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# Access to Justice Metrics

## A Discussion Paper

*Envisioning Equal Justice*

An Initiative of the Canadian Bar Association

April 2013

**Standing Committee on Access to Justice**

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**Note:** This consultation document has been produced by the Canadian Bar Association's Standing Committee on Access to Justice for consultation only. It has not been approved by the CBA, and does not represent an official statement of CBA policy. It is intended to foster discussion. That discussion will be considered by the Committee in making its Final Report and recommendations to the CBA at the Canadian Legal Conference in August 2013.



# Access to Justice Metrics – Discussion Paper

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## 1. Forward

The Canadian Bar Association’s Access to Justice Committee is preparing five discussion papers as part of its *Envisioning Equal Justice* initiative.<sup>1</sup> The *Envisioning Equal Justice* initiative aims to tackle four barriers that currently impede sustainable and sustained improvement to access to justice: lack of political profile, inadequate strategy and coordination of access initiatives, absence of mechanisms to measure change, and identifiable gaps in our knowledge as to what actually works to improve access.

This discussion paper is designed to directly address the third barrier to progress: the absence of common terminology about access to justice, mechanisms to measure change, and a practical definition of success. It explores the conceptual foundation for access to justice metrics and identifies some approaches taken in other jurisdictions and by international organizations. It also presents a summary of findings from consultations held with focus groups concerning how they perceive access to justice, as one important perspective in formulating practical components of access to justice. The paper concludes with consultation questions designed to elicit feedback and discussion on the issues and options canvassed. Your input will assist the CBA Committee to develop its report and recommendations to be tabled at the Canadian Legal Conference in August 2013.

The CBA Committee invites your responses to any or all of the consultation questions, or the content of this Discussion Paper, and asks that all input be sent to the attention of Gaylene Schellenberg, Project Director, by May 15 2013.

## 2. Introduction: Why Metrics?

The effectiveness of the Canadian justice system suffers because we have an extremely limited vocabulary to describe and measure this system and the ways in which it functions; whether and how to measure the legal system’s performance are themselves contentious issues. We do not have a consensus about the meaning and definition of access to justice: although we can probably all agree that it is a complex and complicated phenomenon.<sup>2</sup> A common understanding of the components of access to justice is the first step in developing performance measurements, for which we use the global term “access to justice metrics”.

We have a shared sense that the access to justice “problem” is growing and yet this is only an intuition founded on anecdotes. We are unable to give definitive answers to even most basic

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<sup>1</sup> The first two discussion papers, “*Tension at the Border*”: *Pro Bono and Legal Aid* and *Underexplored Alternatives for the Middle Class* are available on the CBA website. The two remaining discussion papers will be available by early April. For a full project description see: [www.cba.org/CBA/Access/main/project.aspx](http://www.cba.org/CBA/Access/main/project.aspx)

<sup>2</sup> Dr. Liz Curran, *Literature Review: examining the literature on how to measure the ‘successful outcomes’: quality, effectiveness and efficiency of Legal Assistance Services* (Australia: February, 2012) at 3 [Curran 2012].

inquiries about barriers to access and we lack the capacity to pull together the fragmented data available to us into anything close to resembling a complete picture of access to justice in Canada. The maxim “you can only manage what you can measure” is well known. The absence of shared views on what constitutes access to justice, what to measure, and how to measure it, hampers policy development and decision-making in the legal and judicial institutions central to the proper functioning of our democratic order.

In its 1996 report, the Canadian Bar Association’s *Systems of Civil Justice* Task Force decried the lack of basic management information, concluding that the paucity of information was both indicative of and related to one of the five main identified barriers to access: inadequate management tools and resources.<sup>3</sup> The report recommended developing and maintaining national baseline data on the courts.<sup>4</sup> Some progress has been made in improving court-based data collection and there are ongoing initiatives to gather more sophisticated data, particularly around the costs of various aspects of the justice system.<sup>5</sup> Yet, we are far from having a shared framework for gathering data, much less a sound knowledge base for justice system decision-making.

Canada is not alone in this regard. A recent study by the RAND Institute for Civil Justice in the US concluded:

*Our chief observation at present is that limited and low-quality data across many dimensions of civil justice system performance will hamper any future empirical efforts. Consequently, we suggest a set of priorities for future civil justice data collection activities.*<sup>6</sup>

Similarly, in the UK, Professor Hazel Genn has pointed out that:

*There has been an historic lack of basic factual information about the characteristics of litigated cases in the civil courts. Although courts in England and Wales collect a considerable quantity of information for administration purposes, this database information generally misses vital descriptive elements such as case type, value and outcome.*<sup>7</sup>

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<sup>3</sup> Canadian Bar Association, *Systems of Civil Justice Task Force Report* (Ottawa: Canadian Bar Association, August 1996) at 18.

<sup>4</sup> *Ibid.* at 75.

<sup>5</sup> See for example: British Columbia’s “Costing of Justice Project” and “Justice Sector Business Intelligence Project” discussed in British Columbia, Ministry of the Attorney General, *Modernizing British Columbia’s Justice System* (Green Paper, February 2012); Canadian Forum on Civil Justice, *Costs of Justice Project*: [www.cfcj-fcjc.org/cost-of-justice](http://www.cfcj-fcjc.org/cost-of-justice)

<sup>6</sup> Michael D. Greenberg and Geoffrey McGovern, *An Early Assessment of the Civil Justice System After the Financial Crisis – Something Wicked This Way Comes?* (California: RAND Occasional Paper, 2012) at 45.

<sup>7</sup> H. Genn, *Solving Civil Justice Problems: What might be best?* (Paper prepared for Scottish Consumer Council Seminar on Civil Justice, 2005).

At the same time, the need to build an evidence base for the civil justice system has become a priority in some countries, notably as highlighted below, Australia.

The development of access to justice metrics is an important building block for reform. Metrics would serve a range of purposes from informing the public about their justice system, to informing day to day decision-making of people participating within the justice system, to informing policy making processes and supporting change processes. Metrics are also likely “to enhance users’ choice, to enable comparison and learning, to increase transparency, and to create incentives for improving access to justice.”<sup>8</sup> There is a growing awareness concerning the utility of increased empirical knowledge about the functioning of the justice system, but uneasiness over how to meet that goal. In short the challenge is: “can we make access to justice a quantifiable concept instead of a broad aspiration?”<sup>9</sup>

This paper explores the challenge of quantifying access to justice, by providing a brief overview of the components of how to frame access to justice metrics and some examples of existing approaches and methods. It explores too how the voices of Canadians, particularly members of groups who face substantial barriers to the justice system, can be considered in framing these metrics. The concluding section is designed to stimulate consideration of these ideas through an identification of issues and questions for further consideration.

### **3. Framing Access to Justice Metrics**

Metrics are measures of an organization’s activities and performance, and are based on the organization’s established objectives, indicators or criteria for specific areas of accomplishments. Metrics are quantifiable measures that drive improvement and characterize progress. Indicators and metrics can be combined into an index with the index providing an overall measurement of the system’s or organization’s operation. This section sets out and discusses examples of access to justice objectives, indicators, metrics and indices.

Metrics will only be useful if the objectives are clear, the indicators well-thought out and the computation accurate. Both substance and procedures for measurement are critically important:

*A rigorously computed index of data which does not properly represent the measured idea may end up being a worthless use of time and resources. The opposite is also true – even if the*

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<sup>8</sup> Martin Gramatikov, Maurits Barendrecht, and Jin Ho Verdonchot. “Measuring the Costs and Quality of Paths to Justice: Contours of a Methodology” (2011) 3 *Hague Journal on the Rule of Law* 349 at 349.

<sup>9</sup> *Ibid.* at 350.

