

Middle Income Access to Justice

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13 Growing Legal Aid Ontario into the Middle Class: A Proposal for Public Legal Expenses Insurance

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I. Introduction

The legal aid system in Ontario is not working, particularly with respect to access to justice in civil matters. Financial eligibility requirements remain frozen at extremely low levels and have been steadily eroded by inflation, leaving increasing numbers of people ineligible for publicly paid legal assistance. The range of services covered prioritizes criminal law and family law and, except for some legal aid clinics, does not extend to employment law, consumer law, and debtor/creditor law. In combination, this means that publicly funded legal aid cannot meet many of the most pressing legal needs of middle income Ontarians. Moreover, private markets, as currently structured and regulated, have not bridged this gap in access. Market rates for legal services continue to rise, and representation by legal counsel is unaffordable for a majority of Ontarians. As a result of these pressures, staggering numbers of Ontarians are attempting to navigate an increasingly complex civil justice system without any or adequate legal assistance, and they feel increasingly alienated from the system. The Chief Justices of Canada and of Ontario have independently referred to this state of affairs as a 'crisis' for the legal system.¹

1 Hon. Warren K. Winkler, Chief Justice of Ontario, 'Civil Justice Reform – The Toronto Experience' (The Warren K. Winkler Lectures on Civil Justice Reform, delivered at the Faculty of Law, University of Ottawa, 12 September 2007); Tracy Tyler, 'Access to Justice a "Basic Right": Country's Top Judge Says the System's High Cost Is an "Urgent" Problem That Must Be Addressed, But Lawyer's Recent Accusations of Money Grubbing among his Peers Won't Help, Chief Justice Says' *Toronto Star*, 12 August 2007.

Many of the solutions to this crisis that have been proposed to date have taken the basic financial architecture of the legal aid system as it currently exists but would increase funding significantly. This would serve a number of goals: it would maintain existing levels of services by providing significantly enhanced compensation to lawyers who take on legal aid cases and thereby ensure the future of the legal aid bar; and it would also expand both eligibility and the areas of law covered.² In our view, increasing public funding for legal aid on the scale required to serve the civil justice needs of the middle class, on a sustainable basis, is an economic and political non-starter. In this paper, we propose a different solution to the system's failings: to grow Legal Aid Ontario (LAO) into the middle class by grafting public legal expenses insurance onto the existing program of publicly funded legal services for low income Ontarians. Adapting the acronym for legal expenses insurance, LEI, we term this a proposal for public LEI. This proposal would respond directly to the institutional, political, and market challenges that beset access to justice.

The first (and central) challenge to reform is institutional: the disarticulation of the justice system and its component parts, which are strongly independent – beginning with the courts, which are self-administered, and the legal profession, which is self-governing. In our justice system, no single institution is responsible for the whole and therefore no single institution can establish the financial and regulatory incentives that will drive down costs for publicly paid legal services while ensuring that the most acute legal services needs of Ontarians are met. We assume therefore that effective reform will have to involve the creation of new institutional capacities and a corresponding realignment of incentives to make cost-effective legal services viable. The principal mechanisms we propose for accomplishing these objectives are enhanced purchasing power for the public payer for legal aid services, and improved information about the system as a whole. We propose to enhance LAO's capacity along both these dimensions. Indeed, one of the principal advantages to locating a public LEI program within an existing institution, LAO (as opposed to creating a new public corporation, or facilitating the growth of private markets for LEI), is that LAO, as the dominant purchaser of legal services in Ontario, could use public LEI to achieve the purchasing power it needs to require lawyers to

² Ontario Ministry of the Attorney General, *Report of the Legal Aid Review 2008* by Michael Trebilcock (2008) [Trebilcock Report].

innovate in how they deliver these services, and to institute innovative structures for the delivery of services on its own. Grafting the program onto LAO as it currently exists will enable the program's administrators to maximize economies of scale and scope while fostering institutional complementarities. Our proposal that taxpayers and lawyers can participate in the program as a matter of choice will help maintain the competitive pressures necessary to ensure that the program is able to guarantee services at low cost while continuing to innovate.

With improved data, LAO would be assisted in overcoming the institutional fragmentation that is a barrier to reform. It is striking how little information we have, in contrast to other public services (e.g., health care), about the operation of the justice system. Accordingly, meaningful reform will have to include improvements in the way we gather and disseminate information about the system (to scholars, practitioners, and the public) – for example, through the creation of an arm's length agency to augment the work of independent scholars and organizations currently engaged in the collection and analysis of this kind of information. These data, in turn, would help empower LAO to lead an evidence-based discussion of justice sector reform.

The second challenge is political. Middle income earners currently have very little stake in legal aid because their only involvement in the system is as taxpayers as opposed to participants. Accordingly, we assume that there is very little likelihood that politicians will direct significant new funding into the system in order to target the civil justice needs of middle income earners on an ongoing basis. Indeed, in the contest for increased public funding, legal aid has consistently lost out to those public programs that cater to the middle class, especially health care and education. Legal aid, to ensure its political viability, needs to expand its scope to encompass the middle class. This new set of stakeholders in the legal aid system will champion its ongoing viability, which will benefit the poor in two ways: (1) by providing political incentives that will maintain and even marginally improve public funding in the face of competing budgetary pressures, and (2) by enhancing LAO's existing institutional capacities by providing direct financial support to LAO through premiums. Program contributions from higher income Ontarians can help pay for services provided to lower income Ontarians by funding common organizational infrastructure.

The third challenge concerns the operation of markets. The markets for legal services generally and for private LEI in particular are characterized by failures of information in addition to other shortcomings.

On the demand side, ordinary consumers of legal services have very little capacity to anticipate what their needs may be in regard to legal services or to evaluate the quality of services on offer when those needs become acute. LEI is an effective means of spreading the risk of legal contingencies, recognizing that consumers are generally reluctant to pay for insurance, again, because it is hard to anticipate the legal contingencies that will affect them. On the supply side, the gap between what legal services cost and what most Ontarians are able to pay means that many lawyers lack the financial incentives to serve low and middle income consumers. With respect to LEI, problems of adverse selection (high-risks disproportionately seek insurance) and moral hazard (once insured, individuals may have incentives to engage in protracted or speculative litigation) may render comprehensive private insurance extremely expensive. These forms of market failure, and the lessons we draw from the European market for LEI (which has been fostered, in significant part, by state intervention), weigh in favour of an insurance model for legal services, and a public rather than a private model. In our model, every Ontarian would be enrolled as a matter of default but would be free to 'opt out'; conversely, lawyers would not be enrolled by default but would be free to 'opt in' on a case-by-case basis (as they currently do in the LAO certificate system). In other words, as a matter of default, the program would provide strong incentives for participation while preserving the freedom of participants to choose private alternatives.

