Journal of Law and Social Policy

Volume 19 Article 6

January 2004

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Citation Information
Cormier, Michael. "A Response to "The Critical Characteristics of Community Legal Aid Clinics in Ontario"." *Journal of Law and Social Policy* 19. (2004): 82-93.
DOI: https://doi.org/10.60082/0829-3929.1029
https://digitalcommons.osgoode.yorku.ca/jlsp/vol19/iss1/6

A Response to "The Critical Characteristics of Community Legal Aid Clinics in Ontario"

Michael Cormier*

Résumé

Lenny Abramowicz examine, dans son article, les facteurs qui, selon lui, ont contribué au succès du système des cliniques juridiques communautaires en Ontario. Le présent article se veut une réaction à l'analyse de M. Abramowicz.

Pour mieux cerner les conditions qui ont favorisé la longévité du système des cliniques juridiques communautaires en Ontario, l'article commence par passer en revue l'évolution historique du système de l'Aide juridique en Ontario. Cependant, ce regard jeté en arrière diffère quelque peu de celui de M. Abramowicz.

Les déclarations de M. Abramowicz concernant les points forts du système des cliniques juridiques communautaires en Ontario comprennent un grand nombre de suppositions à propos du fonctionnement des cliniques et des personnes qui ont servi sur leurs conseils d'administration. Le présent article remet en question bon nombre de ces suppositions. En plus, cet article examine les suppositions faites concernant les clients des cliniques et les services juridiques offerts aux personnes défavorisées. Il soutient qu'il n'existe que très peu de faits pour soutenir les assertions du pourquoi et du comment le système des cliniques s'est avéré un succès en Ontario. Pour tout dire, il n'existe pas suffisamment de recherches permettant soit de prouver ou d'infirmer beaucoup de ces assertions. Ce qui amène l'auteur à affirmer qu'il faudrait, en fait, qu'il y ait plus de recherches.

En dernier lieu, l'article soutient que, à la fois les cliniques, et le modèle utilisant les avocats du secteur privé, sont prisonniers de leurs propres mythes quant au type de travail dont ils devraient s'occuper. Il y a donc lieu d'examiner les deux systèmes afin de voir comment les coordonner pour mieux servir les collectivités marginalisées. Bien que le système de cliniques juridiques de l'Ontario ait réussi à aider les personnes à faible revenu à faire respecter leurs droits juridiques, il est temps de se livrer à une analyse en profondeur afin que cela continue à être le cas à l'avenir aussi.

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Introduction

In "The Critical Characteristics of Community Legal Aid Clinics in Ontario" Lenny Abramowicz discusses what he considers to be the unique characteristics that have contributed to the success of the Ontario legal clinics. He does not define success or discuss what he would consider to be indicators of success. His only reference to what he sees as success is the fact that the Ontario clinics have existed for a longer time than other clinic systems. There is good reason to be proud of the Ontario system and to celebrate its longevity; however, a serious discussion of the reasons for success require a better definition of success and an articulation of the indicators of that success. In examining the article by Abramowicz I will deal only with issues that I consider to be questionable and important.

My analysis will emphasize two points. First, there is a dearth of empirical research focusing on the Ontario clinic system. This lack of research ensures that many statements about the system cannot be verified. Some articles and some government commissions have considered both legal aid generally and Ontario clinics specifically; however, these efforts have relied on literature reviews and submissions from interested parties. These writings are valuable but are not a substitute for empirical research.

The many statements about Boards of Directors provides an example of the lack of data. Boards of Directors are often praised as cornerstones of the Ontario clinic system, but no research has been conducted that would verify or refute these assertions. Clinic boards use a number of different operating methods and hold different views of their goals and responsibilities. Are some more successful than others? Are some not functional? Do some structures better accommodate the needs of clinic clients? The short answer is that we do not know.

There are data available that could be used to at least start assessing assertions about the clinic system. Historical data exist in places such as the archives of the Law Society of Upper Canada and the information collected from clinics each year. Undoubtedly other archives and sources of yearly reports could be examined. Political statements, such as those by Chief Justice McMurtry, are gratifying and help build confidence in the system, but they are not a substitute for research and analysis.