*data validly measure components of access to justice, a flawed index construction will cast doubts on the outcome.*<sup>10</sup>

Experience at the international level suggests that time must be invested in developing a common language to articulate results and a shared framework in which to capture data.<sup>11</sup> These in turn require a deep understanding and robust description of the program/processes/ organizations and one that adapts to and learns from actual practice as it evolves over time.<sup>12</sup> Measuring outcomes and results will never be an exact science but it is essential to move beyond counting inputs and completion of activities if metrics are to be meaningful.<sup>13</sup>

### **A. Access to Justice Objectives**

Justice system objectives are often framed in obvious and concrete terms, for example, terminating disputes and reducing time and costs associated with dispute resolution/litigation. However, objectives can also be more broadly cast to extend to justice system values. Many reports on access to justice and justice system reform more broadly list these objectives.<sup>14</sup> In some cases these lists of objectives can be quite refined including, for example:

1. Promoting substantive and procedural fairness;
2. Satisfying disputants' substantive interests;
3. Satisfying disputants with the dispute resolution process itself;
4. Reducing risks related to disputes;
5. Reducing harm to disputants and others, including society generally;
6. Providing greater choice in dispute resolution processes for disputants and ADR professionals;
7. Increasing disputants' capabilities to handle other disputes;
8. Promoting productive relationships between disputants;
9. Satisfying disputants with the services of dispute resolution professionals;

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<sup>10</sup> Martin Gramatikov and Malini Laxminarayan, "Weighting Justice: Constructing an Index of Access to Justice" (Tilburg University, Netherlands: TISCO Working Paper Series on Civil Law and Conflict Resolution Systems, Nov. 10, 2008) at 5-6.

<sup>11</sup> See, for example, Capacity Development Group, "Overview of the UNDP's Approach to Measuring Capacity" (Bureau for Development Policy, United Nations Development Program, June 2010); Dr. P. Downes, "Measuring Outcomes in Relation to SCP Core Elements" (St Patrick's College, UK: Educational Disadvantage Centre, January 13, 2011).

<sup>12</sup> *Ibid.* "Overview of the UNDP's Approach to Measuring Capacity" at 10.

<sup>13</sup> *Ibid.* at 6.

<sup>14</sup> See, for example, CBA *Systems of Civil Justice Task Force Report*, *supra*, note 3; Report by the Access to Justice Task Force, Attorney-General's Department, *A Strategic Framework for Access to Justice* (Barton ACT: Government of Australia, 2009).

10. Improving the culture of disputing for disputants, professionals, and society, and
11. Promoting compliance with social policies expressed in the law, such as non-discrimination.<sup>15</sup>

## **B. Access to Justice Indicators**

Canadian justice system data collection focuses on measuring inputs and counting activities. For example, Justice BC's Data Dashboards provide court, corrections and prosecution data. The court data dashboards provide provincial, regional and local court statistics about the justice system's operations and progress over the past five fiscal years. The statistics represent activity in all three levels of court (BC Provincial, Supreme and Appeal Courts) and both justice divisions (criminal and civil, which includes family justice). The data include:

- new court cases;
- concluded Provincial Court cases;
- province-wide breakdown of Provincial Court criminal cases by length of time to conclude;
- location breakdown of Provincial Court criminal cases by length of time to conclude;
- median time to conclude Provincial Court criminal cases;
- court sitting hours;
- scheduled court appearances; and
- civil court documents filed.<sup>16</sup>

The Justice BC's Data Dashboards' approach is perhaps one of the most accessible and innovative approaches, but it provides only a limited, partial picture of justice system performance. Evaluations of specific types of justice system services, such as public legal education and information and legal aid, also tend to focus on inputs and counting activities, although they often extend to reporting on client satisfaction statistics.<sup>17</sup> It is only very recently that justice system service providers have begun to gather information and report on outcomes, even to a limited

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<sup>15</sup> John Lande, "A Guide for Policymaking that Emphasizes Principles, and Public Needs" in 26:11 (2008) *Alternatives to the High Cost of Litigation* at 197.

<sup>16</sup> [www.justicebc.ca/en/rm/data/dashboard.html](http://www.justicebc.ca/en/rm/data/dashboard.html)

<sup>17</sup> Erol Digiusto, "Effectiveness of public legal assistance services – A discussion paper" (Justice Issues Paper 16, Law and Justice Foundation of New South Wales, October 2012) at 4; Lindsay Cader, "Evaluation of Public Legal Education and Information: An Annotated Bibliography" (Ottawa: Justice Canada, 2003); PLEI Coordination and Resource Unit, "A Snapshot of Evaluations from PLEI Groups in Canada" (2010, and updated).

extent.<sup>18</sup> Unquestionably, there are significant conceptual and methodological challenges to measuring justice system effectiveness in terms of outcomes.<sup>19</sup> Recent reports have emphasized the importance of focusing on outcomes in access to justice reform.<sup>20</sup>

Despite the inherent difficulties, access to justice metrics requires us to measure and report on outcomes as well as inputs and the relationship between the two:

*Looking at the inputs of the system could provide some knowledge on the general legal infrastructure, but the input-based approach could, at best, provide an approximation for the performance levels. The outcomes of the legal system are a more valid representation of its ability to solve problems, provide legal certainty and reinforce the social order. Again, the question remains what set of indicators better gauges the outcomes of a legal system.<sup>21</sup>*

The development of solid outcome indicators requires the input of all stakeholders and taking into account the perspective of both providers and users of justice system services.<sup>22</sup> It is critical that indicators be both transparent and concrete enough to be useful.<sup>23</sup>

### **C. Access to Justice Measurements**

A collaborative process is equally important for the development of data collection designed to measure access to justice indicators. Full disclosure of methods and criteria for scoring is key to ensuring the results are fair. An Australian report recommends the adoption of a set of principles to underpin the measurement process:

- **Comprehensiveness:** The data gathered should be comprehensive, allowing assessment of performance against all objectives;

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<sup>18</sup> See for example, Ken Smith, Ph.D, *Evaluation of Law Help Ontario as a Model for Assisting Self-Represented Litigants in the Ontario Superior court of Justice at 393 University Avenue in Toronto: Final Report* (The Resource for Great Programs, Inc., November 5 2009) at 7; Focus Consultants, *Evaluation of Family Legal Services, Legal Services Society -Final Report* (May 1, 2012); Jessica Pearson and Lanae Davis, *The Hotline Outcomes Assessment Study Final Report - Phase III: Full-Scale Telephone Survey, Commissioned by the Project for the Future of Equal Justice* (Denver CO: Center for Policy Research, November 2002); M. Smith and A. Patel, *Using Monitoring Data: Examining Community Legal Advice Centre Delivery* (London: Legal Services Commission, 2010).

<sup>19</sup> Digiusto, *supra*, note 17 at 5-6; Curran 2012, *supra*, note 2 at 14-18.

<sup>20</sup> See for example, Legal Services Society, *Making Justice Work: Improving Outcomes and Access for British Columbians. A Report to the Minister of Justice and Attorney General The Honourable Shirley Bond* (Vancouver: LSS, July 1, 2012) at 4.

<sup>21</sup> Gramatikov and Laxminarayan, *supra*, note 10.

<sup>22</sup> Curran 2012, *supra*, note 2 at 19.

<sup>23</sup> Gramatikov and Laxminarayan, *supra*, note 10 at 24; See also discussion in: Daniel Kaufmann, Aart Kraay and Massimo Mastruzzi, "Governance Matters VII: Aggregate and Individual Governance Indicators 1996-2007" (Washington DC: Policy Research Working Paper, The World Bank, June 2008).

- Consistency: Data should be gathered in a manner that is consistent, allowing comparison across different service types, service providers and pathways to justice;
- Economy and simplicity: The simplest and least expensive data collection methods should be used;
- Data is capable of aggregation and disaggregation: Data should be gathered in a way that is capable of aggregation and disaggregation;
- Relevance: Data gathered should be relevant to the agencies and individuals providing it as well as to government objectives;
- Timeliness: Data should be gathered frequently enough and released soon enough after gathering to retain relevance for decision makers.<sup>24</sup>

#### **D. Access to Justice Indices**

The idea behind an index is simple: to summarize several indicators into one numerical score. Indices allow for pulling together complex data along a number of data points into one simplified score. Often scores on different indicators or sub-indicators are weighted according to an assessment of their ability to measure important aspects of a system's operation. One of the main benefits of an index is that it makes it easier to track overall system performance over time.

