid packages currently under development include divorce and disputes regarding disability benefits. Two teams consisting of first-tier legal professionals, lawyers, mediators and other experts (e.g., social workers, academics, occupational health experts) have been tasked to define, distinguish and describe possible route(s) and package(s) in terms of content and process. The teams are facilitated by the LAB and an external facilitator.

The justice journeys and legal aid packages will also be instrumental in determining the quality standards for legal aid and mediation. The findings from the desk research into quality of legal aid form the basis, which will be further enriched and concretised in consultation with the professionals and other experts.

A working method has been established to develop and implement the justice journeys and legal aid packages (see figure 2).

![Figure 2: Development & learning circle justice journey / legal aid packages](image-url)
(Input) The Knowledge Centre of the LAB collects and shares the relevant information (data, insights from research, practical knowledge) for the team designated to design the journeys and packages.

(Development) The team describes the steps and phases that citizens take when looking for support to find a solution for their legal problems. Specialised services are detailed in the legal aid package. As described earlier, the basic package contains modular services as well as add-ons containing specified services regarding specified personal or problem-related issues for which the basic package is insufficient.

(Output) The justice journeys and legal aid packages are supported by data and research (if available), and validated by the professionals and experts. These substantiated and validated justice journeys and legal aid packages are the output of the team. They are either first tested in a pilot or directly implemented in practice.

(Working in practice) The operation and quality of the justice journeys and legal aid packages in practice are continuously measured through a robust monitoring and evaluation system.

(Data collection) Firstly, data are collected charting long-term trends in volumes, supply and demand. This increases the predictability of supply and demand and allows for strategic planning. These key facts and figures are since long present in the Dutch system and will be gathered specifically for the journeys and packages. In addition, new data will be collected on the needs of citizens using the services in order to solve their problem. What seems to hinder them or hold them back? What specific steps did they take, which services and interventions contribute effectively to a solution? How did they experience the justice journey and legal aid package, and what were the experiences of their counterparts and the professionals involved in the conflict resolution process? Information about the outcomes obtained and the quality and sustainability of these solutions will also be collected. The collection of quantitative and qualitative data from citizens, their counterparts and the service providers using and providing the journeys and packages is particularly important for establishing feedback loops, which aim to pinpoint possible obstacles and improvements in the justice journeys and legal aid packages.

(Periodic revision) The results of these measurements are used for the periodic revision, improvement and further development of the justice journeys and legal aid packages. Hence, an evidence base will be built, which will systematically contribute to a proven and learning legal aid system, one of the main themes that surfaced from the desk research (theme 4, What Works).

Towards a renewed, learning legal aid system
Despite the recent fall of the Dutch cabinet and following elections in March 2021, the reform has not come to a standstill. The transformation towards a renewed system capable of learning, innovating and improving took off and the development of justice
journeys and legal aid packages by the LAB and its partners will continue. This is done step-by-step and incrementally, and it is regarded as positive and inspiring that the transformation is widely supported by the Ministry of Justice and Security, the stakeholders in the legal aid system and other network partners.

Of course, at this moment there is no guarantee for implementations of the reform. After all, the political course of the new cabinet will determine both the structure and the pricing of the legal aid system. The House of Representatives elections were held in March and it is up to the new minister whether he wants to move on with the current reforms and create the (financial) preconditions for the renewed learning system. The childcare benefits scandal in which the Tax Authority falsely accused thousands of families of fraud led to important new insights in how the relationships between citizens and public authorities could and should be improved. A person-centered orientation will be high on the agenda in the upcoming years and public authorities are likely to develop new approaches. These new notions are, obviously, fully in line with the current transformation in the legal aid system. Therefore, it is very likely that the next cabinet will continue the reform of the legal aid system in accordance with these developments.

The LAB is currently reassessing its core tasks in the light of the reforms and the other developments. For example, the LAB develops a service catalogue containing legal aid packages, add-ons and other services. Lawyers, mediators and future other service providers who meet the quality standards will be registered at the LAB, and sign up for the services in the service catalogue they seek to provide. In the near future, the LAB will also match a person eligible for second tier legal aid with the most suitable and efficient package(s) and service provider(s).

