

Lawyers' Rights Watch Canada

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The Right to Legal Aid: Recommendations for Reform of British Columbia's Legal Aid System in accordance with Canada's International Human Rights Obligations

Submission to the Legal Aid Services Review of the Province of British Columbia

22 November 2018

Introduction

This submission summarizes and makes recommendations based on the international human rights law (IHRL) obligations binding on British Columbia (BC) to:

1. Provide legal aid service delivery models that ensure equality before the law and equal access to the protection of the law for everyone without discrimination on the basis of economic, social, ethnic, racial, sexual, religious, or other status; and,
2. Create a statutory body, independent of executive control, that is mandated and resourced to provide an explicit right to adequate legal aid in criminal, civil matters, and administrative matters where legal assistance is indispensable for a fair hearing to determine rights by a court or tribunal.

Lawyers' Rights Watch Canada (LRWC) is a committee of lawyers and others who promote international human rights, the integrity of legal systems, and the rule of law internationally through advocacy, research, and education. LRWC has Special Consultative Status with the Economic and Social Council of the United Nations (UN). Since 2010, LRWC has advocated for legal aid in BC that complies with IHRL duties to provide legal aid as a key component of a legal system governed by the rule of law. LRWC publications on legal aid include:

- *The Right to Legal Aid: How British Columbia's Legal Aid System Fails to Meet International Human Rights Obligations*, LRWC, 2014.¹
- *International Right to Legal Aid: BC Missing Women Commission of Inquiry*, 2013.²
- *International Law Obligations to Provide Legal Aid*, submission to the Public Commission on Legal Aid, 2010;³
- Other submissions in 2012, 2013, 2014, 2015, and 2016, including submissions to UN human rights bodies.⁴

Current provision of legal aid in BC falls so short of IHRL obligations that the legitimacy of BC's legal system is in question for persons who need but cannot afford lawyers. For more than a decade, UN treaty monitoring bodies have regularly criticized Canada, particularly BC, for failing to comply with IHRL obligations to ensure equality before the law and equal protection of the law by providing legal aid when necessary for effective access to courts, equal protection of the law, and fair hearings to determine rights and remedy violations:

- **2006:** The UN Committee on Economic, Social and Cultural Rights (CESCR), reviewing Canada's fulfilment of obligations under the *International Covenant on Economic, Social and Cultural Rights* (ICESCR),⁵ concluded that cuts to civil legal aid in BC resulted in "a situation where poor people, in

particular poor single women, who are denied benefits and services to which they are entitled to under domestic law, cannot access domestic remedies.”⁶

- **2007:** The UN Committee on the Elimination of Racial Discrimination (CERD), reviewing Canada’s compliance with the *International Convention on the Elimination of All Forms of Racial Discrimination* (ICERD),⁷ noted “difficulties with access to justice for aboriginal peoples, African Canadians and persons belonging to minority groups.”⁸
- **2008:** The UN Committee on the Elimination of Discrimination against Women (CEDAW Committee), reviewing Canada’s compliance with the *Convention on the Elimination of All Forms of Discrimination against Women* (CEDAW),⁹ concluded that cuts to civil legal aid—particularly in BC—effectively deny equality rights to low-income women.¹⁰ The CEDAW Committee urged Canada to improve legal aid throughout Canada, to ensure access to remedies for discrimination on the basis of sex, especially in family and poverty law.
- **2012:** The Office of the UN High Commissioner for Refugees (UNHCR) found that changes to Canada’s asylum procedures, together with legal aid funding cuts across Canada, had resulted in increased unrepresented claims by asylum-seekers in Canada. The UNHCR noted that lack of representation has had a major impact on the fairness of refugee determination procedures and that the acceptance rate for unrepresented claimants was significantly lower than for represented claimants.¹¹
- **2015:** The UN Human Rights Committee (HR Committee), monitoring Canada’s compliance with the *International Covenant on Civil and Political Rights* (ICCPR),¹² found Canada in violation of ICCPR Articles 2, 10 and 14, noting “the disproportionately high rate of incarceration of indigenous people, including women, in federal and provincial prisons across Canada,” as well as obstacles faced by indigenous people in recourse to justice. The HR Committee urged Canada to “strengthen its efforts to promote and facilitate access to justice at all levels by indigenous peoples” (emphasis added).¹³
- **2016:** The CEDAW Committee found considerable diminishment in and restrictions on financial support for civil legal aid programs in Canada over 20 years, “affecting particularly women who are the primary users of civil legal aid.” The CEDAW Committee urged Canada to increase funding for civil legal aid “in order to ensure that women have access to adequate legal aid in all jurisdictions, in particular women who are victims of violence, indigenous women and women with disabilities” and to “[r]eview criteria applied in income tests for eligibility to ensure access to civil legal aid, especially in the area of family law, to all women without sufficient means.”¹⁴ The CEDAW Committee further recommended that women migrant domestic workers who are victims of rights violations have effective access to justice, including legal aid.¹⁵
- **2017:** The UN Committee on the Rights of Persons with Disabilities on its initial review of Canada’s compliance with the *Convention on the Rights of Persons with Disabilities*, concluded that women with disabilities face intersectional discrimination, including in access to justice, “which particularly affects indigenous women with disabilities” and expressed concern about “[v]iolence and abuse, including sexual violence, against children with disabilities, and the lack of mechanisms to access justice, remedies and redress.”¹⁶
- **2018:** The UN Human Rights Council (HRC) Universal Periodic Review (UPR) of Canada’s human rights record repeated UPR recommendations made in 2013 that emphasized the need to ensure access to justice, particularly for Indigenous women and members of minority groups.¹⁷