One other problem with understanding why Ontario clinics succeeded when others did not is the lack of information about the other clinic systems. Is it true that other less successful systems did not use boards of directors to control local clinics? If they did, then the success of Ontario's clinic system cannot be attributed to the existence of local boards.

I want to make it clear that I am not arguing that boards are good or bad, but rather that we do not have enough information to make either assertion. Furthermore, if they are good, what makes them work effectively? Are all ways of organizing and structuring boards equal? Are boards truly representative of the communities they serve? What is meant by representative?

Second, there are assumptions implicit in many of the assertions by Abramowicz. In order to objectively evaluate the system, it is necessary to expose these underlying assumptions and determine the degree to which they can be verified.

Finally, it must be noted that this analysis is not meant to suggest that every aspect of the system must change. Rather, I argue that any future growth or stability is dependant on an objective fact-based understanding of the present strengths and weaknesses of the system and clearly enunciated goals for legal aid.

One editor of this journal pointed out that a number of the aspects I criticize in this article are necessary myths. It is true that most organizations live with a number of myths. However, from time to time these myths must be examined and adjusted to accommodate new realities. The question of what needs to be changed, discarded, or developed can only be answered and after a full analysis of the system.

Traditional Law Practice

One problem with exploring the clinic system in Ontario is the use of terms that may seem self-explanatory but defy easy definition. One example is the use of the term "traditional law practice." Given the variety of practices that have existed in the province and the change in practice over the last 50 years, it is difficult to give any specific meaning to this phrase. Small-town general practices are and have always been different from corporate practices in downtown Toronto. Many assumptions about traditional practice made by Abramowicz may apply to a type of small-firm practice in smaller communities. As will be evident from this critique, I believe there is a need to take a closer look at non-clinic practice in order to determine where clinics may fit in the universe of legal practice.

History of Legal Aid in Ontario

A better understanding of the Ontario clinic system can be gained by examining the early history of legal aid in Ontario. It will be argued later in the paper that many of the main characteristics of both the judicare and clinic systems in Ontario are the result of the historical context of their beginnings. Another key is the people involved in the organizing of the system during its first ten years. Both the clinic and judicare systems had leaders whose beliefs shaped the structure of the system. These factors brought about the circumstances that helped ensure the longevity and growth of the clinic system. However, these factors were also responsible for the fact that Ontario created two systems of legal aid – judicare and clinics – which developed separately and view their respective roles somewhat rigidly. I will argue that it is time to re-examine both systems and make adjustments in order to best serve the public.

Beginnings

Legal aid in Ontario was first formally organized because of an initiative by the Law Society of Upper Canada [the Law Society].[1] In 1951, the Ontario government passed legislation that allowed the Law Society to establish a system for providing legal

1. M.P. Reilly, "Origins and Development of Legal Aid in Ontario" (1988) 8 Windsor Yearbook of Access to Justice 81.

assistance to marginalized people.[2] The Law Society had lobbied the government for this right. Although it would have preferred a funded system, the Law Society believed that it was unrealistic to expect the government to pay for legal aid, so it settled for a system dependant on the charity of lawyers in practice.[3]

The government took no part in the operations of the system; they delegated all matters of organization and operation to the Law Society. The great majority of the people in charge of overseeing legal aid were members of the Law Society.

The two themes of limited participation by the government and control by lawyers sitting on the governing body of the Law Society set the political and philosophical atmosphere for the first funded system of legal aid in Ontario. It also set the stage for the clash between those who pushed for clinics and those who preferred the certificate system.

Almost from its inception the unfunded legal aid system was in trouble.[4] In the late 1950s and early 1960s, the problems with the plan became extreme. Lawyers were refusing to serve on panels because of the amount of time involved. Numerous people were appearing in court without counsel. The result was a concerted effort by the bar, the public, and some politicians to convince the government to fund the plan.[5] The government established a review of the plan in the mid-1960s,[6] and in 1967 the then government of Ontario established the first funded legal aid plan in Ontario.[7]

However, the government left the running of the plan in the hands of the Law Society. Furthermore, the government review set up in the mid 1960s looked exclusively at the existing unfunded plan and did not consider other areas of practice or other ways of practising law. Therefore, the funded plan emphasized the same areas of law as the unfunded plan: criminal and family litigation.[8]

Under the unfunded plan the Law Society had established a committee to oversee the operations of the plan, and the funded plan followed the same processes. The government delegated to the Law Society, which delegated to a subcommittee. The subcommittee reported to the governing body of the Law Society.