The Knowledge Center, another new core task of the LAB, shows the LAB’s pivotal role in the validation, monitoring and evaluation of the quality of legal aid in justice journeys and legal aid packages, and in an evidence-based and learning legal aid system. By systematically collecting, sharing and using data and qualitative information, knowledge is brought to the heart of the legal aid system. Also current knowledge gaps can be filled and overview and insight will be created for all stakeholders in the system. One of the core products that the LAB will co-develop with its partners is the annual independent "State of Legal Aid". The State will inform legislators, policymakers, practitioners, service providers, scientists, citizens and their counterparts about the effect of the public goods "access to justice" and legal aid. Thus, the learning system underpinned by evidence and cooperation will become a reality in 2025.

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7 The ‘childcare benefits scandal’ was the reason why the cabinet resigned on 15th of January 2021, see https://en.wikipedia.org/wiki/Dutch_childcare_benefits_scandal.
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Risk, Reward and Technology – Responding Effectively to COVID19

By Jeff Giddings¹, Jennifer Lindstrom² and Jacqueline Weinberg³
Faculty of Law, Monash University

Introduction
This paper provides an account of how Monash Law School’s Clinical Legal Education Program harnessed various technologies in responding to the COVID19 pandemic. Across three main sites – Monash Law Clinics (Clayton and Melbourne) and Springvale Monash Legal Service – the program provides a broad range of legal and related services to thousands of clients each year. Monash University operates Australia’s largest clinical legal education program,

The COVID19 pandemic, with social distancing requirements, brought an urgent necessity to develop, design and implement a remote legal service at Monash Law Clinics. We were in the same boat as many other legal assistance providers, having to respond quickly in the midst of rapidly changing circumstances. We had to shut down but with service continuity plans. In the face of different and more acute client needs, Monash Law Clinics needed to balance these client needs with the safety of students and staff. All services had to be delivered remotely. Technology was central to our program’s efforts to continue to offer services in the midst of uncertain and changing circumstances.⁴

We formulated plans with input from staff, the Law Faculty and the University. We had the benefit of having our plans accepted by the University, enabling a swift transition to remote services in late-March 2020. Phone-based services were provided to existing clients and then extended to a limited number of new clients from mid-April 2020. Towards the end of June, staff returned on site as we introduced additional remote services.⁵ In restarting, we identified that technology would enable our plans to serve clients. In the midst of uncertainty, addressing the significant risks to clients, students and staff – both in terms of personal safety and information security – was important.

Experience in digital delivery, especially in 2018-19, facilitated a range of responses to COVID19. A Virtual Legal Clinic was developed and technology-focused clinics were established in areas including law reform and anti-death penalty advocacy.⁶ Additionally, the experiences of these clinics informed the move to remote delivery as well as the introduction of new services, most notably a Technology and Access

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to Justice Clinic, a Lawyer-Assisted Family Dispute Resolution Clinic, two new Human Rights Clinics and a Social Security Advocacy Clinic.

The paper identifies ways in which service delivery and student learning have been enhanced by the changes necessitated by COVID19. These insights are now informing our return to greater face-to-face service delivery.

**The Monash Law Clinical Program**

Monash Law Faculty established Australia’s first clinical legal education programme in 1975. Monash is now the first Australian law school to guarantee its students the opportunity to participate in a clinic-based learning experience during their degree. In 2020, despite COVID19, more than 500 students participated in various clinics for which they received academic credit. We offer our students the opportunity to work in community law, family law, criminal law, multiple dimensions of human rights (climate justice, anti-death penalty, modern slavery, domestic and international human rights & democracy and freedoms), client advocacy, law reform, international trade – we are introducing a health justice partnership in late-June, 2021 partnering with cohealth, a leading network of community health services across northern and western Melbourne.