BC’s failure to meet IHRL obligations to ensure legal aid and the consequent unfairness and unequal access to the protection of the law and remedies for rights violations, noted by UN bodies, are inextricably linked with inadequacies in legal aid service delivery models, particularly the *Legal Services Society Act* (LSS Act).¹⁸

Canada’s obligations to ensure legal aid in criminal, civil and administrative matters

The right to state-funded legal assistance for criminal and, in some cases, civil proceedings has been embedded in IHRL for more than 50 years. The ICCPR, binding on all levels of government in Canada since ratification by Canada in 1976, provides that:

14. (3) In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:...

(d) ...to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it;...¹⁹

The HR Committee has determined that the ICCPR Article 14 applies to both civil and criminal proceedings and that, although Article 14(3)(d) refers explicitly only to persons charged with criminal offences, the interests of fairness may require States to provide free legal aid in civil matters.²⁰

UN treaty bodies confirm that a right to legal aid is based on the principle of equality and the right of everyone to have equal access to the courts in criminal, civil and administrative matters. Failure of States to provide legal aid constitutes discrimination where individuals' financial situations place them in a position of inequality before the law.²¹ The HR Committee, in its 2006 review of Canada, noted inadequacy of remedies for violations of the ICCPR Article 2, 3, and 26 guarantees of equality and non-discrimination rights.²² Expressing particular concern about the number of violent deaths of Indigenous women in Canada, the HR Committee noted that "legal aid for access to courts may not be available" to ensure effective access to the justice system.²³ In 2006, the CESCR noted that "inadequate availability of civil legal aid," particularly for economic and social rights, is a contributing factor to lack of redress available to victims of violations.²⁴

The Charter of the Organization of American States (OAS), also binding on Canada, contains an explicit duty to ensure, "[a]dequate provision for all persons to have due legal aid in order to secure their rights."²⁵ In both UN and OAS human rights systems, tribunals and treaty-monitoring bodies have interpreted IHRL to include, in specific circumstances, an implied right to legal aid for criminal, civil, and administrative proceedings in the effective exercise of due process rights and other internationally protected rights, including rights to non-discrimination, to equality before the law, and to an effective remedy.²⁶ While Canada is not a party to the *American Convention on Human Rights* (ACHR), and Canadians may not therefore petition the Inter-American Court of Human Rights (IACtHR), individual Canadians may bring petitions to the Inter-American Commission on Human Rights (IACHR) for violations of the *American Declaration on the Rights and Duties of Man* (American Declaration).²⁷ The IACHR has ruled that the American Declaration must be interpreted in light of developments in the *corpus juris gentium*²⁸ of IHRL which includes the inter-American human rights system, and specifically the ACHR and jurisprudence of the IACtHR.²⁹ The IACtHR has ruled that a State's failure to provide legal aid necessary for effective legal recourse renders that recourse illusory and constitutes a violation of the ACHR Article 8 duties to ensure fair trial rights and Article 25 duty to ensure judicial protection, in conjunction with ACHR Article 1.1.³⁰

Finally, under IHRL the right to free legal assistance may be, in some circumstances, a necessary precondition for the exercise of the right to an effective remedy for rights violations.³¹

The 2012 UN *Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems* (UN Principles),³² which are drawn from international standards and best practices, affirm that "legal aid is an essential element of a fair, humane and efficient criminal justice system that is based on the rule of law" and a "foundation for the enjoyment of other rights, including the right to a fair trial...a precondition to exercising such rights and an important safeguard that ensures fundamental fairness and public trust in the criminal justice process."³³ While the UN Principles address access to legal aid in the criminal justice system, they have been interpreted as fully applicable to civil and administrative law cases where free legal assistance is indispensable for effective access to the courts and a fair hearing, as well as for access to legal information and counsel and to mechanisms of alternative dispute resolution.³⁴

In 2017, the UN Office on Drugs and Crime (UNODC) developed the *Model Law on Legal Aid in Criminal Justice Systems with Commentaries* (UN Model Law)³⁵ to assist States in drafting legal aid legislation. Based on the UN Principles, the UN Model Law proposes a model for establishing a comprehensive criminal legal aid system that includes not only legal representation but also provision of legal advice, assistance, and information by a variety of legal aid providers.