A public insurance model for legal services would enable us to mitigate these institutional, political, and market impediments to access to justice. It would be a means of pooling the resources of the system's diffuse and heterogeneous clients and using their collective demand for legal services to drive down the costs of legal services, by funnelling demand through a dominant purchaser of legal services: institutional consolidation on the demand side would offset institutional fragmentation on the supply side. Financed by taxpayer premiums, the model would be financially self-sustaining. In addition, LEI located in LAO would serve as a platform for political mobilization: rejuvenated with a mandate and the resources to serve a wider consumer base at low cost, LAO could lead discussions about the reform of the system in a way that current institutions advocating access to justice cannot.

Our fundamental assumption is that access to justice is a 'basic right' for all Canadians. Some range of legal services should be provided to all citizens on a non-means-tested basis. But in order to realize the

right to access to justice, we must pay careful attention to questions of institutional design and the political and economic incentives those institutions create. In order for reform to succeed, it must be motivated by moral considerations but approached with a strategic mindset. The basic calculus is this: if we continue to expect middle income Ontarians to financially support, through their tax dollars, a legal aid system for the poor, we would be wise to offer them a material stake in the well-being of the system, in as transparent a manner as possible – by linking their financial stake in the system to legal services that meet their most acute needs. Creating a public legal expenses insurance program is one way to accomplish this objective. In companion research, our colleagues have found that the most acute, unmet civil legal needs for middle income Ontarians arise in the areas of family law, employment law, and consumer and debtor/creditor law.³ Accordingly, we propose a public LEI program that would target these needs. At the same time, we take the position that all of the program's participants (taxpayers on the demand side; lawyers on the supply side) should be free to favour market alternatives if they choose: taxpayers would be free to 'opt out' of a program in which they are enrolled by default, while lawyers would be encouraged to 'opt in' on a case-by-case basis.

We advance our proposal as follows. In Part II, we elaborate on our diagnosis of the challenges posed by the disarticulation of the justice system into 'contending autonomies' and on the incentives of the system's major players that may pose barriers to reforming the system. In Part III, we build the case for increasing LAO's fiscal and informational leverage in the justice system using a public LEI program, by describing how LEI works and the case for a public model based on the need for state intervention to foster private markets for LEI in other jurisdictions. In Part IV, we describe the key features as well as the benefits of a public LEI program: it could empower LAO and its partners to innovate in the delivery of cost-effective legal services in Ontario, in conjunction with an arms-length body empowered to gather the information about the system that we will need to evaluate these innovations. In Part V, we conclude.

3 University of Toronto Faculty of Law, Middle Income Access to Civil Justice Initiative, Background Paper by the Steering Committee, http://www.law.utoronto.ca/documents/conferences2/AccessToJustice_LiteratureReview.pdf [Background Paper].

II. The Reform Challenge: Contending Autonomies and Diffuse Consumers

Regarding the obvious question of 'who is in charge?' of the administration of justice in Ontario, the facts reveal disconcertingly that the answer is 'everybody and nobody.' Thus our diagnosis of the justice system's failings begins with the observation that our legal system is defined by the autonomy of its major players and by the difficulty of aligning incentives to reform among them.

We begin with the constitutionally protected independence of the judiciary and the professional autonomy of lawyers (which may also have a constitutional foundation). Broadly speaking, in the name of judicial independence, judges have historically resisted state oversight of courts administration – for example, the Ontario Integrated Justice Project.⁴ Likewise, lawyers typically resist oversight of their management of cases due to concerns that this will affect solicitor-client relations by constraining the lawyer's professional judgment and the client's liberty to instruct counsel. Indeed, the independence of both lawyers and judges is layered, because individual lawyers and judges work independently of each other while forming, as groups, self-governing institutions that are largely independent of state oversight. Thus, the collective resistance to accountability and oversight is compounded by the individual independence of judges and lawyers.

Lawyers and judges, however, are not the only 'contending autonomies' that shape the justice system. Indeed, we can extend the characterization of independence to the Law Society of Upper Canada, university-based law schools, community legal clinics, and LAO itself (which is an arm's length agency of the government), as well as the provincial and federal governments. The independence of these institutions from one another allows each of them, to a greater or lesser extent, to avoid shouldering responsibility for reforming the system. For example, the Law Society as the self-regulating body for the legal profession has historically found itself in a conflict of interest position vis-à-vis widening access to the supply of legal services, due to the pro-

⁴ See, for example, *2003 Annual Report of the Office of the Provincial Auditor of Ontario*, http://www.auditor.on.ca/en/reports_en/en03/403en03.pdf; Sandford Borins, 'New Information Technology and the Public Sector in Ontario: A Report to the Panel on the Role of Government' (June 2003), <http://www.law-lib.utoronto.ca/investing/reports/rp12.pdf>.

fession's historical perception that allowing paralegals, volunteers, and clinics to provide legal services will erode the monopoly of lawyers to provide these services. The vigorous debate in Ontario over the licensing of paralegals usefully illustrates this point.⁵ Law schools do not see themselves, necessarily, as preparing their students for careers in service to lower and middle income Ontarians, in the areas of family, employment, and consumer and creditor/debtor law. LAO is a quasi-independent agency, though it may still find itself under pressure to align its policies and goals with the expectations of the Attorney General (financial and otherwise), and though its regulatory authority is subject to oversight by the Lieutenant Governor in Council (indeed, to a large extent LAO's regulatory authority in respect of legal aid services is concurrent with the provincial government's).⁶ Community legal clinics are fiercely protective of their institutional autonomy, often operating at the behest of community-based boards of directors and resisting LAO oversight. Finally, either level of government may act autonomously of the system as a whole, where they are not under consistent pressure to internalize the costs of their policy decisions – decisions that increase the burden on the legal aid system without commensurate investments in the system or cost sharing. A well-known example is the provincial government's 'guns and gangs' policy, which has had enormous cost implications for LAO and has resulted in the diversion of resources toward its big case program and away from other criminal matters. Changes to the refugee determination system by the federal government have likewise had implications for LAO expenditures.

We have so far surveyed the institutional barriers against reform on the supply side of the legal services equation. On the demand side, there is another set of public choice issues. The consumers of legal services in general are a diffuse, heterogeneous, and disorganized group and face information and collective action problems in organizing themselves and articulating their concerns in so many different fora.⁷ The situation

⁵ See generally, Julia Bass and Paul Saguil, 'The Authorized Provision of Legal Services by Non-Lawyers: Paralegals and Others,' in *Canadian Legal Practice – A Guide to the 21st Century*, ed. Adam Dodek (LexisNexis Canada, 2009).

⁶ See *Legal Aid Services Act*, 1998, S.O. 1998, c.26, s.97.