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2. *Law Society of Upper Canada Amendment Act,* S.O. 1951, c. 45.
3. Law Society of Upper Canada, Minutes of Convocation, 15 February 1951.
4. Letter from W.H. Waugh to Earl Smith, Esq., QC, provincial Director of Legal Aid (14 April 1955) 30-2-1, Legal Aid Collection – General Archives Law Society of Upper Canada; Letter from W.E.G. Young to E. Smith, Director of Legal Aid for Ontario (31 January 1955) 3-2-1 Legal Aid Collection – General Archives Law Society of Upper Canada; and M. Cormier, "Legal Aid in Ontario: The Function of Charity" (1990) 6 J. L. & Soc. Pol'y 102.
5. Ontario, *Report of the Joint Committee on Legal Aid* (Toronto: Ministry of the Attorney General, 1965) at 5.
6. *Ibid.*
7. *Legal Aid Act,* 1966, S.O. 1966, c. 80 as am. By S.O. 1968–1969, c. 000.
8. *Ibid.*

The Emergence of Poverty Law

At about the same time that the Ontario government was reviewing the legal aid system in Ontario, the United States had declared war on poverty (eventually poverty won). As part of that initiative, the legal aid movement in the United States changed dramatically. Previously legal aid in the United States was funded through private charities that provided limited services to specified groups. The new movement emphasized working in the neighbourhoods of the poor and letting the poor set the agenda for the type of law and lawyering that would be offered. It was also open to a wide array of poor people.[9]

Another affect of the poverty law movement was that lawyers from prestigious law schools, such as Harvard, were forgoing work with major firms and instead working with the poor. This led to the development of a group of talented lawyers dedicated to helping marginalized groups. It also led to an increase in academic writing on the practice of poverty law. There was an increase in experimenting with different methods of providing legal services to marginalized people. One such experiment was the establishment of a clinic system that operated in the communities in which the poor lived.[10]

Among the most influential members of the poverty law movement were the Cahns, a young married couple who attended Harvard law school. They wrote an article on the idea of having neighbourhood law firms serve the poor, arguing that the best way to serve the poor was to locate clinics within the communities in which the poor lived and allow them to help set the agendas of the clinics.[11] In the early 1970s, the Cahns spoke at a conference in Toronto and inspired Canadian lawyers and legal activists to set up similar services.

Another influential writer on legal aid was S. Wexler.[12] He advocated teaching the poor to practise law for themselves. It was his belief that if the poor became their own lawyers they would learn to manipulate law and wrestle control from the government and upper classes that used law as a tool to control society. The poor would become more able to determine their own destines.[13]

The bringing together of the ideas of the Cahns and Wexler contributed to the philosophy behind the clinic system. There was a belief that the poor must have more control of the legal system that controlled their lives. There was also a belief that neighbourhood law offices would help this happen.

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9. Earl Johnston Jr., *Justice and Reform* (New York: Russell Sage Foundation, 1974).
10. *Ibid.*
11. Edgar Cahn & Jean Cahn, "The War on Poverty: A Civilian Perspective" (1964) 73 Yale L.J. 1317.
12. S. Wexler, *Practicing Law for the Poor* (1970) 1049 Yale L.J. 79.
13. *Ibid.*

Ontario Clinics

Soon after the introduction of the funded legal aid system in Ontario, the existing clinics lobbied for funding. These clinics were opposed to simply having the areas of law in which they practised, workers compensation, etc., added as matters for which lawyers could receive certificates. Many poverty activists, both lawyers and non-lawyers, were suspicious of lawyers in private practice. They felt that lawyers would ignore the needs of welfare recipients, injured workers, and other marginalized people. The activists were also certain that lawyers practising traditional law would be unable to handle files in the areas of law that affected the poor. Finally, many poverty activists believed that lawyers were part of the problem, not the solution.[14]