Monash Law has developed enduring partnerships with other community legal centres and supported other agencies engaged in front-line service delivery. These agencies are now facing unprecedented demand for assistance from people seriously impacted by circumstances generated by the pandemic.

In responding to the COVID19 pandemic, we harnessed various technologies to continue to deliver services to clients. All our services had to be delivered remotely. Our clients faced different and more acute needs and we needed to balance these client needs with the safety of students and staff. We built on experience in digital delivery with secure use of Zoom, MS Teams and phone services providing the key platforms. Jackie Weinberg led the development of a Virtual Clinic and technology-focused clinics were established in some of the areas referred to earlier including law reform (with the Australian Law Reform Commission) and anti-death penalty advocacy (with the Capital Punishment Justice Project and a range of international partners).

**Technology-assisted Clinics**

In 2017, we identified opportunities to provide legal services to clients who cannot attend community services in person, because they live in regional or remote areas, or because of disadvantage and marginalisation. We established the virtual legal

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Clinic (VLC) within the Monash Law Clinics, whereby clients are provided with legal assistance using technological platforms like Zoom and Teams as well as telephone services. Additionally, the VLC provides opportunities for law students undertaking clinical placements to develop the skills needed to make the law available to people who would otherwise have no affordable sources of legal help. The VLC also fits with MLC’s strong community service focus while also developing significant aspects of clinical teaching, particularly in relation to professionalism and values.

We were able to assist clients who are disadvantaged either through financial hardship, disability, language barriers, family violence or other circumstances that have arisen through COVID-19. As of January 2021, there were 22.31 million internet users in Australia, constituting 88% of the Australian population. For many, digital tools, such as apps and video conferencing have become widely accepted as a means to access legal services. Where clients do not have access to virtual technology due to socio-economic factors, such as age, or geographical isolation, legal advice may be provided using other virtual means, such as via telephone.

The VLC model in a community setting provides user-focused services to address client needs and assist those who would not otherwise be able to access justice. The VLC adapts existing models to expand practice-based learning opportunities for clients to access justice. The VLC operates in a similar way to more conventional services, incorporating digital technology to make appointments, assess potential conflict of interest, and provide documents and information that prepare the client for their ‘virtual appointment’. Clients are made aware of the availability of the VLC, with information on the Monash Law Clinics website about procedures and protocols. Clients have reported back to us that they are able easily to access information about our service and are grateful to be able to access this service remotely. When providing advice through the VLC, our practitioners tailor their communication to the situation and context of each client as part of a client-centred approach. In particular, they communicate in a way that enhances their relationships with clients, using clarity to build trust where face-to-face interaction is not possible.

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13 Weinberg & and Giddings, (note 12).
14 Ibid.
Susskind and Susskind identified the opportunities for legal professionals to use a range of new technologies to make services more efficient and to organise and make available their collective knowledge and expertise in society. COVID-19 has highlighted the potential for such innovations to deliver efficient, affordable and widely available legal services. The continuing development of virtual delivery of legal services requires practitioners to become adept with new skills and competencies. In particular, they need to learn to communicate differently, gain mastery of the data in their disciplines, establish new working relationships with technology, and to diversify the services they offer.

Technological innovations are influencing the practice of law and as such lawyers and law students need to develop new skill sets in order to thrive professionally. Building the evidence base about our experiences with this work will help clinics develop effective legal service and educational practices as we navigate the new terrain. The demands of modern law practice make it imperative that students master a range of new technologies and communications methods. By participating in the VLC, students are provided with opportunities to gain insight into the intersection between law and technology in advancing legal service, and how technology can be used to increase access to justice. Students are exposed to how technology impacts on legal service and are equipped with the skills needed to match the demands of the modern lawyer. Our experience in developing and implementing the VLC guided the subsequent development of the Lawyer Assisted Family Dispute Resolution Clinic.