⁷ As Trebilcock has observed, '[C]onsumers of professional services including legal services may be ill-equipped to diagnose or identify the precise nature of the problem they are confronting, which may require professional services. Even if they can identify the problem or need, they may be ill-equipped to choose an appropriate service provider, to exercise meaningful judgement over the appropriate service

is somewhat more complex with respect to legal aid. The fact that the program is targeted at the very poor has generated a politics in which the financing of publicly funded legal services is viewed as part of the bundle of social services targeted at the poor (e.g., welfare or public housing). Thus, in addition to provider organizations (e.g., the Criminal Lawyers' Association, the Association of Legal Clinics of Ontario), anti-poverty groups also advocate increased public funding for LAO. By contrast, the exclusion of the middle class from the scope of legal aid means that it is not an influential voice for reform.

Any discussion of the reform of publicly funded legal services has to acknowledge these issues. With respect to the supply of legal advice and representation, for example, it is clear that lawyers can respond to market pressures on an individual basis to reduce costs and explore alternative means of providing legal services (especially where practitioners work together in a firm or other arrangement to rationalize services and reduce costs). Nonetheless, the gap between what most legal services cost and what lower and middle income Ontarians are able to pay means that without the intervention of a dominant payer for publicly paid legal services, there is no institutional purchaser to provide lawyers with the financial incentives to address the needs of this underserved clientele. Even where these services are purchased by the state, we see that it is very difficult to practise-manage lawyers, who exercise considerable autonomy in respect of legal aid services and who are not required to use least-cost methods of providing advice to ensure that public money goes farthest. As Trebilcock has noted, LAO 'has often faced a certain amount of resistance to change from its service providers, which has undoubtedly hampered some of its attempts to be innovative.'⁸ As a result of this, he laments that 'beyond the increased use of staff delivery systems, LAO has not been particularly innovative in service delivery.'⁹ Untested (or undertested) possibilities include more selective membership on legal aid panels, block fees, and triaging

procedure and to monitor effectively performance by the service provider of the relevant procedure thereafter, and the time and cost associated therewith.' See Michael J. Trebilcock, 'Regulating the Market for Legal Services' (2008) 45 *Alta. L.R.* 215, at 217 [Trebilcock, 'Regulating the Market for Legal Services']. See also Ontario Civil Legal Needs Project, *Listening to Ontarians – Report of the Ontario Civil Legal Needs Project* (May 2010), http://www.lsuc.on.ca/media/may3110_ochreport_final.pdf [Listening to Ontarians].

⁸ Trebilcock Report, *supra* note 2 at 83.

⁹ *Ibid.*

(i.e., using staff paralegals or lawyers to handle routine matters before directing clients toward specialized practitioners).

In other words, in a system defined by these competing autonomies, a poorly financed payer for legal aid services has very little leverage. This is even truer of the individual consumer. We appreciate that lawyers who work for legal aid certificates are under considerable pressure to establish efficient practices in their own interest, and that they remain under professional obligations with respect to their standard of practice. Nonetheless, we believe we can achieve a sea change in the cost-effective delivery of legal services by empowering LAO – through a public legal expenses insurance program – to require lawyers and other legal service providers to innovate in how they deliver these services, and by instituting innovative structures for the delivery of services on its own.

III. The Case for (Public) Legal Expenses Insurance

In this section, we describe how LEI works, emphasize the merits of LEI generally, and set out the difficulties associated with encouraging consumers to embrace LEI in the marketplace. Accordingly, we suggest that public LEI (with an opt-out provision) merits attention as a possible solution to private market shortcomings in Ontario.

A. What Is LEI?

LEI provides coverage for unexpected and costly events ('legal accidents') that require the policy holder to consult a lawyer or other legal service provider or resort to the judicial system. LEI plans provide coverage for legal expenses, including litigation costs, in contrast to prepaid plans, which guarantee legal assistance for more predictable events (such as drafting wills or real estate conveyances).¹⁰ 'Stand-alone' LEI plans are generally more expensive than 'add-on' plans, which are linked to other insurance policies, such as home or auto insurance,¹¹ or are an element of employee group benefit plans. Plans may be pur-

¹⁰ See Paul Vayda and Stephen Ginsberg, 'Legal Services Plans: Crucial Time Access to Lawyers and the Case for a Public-Private Partnership,' *supra* this volume [Vayda and Ginsberg, 'Legal Services Plans'].

¹¹ For example, automotive liability insurance in Ontario covers litigation costs arising from claims on the policy.

chased 'before the event' (BTE) or, at a premium, 'after the event' (ATE) in order to manage unpredictable legal costs arising from an existing legal problem. LEI typically uses panels of law firms to which clients are referred. LEI providers have considerable leverage to set the terms of service. For example, a 2002 survey-report sponsored by the Nuffield Foundation describes how a number of insurers in the United Kingdom exercise their leverage to enforce service standards with respect to panel firms (in the personal injury context):

With an attractive quantity of personal injury work to refer, LEI insurers across the market are in a powerful position to negotiate favourable terms with panel firms. These include shorter contracts, tendering processes and the requirements that firms adopt a certain quantity of fixed fee claims in addition to receiving the more lucrative personal injury work ... Firms were expected to adhere to specific service standards and were monitored through annual or bi-annual file audit.¹²

The report also notes that 'a small number of firms said that audits were more theoretical than real as they involved the insurer in unnecessary expense and administration,' but we do not take this as a theoretical criticism of the model.¹³

B. The Current Availability of LEI in Canada

LEI is currently available in Canada but not widely used. The consumer market for LEI in Ontario is served by a single insurer:¹⁴ in 2010, DAS, a German company, began to offer plans in provinces, including Ontario. Media reports indicate that DAS's plans for individuals

12 Pamela Abrams, 'In Sure Hands? Funding Litigation by Legal Expenses Insurance: The Views of Insurers, Solicitors, and Policyholders' (University of Westminster, 2002) at 9 (copy on file with the authors).