Lawyers in private practice had concerns about the use of clinics to represent clients. They were afraid that clinics would rob them of some of their business. They were also concerned that salaried clinic lawyers would not have the normal pressure to settle that exists when a client is paying the lawyer. It was believed that salaried lawyers would erode the independence of the bar and make them little more than civil servants. Many lawyers were unconvinced of the need for clinics, arguing that the pro bono work done by lawyers was adequate to fill the need.[15]

The fact that neither group trusted the other led to the development of two separate systems of legal aid. The process of establishing separate systems started with a push by the clinic activists for an inquiry into the need for a clinic system. A commission was established under the lead of Mr. Justice Osler. After considering the information about the judicare care system and the mutual fears, Osler suggested that a separate committee of the law society be established to oversee the clinic system. As well, it was suggested that the funding of clinics be separate from that of the judicare.[16]

The Law Society followed the recommendations of the Osler report. A committee was established to oversee operations and funding of the clinic system. The Clinic Funding Committee was independent from the judicare committee, and the funding was negotiated separately. The clinic committee reported separately to the Law Society.

Until the late 1990s the Law Society ran the legal aid system. The committees ran separate bureaucracies and received separate funding from the government. They reported separately to the governing body of the law society. Although the committees and employees of the systems talked and met, there was little ability to change or integrate the systems. They had different world views and remained suspicious of each other.

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14. Canada, *The Legal Services Controversy: An Examination of the Evidence* (Ottawa: Queen's Printer, 1971).

15. Law Society of Upper Canada Community Legal Services Report (Toronto: Law Society of Upper Canada, 1972).

16. Ontario, *Report of the Task Force on Legal Aid Part 1* (Toronto: Queen's Printer, 1974) (Chair: John Osler).

In the late 1990s another government commission examined the legal aid system. This was one of the first reviews to look at the system as a whole rather than concentrate on one of the two parts of the system. The new commission recommended that the Law Society no longer run legal aid and that a crown corporation be established to oversee legal aid. Further, it recommended that both clinics and judicare come under the roof of the corporation. For the first time it became possible to bring the two systems together to work on common problems.[17]

The ideological stances and beliefs of the members of the two systems set the stage for the development of legal aid until the late 1990s. Each part of the system protected its own territory. The two parts of the system were able to develop in isolation.

The early history of the clinic system brought about several conditions that helped achieve the success of continuous funding and development. First, the people involved in the clinic system – lawyers, staff, and clients – were responsible for the initial development and continued growth of the system. The result was that the boards and others involved in the development of each clinic felt some ownership of the clinic and had a commitment to its existence.

Once a clinic was up and running, the initial members of the board retired and were replaced by members who had not been part of the development of the clinic. It is not clear that the new members felt the same commitment and ownership that was true of the original board.

As well, it is likely that the protections put in place by the Osler report helped guarantee the continued existence of the clinics. A group of powerful benchers was given the responsibility of overseeing the system, giving them a vested interest in the continued existence and growth of the system. The clinics were protected from any interference from the judicare system, and the government had given a legitimacy to the clinics that was equivalent to that of the judicare system. Since funding was provided separately, there was nothing to be gained by the judicare system trying to limit the funding to clinics. All of these factors made it possible to continue to grow and develop without interference.

Attributes of Marginalized Communities

Abramowicz bases part of his arguments for clinics on the distinctive nature of clinic clients. He argues that there are differences between rich and poor that go beyond the obvious economic distinction, and that the differences require a unique type of legal practice. It is questionable that any of these distinctions exist.

The first point made is that lawyers practising in traditional law firms had not cultivated practices in areas of law that affect the poor. While this seems to be true, it is not clear that they could not do so if such areas were seen as financially lucrative. In fact, there are lawyers in traditional firms practising in the area of worker's

17. Ontario, *Report of the Ontario Legal Aid Review: A Blueprint for Publicly Funded Legal Services* (Toronto: Queen's Printer, 1997) (Chair: John D. McCamus).

compensation, which was one of the areas that the founders of the clinic system had developed. There is no reason to believe that traditional practice cannot accommodate new areas.

There is also no reason to believe that lawyers in traditional practice cannot accommodate members of marginalized communities. Criminal lawyers and lawyers taking child-protection cases deal with such communities continuously.