### **4. Examples of Access to Justice Metrics**

This section provides examples of different approaches to access to justice metrics to make these concepts more concrete and illustrate the potential of moving forward to enrich our empirical data, knowledge and understanding of the justice system. Five examples are described ranging from the most comprehensive to more focused initiatives:

- World Justice Project Rule of Law Index;
- Hague Model Measuring Access to Justice Project;
- an initiative of the Australian government to build an evidence base for the civil justice system;
- US Legal Services Corporation Performance Criteria; and
- a recent Australian study on legal aid effectiveness.

No attempt is made to evaluate these initiatives.

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<sup>24</sup> Elizabeth Shearer, "An evidence base for the federal justice system" (Report prepared for Australia Attorney General's Department, February 2011) at 24-26.

## A. World Justice Project Rule of Law Index

The Chief Justice of Canada introduced the World Justice Project (WJP) Rule of Law Index to many members of the Canadian legal community and the Canadian public when she publicized the fact that Canada received relatively low scores on the access to justice components of the overall index.

The WJP describes its Rule of Law Index as an innovative quantitative assessment tool, which offers:

*... a detailed and comprehensive picture of the extent to which countries adhere to the rule of law in practice. It provides original data regarding a variety of dimensions of the rule of law, enabling the assessment of a nation's adherence to the rule of law in practice, identify a nation's strengths and weaknesses in comparison to similarly situated countries, and track changes over time.<sup>25</sup>*

The Rule of Law is broken down into nine factors or components based on a comprehensive theory of the rule of law: limited government powers, absence of corruption, order and security, fundamental rights, open government, regulatory enforcement, civil justice, criminal justice, and informal justice. Access to justice comprises the last three factors: civil, criminal, and informal justice. These factors correspond to the system objectives or goals that frame the indicators and measurements. The factors are defined and then broken down into sub-factors (indicators) and variables (measurements).

The “Civil Justice” factor of the Rule of Law is defined by the WJP:

*In a rule of law society, ordinary people should be able to resolve their grievances and obtain remedies in conformity with fundamental rights through formal institutions of justice in a peaceful and effective manner, rather than resorting to violence or self-help. Civil justice requires that the system be accessible, affordable, effective, impartial, and culturally competent. Accessibility includes general awareness of available remedies; availability and affordability of legal advice and representation; and absence of excessive or unreasonable fees and hurdles. Impartiality includes absence of arbitrary distinctions, such as social and economic status, as well as decisions that are free of improper influence by public officials or private interests. Effective civil justice also implies that court proceedings are conducted in a timely manner and judgments are enforced without unreasonable delay. Finally, in a rule of law society, it is essential that alternative dispute mechanisms provide effective access to justice, while refraining from binding persons who have not consented to be bound by the mechanism.<sup>26</sup>*

This factor also measures whether the system provides for fair and effective enforcement.

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<sup>25</sup> [www.worldjusticeproject.org/rule-of-law-index](http://www.worldjusticeproject.org/rule-of-law-index)

<sup>26</sup> [www.worldjusticeproject.org/factors/effective-civil-justice](http://www.worldjusticeproject.org/factors/effective-civil-justice)

In establishing the framework, indicators and variables, the WJP recognized that “Access to justice has both a “thin” and a “thick” meaning”.<sup>27</sup> This approach favours “intermediate conception” and addresses:

*...access to justice in terms of access to dispute resolution mechanisms, mostly in terms of access to counsel and access to tribunals. This differs from other frameworks which conceptualize access to justice in the “thicker” sense, in which access to justice encompasses other aspects such as legitimacy of the courts or elements that contribute to enhance the legal empowerment of the poor.*<sup>28</sup>

Civil Justice consists of 57 variables combined to form the following seven sub-factors:

- 7.1 People can access and afford civil justice
- 7.2 Civil justice is free of discrimination
- 7.3 Civil justice is free of corruption
- 7.4 Civil justice is free of improper government influence
- 7.5 Civil justice is not subject to unreasonable delays
- 7.6 Civil justice is effectively enforced
- 7.7 ADRs are accessible, impartial, and effective.<sup>29</sup>

The variables measure: general awareness of available remedies; availability and affordability of legal advice and representation; absence of excessive or unreasonable fees, procedural hurdles, linguistic barriers, physical location of courthouses, and other impediments to access to formal dispute resolution systems; absence of arbitrary or irrational distinctions based on social or economic status and other forms of bias, as well as decisions that are free of improper influence by public officials or private interests; court proceedings are conducted and judgments enforced without unreasonable delay; fair and effective enforcement, accessibility, impartiality, and efficiency of alternative dispute resolution mechanisms (namely, mediators and arbitrators).

Measurement is based on two novel data sources collected by the World Justice Project in each country: (1) a general population poll conducted by leading local polling companies using a representative sample of 1,000 respondents in three cities per country; and (2) qualified respondents’ questionnaires consisting of closed-ended questions completed by in-country practitioners and academics with expertise in civil and commercial law, criminal justice, labor law,

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<sup>27</sup> Juan C. Botero and Alejandro Ponce, “Measuring the Rule of Law” (The Hague, Netherlands: The World Justice Project – Working Paper Series, WPS No. 001, November 2010) at 13-14.

<sup>28</sup> *Ibid.*

<sup>29</sup> *Supra*, note 26.

and public health. These two data sources comprise both experience-based questions as well as perception-based questions.<sup>30</sup>

## **B. Hague Model Measuring Access to Justice Project**

A different approach to the quantitative assessment of access to justice is proposed by the “Measuring Access to Justice” (MA2J) project developed by Tilburg University, Tilburg Institute for Interdisciplinary Studies of Civil Law and Conflict Resolution Systems (TISCO), and Hague Institute for the Internationalisation of Law (HiiL). MA2J has developed a research methodology aimed at measuring access to justice through the perceptions and attitudes of people who have travelled a “path to justice.”<sup>31</sup>

The “path” approach’s units of measurement are individuals who had a legal problem and acted to solve it with the means of state or non-state intervention. The definition of path to justice is simple: a commonly applied process that users address to cope with their legal problem. Three major “pillars” of the experiences of the users are measured: the costs of justice, the quality of the procedure, and the quality of the outcome. Like the WJP approach, each of the three pillars is modeled as a multi-faceted indicator consisting of sub-indicators. The individual scores of the sub-indicators form the scores of the three cost, procedure and outcome indicators. Eventually, the MA2J project intends to aggregate the information on costs, quality of the procedure and quality of the outcome into one composite figure, the Access to Justice Index. The goal is for this index to provide focused information about the measured paths to justice.

The indicators and sub-indicators have been developed over a period of years during which conceptual and methodological problems were addressed.<sup>32</sup> More than twelve-pilot applications of the methodology were conducted to test, validate and refine the measurement instruments and overall methodological framework.<sup>33</sup>

While acknowledging the findings from civil legal needs research that many people who have a problem for which there is a legal solution do not take steps to address that problem, MA2J focus on measuring justice needs “from the moment when a person first takes a step toward resolving the problem.”<sup>34</sup> This “demand-oriented” approach focuses on the most urgent legal problems experienced by citizens. MA2J identifies twelve categories of legal problems “that appear to be urgent in many, if not most, legal systems and locations.”<sup>35</sup> The researchers explain this decision:

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<sup>30</sup> Botero and Ponce, *supra*, note 27 at 3; see, extended discussion at 16-26.

<sup>31</sup> See project website: [www.measuringaccesstojustice.com](http://www.measuringaccesstojustice.com)

<sup>32</sup> Gramatikov, Barendrecht and Verdonschot, *supra*, note 8 at 350-351.

<sup>33</sup> *Ibid.* at 351. Pilot studies have been conducted in the Netherlands, Bolivia, Bulgaria, Thailand, Poland, Australia, Cameroon, Senegal, Afghanistan, Canada and other countries.

<sup>34</sup> *Ibid.* at 355.