Civil legal aid is addressed in the Model Law only in the context of support for victims of crime in civil compensation claims; however, the UNODC notes that “international best practices suggest that the establishment of a holistic legal aid system that provides both criminal and civil legal aid should be considered.”³⁶ Many provisions in the UN Model Law can be adapted for civil legal aid.

Legal aid legislation violates IHRL binding on BC

BC’s current legal aid legislation fails to guarantee effective access to justice in accordance with BC’s IHRL obligations and the evolving international law right to legal aid. Contrary to IHRL, the LSS Act fails to:

- contain a description of the right to legal aid or a comprehensive definition of legal aid;
- ensure the right to prompt and effective legal aid at all stages of the legal process;
- ensure the right to legal aid, regardless of means, where the interests of justice so require;³⁷
- include criteria for eligibility, including financial eligibility, for legal aid;
- ensure the right of appeal to persons denied legal aid;
- stipulate that those providing legal aid services must possess qualifications and training appropriate for the services they provide;
- provide the Legal Services Society (LSS) with the independence from government required by IHRL, including stable and secure funding adequate to establish and maintain a legal aid system that is comprehensive, equitable, accessible, effective, sustainable, and credible.

Until these matters are adequately addressed in new legislation, BC will continue to fail to respect and ensure the internationally protected human rights of people in BC to effective, equal and non-discriminatory access to justice.

Guiding Principles for BC legislation under IHRL

To ensure compliance with IHRL, the BC legal aid system must be founded on and reflect principles that fully respect, protect, and fulfill international human rights to legal aid. Legal aid legislation should include all of the UN Principles adapted to address the right to legal aid for criminal, civil and administrative proceedings. New legal aid legislation in BC must explicitly recognize and guarantee:

- The right to legal aid for all persons, regardless of economic, social, or any other status, to access the courts in all matters – including civil, administrative, and criminal cases – to ensure protection and remedies for violations of internationally protected civil, political, economic, social, and cultural rights, and rights of Indigenous peoples;
- The right to legal aid as a necessary component of other rights, including the right to a fair trial, and as the foundation of an efficient, fair, and accountable justice system based on the rule of law and protection of fundamental human rights;
- A broad definition of “legal aid” that includes, *inter alia*, legal advice; assistance; information and education; drafting; representation and advocacy for adults and juveniles in Canadian and international courts, Indigenous, customary, and informal systems of justice; and services through alternative dispute resolution or restorative justice processes;³⁸
- The right to legal aid, regardless of a person’s means, where the interests of justice so require;³⁹
- The right of children to legal aid that is accessible, age-appropriate, multidisciplinary, effective, responsive to the legal and social needs of children, and exempt from means tests;