13 *Ibid.*

14 Sterlon Underwriting Managers Ltd. provides LEI to corporations and professionals. See <http://www.sterlon.com>. Prepaid LEI plans have been available in Ontario since 1999 on a personal or household basis through an American company called Prepaid Legal Services ('PPLS'). See <https://www.prepaidlegal.com>. LEI has also been made available to some labour unions for their members. For example, the Canadian Auto Workers Union ('CAW') and the Power Workers Union ('PWU') both provide LEI plans to their members. See CAW Legal Services Plan, <http://www.cawlsp.com>; PWU Protection Plan, http://www.pwu.ca/protection_plan/legal_expense.php.

could cost under \$500 per year and provide up to \$100,000 in coverage per claim, including litigation costs, but that the plans would exclude family law cases.¹⁵ Quebec is the exceptional market in Canada; there, approximately twelve companies offer LEI plans for individuals and families, at premiums ranging between \$35 and \$90 per year. Coverage includes both telephone legal assistance and coverage for the costs of legal representation. The insured can generally select their own lawyer and legal strategy, with the lawyer being paid by the insurer at below-market rates. Coverage generally does not include services for family law matters, criminal charges, and pre-existing matters, and it is usually limited to \$5,000 per dispute and \$15,000 per year.¹⁶ As a result of significant promotion by the Barreau of Quebec, approximately 10 per cent of Quebec residents are covered by LEI plans (although this is arguably a disappointing result, as we discuss below).¹⁷ The European market for LEI is significantly more developed than in Canada, although highly variable from country to country, for reasons set out below.¹⁸

C. Why Public LEI? What Kind of Public LEI?

Our review of the literature suggests that the supply of and demand for LEI is highly responsive to state intervention to mitigate market failure. Indeed, barring ideal conditions, the private adoption of LEI may not occur on a significant scale without state intervention. On the supply side, state intervention may be required to ensure a sizeable and well-diversified risk pool – for example, by making LEI compulsory – or to help make the costs of litigation as predictable as possible – for example, by requiring adherence to costs tariffs. On the demand side, the need for state intervention may arise from a number of sources: consumer cognitive bias (i.e., the inability of consumers to consider the

15 Tracey Tyler, 'Firm to Offer Up to \$100,000 Legal Coverage for \$500,' *Toronto Star*, 7 October 2009, <http://www.thestar.com/news/gta/article/706635>. See also DAS, <http://www.das.ca>.

16 Barreau du Québec, 'Legal Protection Insurance: For a Greater Access to Justice' (1999).

17 Tracey Tyler, 'New Insurance Makes Lawyers Affordable,' *Toronto Star*, 18 August 2008, <http://www.thestar.com/article/480287>.

18 See, generally, riad / International Association of Legal Expenses Insurance, 'The Legal Protection Insurance Market in Europe' (June 2010), <http://www.riad-online.net/430.0.html>.

true risks of legal contingencies), the complexity of LEI policies (which may be difficult to sell on their own, or to distinguish in their substance and limitations from the other policies to which they are added), and cost.¹⁹

Among these considerations, the issue of cost may be determinative. Even for the middle class, the costs of LEI may be prohibitive. Kilian and Regan have found that in Germany (where LEI has been widely adopted and the plans are generally affordable), the distribution of private LEI associated with household insurance policies is largely consistent with income distribution: 'the least priority seems to be given to LEI if only limited financial resources are available.'²⁰ As a consequence, the authors expect that it would be 'very difficult' for governments to substitute private LEI for publicly funded legal aid.²¹ Indeed, while the lowest income earners in this case would qualify for legal aid in Germany (which may explain their reluctance to purchase insurance), the authors nonetheless caution that

19 For instance, Germany is Europe's largest LEI market (approximately 44 per cent of German households have coverage and about 25 per cent of all lawyer fees are paid by LEI plans); but Kilian and Regan advise that LEI 'has only been able to flourish [in Germany] because the most important conditions of insurance theory are met by the German legal system.' For example, speculative funding of attorney fees is forbidden, legal aid is available only on the basis of stringent merits and means tests, and neither lawyers nor non-lawyers are allowed to offer legal services pro bono. On the supply side, costs and court fees are calculated based on a statutory scale of fees based on the monetary value of the dispute. Consequently, uncertainty in relation to fees is reduced from the outset of the litigation. The risk pool is 'mainly a historic achievement' but is sizeable. We note that some authors characterize Germany as an example of a jurisdiction where LEI has flourished without state intervention, but the above list of factors belies that assertion; the conditions for LEI to flourish are a product of legislative choices. See Matthias Kilian and Francis Regan, 'Legal Expenses Insurance and Legal Aid - Two Sides of the Same Coin? The Experience from Germany and Sweden' (2004) 11 *International Journal of the Legal Profession* 233 [Kilian and Regan, 'Legal Expenses Insurance']. In another notable example, the well-established private market for LEI in Sweden can also be attributed, at least in part, to strong government support: beginning in the 1960s, the public legal aid regime was supplemented by free (government-sponsored) LEI for a limited set of civil law issues, provided to the public through private home insurance policies. The government cut back public support for LEI in the 1990s. See Francis Regan, 'The Swedish Legal Services Policy Remix: The Shift from Public Legal Aid to Private Legal Expenses Insurance,' 30 *J.L. & Soc'y* 49 2003 [Regan, 'The Swedish Legal Services Policy Remix'].

20 *Ibid.* at 243.

21 *Ibid.*

cutting back legal aid budgets with the hope that those included by legal aid in the future will take out insurance cover is a rather optimistic approach. It seems to be more likely that a fair number of those losing legal aid cover would be left totally unprotected against the expense of legal services.²²

In the face of these concerns, Kilian and Regan observe that 'the crucial [policy] question is how citizens can be convinced to take out insurance cover instead of relying on legal aid (or other ad hoc funding mechanisms).'²³ The obvious solution is to make LEI compulsory - that is, to link LEI with other forms of compulsory personal insurance, such as automobile liability insurance.²⁴ Nonetheless, this is not a solution that legislatures have adopted (although Kilian suggests that some have considered it).²⁵ This is likely the case because mandatory LEI is a political non-starter, taking into account the likely resistance from consumer groups.²⁶

If mandatory legal insurance is not an option, what are the alternatives?²⁷ Marketing private LEI is not a complete answer. It stands to reason that legal service insurance policies 'are not typically sold to marginalized groups of the society whose jobs are threatened, or who are facing eviction from housing,' or who are otherwise at risk.²⁸ As we argue below, mandatory public LEI (which would be difficult to achieve politically) and purely voluntary LEI (which would be inefficient) do not exhaust the range of possibilities. There is a third option, an opt-out regime, which we detail shortly.

22 *Ibid.*

23 *Ibid.* at 236.

24 *Ibid.* See also, Regan, 'The Swedish Legal Service Policy Remix,' *supra* note 19.

25 Matthias Kilian, 'Alternatives to Public Provision: The Role of Legal Expenses Insurance in Broadening Access to Justice: The German Experience,' 30 *J.L. & Soc'y* 31 2003 at 35.

26 Kilian also suggests that the 'legal risks have not been regarded as serious enough, in personal or economic terms, to introduce compulsory LEI in either England or Germany.' See *ibid.*

27 Depending on the jurisdiction, barriers to entry for private LEI firms can be removed - for example, the U.K. will soon allow non-lawyers to invest in legal practices - but the same underlying issues that we have identified will remain unless the state intervenes. See Ministry of Justice (U.K.), 'Alternative Business Structures Fact Sheet' (9 June 2008), <http://www.justice.gov.uk/publications/abs-fact-sheet.htm>.

28 Edward Blankenburg, 'Private Insurance and the Historical "Waves" of Legal Aid' (1993) 13 *Windsor Yearbook of Access to Justice* 185 at 199.