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

*The assumption is that these categorizations are among the criteria that should guide choices about investments in institutions, regulations and procedures. Therefore, for the purpose of describing the accessibility of justice systems, these legal problems will set the agenda, and any methodology intended to measure access to justice will have to be suitable for assessing the mechanisms used to manage these problems.<sup>36</sup>*

Measurement is undertaken from the perspective of the “users” based on their experience on the path of justice:

*After completing a path to justice, people think about the costs incurred, the procedure and the outcome. In its essence the methodology asks the users of justice to reflect on their experiences and formulate a quantitative account of the particular path to justice.<sup>37</sup>*

The quality of procedures and outcomes are measured not against an objective characterization of justice, but against the user’s perception of procedure and with the outcome being the perceived result of the procedure and the perceived quality of the received outcome. Data is collected through surveys of random samples of persons who have engaged in and used the services within various paths to justice.

Costs of justice, quality of the procedure, and quality of the outcome are multi-faceted categories and MA2J measures their different dimensions with one or more variables. For example, the costs of the procedure are defined as the resources the user would need to travel from the beginning to the end of a path to justice. Within this indicator, a set of sub-indicators reflect different types of procedural costs: out-of-pocket expenses, time, and other opportunity and intangible costs (stress, emotions, etc.).

Table 1 sets out the indicators and sub-indicators developed by MA2J.<sup>38</sup>

**Table 1: MA2J: Indicators of the Costs and Quality of Paths to Justice**

**Cost of the Procedure**

<i>Indicator</i>	<i>Description</i>	<i>Examples</i>
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<sup>36</sup> *Ibid.* at 351.

<sup>37</sup> *Ibid.* at 353.

<sup>38</sup> Jin Ho, Verdonschot, Maurits Barendrecht, Laura Klaming and Peter Kamminga, “Measuring Access to Justice: The Quality of Outcomes” (Tilburg University, Netherlands: TISCO Working Paper Series on Civil Law and Conflict Resolution Systems, No. 14, 2008).

<i>Indicator</i>	<i>Description</i>	<i>Examples</i>
Out-of-pocket expenses	The monetary amount spent on transactions during and as a result of the proceedings	Lawyer fees, expert fees, filing fees, transportation fees, bailiff and witness fees, notary fees, costs for communication
Time	Time spent dealing with the procedure	Searching for a legal advisor, collecting information, contacting professionals, travelling, awaiting/attending hearings, waiting in queues
Other lost opportunities	The cost of lost opportunities due to the proceedings and their possible lengthiness	Lost income, devaluated resources, losing a job opportunity
Intangible costs	On their paths to justice, people tend to expend emotions, suffer stress, become depressed or experience deterioration in their relationships with significant others	Stress, negative emotions such as frustration, fear, disappointment or anger, loss of relationships

### Quality of the procedure

<i>Indicator</i>	<i>Description</i>	<i>Sub-indicators</i>
Procedural Justice	Fairness perceptions of users regarding the processes that are utilized to resolve disputes and allocate resources	Process control, decision control, consistency, bias suppression, accuracy, ability to correct, ethicality
Restorative Justice	Concerned with the harm that has been caused by the legal problem and attempts to offer reparation to the user of justice	Opportunity to ask the other party for an explanation and recognition
Interpersonal Justice	The extent to which people are treated with politeness, respect, and propriety	Politeness, respect, propriety, respect for rights

<i>Indicator</i>	<i>Description</i>	<i>Sub-indicators</i>
Informational Justice	The validity of information provided by decision makers as the foundation of the decision making process	Honesty, explanation of rights and options, as well as whether the explanation was timely, understandable, and in need of clarification

**Quality of the Outcome**

<i>Indicator</i>	<i>Description</i>	<i>Sub-Indicators</i>
Distributive Justice	The allocation of resources among individuals with competing needs or claims	Equity, equality, need
Corrective (compensatory) Justice	When one person is wrongfully injured by another, the injurer must make the harmed party whole	Compensation
Restorative Justice	Looks to the future and the best means to achieve reparation of harm, including elements of apology, shame and repair of relationships	Opportunity given to the offender to show remorse and to accept responsibility, the degree of reparation of emotional and monetary harms, closure, alleviation of fear
Retributive Justice	An infliction of proportionate loss and pain to the injurer is necessary to achieve justice	Just desserts
Utilitarianism	Social harmony can be attained via the prevention of future harm	Deterrence and incapacitation
Informational Justice	The validity of information provided by decision makers as the foundation of the decision making process	Outcome justification
Transformative Justice	The future is a main concern, in addition to transformations with the self, self-in-relationships, and self-in-society	Considering parties' interests and re-building relationships

<i>Indicator</i>	<i>Description</i>	<i>Sub-Indicators</i>
Legal pragmatism	Concerned with facts and consequences	Pragmatic outcome, consequences taken into account
Formal Justice	Similar cases are defined by the situation, not the person – i.e., treat similar cases alike	Similar outcomes and ability to compare outcomes with related others

The three indicators will be drawn together into a composite access to justice index based on a rating of the importance of the indicators and sub-indicators (with the more important dimensions given more weight within the index).<sup>39</sup>

MA2J is expected to assist in measuring, defining and operationalizing the paths of justice that meet the demands for resolution of urgent legal problems. The researchers foresee that the project “will provide vital data for the accessibility of the legal processes put in place as well as the subjective perceptions of the users.”<sup>40</sup> Comparisons will also be possible with alternative paths to justice, between different users or groups of users, or with a baseline data collected through a separate process. It will be possible to measure changes in the paths to justice and along the three main indicators over time. The information gathered will also provide feedback to providers of justice system services, identify bottlenecks and may make it possible to predict use of different paths. In summary:

*What the data from MA2J could offer the users is knowledge which will make it easier for them to weigh the cost and benefits of a (legal) process. Better assessment of the cost, quality of the procedure and quality of the outcome should lead to improved access to justice.*<sup>41</sup>

This data will also assist in evaluating different systemic properties such as accessibility, predictability, fairness and equality.<sup>42</sup>

### **C. Australian Initiative to Building An Evidence Base for the Civil Justice System**

The Australian Attorney-General’s Department has responded to the mounting reports decrying the lack of justice system data collection<sup>43</sup> by launching an initiative to consider “what might be

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<sup>39</sup> See discussion in Gramatikov and Laxminarayan, *supra*, note 10.

<sup>40</sup> Gramatikov, Barendrecht and Verdonschot, *supra*, note 8 at 370.

<sup>41</sup> *Ibid.*

<sup>42</sup> *Ibid.* at 372.

<sup>43</sup> Attorney-General’s Department, *A Strategic Framework for Access to Justice in the Federal Civil Justice System – Report by the Access to Justice Taskforce* (September 2009) at 72; National Australian Dispute

involved in developing a sound evidence base to better support civil justice policy and reforms”.<sup>44</sup> This objective of this initiative is to develop, over time:

- A robust evidence base that will enable us to answer important questions about what the civil justice system delivers to the people who use it, its value to the Australian community and the extent to which it meets broad public policy objectives.
- Reliable information about people’s needs and expectations, why and how they choose and move between services, what influence those choices and decisions, what happens to them along the way, the extent to which their needs and expectations are met and the outcomes they get.
- Approaches to analysing information that is gathered to enable us to understand how changes to one part of the system may influence other parts of the system so that better judgements can be made about the system-wide impacts of policy and service delivery changes.<sup>45</sup>

The Australian Attorney-General’s Department recognises that if the project is to be successful “it would need the support and commitment of all, or at least key, stakeholders in the civil justice system. The project will be a long term one which will require stakeholders to engage with it and commit some resources, if only in terms of time, to achieve its objectives.”<sup>46</sup>

A description of the results of this initiative is illustrative of one approach to framing access to justice metrics:

*A shared system-wide evidence base that comprises consistent data about the people who use the system and the services delivered to them will enable us to see:*

- *whether the civil justice system as a whole is achieving its objectives and what it is delivering to the Australian community*
- *how different organisations and services contribute to that*
- *how people connect with and what patterns emerge as they move through the system*
- *where there are gaps, pressure points, emerging trends and opportunities*
- *where there are opportunities for better coordination*
- *where potential exists for development of more complementary services*
- *where there is potential for innovation, and*

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Resolution Advisory Committee, *The Resolve to Resolve – Embracing ADR to improve access to justice in the federal jurisdiction* (September 2009) Rec 6.4.