- The right to legal aid, where appropriate, for victims and witnesses of crimes;
- The right of access to legal aid without any discrimination based on age, race, colour, gender, sexual orientation, language, religion or belief, political or other opinion, national, ethnic or social origin, property, citizenship or domicile, birth, education, social, or other status;⁴⁰
- An inclusive and equitable legal aid system designed to improve meaningful access to legal aid for marginalized, vulnerable, and historically excluded groups;⁴¹
- The right to prompt and effective legal aid at all stages of the judicial process including pre-trial release, appeals, and interlocutory matters in civil cases. Effective legal aid includes, but is not limited to: Unhindered access to legal aid providers for detained persons and the right to have a legal aid provider present during questioning by any investigative authority and at all stages of the proceedings; confidentiality of communications and consultations with legal aid providers; access to case files; and adequate time and facilities to prepare the case;
- The right of all persons to be promptly informed of their rights to legal aid and to due process prior to any questioning and at the time of deprivation of liberty;
- Education, research, and broad public dissemination of information on the right to legal aid and how to access legal aid, with attention to needs of isolated and marginalized groups;
- Specific criteria to determine eligibility for legal aid;
- The right of appeal from decisions denying legal aid;
- The right of legal aid beneficiaries to be exempted from court costs;
- Criteria for accreditation of legal aid providers including: Provisions to ensure that all legal aid providers possess education, training, skills, and experience commensurate with the nature of their work, including the gravity of the situations dealt with, and the rights and needs of women, children and groups with special needs; and provisions to ensure that disciplinary complaints against legal aid providers are promptly investigated and adjudicated in accordance with professional codes of ethics before an impartial body and subject to judicial review;
- The right of legal aid providers to carry out their work effectively, freely, and independently without intimidation, hindrance, harassment, or improper interference;
- That legal aid providers and beneficiaries have the same rights, privileges, obligations, responsibilities, and duties as those arising from any lawyer-client relationship;
- That the body administering the provision of legal aid is: Free from political interference; independent from government in all decision-making related to legal aid; and not subject to direction, control or financial intimidation by any person or authority in the performance of its lawful functions, regardless of its administrative structure;
- That the body administering legal aid has the necessary powers for managing, coordinating, and monitoring efficient and effective delivery of legal aid in accordance with IHRL standards, including undertaking and promoting research in the field of legal aid, and access to justice regarding needs for legal aid services by indigent persons and marginalized groups;
- That secure funding is provided through dedicated and sustainable funding mechanisms adequate and appropriate to ensure the establishment and maintenance of a legal aid system that complies with IHRL and is comprehensive, equitable, accessible, effective, sustainable, and credible;
- Leadership from an independent legal profession in determining legal aid delivery methods;
- That responsibilities to provide legal aid are shared among government and non-government legal aid providers, and that appropriate mechanisms are in place to facilitate effective coordination; and
- Effective remedies and safeguards in the event that access to legal aid is undermined, delayed, denied, or if persons have not been adequately informed of their right to legal aid.

References

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² J. Grant Sinclair, QC, International Right to Legal Aid in relation to the *British Columbia Missing Women Commission of Inquiry*, LRWC, 2013, <http://www.lrwc.org/ws/wp-content/uploads/2013/12/International-Right-to-legal-aid..G.Sinclair.pdf>.

³ LRWC, *International Law Obligations to Provide Legal Aid*, submissions to the Public Commission on Legal Aid, October 2010, <http://www.lrwc.org/ws/wp-content/uploads/2012/03/Legal-Aid-LRWC-Oct-25-2010.pdf>.

⁴ Other LRWC submissions relevant to legal aid include: *Missing and Murdered Aboriginal Women and Girls in British Columbia and Canada*. LRWC and the B.C. CEDAW Group Submission to the UN Committee on the Elimination of Racial Discrimination on the occasion of its review of Canada's 19th and 20th reports, January 2012, https://tbinternet.ohchr.org/Treaties/CERD/Shared%20Documents/CAN/INT_CERD_NGO_CAN_80_8280_E.pdf; LRWC, Oral Intervention at the UN Human Rights Council on Legal Aid in Canada, 30 May 2013, <https://www.lrwc.org/canada-oral-intervention-at-the-un-human-rights-council-on-legal-aid-in-canada-statement/>; Rights of Indigenous Peoples: Access to Justice and Protection of Human Rights Defenders, Oral Intervention by LRWC to the UN Human Rights Council, 17 September 2014, <https://www.lrwc.org/rights-of-indigenous-peoples-access-to-justice-and-protection-of-human-rights-defenders-oral-intervention-by-lrwc-to-the-un-human-rights-council-on-17-september-2014-presented-by-catherine-morris/>; LRWC, British Columbia must enact legislation to provide legal aid in compliance with international law, Statement, 10 March 2015, <https://www.lrwc.org/legal-aid-in-british-columbia-implementation-of-bcs-international-human-rights-treaty-obligations-statement/>; "LRWC, the Native Women's Association of Canada, BC CEDAW Group, Feminist Alliance for International Action, and International Women's Rights Project call on the federal government to immediately adopt and implement TRC recommendation to conduct public inquiry into missing and murdered Aboriginal women and girls," Joint Statement, June 2016, <http://www.lrwc.org/ws/wp-content/uploads/2015/06/Implement-Nat.InquiryUNDRIP.LRWC-BC-CEDAW-NWAC-FAFIA-IWRP.16.06.151.pdf>.

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⁶ UN Committee on Economic, Social and Cultural Rights (CESCR), *UN Committee on Economic, Social and Cultural Rights: Concluding Observations, Canada*, 22 May 2006, E/C.12/CAN/CO/4; E/C.12/CAN/CO/5, at para. 14. See also, paras. 11(b), 43, available at: <http://www.refworld.org/docid/45377fa30.html>.

