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ONTARIO

THE SECOND ANNUAL REPORT

OF THE ADVISORY COMMITTEE ON

LEGAL AID IN ONTARIO

TO THE HONOURABLE ARTHUR A. WISHART, Q.C.,

MINISTER OF JUSTICE AND

ATTORNEY GENERAL FOR ONTARIO

1969

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THE HONOURABLE ARTHUR A. WISHART, Q.C.,

*Minister of Justice and
Attorney General for Ontario,*

Parliament Buildings,
Toronto 2, Ontario.

Dear Mr. Attorney:

Pursuant to the provisions of *The Legal Aid Act, 1966*, I have the honour to present the Second Report of the Advisory Committee on Legal Aid for Ontario, being its Report for the year ending March 31st, 1969.

Yours truly,

JOHN W. BROOKE,
Chairman.

May 1st, 1970

THE SECOND ANNUAL REPORT OF
THE ADVISORY COMMITTEE ON LEGAL AID IN ONTARIO
1969

This is the second annual report of the Advisory Committee on Legal Aid and it is concerned with the year ended March 31st, 1969.

ACTIVITIES OF THE COMMITTEE

1. Since the delivery of its last report to you on December 23rd, 1968, this committee has met on a number of occasions and, through discussions with persons charged with the responsibility for the administration of the legal aid plan and with other persons, has sought to inform itself as to the operation of the plan and to form an independent judgment on the matters which by the statute we are required to report upon.

2. You will recall that the committee met with you to discuss its activities and at that time you gave approval for the conduct of an independent limited scale cost benefit study to be conducted under the direction of the committee. We are pleased to report to you that this study is presently in progress.

3. We report to you that we also had meetings with Mr. M. Borczak, the Deputy Minister of the Department of Social and Family Services for the Province of Ontario and his associate, Mr. H. R. Dignam.

4. We sought and obtained information from members of the Law Society of Upper Canada who are charged with the responsibility for the administration of the plan. In particular, we met with Mr. W. G. C. Howland, Q.C., the Treasurer of the Law Society, and with Mr. T. P. Callon, Q.C., the Chairman of the Legal Aid Programme Committee, which committee is charged with the direct responsibility for the administration of the plan.

5. The committee met, of course, with Mr. A. Lawson, Q.C., the Provincial Director of Legal Aid. Special mention must be made of his continued cooperation in supplying our committee with information which it required from time to time and, generally, in seeing to it that we were informed about the operation of the plan.

6. We met with Mr. D. J. McCourt who is the Controller of the Legal Aid Plan with whom we discussed financial aspects of the plan.

7. We met with Mr. F. J. Cornish, Q.C., the Area Director for the County of York, with Mr. W. R. Donkin, Deputy Area Director for the County of York, and subsequently with members of the Area Committee for that County, specifically, Miss P. Haslam, Mr. A. M. Kirkpatrick, Mr. L. Richardson, Mr. E. Houser, Q.C., and Mr. C. Bynoe.

8. In attempting to perform our duties, we sought to determine and keep abreast of the problems in the administration of the plan as they developed from time to time, to consider and where possible to determine the bases, if any, of unfavourable or unwarranted criticism in the news media and elsewhere and, finally, to maintain an appropriate contact with other persons directly concerned with the legal aid programme, including members of the bench and Crown officers. In this regard, we sought and obtained reports from the County and District Court Judges' Association and from the Provincial Judges' Association, which were most helpful in our studies. We also received complete cooperation from the Crown Attorney at Toronto with respect to the inquiries we made of him.

9. In every quarter we received complete cooperation. It has been our experience that all discussions have been conducted with candor, and we judge that those engaged in the administration of the plan have a deep-rooted sense of its importance and a real determination to make it work successfully.

10. We have become concerned about area committees and the future participation of such persons presently employed in legal aid on a voluntary basis. These persons have made an important contribution to the plan through its initial years. However, they cannot be expected to continue to perform their work indefinitely. It has been made plain to us in our inquiries that many of these people have developed individual skills in the areas of responsibility which they have accepted and we suggest that care be taken in effecting their replacement so as to minimize the impact of the loss of their knowledge and skills.