<sup>44</sup> Australian Government, Attorney-General’s Department, *Symposium Paper: Building An Evidence Base for the Civil Justice System* (May 2011) at 3.

<sup>45</sup> *Ibid.*

<sup>46</sup> *Ibid.*

- *how changes in one area are likely to impact elsewhere.*<sup>47</sup>

The Australian Attorney General's Department hosted a symposium to discuss with stakeholders how to move forward with this initiative in May 2011 and a further forum was held in May 2012. A working group of all civil justice system stakeholders and data experts is developing a framework to guide the collection of consistent data to create an evidence base for the civil justice system.<sup>48</sup> A research team was commissioned to undertake a scan of recent empirical research and develop draft objectives for the civil justice system. This report proposed a seven-point classification system that could form the base for access to justice metrics:

### **1. Social Stability and Growth**

- The civil justice system
- The justice market
- The benefits of justice

### **2. Community Resilience and Capacity Building**

- Information and education
- Building dispute/conflict resolution skills in individuals and communities

### **3. Expedient Resolution of Disputes**

- Referrals to appropriate legal and non-legal services
- Use of ADR as a means of early resolution of disputes
- Settlement rates and time to settlement

### **4. Service quality, including just and fair processes**

- Procedural fairness
- Practitioners
- Regulation/accreditation of practitioners/standards
- Service quality
- Client satisfaction/perceptions of fairness

### **5. Equity of Access**

- Affordability
- Barriers to access

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<sup>47</sup> *Ibid.* at 4.

<sup>48</sup> [www.ag.gov.au/LegalSystem/Pages/Anevidencebasefortheciviljusticesystem.aspx](http://www.ag.gov.au/LegalSystem/Pages/Anevidencebasefortheciviljusticesystem.aspx)

- Access to informal, formal and everyday justice institutions and services
- Judicial case management
- System complexity

#### **6. Wellbeing**

- Impact of justice system services on individuals and groups with particular needs
- Effective referral to appropriate non-legal services
- Collaborative relationships

#### **7. The Research and Evidence Base**

- Data collection
- Performance measurement
- Research and evaluation.<sup>49</sup>

The authors describe this project “as part of the “bottom-up” approach to building an evidence base for the civil justice system - assessing the utility of existing data collections.”<sup>50</sup> The study is an important step closer to building the framework for access to justice metrics in Australia.

### **D. US Legal Services Corporation Performance Criteria**

Performance criteria designed for evaluation of legal aid programs provide another approach to identifying access to justice metrics. The United States Legal Services Corporation (LSC) has developed performance criteria designed to assist in evaluating effectiveness of services and contributing to program improvement and accountability.<sup>51</sup> The criteria provide a framework though they do not present quantitative standards. The vision behind the original criteria is seen as remaining applicable today: “by providing a single framework for structured evaluations by peers or other experts, the criteria support a consistent national system for measuring program performance.”<sup>52</sup>

The LSC performance criteria are expressed in three levels of increasing detail:

- a) The individual *criteria* themselves, which describe in broad terms the desired effectiveness for that area;

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<sup>49</sup> Dr. Robyn Sheen and Dr. Penny Gregory, *Building An Evidence Base for the Civil Justice System – Civil Justice System Framework and Literature Review Report* (Australia: Attorney-General’s Department, September 3, 2012).

<sup>50</sup> *Ibid.* at vii.

<sup>51</sup> Legal Services Corporation, *Performance Criteria* (2007 Edition).

<sup>52</sup> *Ibid.* at 1.

- b) The *indicators*, a set of specific markers or factors, which are suggestive of whether the criteria are being met (this list is open-ended); and
- c) The *areas of inquiry*, a third level of detail, which provide specific guidance to reviewers in terms of questions to be asked and topics to be examined.<sup>53</sup>

The criteria are specifically designed “to take account of the reality that Legal Services programs do not have sufficient resources to provide comprehensive services that fully meet all of the major civil legal needs of low-income people in an entire service area.”<sup>54</sup> Like the MA2J focus on “urgent” needs, the LSC criteria focus on “the most pressing civil legal needs.”<sup>55</sup>

The LSC criteria focus particularly on results and outcomes and emphasize looking at: (a) the outcomes and results of program activity for clients and the low-income population; (b) processes and systems; and (c) other “input” factors such as staff experience, equipment, office space, research capabilities, and so on. LSC explains:

*While results and outcomes for clients are central, examination of systems, processes, and inputs is also important, since their presence makes it more likely that successful outcomes can be replicated consistently over time.*<sup>56</sup>

While providing a national framework, the Criteria are meant to “embody a *dynamic* vision of program work, related to the specific needs, resources and situations in each particular community” and the incorporation of experience and learning into change processes.<sup>57</sup> The commitment to capturing this dynamism in the evaluation framework is described in this way:

*...the Criteria begin with an examination of the effectiveness of the program’s assessments of legal needs, and follow a logical flow: identification of the most pressing problems; setting goals, priorities, and objectives; developing delivery and advocacy strategies; targeting resources based upon the most pressing legal needs; implementing the objectives and working toward the desired, expressed outcomes; and then assessing and evaluating the effectiveness of the efforts before making a new determination of need and going through the entire process again.*<sup>58</sup>

The LSC Performance Criteria are:

**PERFORMANCE AREA ONE:** Effectiveness in identifying the most pressing civil legal needs of low-income people in the service area and targeting resources to address those needs.

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<sup>53</sup> *Ibid.* at 1.

<sup>54</sup> *Ibid.*

<sup>55</sup> *Ibid.* at 10.

<sup>56</sup> *Ibid.* at 4.

<sup>57</sup> *Ibid.*

<sup>58</sup> *Ibid.*

**Criterion 1. Periodic comprehensive assessment and ongoing consideration of legal needs.**

**Criterion 2. Setting goals and objectives, developing strategies, and allocating resources.**

**Criterion 3. Implementation.** The program pursues these goals, objectives, and strategies, working to achieve the desired outcomes through legal representation and assistance, advocacy, and other program work.

**Criterion 4. Evaluation and adjustment.** The program regularly analyzes and evaluates the effectiveness of its delivery strategies and work, in major part by comparing the results actually achieved with the outcomes originally intended, and utilizes this analysis and evaluation to make appropriate changes in its goals, objectives, strategies, and legal assistance activity. Such adjustments should be made on a flexible and ongoing basis, not just after the periodic comprehensive assessments.

**PERFORMANCE AREA TWO:** Effectiveness in engaging and serving the low-income population throughout the service area.

**Criterion 1. Dignity and sensitivity.** The program conducts its work in a way that affirms and reinforces the dignity of clients, is sensitive to clients' individual circumstances, is responsive to each client's legal problems, and is culturally and linguistically competent.

**Criterion 2. Engagement with the low-income population.** The program is engaged effectively with the population eligible for its services, including major and distinct segments of that population and, where appropriate and feasible, incorporates perspectives from that population and its major segments in its work and operations.

**Criterion 3. Access and utilization by the low-income population.** Consistent with its goals, objectives, and strategies, a program should, within the limits of its resources, be accessible to and facilitate effective utilization by the low-income population in its service area, including all major segments of that population, and all categories of people who traditionally have had difficulties in getting access to or utilizing civil legal assistance.

**PERFORMANCE AREA THREE:** Effectiveness of legal representation and other program activities intended to benefit the low-income population in the service area.