D. *Objections to LEI*

Quite aside from how broad participation could be ensured, the efficacy of private LEI has been doubted on the basis of adverse selection and moral hazard. We take the view, supported by the literature,²⁹ that concerns about the abuse of these programs can be addressed in their design. For example, some services that lend themselves to abuse (such as traffic infractions) could be exempted entirely from coverage. Alternatively, co-payments could be introduced for those services.

IV. How a Public LEI Program Might Work in Ontario

As far as we are aware, the idea of public LEI has not been considered in Ontario. Nonetheless, in our view, an opt-out public LEI program should be considered here. The ideal conditions for private LEI to flourish do not exist in Ontario, and we doubt the efficacy of attempting to engineer a market for this product from scratch (although we acknowledge the need to experiment with policies that would complement the public-private mix of LEI offerings that we advocate below). Second, the legal services needs that LEI would address here are not suitable for the obvious alternatives, such as class actions and contingency fees. Neither of these mechanisms is suitable for the kinds of personal civil matters that are pressing and acute in Ontario (although the latter might be ideal for potentially lucrative litigation such as personal injury claims). In the remainder of this paper we provide a thumbnail sketch of the logistics involved in creating a public LEI program – who and what services would be covered, and how it would be paid for. We also flesh out the benefits to creating a public LEI program: it would increase the purchasing power of LAO in relation to the private bar, so that it could lead the reform discussion and innovate in its own right. We also discuss the critical importance of information to the reform effort.

A. *The Mechanics of a Public LEI Program in Ontario*

The basic model for the program we advocate is that all taxpayers are enrolled by default, although free to 'opt out,' while lawyers have to

²⁹ See, for example, Kilian and Regan, 'Legal Expenses Insurance,' *supra* note 19 at 242-3.

'opt in' on a case-by-case basis. In the remainder of this part we explain how premiums would be established (on an actuarial basis), how services would be included (on the basis of consultation), why extra-billing would not be permitted, and how the program would be financed and administered (by premiums, through LAO). We close with a comment on the handling of problem participants.

(1) *The importance of competition and shared institutional capacities.* Our proposal for the mechanics of the program, outlined in more detail below, is based on two assumptions: the need to foster competition in the marketplace for innovative, low-cost legal services; and the value of economies of scale and scope among public institutions. We take the view that these assumptions can be balanced in a productive tension. We have suggested that grafting the program onto LAO as it currently exists will enable the program's administrators to maximize economies of scale and scope while making the most of what LAO and a public LEI program would have in common – that is, the institutional capacities that would be necessary to administer and provide legal services directly to LAO's existing clients as well as to the new clients of a public LEI program (e.g., billing clients and the training and management of staff lawyers and paralegals). Given the choice between grafting a public LEI program onto LAO as it currently exists (or linking it with LAO as an affiliate institution)³⁰ and creating a new institution from scratch, we prefer the former. Our position raises an immediate objection: if LAO as it currently exists has failed to innovate, how can a larger version of the same organization be expected to succeed? We answer this objection, in part, by stressing the importance of competition. For the reasons set out below, we propose that taxpayers and lawyers be free to participate in the program as a matter of choice. In other words, the program's participants will have an 'exit' option, not merely a 'voice' option (as in the public health care system), as a means of expressing their preferences. This will help maintain the competitive pressure on a public LEI scheme that will be necessary to ensure that the program is able to guarantee high-quality services at low cost while continuing

³⁰ Compare the relationship between LSUC and the Lawyers' Professional Indemnity Company ('LAWPRO'), the insurance company that provides professional liability insurance to lawyers in private practice in Ontario. LAWPRO was incorporated in 1990 by LSUC but has operated independently since 1995, with its own management and Board of Directors. See <http://www.lawpro.ca>.

to innovate (indeed, innovation will be imperative to the success of the program, from a competitive standpoint). This is just one of the reasons why we take the view that an 'opt out / opt in' approach for taxpayers and lawyers, respectively, is so critical to the model for public LEI that we are proposing.

(2) *Consumers opt out.* We have suggested that state intervention is needed to encourage lower and middle income Ontarians to embrace LEI. However, we do not believe that mandatory public LEI is the answer, for political reasons but also because a public LEI program cannot provide complete coverage for the needs of Ontarians and private alternatives should be encouraged for those who can afford them. Indeed, we expect that wider public awareness of the benefits of public LEI will help spur the development of the private LEI market for legal services that are not covered by the LEI scheme, or for private LEI for add-on services or as a comprehensive, competitive alternative to public LEI. Accordingly, we take the view that the program's participants (taxpayers) should be free to opt out of the program in favour of market alternatives.

We note that an opt-out approach (rather than an opt-in approach) is consistent with a recent shift in policy-making thinking, whereby 'default' policy options are designed to promote socially beneficial outcomes.³¹ This approach is based on social science research into the ration-

31 See Richard H. Thaler and Cass R. Sunstein, *Nudge: Improving Decisions About Health, Wealth, and Happiness* (New Haven: Yale University Press, 2008). The authors, calling themselves 'libertarian paternalists,' introduce this concept with (among others) a stylized illustration of the University of Chicago's annual benefits enrolment process. Each year, employees are invited to choose whether to enrol in, and how much to contribute to, various benefits plans – for example, health insurance entitlements, flexible spending accounts for health insurance, and retirement savings accounts. For the sake of simplicity, the authors contrast the effect on the employees of setting the 'default' option at 'back to zero' or 'same as last year.' The authors suggest that 'libertarian paternalists would like to set the default by asking what reflective employees ... would actually want.' For instance, employees would probably prefer to retain their entitlement to heavily subsidized health insurance; accordingly, the default option for this entitlement should be 'same as last year.' If the default was 'back to zero,' then an employee who missed the deadline for enrolment in any given year would be seriously disadvantaged. Selecting the default options for the other benefits involved more nuanced analysis. Because they involved discretionary spending, it probably made sense to set the default options at 'back to zero' for contributions to flexible spending accounts for health insurance and retirement savings accounts. Nonetheless, contributions for the retirement savings accounts could be cancelled at any time; accordingly, it might make sense to set the default option for that benefit at

ality of personal judgments and decisions; the evidence suggests that people do not typically analyse the costs and benefits of every choice they make but are instead prone to accept the status quo. Recognizing this yields the possibility that default policy options across a wide spectrum of regulatory activity can be used to promote health and well-being and to avoid the social cost of underutilization of services or benefits, while preserving freedom of choice – for example, in the pension reform context.³² Indeed, the Province of Quebec has recently announced its commitment to developing a Voluntary Retirement Savings Plan (VRSP) for Quebec workers (i.e., those who are not already covered by an employer-sponsored pension plan), predicated on these same basic principles. In order to ensure the participation of a large number of workers so that they benefit from low-cost pension plans, eligible workers would be enrolled by default, with the freedom to opt out; the opt-out model has been proposed as a key feature of the plan's design.³³