It has been said that area committees should be considered as an involvement of the community in the legal aid plan. In view of the concern that legal aid may not be serving the chronic poor in the community and in an effort to guard against such eventuality, we suggest to you that in the appointment of new members to the Area Committee, consideration be given to the selection of persons who may be able to discern insofar as it is possible, whether the chronic poor in the community understand that legal aid may help them and that they are given adequate opportunity to avail themselves of it.

SECOND ANNUAL REPORT OF THE LAW SOCIETY

11. The second annual report of the Law Society being the report for the year ending March 31st, 1969, was received by this committee during the month of December of that year. The report is a model of brevity, while containing a very complete statement of the operation of the plan for the year under review. In our opinion, it complies with section 10 of *The Legal Aid Act*, containing a full statement of the nature and the amount of legal aid rendered, a statement of receipts and disbursements of the fund, a copy of the auditor's report and general information as to the working of the Act and Regulations.

12. Of particular importance, in our view, is the complete statistical analysis which is contained in the appendices of the report. We believe the report adequately covers the most significant developments of the plan during the course of the year in question and contains a frank statement of the problems which were encountered by those charged with the responsibility for its administration.

PREVIOUS RECOMMENDATIONS MADE BY THE COMMITTEE

13. In our previous report, we outlined the areas which we felt to be of concern and made recommendations with respect to their study. In all but two of these areas, it appears that improvement in the operation of the plan has been obtained through appropriate changes in administration and by the passage of enabling legislation. These developments result from the combined initiative of the Law Society, the Director of the Legal Aid Plan and his staff, and the Department of Social and Family Services. We now turn to deal with these matters specifically.

14. The reports of the Law Society and of this committee for the year ended March 31st, 1968, revealed concern as to whether the underlying philosophy of the plan being legal aid rather than legal care was being observed in its administration. You will note from the report of the Law Society at page 8, that there has been improvement over the preceding year in the receipt of contributions from those persons found to be able to pay part or all of the costs of the legal aid rendered to them. We affirm that this is the result of better procedures and a more knowledgeable use of data processing instituted by the Controller of the plan in carrying out the present policy that obligations under the plan be recovered whenever possible. We are aware of the problems that arise in carrying out a firm policy with respect to collection of such debts and we recommend that those concerned continue to study the appropriateness of the present policy so as to preserve the basic premise of the contributory legal aid plan, while at the same time insuring that no injustice is done to any person in the collection of his debt for legal aid, and also that the cost of the collection of debts is appropriate to the amount of the recovery.

15. In our first report, we recommended that a study be made to determine whether or not there should be a revision of the existing formula used to determine what persons were eligible for legal aid. We note that page 7 of the Law Society's report reveals adjustments that have been made in the criteria used by the Department of Social and Family Services for determining the financial eligibility of those applying for legal aid. We have gone into this matter in some detail in the meetings which we refer to above, and we are of the opinion that the adjustments have substantially met the criticism which was the basis of our recommendation in our first report: specifically, that legal aid in some instances was being improperly extended to persons who previously would have had or found sources of money to provide for their own legal care.

16. We are aware that there are still persons who are obtaining legal aid when charged with certain criminal offences for whom money for a defence would probably have been available from outside sources prior to the advent of legal aid. The matter is not one which is easy of solution and we continue to study the question in the hope that we can advise you further in this regard.

17. We recommended in our first report that the legal profession be urged to be vigilant in discerning and discovering abuses of the plan. No one is more concerned that this be done than the Law Society. The report of the Law Society discusses the use of three procedures which are important in relation to abuses of the plan. These procedures are: the supervision of those permitted to undertake legal aid through the use of the power to remove a solicitor's name from the panel for cause; the adoption of controls including the limiting of the number of cases which may be undertaken by a lawyer and the use of limited certificates in some criminal and civil cases; and, finally, proceedings before the Discipline Committee of the Law Society of Upper Canada with the possible loss of professional standing either permanently or temporarily.

18. The power to remove the name of a solicitor from the legal aid panel for cause is provided by section 29 (2) of the regulations. We regard the careful use of this power as being necessary to insure the efficient administration of the plan. Obviously, it is appropriate in cases where there is an abuse of the Act or regulation. Serious questions surround the use of this power when it is contended that there is a general incompetence or a failure to provide professional service of the standard that one ought to expect. We emphasize that this power must be used with the greatest care. There is no doubt that such an order may cause a hardship on a solicitor as work under the legal aid plan may be an important source of income to him, to say nothing of the injury to his professional reputation in the community. The policy which directs those vested with the power to take away the privilege to participate in this important field must be carefully developed to insure that the lawyer is as fairly dealt with as he would be if he were called before the Discipline Committee of the governing body of his profession.