**Criterion 1. Legal representation.** The program conducts its direct legal representation, in both full and more limited forms, in an effective and high-quality fashion which comports with relevant state requirements, governing professional

ethics and practice of law, funding source requirements, relevant portions of the ABA Standards for the Provision of Civil Legal Aid, and these Criteria, and in particular:

**Criterion 2. Private attorney involvement.** The program effectively integrates private attorneys in its work in order to supplement the amount and effectiveness of its representation and other services to achieve its goals and objectives.

**Criterion 3. Other program services to the eligible client population.** Consistent with its goals, objectives, and strategies, the program provides services in addition to direct client representation that are designed to help low-income people address their legal needs and problems. Such services may include, but are not limited to, community legal education (general legal information not predicated upon a client’s particular case or facts), assistance for self-help activities and *pro se* appearances, offering or facilitating participation in alternative dispute resolution, and other available approaches, utilizing the Internet, websites, interactive media, and other available technologies as appropriate. The program continually seeks to find innovative ways to deliver services and meet client needs.

**Criterion 4. Other program activities on behalf of the eligible client population.** Consistent with its goals, objectives, and strategies, and within the limits of available resources and the terms of its funding, a program engages in other activities on behalf of its eligible client community that have a beneficial effect on systemic legal problems and economic opportunities of the eligible client population. These activities include, but are not limited to, communication and liaison with the judiciary, organized bar, government agencies, academic and research centers, social service agencies, and other information sources, state and national legal advocacy organizations, other organizations working on behalf of low-income people, and other entities whose activities have a significant effect on the eligible client population.

**PERFORMANCE AREA FOUR:** Effectiveness of governance, leadership and administration.

### **E. Australia Study on Legal Aid Effectiveness**

The Australian government has initiated a review of the National Partnership Agreement on Legal Assistance Services, which is to include measurement of outcomes. A draft evaluation framework discussion paper prepared by the independent evaluators, Allen Consulting Group, has been circulated for comments.<sup>59</sup> As part of the preparatory work for the review, Dr. Liz Curran was commissioned by the Australia Attorney-General’s Department to carry out a literature review of “research, studies, reports, reviews and evaluation and other material both nationally and

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<sup>59</sup> See, for example, the submission of the Law Council of Australia, “Review of the National Partnership Agreement on Legal Assistance Services: Draft Evaluation Framework Discussion Paper” (Law Council of Australia, August 2012).

internationally around legal assistance service evaluations” in preparation for a major national review of legal aid in Australia.<sup>60</sup> Curran’s very thorough review of 47 international and 91 Australian studies focuses on four concepts: ‘successful outcome’, quality, efficiency, and effectiveness. Her review provides important insight into potential avenues to developing access to justice metrics, as well as outlining the many challenges facing this endeavor.

Her study outlines a number of barriers to developing strong evaluation methodologies for legal aid including:

- The lack of a common language with which to articulate results.
- The lack of a framework in which to capture them.
- The difficulties in being able to measure and prove success.
- The fact that outcomes can be influenced by factors external to a service.
- The reality that evaluations can impose significant burdens on service providers to gather data which can distract from service delivery itself.<sup>61</sup>

Perhaps not surprisingly given these difficulties, Curran finds that “very little outcome/results based measurement has actually been undertaken internationally or domestically although there is some literature on how one might go about it.”<sup>62</sup>

Coincidental to the national review, Dr. Curran was commissioned by one of the smaller Australian legal aid programs, Legal Aid in the Australian Capital Territory (LAACT). The purpose of the review was to “measure and enhance the quality of legal aid services” delivered by Legal Aid Act.<sup>63</sup> For the purpose of this review, the research team developed a set of outcome indicators “based on those elements identified as essential for an outcome to occur.”<sup>64</sup>

The outcome indicators developed for the evaluation of LAACT are linked to overarching access to justice objectives such as holistic, joined-up service provision, early intervention, client-centered services and so on. These outcome indicators could serve equally well as sub-indicators for measuring various dimensions of access to justice. As such they provide useful insight into both the process and content of developing access to justice metrics.

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<sup>60</sup> Curran 2012, *supra*, note 2 at 3.

<sup>61</sup> D. Bunham, “Measuring Success: How can we develop an evidence base for Measuring Outcomes” (Lancashire County Council and Community Service, 14 August 2011).

<sup>62</sup> Curran 2012, *supra*, note 2 at 13.

<sup>63</sup> Dr. Liz Curran, *We Can See There’s a Light at the End of the Tunnel Now – Demonstrating and Ensuring Quality Service to Clients* (Legal Aid ACT, 2012) [LAACT Report].

<sup>64</sup> LAACT Report, *ibid.* at 2.

In this research, outcomes were defined as follows:<sup>65</sup>

<b>Outcome</b>	<b>Qualities Demonstrated By Outcome</b>
1. A good client interview	Holistic, Joined-up, Quality, Problem Identification, Empowerment, Good Practice, Early Intervention, Prevention, Responsiveness, Client Centred, Alternative Dispute Resolution (ADR), Targeting, Expertise
2. Clients with chaotic lifestyles attend interviews, appointments and court dates	Early Intervention, Prevention, Empowerment, Client Centred, Holistic, Targeting
3. As appropriate, sentences are minimized or unsubstantiated charges are dropped	Rule of Law, Efficiency, Good Practice, Expertise
4. Clients are better able to plan and organize their legal affairs	Early Intervention, Prevention, Empowerment, Quality, Good Practice, Client Centred
5. Improvement in the client's interaction with the legal system	Early Intervention, Prevention, Empowerment, Client Centred
6. Consideration of issues before a court or tribunal enhanced because the lawyer asked questions/raised issues and brought the client's story before the court	Rule of Law, Quality, Voice, Flexibility, Good Practice, Client Centred, Responsiveness, ADR, Expertise
7. Client is better able to understand their legal position and the options open to them	Early Intervention, Prevention, Empowerment, Good Practice, Quality
8. A process is undergone where the client is listened to, respected and given fearless advice of their legal position	Quality, Client Centred
9. Relationships and trust building with other legal and non-legal support agencies enabling client referral and support	Early Intervention, Prevention, Holistic, Joined-up, Good Practice, Quality
10. Holding of authority to account	Rule of Law, Quality, Voice, Flexibility, Good Practice, Client Centred, Responsiveness
11. A holistic service delivered to the client through collaboration, networking, community legal education and joined-up services	Good Practice, Client Centred, Problem Identification, Collaboration, Prevention, Early Intervention, Holistic, Joined-up

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<sup>65</sup> LAACT Report, *ibid.* at 4-5.

## 5. Incorporating Community Voices in Access to Justice Metrics

A practical and useful definition of access to justice is the foundation for developing meaningful indicators and measurements of the system’s effectiveness. The CBA Access to Justice Committee resolved that, in particular, we would include the perspective of marginalized community members most affected by a lack of access to justice in any discussion of developing access to justice metrics.

Toward this end, the CBA Access to Justice Committee held a series of consultations from November 2012 to February 2013, in partnership with community based organizations and legal aid offices. We conducted thirteen community consultations across Canada: in Calgary, Saskatoon, Toronto, Montreal and in the Maritimes. The consultations were conducted exclusively with marginalized community members; low-income adults and youth, racialized groups, single mothers, and people with disabilities. The findings from our consultations were considered in conjunction with other recent public and stakeholder consultations on access to justice, in British Columbia, Manitoba and Ontario.

Practical components of access to justice emerged from hearing marginalized community members’ voices. This section provides an overview of our findings<sup>66</sup> organized according to two main themes considered during the consultations:

- What happens when access to justice is denied?
- What happens when access to justice is afforded?

We outline the discussions under each major theme, intending to reflect the shared individual experiences that were offered. We then summarize what we heard as a response to the general question: *how does this inform a practical definition of access to justice?* These summary paragraphs can be seen as a conceptual foundation for developing access to justice metrics, strengthened by the voices of community members whose every day lives are deeply affected by the operation of the justice system.

### A. What Happens When Access to Justice is Denied?

Responses to the discussion question “what happens when access to justice is denied” elicited a common pattern of responses concerning the barriers people face, how it impacts them and how it affects their perception of the justice system. These responses are grouped under four main themes: legal rights are “just on paper”; justice systems “cannot be trusted”; justice is person-dependent; and justice systems are difficult to navigate.