An opt-out approach to public LEI could help Ontarians avoid the social cost of legal underrepresentation. Indeed, our proposal that Ontarians be enrolled in a public LEI program by default appears to be supported by public opinion data and the experience of other provinces, which (we suggest) indicates that consumers are unable to accurately evaluate the potential likelihood and costs of legal contingencies. For example, the recent Report of the Ontario Civil Legal Needs Project (*Listening to Ontarians*), a survey of low and middle income Ontarians, found that more than two-thirds of respondents (67 per cent) said they would not be interested in obtaining LEI, the majority of whom (56 per cent) did not believe they would need it, and nearly one-third of whom

'same as last year.' The underlying assumption in this illustration is that not everyone who is eligible for these benefits will actually go through the process of making these selections every year. Thus, a set of rational default options – thoughtfully designed 'choice architecture' – can minimize the cost of this kind of failure. Working from this premise, the authors highlight the cognitive biases that impact personal decision making, and propose a wide range of default interventions, in both the private and public sectors, that could be designed to 'nudge' citizens toward choices that reflect their presumed self-interest, without significantly burdening their freedom to choose otherwise. See *ibid.* at 1–14.

32 See Keith Ambachtsheer, 'Pension Reform: How Canada Can Lead the World,' C.D. Howe Institute (18 November 2009), <http://www.cdhowe.org>.

33 Government of Quebec, '2011–2012 Budget: A Stronger Income Retirement System – Meeting the Expectations of Quebecers of Every Generation' (2011) at 3.2, <http://www.budget.finances.gouv.qc.ca/>.

thought it would be too expensive.³⁴ Similarly, despite the efforts of the Barreau in Quebec (i.e., despite a five-year, \$2 million campaign to promote LEI through a website, hotline, television advertising, and pamphlets distributed in lawyer's offices), citizens of that province have not widely embraced private LEI.³⁵ We take the view that findings along these lines cannot be taken at face value but rather should be understood as reflecting our systematic myopia in regard to forecasting the value of insurance for legal services. Indeed, *Listening to Ontarians* found that the main reason (42 per cent) most people cited for not seeking out legal assistance for a legal problem 'was their perception that legal assistance would cost too much or that they could not afford a lawyer.'³⁶ If we are wrong in our assumptions, and if a majority of taxpayers are genuinely determined not to obtain coverage for legal expenses, then they would remain free to opt out of the program we are proposing. Nonetheless, we expect that a policy shift whereby Ontarians were automatically enrolled in a program that would potentially yield more benefits to them at a lower cost than anticipated (by statistical measures) could yield a sizeable pool of program participants who would elect to remain in the program as they discovered its substantial benefits.

Taking the view that an 'opt out' approach is essential to the integrity of a public LEI program, we acknowledge the possibility that participants will do precisely that, and we stress the need to manage premiums and coverage carefully to ensure that participants realize (and recognize) true value for premiums. We propose the following institutional architecture in which this fine-tuning will take place.

(3) *Lawyers opt in.* Lawyers would not be enrolled in the program by default but rather would be free to opt in on a case-by-case basis (i.e., one file at a time). This is how lawyers currently participate in the existing LAO certificate system, in order to maintain a mix of LAO and non-LAO clients. The goal would be to extend the same model to lawyers under public LEI. Lawyers available to take public LEI files would identify themselves on publicly accessible lists or websites by area of competence and location (as is the case at present with lawyers willing to accept legal aid certificates).

34 Ontario Civil Legal Needs Project, *Listening to Ontarians*, *supra* note 7 at 39.

35 Luis Millan, 'Legal Insurance: While Europeans Have Embraced the Concept, Canadians Remain Cool to Pre-paid Legal Services,' *Lawyers Weekly*, 1 May 2009.

36 Ontario Civil Legal Needs Project, *Listening to Ontarians*, *supra* note 7 at 39.

We expect that by pooling a large number of taxpayer contributors, LAO would be able keep the cost of premiums down while offering competitive rates for legal services, thereby attracting a sizeable cadre of lawyers to accept public LEI mandates at different stages of their careers. Indeed, we expect that, owing to the nature of the oversight that LAO will adopt in relation to public LEI mandates, a number of lawyers will establish themselves as proficient and reliable partners to LAO in the program. At the same time, because lawyers rely on a mix of institutional and individual clients paying different rates depending on the nature of the legal services they require, preserving maximum freedom of choice for lawyers in the program (i.e., to accept or decline public LEI mandates on a case-by-case basis) will enable more lawyers to participate on business terms that they can manage.

(4) *Premiums.* The rates for premiums should be established on the basis of actuarial calculations. In our view, the alternative approach – tying premiums to ability to pay (i.e., establishing premiums on actuarial principles but adjusting them up or down to take into account a modest cross-subsidy between higher and lower income participants) – would raise the untenable possibility that the middle class would opt out of the program, thereby eroding its financial basis. From the standpoint of optics, we assume that middle income consumers would be sceptical of the benefits of a redistributive program for LEI, for the same reason that private markets for LEI have yet to flourish here: taxpayers undervalue it. From an economic perspective, we assume that a public LEI program that is not established on actuarial principles would face competitive pressure, at least in the long run. We assume that higher income participants would eventually opt out of a redistributive program in favour of lower-cost private alternatives, or abandon LEI altogether.

We acknowledge the possibility that if premiums are not cross-subsidized, they will be perceived as too high by middle and lower income Ontarians; accordingly, in the next section we propose that discrete services targeting their particular needs should be included. Nonetheless, we emphasize that if a high number of low income Ontarians decided to opt out of the program (because of the cost of premiums) while remaining ineligible for legal aid (because it is directed at the very poor), this would serve as a powerful signal to government that legal aid coverage should be expanded. In other words, legal aid and public LEI are complements, not substitutes.

(5) *Lawyer remuneration and included services.* Generally, stakeholders – including lawyers and consumers – should negotiate rates for lawyer remuneration and schedules for included services in a manner akin to how tariffs and schedules are maintained in the Ontario Health Insurance Plan (OHIP), which involves stakeholders in an ongoing process of review.

In terms of the obvious imperative to establish rates for services that are reasonably attractive to lawyers, we stress that a public LEI program would benefit lawyers simply by consolidating demand. This could have a pronounced impact on small firms and sole practitioners in particular, and especially on lawyers working in underserved communities (including rural communities), by helping ensure a steady supply of clients who have historically faced hurdles to finding a lawyer. Moreover, a strategic approach to lawyer remuneration might be used to augment the program's impact on underserved markets (i.e., by area of law as well as geographically). For example, rates for family law lawyers could be adjusted upwards, on a comparative basis, to encourage young lawyers to take family law mandates.