Lawyer Assisted Family Dispute Resolution Clinic

The Lawyer-Assisted Family Dispute Resolution clinic was created in 2020 in collaboration with Brimbank-Melton Community Legal Centre and the Family Relationship Centre in Sunshine. This clinic is the first of its kind in Australia and was designed to advance dual objectives, firstly, to provide a vital service to clients in our community and secondly, to give our students the opportunity to expand their knowledge of family law and dispute resolution processes.

Family law reforms in 2006 required separated parents to make a genuine effort to resolve parenting disputes with the help of a qualified practitioner in a non-adversarial way through family dispute resolution (FDR). FDR must be attempted before an application for parenting orders can be made to the court, unless exceptions apply. Community-based Family Relationship Centres (FRCs) were established around the country as a result of these reforms to provide FDR

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18 Ibid.
20 Susskind & Susskind (note 17).
22 Weinberg & Giddings, (note 12), Thanaraj (note 21).
24 Family Law Act 1975 (Cth) s 60I(9).
services.\textsuperscript{25} One of the models provided by FRCs is the Lawyer Assisted Family Dispute Resolution model (LAFDR). LAFDRs can contribute to addressing imbalances of power between the parties and provide access to timely, safe and a cost-effective alternative to litigation.\textsuperscript{26} In 2018 to 2019, National Legal Aid reported that it conducted 8116 legally-assisted sessions with a settlement rate of almost 80%\textsuperscript{27}. This highlighted the importance and value for lawyer-assisted FDRs and for our service to be involved in providing this service to families with more complex circumstances than can be accommodated by FDR.

Before 2020, LAFDRs were conducted in-person. In response to the Pandemic and social distancing requirements, service providers needed to find other ways to conduct LAFDRs in an effective, safe and secure way. We designed a clinic which could offer LAFDR and associated services remotely, predominantly via videoconferencing technology. This method provided a viable alternative to onsite and in-person delivery. We opened our virtual doors in September 2020.

Since then, the clinic has welcomed 19 students on placements one day a week. The structure of the clinic is as follows. Before a LAFDR, pre-mediation interviews are conducted by the lawyer and student via Zoom. These meetings enable clients to meet us, provide instruction on their matter and set up and test the technology on their devices. Students then spend time researching relevant legal issues and preparing advice. The advice is checked by the supervising lawyer and provided before or during the LAFDR session.

LAFDR sessions are conducted once a fortnight and run for approximately three hours with the mediator, lawyers, students and parents present. The student and supervisor then provide advice to the client in an individual breakout room as required. If an agreement is reached, the mediator will draft a parenting plan at the end of the session. After each LAFDR session, students contact their clients to check whether there are further advice or assistance needs.

With any new clinic, we review our practices regularly and meet with our partners approximately once every three months. So far, some barriers we have experienced include lack of access to reliable internet, data costs, access to technology with video capabilities, Zoom fatigue and issues on managing risk for providing services online. Clients engaging with our services at the clinic are provided with a client agreement and an explanation that no part of the interview can be recorded. At the beginning of LAFDR sessions, the mediator reminds the participants of the above obligations before sessions commence.

Despite the challenges, there have also been benefits for clients and students. We have observed that having legal support gave clients increased confidence to

\textsuperscript{25} Patrick Parkinson, ‘The idea of Family Relationship Centres in Australia’ (2013) 51(2) Family Court Review 195-213, 195.

\textsuperscript{26} Rae Kaspiew \textit{et al}, Evaluation of a Pilot of Legally Assisted and Supported Family Dispute Resolution in Family Violence Cases, Australian Institute of Family Studies (Final Report, December 2012).

\textsuperscript{27} National Legal Aid, Submission to Joint Select Committee, \textit{Australia’s Family Law System} (31 January 2020), 25.
discuss their needs and concerns in relation to their children. Since September 2020, 14 LAFDRs have been conducted. The LAFDR sessions have all resulted in some form of agreement or parenting plan.

The clinic has also provided more than 30 clients with legal advice as they are participating in the FDR process. These clients are referred from the mediators for further assistance either before parties participate in FDR, during the FDR process on options for settlement or after section 60I certificate have been issued.