#### Legal rights are “just on paper”

The vast majority of community members acknowledged that the law affords rights and protections, but felt that those rights and protections were not honoured or accessible. Most participants stated plainly that they did not feel they had any legal rights. It seemed that the

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<sup>66</sup> Amanda Dodge, *Access to Justice Metrics Informed by the Voices of Affected Community Members* (paper prepared for the CBA Envisioning Equal Justice Initiative, March 2013).

greater the marginalization, the more distant people felt from being able to enforce their legal rights. The primary barrier to feeling as though they could access legal rights was, not surprisingly, a lack of financial resources.

Many other barriers were identified as standing in the way of accessing legal rights and protections. Common barriers mentioned were literacy and language barriers, disabilities, both physical and mental, racial discrimination, and level of education. Lack of information appeared to be the greatest hurdle to enforcing legal rights. Lack of information aggravated the emotional impact of going through justice processes (discussed further in the next section).

Community members did identify that impediments sometimes depended on the individual. Some community members pointed to personality characteristics, like tenacity, or attitudes, such as optimism, as determinative of whether someone would pursue legal rights and protections.

When community members were asked whether the law would protect them from abuses of power, or hold a person in authority accountable for breaking the rules, the most common response was laughter. The follow up responses were, unanimously, in the negative. They pointed to significant barriers for them to hold people in authority to account. They did not know how to make a complaint, they did not know where to go to make a complaint, there was not enough information about how to do it, they did not think they would be believed or taken seriously, they were intimidated and made to feel stupid and they were afraid to challenge the more powerful party.

Reprisal was a running theme for why community members did not seek redress when a person in authority broke the rules. Many community members articulated a fear of reprisal if they were to complain or challenge someone in a position of power.

*How does this inform a practical definition of access to justice?*

- **Justice transcends barriers.**
- **Justice is freely and equally available regardless of socio-economic status, ability, education or race.**
- **Justice applies equally to everyone, regardless of their status.**
- **Justice requires that information about rights and how they can be enforced is readily available.**
- **Justice means that complaint and appeal avenues must be accessible and safe.**

Justice Systems “Cannot Be Trusted”

A very strong message heard throughout the consultations is that there are inherent problems with the system itself: it is untrustworthy, corrupt and broken. Several people reported feeling betrayed and abused by the system. One participant stated, “The system is there to defeat you.”

The perception that the system was broken was evident in the frustrations expressed by community members. Both parties to disputes and adjudications reported that the systems had failed them: both offenders and victims, both applicants and respondents. Neither side felt the

system was fair or had worked for them. When it came to addressing their legal problems, community members often did not feel that the systems had helped. There was a sense that they had to find justice on their own.

Excessive and harmful delay was often cited as a frustration, and can be considered in two aspects. First, the system itself creates delay. Community members described having to attend court for repeated adjournments, to wait 4 - 5 months to be heard in court, to miss work for repeated court appearances, and to wait for help from Legal Aid. Delay is a frustrating barrier to enforcement of legal rights and attaining some measure of justice.<sup>67</sup> Secondly, delay is created by the community members' lack of information. Insufficient guidance wastes their time. Often the delay is harmful, creating negative consequences in other areas of the community members' lives.<sup>68</sup>

Community members noted hypocrisy because the ineffective system held such high expectations of them. The lawyers and courts were constantly adjourning, but expected community members to continue to attend at court. The lawyers and courts might not have the proper papers filed, but expected community members to provide all the required information in a timely way. This added to community members' frustration and distrust of the justice system.

Many community members reported feeling pre-judged by the justice system: the judge, their lawyer, the social worker. They felt pre-judged based on their past, race, ability and age. There were frequent references to feeling guilty until proven innocent.

Some community members defined justice as the right to be heard. Many reported that they were not afforded an opportunity to be heard or to tell their stories. Even when they were able to tell their stories, they often were not believed or taken seriously.

One thing that came through clearly was the concern that the justice system does not recognize or understand the social and personal realities of the marginalized people progressing through it. This results in two types of problems. First, the system and its actions actually perpetuates or aggravates the problem that got the community member initially involved in the system. The second problem created by the system's seeming ignorance of social and personal realities is that the legal problem has a "spiraling and multiplying" effect<sup>69</sup> into other areas of their lives, worsening them significantly.

Lastly, community members often felt that the remedies they obtained from the justice system were not meaningful or trustworthy ways to attain redress for the wrong.

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<sup>67</sup> Problematic delay in the criminal justice system also observed by "Town Hall Meeting on Access to Justice: Report and Summary" (Winnipeg: Manitoba Bar Association, 2011) at 7.

<sup>68</sup> See also: "Getting It Right: The Report of the Ontario Bar Association Justice Stakeholder Summit" (Toronto: Ontario Bar Association, 2007) at 7.

<sup>69</sup> L.T. Doust, "Foundation for Change: Report of the Public Commission on Legal Aid in British Columbia" (Vancouver: March 2011) at 21.

*How does this inform a practical definition of access to justice?*

- **Just justice systems earn the trust of the marginalized communities who access them.**
- **Just processes are effective, efficient and timely.**
- **Just systems have reasonable and fair expectations.**
- **Justice ensures that parties are heard.**
- **Justice processes and outcomes are reflective of the social and personal realities of the parties.**
- **Just outcomes are meaningful: they effectively redress the wrong or protect from wrong.**

Justice is Person-Dependent

This was an interesting and unexpected finding. When community members discussed their satisfaction or dissatisfaction with the justice system, it was often reflective of the particular justice professional they had encountered. Whether the service or experience was effective, fair or compassionate depended on the individual, be it the judge, lawyer or police officer. A frequently repeated phrase was: “it’s the luck of the draw”. There were some commendations but mainly several complaints about the quality and compassion of the justice professionals community members encountered.

*How does this inform a practical definition of access to justice?*

- **Just systems ensure consistency in the quality of its justice professionals.**
- **They are consistently effective, fair, respectful and sensitive.**
- **They act with integrity and do not engage in reprisal.**
- **The quality of their service does not depend on how much money they make.**
- **They take the time to listen, to inform, and to do a good job.**

Justice Systems are Difficult to Navigate

Community members were also consistent in their complaint that justice systems were confusing and difficult to navigate. Ignorance of one’s legal rights renders them useless. Information is not readily available. People are not sure where to go for help. It is hard for them to know which forms are the right ones. People are not directed to the right place and often do not have someone to guide them. People reportedly felt like they were “running in circles”. The systems are not integrated; they are in “silos”.<sup>70</sup>

Many community members reported that lack of information and direction exacted an emotional toll. Community members described how scary and intimidating it is not to know what is happening, what their options are, what possible outcomes might be, and so on. They mentioned

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<sup>70</sup> Supported by the Ontario report, *supra*, note 68 at 6.

the anxiety, fear, frustration, discouragement and stress involved in progressing through justice systems. They also talked about their need for emotional support.

Community members described a justice system that is simply overwhelming. It is too complex, too complicated. They reported stress and discouragement over seemingly endless obstacles.<sup>71</sup>

Community members described the many steps involved in pursuing a right or protection, such as getting the right information, getting it translated, paying the fee, finding an advocate, arranging for an interpreter, then tackling the legal issue and the opposing party. It is a legalistic, lengthy and daunting process. It seems a Herculean effort is required, something very discouraging to marginalized community members. One participant summed it up: “It is overwhelming ... You feel incapacitated.”

Other barriers identified to navigating the system included fears of facing the opposing party, desire for privacy (concerns about the Court/tribunal being a public forum, about lawyers speaking openly about their cases in an open hallway), poverty and financial constraints, transportation and child care issues, interpretive services and arranging for accommodations/funding for accommodations.

These difficulties and barriers to navigating the system are frustrating, upsetting and discouraging. Community members said that when facing or even contemplating them, they might “just give up”. When marginalized community members described experiences where they did pursue their legal rights or protections, it was often framed as a fight against the odds.