We assume that services should be offered in respect of acute civil justice needs (e.g., family law, employment law, consumer and debtor/creditor law), which could be identified on the basis of empirical evidence (e.g., consumer surveys). We assume that this would exclude, on a category basis, strongly subjective causes of action, such as defamation. As a matter of substance, the program's administrators should be able to exercise the discretion to screen claims on a merits basis, to ensure that unmeritorious claims (including claims brought in apparent bad faith) are unfunded.

We also stress that our proposal that the program be non-mandatory places particular pressure on the program's stakeholders to develop a 'menu' of services that are easy to understand and place a value on, to ensure that the program is able to meet the diverse expectations and needs of its participants.³⁷ In particular, given that we have proposed that premiums not be cross-subsidized, an obvious concern is that lower income Ontarians will opt out of the program because they consider the premiums too costly. Accordingly, we take the view that popular

³⁷ See, e.g., Ontario Civil Legal Needs Project, *Listening to Ontarians*, *supra* note 7, regarding the imperative to differentiate between the legal services needs of different consumers (including low- and middle-income consumers).

services should be included. For example, we propose the inclusion of high-demand legal services that are usually associated with prepaid legal services plans, such as the drafting of wills, powers of attorney, and real estate conveyances. We acknowledge that including these services in an insurance program runs counter to one basic view of insurance (i.e., that we purchase coverage for low-probability but high-risk events, rather than commodity-type services). Nonetheless, we agree with Vayda and Ginsberg that basic legal services can have a preventative function in relation to more complex legal problems (e.g., valid wills help avoid the social costs of intestacy), and we might justify including these services in a public LEI scheme on this basis alone.³⁸ In any event, we assume that LAO could purchase a high volume of these services at low cost by pooling the resources of all of the program's participants. Thus the program could include highly valued discrete benefits to participants, who might be encouraged to remain in the program on that account alone.

(6) *Extra-billing.* We take the view that lawyers who accept public LEI mandates should not be allowed to negotiate higher rates with their clients on top of insured rates ('extra-billing'). Under the LAO certificate program, a lawyer who accepts a certificate cannot bill above the hourly rate or the total overall billing cap. We would extend the same system to public LEI, for at least two reasons. First, we expect that higher effective rates for public LEI services would undermine public confidence in the value of contributions to the program (regardless of the services that are included in relation to a given case). Second, we assume that the great majority of cases should be able to be handled within the constraints established by LAO. For example, the program could require the unbundling of services to maximize the potential for self-help, and its rates and coverage could be designed to create incentives to settlement, in areas of law where these approaches have been found to be particularly effective. We emphasize that if a high number of lawyers decline to opt into the program (because of the rate of remuneration), this would serve as a powerful signal to LAO that fees for services should be adjusted.

(7) *Financing.* The administrative apparatus for the program as well as

³⁸ See Vayda and Ginsberg, 'Legal Services Plans,' *supra* note 10.

its initial funding would have to be provided through public seed funding. From that point forward, the program would be financed through individual taxpayer premiums rather than out of general tax revenues (i.e., through paystub withholding or the personal income tax filing process). A premium would have the benefit of notifying the taxpayer of her contribution, which is consistent with our objective that she see a dedicated revenue base and identifiable benefit in a plan for which she is eligible and that she be allowed to opt out of the program.

(8) *Administration.* We have already suggested that a public LEI program be grafted onto LAO as it currently exists in order to maximize its existing institutional capacities. Here we acknowledge the corresponding need for LAO to develop new capacities to support the administration of a public LEI program, as well as the importance of good governance in the oversight of the institution's proposed expanded mandate. Professional management in key roles must be ensured, as well as effective board oversight.

(9) *Problem participants.* We have acknowledged that the program's financial integrity could be undermined by adverse selection or moral hazard. As stated above, we take the view (supported in the literature) that LEI programs can be designed to accommodate the risk of abuse – for example, through exclusions of services and the introduction of co-payments.³⁹ Here, we note another form of potential abuse: consumers of legal services who 'opt out' of and strategically rejoin the program, timing their contributions to coincide with litigation. This form of abuse could be curtailed by imposing mandatory waiting periods before benefits, once cut off, are resumed, as well as exclusions of coverage for 'pre-existing' cases as appropriate. Finally, we acknowledge the potential need to exclude certain abusers of the program altogether – on the supply as well as the demand side. LAO should have the capacity to review and, as necessary, bar vexatious litigants as well as incompetent lawyers from the program.

³⁹ We note, in support of this view, the finding of the Ontario Civil Legal Needs Project that '[p]eople do not need, or want, full legal representation to solve every civil legal issue they encounter,' and 'a significant proportion of middle income Ontarians can afford to pay for some legal services.' See Ontario Civil Legal Needs Project, *Listening to Ontarians*, *supra* note 7 at 56.

B. *The Benefits: LAO Purchasing Power and the Impetus to Reform*

An opt-out public insurance scheme benefiting lower and middle income Ontarians, targeting their most acute needs, located in LAO, would have three key benefits: (1) LAO would enjoy increased leverage with respect to the private bar, to lower costs and enforce service standards in relation to publicly paid legal services; (2) LAO would enjoy increased funding to innovate in how it delivers legal services in its own right; and (3) with increased funding and a broadened mandate, LAO would be empowered as a focal point – for members of the community, lawyers, and policy makers – to advocate for innovations to enhance access to justice across the justice system as a whole.

(1) *LAO and the private bar.* An increase in purchasing power derived from a public LEI program could strengthen LAO's efforts to control costs – efforts such as practice-managing legal services provided by the private bar, as well as requiring lawyers who accept LEI mandates to innovate in how they deliver these services. Because LAO is already the dominant purchaser of legal aid services in criminal law matters, we can highlight its existing capacities in this regard – for example, the capacity of LAO's Quality Service Office to develop standards of practice for panels, through a consultative process,⁴⁰ and the willingness of LAO to partner with elite panels in the context of its big case management program. This development was emphasized in LAO's submissions to the Lesage-Code review of large and complex criminal case procedures,⁴¹ where LAO identified 'significant opportunities to improve the effectiveness and efficiency of complex criminal cases in Ontario.' These opportunities included encouraging more of Ontario's best lawyers to accept legal aid certificates; establishing high panel standards for counsel acting in serious criminal cases; establishing protocols, rules, and expectations for counsel accepting these certificates; requiring defence lawyers to be more accountable for their decisions and budgets; ensuring that LAO provide more valuable input on the

⁴⁰ See LAO, <http://www.legalaid.on.ca/en/about/qualityservice.asp>.