19. As to the controls of limiting the number of cases which a lawyer may undertake, the use of the limited certificates in both civil and criminal cases and the controls imposed on lawyers' accounts, our inquiries and interviews reveal that each of these measures had produced some criticism and dissatisfaction in different quarters of the bar. We feel bound to comment on these matters, for some contend that they strike at vital things: the right to counsel of one's choice; freedom of counsel to defend as he sees fit; and, finally, that too much regulation respecting solicitors and accounts has produced a situation which is onerous and unreasonable.

We are aware of the complaints which caused the Law Society to impose the first two mentioned controls and, in our opinion, there was good cause for the Law Society to take action. We have found no reason to believe that these decisions of the Law Society so affected the operation of the plan that the quality of legal service to the public has been

adversely affected and, of prime importance, there is no suggestion to us that any individual has suffered an injustice by reason of or as a result of either or both of these measures. We have had an opportunity of examining the policy of the Law Society with respect to both of these matters and of considering these policies with Mr. A. Lawson. Having regard to all the circumstances, we do not criticize the steps taken by the Law Society to date.

However, we feel the concern of the members of the bar which we have mentioned is sufficient cause to recommend that the Law Society continue to study the effectiveness of the measures referred to. It may well be, in due course, that these measures may be modified or removed. In any event, we propose to reconsider the matter further before our next report.

20. With respect to the measures taken to control solicitors' accounts, we find that this is a matter of serious concern to many members of the profession who provide legal services under the plan. Principal amongst their complaints are that some services are not adequately provided for by the tariff and that billing procedures tend to be cumbersome. In our opinion, the types of controls instituted by the Law Society in this regard are essential. The Law Society is quite aware of the complaints which we have referred to. We are assured that these matters are constantly under review by the Law Society and we believe that the procedures have been improved from time to time. We do, however, recommend that these matters continue to be closely studied by the Law Society with a view to further improvements which will insure full participation by the members of the bar in the plan. The quality of legal service under the plan is dependent upon and envisages full participation by the bar.

21. In our first report, your committee recommended that in the education of students at law, greater emphasis be placed upon the role of the lawyer in legal aid. We note that provision has been made as reported on page 7 of the Law Society report for the Dean of any Law School in Ontario, with the approval of the Law Society, to establish a student legal aid society involving students at his school, and that students who have a degree of Bachelor of Laws who are not yet admitted to the bar, though they be under articles, may participate in legal aid under the supervision of a member of the Bar. We recommend that this programme be extended in order that students working in legal offices after their third year in the course of Bachelor of Laws, be permitted, particularly during their summer employment with lawyers, to participate to the same extent, as we believe that the earlier the student participates in legal aid, the better he will appreciate its value to society. Similar activity by students at law in other jurisdictions has provided a valuable service to the community. We are pleased to note that student legal aid societies have been established in Ontario.

22. In our first report, we recommended that there be a continuing study by the Law Society of Upper Canada, with the cooperation of your office, to insure that remuneration and salaries of those persons engaged

in the plan are not only fair by contemporary standards but such as would attract and retain competent persons who one could expect would make a career of this important public service. We have obtained a schedule showing the numbers and classifications of all persons employed in the Ontario Legal Aid Plan during the year under consideration.

23. Dealing first with persons other than those who might be described as discharging executive responsibility, we report to you that the salary increases achieved, while modest, appear to maintain such salaries within acceptable limits for that year.

24. As to the salaries paid to those persons discharging executive responsibility, there appear to have been moderate increases in these salaries also. We again report to you that there can be no criticism that these salaries are excessive. We recommend that serious study be given to these salaries to insure that they are commensurate with responsibility and sufficiently generous to retain competent people in these important offices.

25. Finally, there are two matters which concerned us in our first report in which we believe further action should be taken. Specifically, these matters are: the adequacy of the public relations programme for legal aid and the evaluation of certain legal procedures and legal services required in relation to them. We propose to deal with these matters further in this report.