Next Abramowicz argues that poor people are unaware of their rights and therefore clinics must take on the task of educating potential clients. Is there any evidence that the poor are less aware of their rights than any other groups? There is no evidence and little reason to believe that the majority of citizens are aware of the legal rights and responsibly. At best, this assertion remains questionable.[18]

The idea that the problems of the poor are systemic and those of others are discrete, requiring limited contact with lawyers, is the next assertion. In truth there are many organizations and people who have long term-involvement with lawyers. Many corporations have firms that advise them on virtually every aspect of business. Insurance companies use law firms to advise on changes to legislation, test cases, and the likely meaning of new legislation. The wealthy use lawyers to set up and run trusts that protect their wealth from taxes and family law claims, to oversee complex deals, and to advise on how to structure their affairs to limit taxes. It may be that only middle-class people have limited use for lawyers. Are the rich and the poor more similar than the middle-class and the rich?[19]

The final point made by Abramowicz is that poor people need to fashion their own responses to legal problems. He states that this cannot be done by lawyers in traditional legal practices. The answer is discussed in the section above.

Fundamental Defining Characteristics of the Clinic System

The core of Abramowicz's argument is that clinics operate in a manner different from that of traditional law firms. He asserts that three qualities make the clinic system unique and successful:

1. Local community governance
2. Practice in areas of poverty law
3. Legal response provided through a broad array of services

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18. A recent study for Justice Canada found that low income people place more value on public legal education and information. Is it possible that they also seek out this information more frequently? Report to Justice Canada Public Legal Education and Information Study March 2002 By Compas Inc. Multi-Audience Research, Ottawa, Toronto and Winnipeg.

19. Report prepared for the Department of Justice, Ottawa, and the Faculty of Queens University, Legal Services in Rural Areas: An Evaluaion by D. Laureen Snider Ph.D. (July 1978. revised March 1981) at 27–35.

Broad Array of Services

I will start with the final point first, since I think it is the easiest to answer and the least likely to matter to the clinic system. Many law firms provide an array of services to clients. It is not unusual for a law firm to provide education in the form of both written materials and lectures. Law firms will also provide advice on lobbying governments. Virtually all provide summary advice and referral services. Numerous firms provide services equivalent to those provided by clinics.[20]

Clients have often required more than one-on-one case assistance. Law firms recognize the need to market their services, and providing a range of assistance to the public is one way to do it.

Local Community Governance

It must be noted that Abramowicz does not fully explain what community he is discussing. Is it all the people within the geographic area served, just potential clients, some other subgroup? There is a need to examine the concept of community in more detail and analyze the degree to which boards can represent the numerous and diverse communities over which they have jurisdiction. Can the geographic community and legal area community (such as welfare recipients) be served at the same time by the same board?

However, even without the full definition, it is still possible to examine the assertions in the article. It is assumed in Abramowicz's article that boards of directors provide local control. One assumption implicit in this statement is that board members come from the community at large and that the members of the community (whether community is defined by geography or client groups) are informed about the board and can join if they wish. There is no evidence that all or a majority of boards make an effort to obtain members from within the communities they serve. Some clinics attempt to have a broad membership. Others make no efforts to have corporate members and prefer to have the board choose its successors. It is doubtful that either can truly claim to be representative of its community. Where the corporation has members, other than the board members themselves, the membership is usually relatively small in comparison to the potential membership. It is likely that most members of the communities in which clinics exist have no idea what the clinic policies are or what work is preformed by the clinic. The best that can be said is that the clinic will have representation from active members of the community who have an interest in the clinic system.

It is also doubtful that clinics can change service directions with any speed or ease. Clinics have a small number of lawyers. As well, most clinic lawyers provide service within a specific area of law, such as landlord tenant or workers compensation. It would be difficult for the lawyers to become expert in another area in a short period

20. *Ibid.*

of time, and the lawyers cannot simply be replaced. There are too many political and legal problems in the way of such a solution.

Once again, what is clear is the need for further information in order to determine the flexibility of clinics.

Practice in Areas of Poverty Law

As Abramowicz notes, the first problem with this characteristic of clinics is that there is no definition of poverty law. He tries to solve this problem by using a two-pronged definition: (1) law that disproportionately the poor and (2) areas of law around which a low-income community of interest can easily coalesce.