⁴¹ See LAO, 'Submission to the Lesage / Code Review of Complex Criminal Cases' (20 June 2008), http://www.legalaid.on.ca/en/publications/downloads/advisorygroups/transform-major_lesage-code.pdf [LAO Submissions]. For the consideration of these proposals in the final report, see Ministry of the Attorney General, *Report of the Review of Large and Complex Criminal Case Procedures* by Patrick J. LeSage and Michael Code (2008) at 95–120, <http://www.attorneygeneral.jus.gov.on.ca>.

largest and most complex cases; ensuring that LAO governs the program more effectively and that it can track the costs and progress of the cases better; and providing more ongoing monitoring and analysis of cases as they progress.⁴² We assume that a similarly robust approach to public LEI mandates could be adopted, as appropriate.

(2) *Innovation within LAO.* By providing a mandate for LAO to provide cost-effective legal services in a limited number of areas, a public LEI program could spur LAO's own reform efforts in the areas where delivery innovations have been identified as having real potential. Public LEI in the areas of family law, employment law, and consumer and debtor/creditor law could provide impetus for creating staff offices, as well as online resources, and for pursuing an integrated service delivery model in relation to relevant clusters of problems.⁴³ Innovations could be introduced along the legal services spectrum – a spectrum that includes public legal education and information, advice from non-lawyers, summary advice, brief services and referrals, duty counsel, and unbundled legal services.⁴⁴ We note, as Trebilcock observed in his Legal Aid Review, that LAO has already taken initial steps in many respects⁴⁵ but a great deal of work is yet to be done. What is needed now, in our view, is the infusion of funding, focus, and political traction that a public LEI program, targeting the needs of the middle class, can provide.

(3) *LAO as advocate for evidence-based reform.* LEI located in LAO would serve as a platform for political mobilization: rejuvenated by a mandate and the resources to serve a wider consumer base at low cost, LAO could lead discussions about the reform of the system in a way that current institutions advocating access to justice cannot. In particular, it could lead evidence-based discussions about reform, which it currently does not.

We take the view that the potential for reform would be augmented

42 LAO Submissions, *ibid.* at 4–5.

43 See Trebilcock Report, *supra* note 2 at 109.

44 See Background Paper, *supra* note 3.

45 For example, LAO has been examining ways to make applications for legal aid and access to the legal aid system easier for potential clients via the Internet; developing technological innovations that reduce administrative burdens both for certificate lawyers and for the system itself; and improving the quality of legal aid services in the province by introducing minimum panel standards and a mentoring program. See Trebilcock Report, *supra* note 3 at iii.

by the creation of an arm's length legal services information institute, whose mandate would be to gather information about the justice system for use by LAO, lawyers and judges, policy makers, and academics. A fruitful comparison can be drawn between the legal system and the health care sector (especially the hospital sector), in which a culture of information gathering provides a basis for accountability and service improvement across the system.⁴⁶ In particular, these sectors are in the process of adopting systematic quality assurance and risk management programs, whose purpose is to proactively monitor the quality of medical care by drawing on medical audits, utilization reviews, tissue and death reviews, and incident reports. These serve as triggers for corrections of practice deficiencies as well as for more systemic reviews. A key institution in this regard is the relatively new Canadian Institute for Health Information (CIHI), a national, not-for-profit independent organization that focuses on promoting cooperation among major health care stakeholders and on providing Canadians with essential statistics and analyses about their health and the health care system.⁴⁷ CIHI also coordinates national health information standards to ensure

46 We note that a number of important concerns with respect to the quality and the use of data in the health care sector have been raised in the literature. In the words of one recent report, there is 'a great deal of ambiguity about who is being held accountable, for what, to whom, and with what (if any) consequences or rewards for performance and improvement.' The principal carrots and sticks appear to be financial rather than qualitative. Authors have also noted problems with data quality and with aligning indicators across different levels of the system. The fact remains, however, that information gathering is a deeply entrenched element of the system. The authors of a recent report on public reporting in health care affirm this view, citing 'an irreversible trend toward public disclosure as the public increasingly demands more accountability,' not only because of perceived as well as real deficiencies in quality of care, 'but also because it "is philosophically desirable in democratic societies."' See Jack Wallace, Gary F. Teare, Tanya Verrall, and Ben T.B. Chan, 'Public Reporting in the Quality of Healthcare: Emerging Evidence on Promising Practice for Effective Reporting' (7 September 2007), Canadian Health Services Research Foundation (CHSRF) at 4–5, http://www.chsrf.ca/migrated/pdf/evidenceBoost/Public_Reporting_E.pdf; 'Accountability Agreements in Ontario's Health System: How Can They Accelerate Quality Improvement in Enhanced Public Reporting' (July 2008), Ontario Health Quality Council (OHQC); and Ontario Joint Policy and Planning Committee White Paper at 14–16, http://www.ohqc.ca/pdfs/accountability_agreements_in_ontario-july_31_2008.pdf.

47 See generally, Office of the Auditor General of Ontario, *2006 Annual Report* (2006), s.3.08 at 179, http://www.auditor.on.ca/en/reports_2006_en.htm; for more information about CIHI, see: <http://www.cihi.ca>.

that the measurements are comparable and meet the same quality requirements.

The legal profession must move aggressively in a similar direction. With the exception of institutions such as the Canadian Forum on Civil Justice,⁴⁸ we have no equivalents in the legal system to the various private and public institutions doing the work of data collection and analysis in the health care sector. We echo Trebilcock's observation that consumers of legal services are not interested in the quality of service inputs *per se* (i.e., the education of lawyers and judges) but rather in the quality of service outputs (advice, representation, adjudication),⁴⁹ and the fact remains that we lack sufficient data about the system to evaluate these outputs and require corresponding improvements. Information provides leverage for accountability and reform, and the absence of information about the justice sector makes reform much more difficult. With better data, stakeholders will be empowered in reform-oriented discussions with government, and LAO – newly empowered to speak for the middle class – would have a central role to play in this discussion.

V. Conclusion

We have proposed that we fundamentally reconsider how legal aid services are paid for and provided to lower and middle income Ontarians. Our basic premise is that at least some legal services should be provided to a larger group of Ontarians and that the cost of providing these services should be financed through an optional public insurance scheme, with the result that LAO would enjoy greater purchasing power in relation to legal aid services in Ontario. LAO could thereby impose strict conditions with respect to the deployment of those services, with the goal of containing costs by requiring lawyers and other legal service providers acting for clients under a public LEI mandate to innovate, while instituting innovative structures for service delivery in its own right. We strongly resist the notion that any proposal for reform should be relied on as a silver bullet or a panacea, but we hope a frank discussion of the merits of a public LEI scheme targeting Ontarians' most pressing needs will open up new possibilities for discussion.

⁴⁸ See Canadian Forum on Civil Justice, <http://cfcj-fcjc.org>.

⁴⁹ Trebilcock, 'Regulating the Market for Legal Services,' *supra* note 7 at 226.

PART 8

The Options Papers