PUBLIC RELATIONS

26. As we reported a year ago, we were concerned that there had been a lack of good public relations with respect to the legal aid programme. We are still of this view. Persons employed by the legal aid offices have expressed to us their awareness that such a programme is needed so as to insure that the public will be aware of this scheme and have confidence that it can help them if they are in need of legal assistance. There have, unfortunately, during the year under consideration been instances of bad publicity, including reports made by Grand Juries in the County of York, which commented adversely on some aspects of the scheme. As one could properly expect, there was extensive coverage of these reports by the news media and there is no doubt that the image of the plan suffered. It is not good enough, in our opinion, to simply let all criticism remain unanswered. The public must be informed so as to properly judge the value of the plan to the community and to themselves.

27. We note that during the year under consideration, the amount attributed to advertising as set out in the financial statement was considerably less than that spent in the previous year. We recommend that the Law Society undertake and that the Government approve an expenditure for a programme to put before the public the undoubted benefits that this plan extends to the people of Ontario so that they are better able to understand and to make use of it and to evaluate criticism of it when it occurs.

LEGAL PROCEDURES AND SERVICES

28. During the course of our inquiries, we became aware of the concern by many as to the expenditure of public moneys in the defence of persons who were recidivists having a record of conviction of crimes including crimes of a similar nature. It is difficult for the taxpayer to understand why legal defence should be provided for a person who has a record of convictions for criminal offences, particularly for the same or similar offences as that for which he is then charged. The difficulty is sometimes compounded when a second offence may have been committed or is said to have been committed while the accused person is on bail pending trial.

The concern was brought home to us throughout discussions not only with laymen but also with some members of the bar and, indeed, was the subject of comment by a Grand Jury in its report to the Presiding Judge.

29. The report of the Law Society reveals that out of a total of 19,375 criminal cases in which legal aid was provided, 7,847 cases were cases where persons were charged with robbery or theft or breaking and entering or possession of stolen property. We think it is probably that there would be a substantial number of recidivists amongst the accused in this group of cases. The views expressed to us were substantially the same as those which were stated by the Joint Committee on Legal Aid at page 61 of its report prepared before the passing of the *Legal Aid Act*. You will recall that subsequent to the publication of the Joint Committee's report, further representations were made by interested persons and bodies and, subsequently, the Statute was passed in its present form.

It is our opinion that the Statute in its present form and the present practice conform with the approach taken in most other jurisdictions, is the more informed approach, and there ought to be no change in either legislation or the practice. It is our view that the real safeguard against abuse of the scheme by recidivists or, for that matter, by any other person, lies in the retention of high standards of ethics by the legal profession in the defence of criminal cases. We cannot ignore, however, the strong representations that have been made to us and we report that to you. We can only recommend that those concerned with the administration of the plan continue to study the relationship of the recidivist and the purposes of the plan. It is to be hoped that we are becoming more aware of the inter-relationship of law enforcement, the courts and the correction of the offender. Perhaps, legal aid will be found to assist in the correction of the recidivist and if this is so the advent of the legal aid plan is an even greater social stride.

30. The dominant feature of the report of the Law Society as to the cost of legal aid in civil cases is the very high ratio which costs of divorce and corollary relief bears to all other matters. If the cost of the plan is to be reviewed, this item must be considered. The committee is aware that the Government of Ontario has under consideration the

question of jurisdiction in divorce cases and, from our point of view, the question of costs of divorce cases may be relevant to your consideration.

If the matter were not under consideration by the Government of Ontario, we would have suggestions to make with respect to procedures within the existing framework of legal aid that might to some extent assist in reducing the cost of providing legal aid in these cases. In the circumstances, we have no recommendation to make at this time.

In any event, it is our hope that a substantial saving can be achieved in this area and that such saving would be applied to improving legal aid by extending it into areas where it is not now available. In particular, we feel that there is a need for representation of the individual bankrupt in bankruptcy proceedings, representation of judgment debtors and, of great importance, the extension of legal aid advice service throughout the community particularly where the public may not be aware that legal aid services are available and might help them. Here again we express our concern with respect to whether or not legal aid is reaching out to include persons in a state of poverty. There is little doubt that communication is the threshold problem in assuring that the availability of legal aid is understood and that it will be sought after when needed by a person in such circumstances, and to this end such funds would be well spent.