*How does this inform a practical definition of access to justice?*

- **Justice recognizes that information empowers.**
- **Justice systems are clear about their processes.**
- **The processes themselves are streamlined and straightforward.**
- **Participation is not dependent on one’s financial resources.**
- **Supports are in place so everyone can participate.**
- **Safety and privacy concerns are addressed in meaningful ways.**
- **The emotional health of the participants is considered and supported.**

## **B. What Happens When Access To Justice Is Afforded?**

Responses to the discussion question “what happens when access to justice is afforded” also elicited a common pattern of responses concerning how people wanted the justice system to operate. These responses can be grouped under four main themes: legal rights and justice; information as a prerequisite to justice; justice is about respect; and justice is a holistic concept with systemic solutions.

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<sup>71</sup> Supported by the B.C. report, *supra*, note 69 at 21.

### Legal Rights and Justice

Most participants believed that justice and equality were the goals and underpinnings of the law. Interestingly, the law itself was rarely criticized, it was often venerated as being fair and affording, in principle, rights and protections. They felt that its implementation by the justice system and justice professionals was what was unfair and unequal.

The community provided some definitions of what justice should and can be like. Some of them might be counter-intuitive to those who work in justice systems. Some examples included:

- “Fairness, equality and being held accountable.” – Person with disability, Toronto
- “Due consideration of all the facts and circumstances.” – Man with mental disability, Toronto
- “Being heard. Being taken seriously.” – Single Mother, Kentville
- “It makes it possible to fix the damage.” – Youth, Montreal

*How does this inform a practical definition of access to justice?*

- **Justice is inviolable.**
- **It ensures fairness and equality for all, and moreover, respect for all its participants.**
- **Respect from justice means being heard and providing an effective, meaningful outcome.**

### Information as a Prerequisite to Justice

Community members stated that people first needed to know their rights before they could enforce them. Some people said they believed they had rights, but just did not know what their rights were. Lack of information was a repeated complaint; the provision of legal information was a repeated recommendation. Many believed that public legal education is necessary, both generally and in schools.<sup>72</sup>

It seemed that most community members know when their problem is legal in nature or has a legal aspect to it, but reported how difficult it is to find information about the legal problem and all the procedures required to address it. The community made it clear that it is insufficient just to have information about the *law*; information about the *processes* is also needed. Community members said in no uncertain terms they need to know what is going on and what is going to happen: “What I need to know is: where do I go, what do I fill out, how do I get this resolved?”

Some people said positive things about public legal education materials, that they were helpful and informative. Some mentioned their availability at libraries, courts, legal clinics, MLA/MPP’s offices

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<sup>72</sup> Public legal education is also recommended by the Ontario report, *supra*, note 68 at 7.

and online. Some indicated that they didn't know where to go, and the information was difficult to find, especially for new Canadians. People with disabilities said that, even if they found the information, it wasn't necessarily accessible to them, e.g. in Braille. Some complained that public legal information, like pamphlets and self-help websites, were confusing and difficult to navigate. Some said that information should be plainer and easier to read.<sup>73</sup>

If information is power, a failure to provide information can be considered subordination. Some community members believed they were kept in the dark on purpose, so the justice system could retain its power over them.

*How does this inform a practical definition of access to justice?*

- **Information about law and its processes empowers.**
- **It enables community members to know what their rights are and how to enforce them.**
- **Being informed ensures equal participation in the justice system.**
- **Power is shared equitably between justice professionals and the parties accessing justice systems.**

Justice is about Respect

A recurring theme during the consultations is that marginalized community members did not feel heard and that their matters were not taken seriously. They want to be treated as a respected part of the process. Again, information is powerful. Community members reported that they felt more respected if they were kept in the loop. They also felt more respected if their privacy concerns were being considered, e.g. if the Court or lawyer handled their matter discreetly.

*How does this inform a practical definition of access to justice?*

- **Justice systems respect its participants.**
- **Respect is demonstrated by treating participants kindly, seeing them as equals and ensuring they are informed.**

Justice is a Holistic Concept with Systemic Solutions

One of the most palpable and crucial findings of the consultations was the broad, holistic view of justice held by many marginalized community members. When lawyers and judges talk about access to justice, we usually talk about law and justice systems and the provision of legal services and information. Our vision is often limited to our own frame of reference.

When marginalized community members talked about justice, they talked about what is happening outside of courthouses and law offices, poverty, education, racism, home environments and more.

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<sup>73</sup> See also: Manitoba report, *supra*, note 67 at. 4.

They highlighted the need for the resources and supports necessary to ensure that we live in just societies.

These supports included access to education, meaningful employment, adequate housing and healthy home lives. They believed strongly that addressing these issues would prevent involvement in justice systems, and/or reduce the likelihood of future involvement.<sup>74</sup>

It was clear from the community members' comments and stories that their legal issues are intimately interwoven with the other social and personal issues they were facing. It seemed to flow in two directions. In one sense, what is happening within the justice system has a ripple effect into their lives, like the single mother experiencing excessive delay in the family court who fears losing her house as a result. In another sense, what is happening in their lives and households creates legal problems and promotes involvement in the legal system, like the youth who flees a poor home environment and becomes easy prey for gangs on the street.

Addressing broader issues of poverty, education, employment, housing and healthy families are as important to ensure justice as anything else, arguably the most important. These steps prevent involvement and repeated involvement in the justice system, and are the foundation for just societies.

*How does this inform a practical definition of access to justice?*

- **Justice is more than what is happening inside the justice system.**
- **Justice is about what is happening at home, at schools, at workplaces and on the street.**
- **A just society is a foundation for an effective, fair justice system.**

## 6. Issues and Discussion Questions

The brief conceptual discussion and overview of the descriptions of the five approaches to developing access to justice metrics, whether on an international, comparative, national or program-specific basis, makes it clear that it is a daunting, multi-year task requiring significant resources and collaboration. The Australian Attorney-General's Department noted that it faced four significant challenges in undertaking a major project to build an evidence base for the civil justice system:

- First, reaching agreement in a diverse system comprising a range of different professional interests is likely to be difficult
- Second, many organisations already have significant investments in electronic and other data collection systems that would be costly to change
- Third, engaging private service providers such as lawyers and commercial arbitrators or

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<sup>74</sup> See also: Manitoba report, *ibid.* at 4.

mediators and state/territory bodies will be challenging, and

- Resourcing – initially the project will require an ongoing commitment of time by personnel able to contribute to progressing it. As the project develops there may be requirements for IT or other systems to be developed for reporting and recording of agreed data terms and metrics. If necessary a case for resourcing may be able to be made.<sup>75</sup>

At the same time, building an evidence base for the Canadian civil justice system is indispensable to making significant progress in increasing access to justice. The premise of this discussion paper is that the time is past due for justice system stakeholders to work together to initiate and carry through on this foundational work. The CBA's initial consultations highlight the importance of including the voices of community members, particularly the individuals and groups who face the greatest barriers to justice.

### **A. Discussion Questions**

**To assist the CBA Access to Justice Committee in developing recommendations in this area, we are seeking your feedback on the following questions:**

1. What efforts to develop access to justice metrics in Canada are you aware of?
2. Should the development of access to justice metrics be prioritized? Why or why not?
3. What are the challenges/barriers to developing access to justice metrics? How can they be overcome?
4. Are there existing data collections that could provide a starting point for the development of access to justice metrics? Is an audit of existing data collections required?
5. What in your view should be included within the framework for access to justice metrics in terms of objectives, indicators and variables or measurements? Are there elements/approaches from any of the examples discussed here that should be included or excluded?
6. How can the perspective of community members and clients/users of the justice system be integrated into access to justice metrics?
7. What needs to be done to develop and agree upon access to justice system objectives and indicators?
8. Do certain components of the justice system have a primary responsibility for leading the development and adopting of access to justice metrics? (e.g. courts, federal and/or provincial/territorial governments, academics, etc.) Which one(s)?

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<sup>75</sup> *Supra* note 14 at 4.