From the clinical legal education perspective, we are providing future lawyers with practical experiences in interviewing clients, drafting documents and correspondence and the chance to learning about FDR in a real-life setting. Our partner organisations have welcomed participation by the students. The development of this clinic and insights continues to inform other dimensions of the Monash Clinical Program, student learning and service delivery to the community. Going forward, we hope to continue this clinic offering and hope to expand services to families in regional areas.

**Taking Street Law Online**

Monash Law Clinics now operates a Street Law Program, in partnership with the Monash Law Students’ Society (LSS). In the second half of 2019, Jeff Giddings worked with a group of 20 volunteer Monash law students to develop their skills to present community legal education talks to school groups. We ran 3 workshops to prepare the students and then had group debriefs to discuss their experiences. Student groups then delivered 10 presentations to a range of schools.

These experiences provided a great platform for further development of the program. The program is specifically designed to offer opportunities for middle-year volunteer law students to develop client-focused skills that will prepare them for taking part in the Monash Clinical Program. And we get to connect with local schools and their students.

Despite COVID19, the Street Law Program ran again in 2020, developing community legal education presentations to be delivered remotely to schools and community organisations. Two virtual workshops on interactive teaching were used to prepare 30 students (selected from more than 90 applicants) for their involvement in the program. The shift to virtual delivery of the workshops – via Zoom – worked better than expected. Contributions from students who had participated in 2019 kept the interactivity and highlighted the importance of focusing on presenting in ways that work for your audience.

On September 3, 2020, the Monash Street Law Program featured prominently at an online roundtable convened by Street Law UK and Ireland. The ‘Delivering Streetlaw in a Socially Distanced World’ roundtable started with a presentation titled ‘Virtual and Personal: Lessons From Taking Monash Street Law Online’ involving Jeff

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Giddings and 4 Monash Law students. The Monash experience was acknowledged as valuable to northern hemisphere colleagues who were preparing to move to virtual delivery of their legal literacy programs.

The 2021 Street Law Program has started and, where possible, will run face-to-face. The preparation workshops now have a dual orientation, developing the ability of students to present on community legal education topics in ways that work best for their audience and suit the circumstances. A structured mentoring model has been used to support new volunteers at the same time as giving the mentors opportunities to develop their teaching skills.

Conclusion
We see four key insights from our recent experience and our response to the COVID-19 pandemic:

1. There is great scope for law students to contribute to service delivery for clients with a wide range of legal needs
2. The tech doesn’t have to be high-tech. Relatively low-tech options like phone and Zoom are likely to be fine if they serve the clients effectively and the safety and security of people and information is prioritised.
3. We’ve added value through partnering with a range of leading organisations. Our ability to build on existing networks was a key to the program’s response to COVID19.
4. Our work in developing clinics that harness various technologies will continue to inform the other dimensions of the Monash clinical program as we develop the ‘new normal’.

While everyone has felt the impact of COVID19, that impact has been greatest upon vulnerable members of our communities. Clinics should prioritise the delivery of services to groups who have limited opportunities to advocate effectively for themselves. Clinics need to support their communities, offering services to people in need, while also prioritising the safety of staff and students. In the case of the Monash Clinical Program, the response to COVID19 has been framed by extensive experience in developing and sustaining clinics that balance the dual objectives of student learning and client service. The response has sought to provide supervisors with a degree of flexibility while also providing effective structures to ensure continuity and consistency. Monash’s lengthy experience has provided those involved with the confidence to take appropriate chances and be creative in the design of remote activities.
Has Covid accelerated or decelerated technological transformation?

Richard Susskind
June 2021

In the middle of March 2020, court buildings around the world began to close in response to the widespread transmission of SARS-CoV-2, a newly identified coronavirus, and to the related respiratory disorder, Covid-19, which was threatening the health of the global community. Within days, alternative ways of delivering court service were put in place in many jurisdictions.