31. Your committee notes that 32,240 cases undertaken by legal aid were completed in the year under study compared with 15,318 cases in the previous year and that the cost of legal aid in the period rose from approximately \$4,000,000.00 in the previous year to approximately \$7,000,000.00 in 1969. We have examined the statement of receipts and disbursements and the increased cost appears to us to be as anticipated. We find no reason to criticize any specific area of expenditure save for the comments we have had to make regarding the need to consider the cost of divorces. The justification for the expenditure of these moneys is, of course, the social value of the plan to the public of Ontario. At the present time, there are four programmes of study being carried out, each independently of the other and each for different reasons, the results of which should be available to you in the not too distant future. These results should go some distance in measuring the value of the plan. These are the four studies:

- (a) The study being carried out by Management Consultants retained by the Government of Ontario to consider certain aspects of the value of social services in the province.
- (b) The statistical study carried out by the Director of Legal Aid, being a survey of criminal cases undertaken as a result of criticism which was directed at the Law Society of Ontario alleging abuses of the scheme.
- (c) The study being carried out by this committee on cost benefit.

- (d) The study which has been undertaken by a department at the University of Toronto which has as its purpose consideration of the effect of legal aid on certain aspects of the criminal justice system in this province, and which it is hoped will include some economic analysis of the system.

The Committee is satisfied that each of these studies will make a contribution to your knowledge of the value of legal aid. We are particularly impressed with the initiative shown by the Law Society and those charged with the administration of the plan in instituting the study second above referred to. Those who complained were critical of both the bar and the Law Society in its administration of the plan. If the results of the total study affirm the conclusions reached in the sample study, not only will the criticism have been answered, but there will be a definite basis to conclude that the judgment being exercised by the bar in the defence of criminal cases under the legal aid plan has indeed been reasonable. Further, the study should prove that the plan has provided an important measure of economic and social value both to the community and to the individuals involved and before the court.

COMMITTEE MATTERS

- (1) During the year under consideration we were fortunate to obtain the part-time services of a secretary to our committee. The incumbent is a member of the bar with a background of work including work with the Law Reform Commission and similar projects, and is ideally suited to serve this committee. We expect that the incumbent will be of great assistance in coordinating the work of the committee and we hope will insure continuity as the members of the committee step down and are replaced from time to time.
- (2) On the 18th day of October, 1969, His Honour Chief Judge Willmott retired as the Chief Judge of the County and District Courts of the Province of Ontario and ceased to hold office as a Judge and as a member of this committee. We record our appreciation of the contribution made by Chief Judge Willmott to the work of our committee, not only because of his industry, but because of his appreciation of the difficulties of the administration of such a plan and because of his deep insight into social problems in Ontario, all of which gave us a better perspective in approaching our studies.
- (3) After consultation with you, we record our views in the matter of the composition of this committee.

While the legal aid plan is relatively simple in its design, its application to the vast area of Ontario with its population distribution provides administrative difficulties. There is no doubt that many of the people of Ontario are receiving needed legal service which was not available to them before the advent of the plan. The figures revealed by the report of the Law Society of Upper Canada make this abundantly clear.

The increasing demand for such service will test existing procedures in the administration of the plan, and may tax the capacity of the courts at all levels.

Your committee is well into its third year in observing these matters, and we believe that it will be at least another year, during which we propose to visit the various regions of the Province, before we will have obtained a relatively complete perspective. If continuity of perspective is not to be lost, we suggest to you that a minimum term for membership on this committee be three years.

In our opinion, the present committee will be better able to serve you if their appointments be considered on the above basis and provision is made for the eventual retirement of one-third of the committee annually at the expiration of its three-year term of service.

We have no reason to recommend any change in the composition of the committee from that which is presently required by the provisions of the Statute. We recommend the committee be kept at the level of nine persons appointed from various parts of the province.

All of which is respectfully submitted.

JOHN W. BROOKE

JOHNSTONE L. ROBERTS

FRANCIS E. WIGLE

P. S. FITZGERALD

ANNA STEVENSON

GEORGE E. WALLACE

ELLIOTT STEDELBAUER

CHARLES E. HENDRY