The first part of the definition may turn out to be less obvious than is expected. It has, for example, been argued that environmental laws effect the poor disproportionately because toxic materials are often dumped in their neighbourhoods. However, it is the second part of the definition that is most problematic.

I will start with the idea of community of interest. How is community to be defined? Is the interest just the legal issue? Must all affected members agree on the goal for the community of interest? It is possible to have a common interest but a different goal.

Another problem is the question of whether such communities exist only in clinic practice. In fact, a similar approach has been taken by numerous litigants. The insurance industry has often coalesced around an issue and used law firms to help. Firms practising labour serve either management or unions. They advise their legislation, strategy, etc. Undoubtedly other examples exist.

It is still possible to argue that community of interest is the method by which clinics pick their areas of practice. Using Abramowicz's own example, this approach can be shown to be questionable. He uses the example of a criminal charge with an overlay of a landlord tenant matter, to explain why landlord–tenant matters belong in the clinic and criminal matters do not.

Abramowicz asserts that a pivotal test for determining areas in which clinics should practice involves asking whether opposing parties might sit on a clinic board. There is no reason to be concerned about parties to a dispute sitting on the same board. A number of boards have a policy disallowing anyone who is a client of the clinic from sitting as a board member while a client. In some cases he or she must wait until one year after being a client. This approach makes sense, since having a board member who is a client presents more problems than just finding the other side sitting on the board.

The next concern is that of people on the opposite side of the issue meeting in the reception area. Firms face this problem regulaly and deal with it effectively through pre-screening, using conflict-of-interest checks.

Further in the case outlined by Abramowicz, it is the landlord–tenant matter and not the criminal matter that would be most likely to create a conflict. The other side in a

criminal matter is the Crown. However, it is not unusual to have a landlord–tenant matter where one tenant initiates the process against another tenant. In Abramowicz's example, it can arise when the tenants push the landlord to evict the dealer. It can also happen in domestic violence cases where one spouse wishes to be released from the lease because he or she can no longer live with the other tenant, or when tenants complain about another tenant's pets or the noise by another tenant. The landlord may bring the main action, but it also possible for the tenant to bring an action against the landlord and the offending tenant.

Using the analysis suggested by Abramowicz, the areas of criminal law and child protection law would be most likely areas of law that clinics would practise. The applicant is almost always the state. Those affected are disproportionately poor, and there is reason to believe that the state does not treat poor and rich alike in these areas of law. Yet both of these areas are part of the certificate system.

I am not suggesting that clinics immediately begin to practise child protection or criminal law. Rather, my point is that we need to examine more carefully and with more information the question of which areas of law belong in clinics. A response requires a more accurate picture of clinics and detailed analysis of the areas of practice.

What Are the Unique Characteristics of Clinics?

Oddly enough, I would agree that the ability to move beyond one-on-one file work is an important aspect of clinic work. However, I would argue that it is important not because others do not do it, but rather because they do. The government and institutions that are in some manner opposed to the rights and positions of the poor regularly use lawyers to help limit the rights of the poor. In order to counter them, it is important that the poor have equivalent access to legal advice that goes beyond case-by-case representation.

It would be difficult to use the judicare system to provide this service. Certificates for lobbying and community development would be difficult to control in the same way that individual case certificates are controlled. Limiting hours and types of service would likely defeat the very reason for such political action.

One of the things that clinics do well is bring together poor clients with agencies that serve them. Most clients of clinics have a multitude of interrelated problems involving a number of agencies. It is difficult to provide these clients with the type of services necessary to solve these problems using the certificate system, given the time and service limitations of individual certificates. However, often the solution of one problem affects the other. A parent charged with a criminal act will often have problems involving Children's Aid. These are not isolated issues.

Likely there are numerous other benefits to using clinics for certain types of legal problems. Each idea needs to be explored and studied to determine priorities and directions. As stated above, it is necessary to analyze both clinic and judicare opera-

tions in more detail and to consider the areas of law in terms what process fit best with the characteristics of clinic practice.

The Ontario legal aid system has many strengths and has contributed to the equalization of justice in Ontario. Both the certificate system and clinics have their strengths and weaknesses. They were both born and developed in isolation and in a different legal and political culture. It is time to examine each part of legal aid and ensure that it able to meet the needs of the future.