There remain some sceptics and critics, but in light of the experience during the crisis, there is certainly greater acceptance now than in February 2020—amongst lawyers, judges, officials, and court users—that judicial and court work might be undertaken very differently in years to come. Minds have been opened and changed over the past few months. Many assumptions have been swept aside.

On the strength of almost one year of remote courts in operation, many lawyers and judges are now insisting we will never go back, that the transition to technology-based justice has been achieved. This is overstatement. The leap from physical courts to remote hearings has of course been remarkable, but it is early days and no one can sensibly claim that they are suitable for all cases and issues. We are at the foothills of the transformation in court services. The current array of remote courts are a valiant collection of ad hoc services but much work and investment will be needed to industrialise these efforts, to build court capabilities that are scalable, stable, and, crucially, designed for use as much by lay people as by lawyers.

More than this, the current systems that have been cobbled together are still examples of what I call automation rather than innovation. Broadly speaking, automation involves computerising our current ways of working while innovation (as I define this term) involves undertaking tasks and delivering services that are not possible without technology. Almost all the remote courts that have been set up in
response to the virus are variations on the theme of traditional courts – automation. But we should be clear: dropping our current court systems into Zoom is not, as some commentators like to intone, a ‘shift in paradigm’. In truth, working from the kitchen is not the much-vaunted disruption of traditional courts. Of course, we have seen an accelerated deployment of some video technologies, but these have largely served to propped up – digitally relocate - our conventional court services. The people, procedures, and problems involved remain substantially the same.

In the post-covid world, however, if we are to tackle the access-to-justice problem head on, we will need to move beyond grafting technologies onto current operating practices.
Instead, in light of insights gained as we poke our way somewhat haphazardly through the crisis, the challenge will be to develop systems that allow us to deliver court service in ways that previously were not possible; not to computerise current practice. The great power of technology lies in innovation rather than automation - the development of systems that replace rather than streamline our old ways of working.

The shift to video hearings, then, is not the fundamental transformation that awaits us in the long run, which is when many of the activities of lawyers are themselves replaced by increasingly capable systems. That transformation has in fact been decelerated by Covid. For most legal professionals and court workers, artificial intelligence (in particular) has been put on hold, while we have urgently secured better ways of communicating and collaborating when unable to meet physically. During Covid, we have been much less concerned than we were in, say, 2019, with transformative court technologies.

This is why I say that the pandemic has accelerated the uptake of some technologies but decelerated the deployment of others. In summary, Covid has accelerated automation, but decelerated innovation (in the senses noted above).

I find it helpful to regard the developments of the last few months as a huge unscheduled pilot, a great experiment in the use of a variety of technologies in our
courts. They were inspired by the need to keep our court services afloat, but they should also cast light on possible futures for our courts. In some cases, it has been a proof of concept. But if this is indeed an experiment, we should be systematically and rigorously collecting data about timings, volumes, technologies, applications, users (lawyers and clients, both represented and self-represented) and their experiences. Thus far, in the melee of keeping courts operational, the gathering of data about the performance of remote courts has been modest and uneven.

Nonetheless, there are a number of fledgling attempts to monitor developments and evaluate progress. One of these is Remote Courts Worldwide. We launched this on 27 March 2020, four days after the Prime Minister of the United Kingdom declared a nationwide lockdown. Remote Courts Worldwide is a website - a joint effort, hosted by the Society for Computers and Law, funded by LawTech UK, and supported by Her Majesty’s Courts & Tribunals Service - designed to help the global community of justice workers (judges, lawyers, court officials, litigants, court technologists) to share their experiences of remote alternatives to traditional court hearings. At launch, around 20 jurisdictions were handling cases by video. Today (June 2021), 168 countries are now on RCW.

To the question I have been asking since the 1990s – is court a service or a place? – the resounding answer, from Albania to Zambia, is that, in some cases at least, parties do not need to assemble physically to have their legal differences authoritatively settled by the state.

Amusing anecdotes about video abound – from a toilet-flushing incident during a remote hearing of the US Supreme Court, to the tale of the Texas attorney who appeared before a District Court as a talking cat face (courtesy of a Zoom filter). Case studies in resourcefulness are also in abundance, from Scotland’s repurposing of cinemas into remote jury trial centres, to the provision of laptops by the UN Development Program to the Sri Lankan Ministry of Justice to help boost their use of remote hearings.

There have also been disturbing reports – for example, after a three-hour hearing at Lagos High Court, ‘the virtual judgment of the court,’ in the words of Justice Dada,
was that the accused ‘be hanged by the neck’ (https://www.thetimes.co.uk/article/man-is-sent-to-death-row-via-zoom-fkhs7h0d3).

1. In all, though, the level of satisfaction with video hearings amongst judicial and legal users globally is much higher than would have been predicted in early 2020. Judges and lawyers adapted with uncommon alacrity when it became clear their iceberg was melting. Using video systems in earnest has led battle-hardened cynics to be unlikely advocates of technological change. Equally, most litigants say that participating remotely is more convenient and less forbidding than appearing in courtrooms. In terms of open justice, many report that video hearings are more accessible than traditional courts, both to the media and the public.

Certain types of dispute have emerged as well suited to remote handling—interim, procedural, and interlocutory hearings; routine family work; small money claims; minor criminal offences; many commercial disputes; administrative cases; and civil appeals.

It is no shock therefore that two-thirds of the respondents (mainly lawyers and court workers) in soon-to-be-published RCW research believe that remote proceedings could serve as a “long-term, viable means of providing court services”. There is a risk here, however, of falling foul of the fallacy of the successful first step. The explosive uptake of video hearings cannot be denied, but nor should their limitations.

It has become clear that for some kinds of cases—such as sensitive family work, serious crime, or where extensive cross-examination is required—conventional physical hearings are preferable. Much more analysis needs to be done to determine what types of cases or issues are best suited to what types of disposal, whether in person, by audio or video, or even on the papers alone. But it is clear, in principle, that video hearings are not a panacea.

In practice too, there are concerns. There are reservations about privacy and security. There are fears that the ‘majesty’ of a court is lost in remote hearings (although many argue that majesty is too high a bar and that solemnity and authority should suffice). There have been difficulties for elderly, for those requiring
translation, and for court users with poor internet connection or other technical difficulties, including judges working from court buildings with poor wi-fi. If the technology fails or falters, then confidence plummets. The tolerance of technological glitches that judges and court users have shown in the past year is unlikely to extend into the post-Covid period.

Likewise, technological solutions are needed for another practical problem - that mass lists of short cases or applications run more quickly in the traditional system than when handled by video. The answer here probably lies in the provision of virtual lobbies and online collaboration spaces, but here again if video is to play a leading role in the post-covid recovery, the whole set-up needs industrialised.

Note too that, in technological terms, video hearings are stone-age stuff conceived in the 1980s. Their recent adoption offers a kick-start to the transformation of our courts. But the ad hoc Covid systems will be superseded this decade by asynchronous procedures, court-connected online dispute resolution, telepresence, virtual reality, blockchain, and artificial intelligence, terms as unfamiliar to most lawyers today as Zoom and Teams were twelve months ago.

If today’s video hearings are claimed to be the main answer to the future of courts, we are asking the wrong question. A sustainable, technology-enabled court service of the future will offer a blend of physical and online service, a buffet of options (of which video is but one) optimised for different types of case, balancing the interests of court users with the practicalities of delivering a public service. To get there, we will need greater government investment and the support and vision of leaders across the legal community. And we will need to move beyond automation to innovation through technology – delivering court services in ways that are not possible without technology. 1

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1 This note is based on the preface to the paperback edition of the author’s book, Online Courts and the Future of Justice (Oxford University Press, July 2021) and on a column (‘Video hearings have transformed courts but are not a panacea’) published in The Times on 1 April 2021.