⁷ UN General Assembly, *International Convention on the Elimination of All Forms of Racial Discrimination*, 21 December 1965, United Nations, Treaty Series, vol. 660, p. 195, available at: <http://www.refworld.org/docid/3ae6b3940.html> (ratified by Canada 14 October 1970).

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⁹ UN General Assembly, *Convention on the Elimination of All Forms of Discrimination Against Women*, 18 December 1979, United Nations, Treaty Series, vol. 1249, p. 13, available at: <http://www.refworld.org/docid/3ae6b3970.html>. (Canada ratified CEDAW on 10 December 1981 and the *Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women* on 18 October 2002).

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¹¹ UN High Commissioner for Refugees (UNHCR), *The Impact of the Lack of Legal Representation in the Canadian Asylum Process*, 6 November 2012, available at: <http://www.refworld.org/docid/5100f8e02.html>.

¹² UN General Assembly, *International Covenant on Civil and Political Rights (ICCPR)*, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171, available at: <http://www.refworld.org/docid/3ae6b3aa0.html> (ratified by Canada 19 May 1976).

¹³ UN Human Rights Committee (HR Committee), *Concluding observations on the sixth periodic report of Canada*, 13 August 2015, CCPR/C/CAN/CO/6, at para. 18, available at: <http://www.refworld.org/docid/5645a16f4.html>.

¹⁴ CEDAW Committee, *Concluding observations on the combined eighth and ninth periodic reports of Canada*, 18 November 2016, CEDAW/C/CAN/CO/8-9, at paras. 14, 15 and see also para. 17, available at: <http://www.refworld.org/docid/583868044.html>.

¹⁵ *Ibid.*, para. 39(f).

¹⁶ UN Committee on the Rights of Persons with Disabilities (CPRD), *Concluding observations on initial report of Canada*, UN Doc. CRPD/C/CAN/CO/1 (8 May 2017), at paras. 15, 33(b), available at: https://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRPD%2fC%2fCAN%2fCO%2f1&Lang=en

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¹⁸ *Legal Services Society Act* [SBC 2002] Chapter 30, http://www.bclaws.ca/civix/document/id/complete/statreg/02030_01.

¹⁹ See: ICCPR, *supra* note 12, Article 14. The right of persons charged with criminal offences to have free legal assistance assigned to them is also explicitly stated in: UN General Assembly, *International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families*, 18 December 1990, A/RES/45/158, Article 18, available at: <http://www.refworld.org/docid/3ae6b3980.html>; UN *Basic Principles on the Role of Lawyers*, 7 September 1990, para. 6, available at: <http://www.refworld.org/docid/3ddb9f034.html>; UN General Assembly, *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment: resolution* / adopted by the General Assembly, 9 December 1988, A/RES/43/173, para. 17(2), available at: <http://www.refworld.org/docid/3b00f219c.html>; and *UN Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems*, Guideline 5, *infra* note 32, at para. 45(c).

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²⁸ Latin term meaning the “body of the law of nations” and referring to the entirety of international law.

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³¹ See, e.g., HR Committee: *Communication No 1959/2010, Jama Warsame v Canada* at para 7.6; IACHR, Report No 41/04, Case 12.417, Merits, *Whitley Myrie*, Jamaica, October 12, 2004.

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³³ *Ibid*, UN Principles, Principle 1.

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³⁶ *Ibid*, at p.2.

³⁷ UN Principles, *supra* note 32, Principle 21 states that legal aid should also be provided, regardless of the person's means, if the interests of justice so require, for example, given the urgency or complexity of the case or the severity of the potential penalty. The Model Law on Legal Aid, *supra* note 35, at Article 4, expands on this, stating:

4.1. Subject to the procedures established under the present Law, an individual is entitled to legal aid, regardless of his or her financial means, when he or she:

4.1.1. Is arrested, detained, suspected or accused of, charged with or sentenced for a crime punishable by a term of imprisonment [*or the death penalty*];

4.1.2. Is arrested, detained, suspected or accused of, charged with or sentenced for a non-imprisonable crime, when the interests of justice so require, owing to the urgency of the circumstances, the complexity of the case or the severity of the potential penalty;

4.1.3. Is arrested, detained, suspected or accused of, charged with or sentenced for a non-imprisonable crime, and is a child, a person with disabilities, a person with mental illnesses, a stateless person, an asylum seeker, a refugee, an internally displaced person or a victim of human trafficking.

³⁸ The term "customary" found in the Model Law on Legal Aid, *supra* note 35, includes Indigenous legal systems. The Model Law states at, Section 11.1, that Legal Aid services shall include the following: The provision of legal advice (11.1.1); The provision of legal assistance (11.1.2); The provision of legal information (11.1.3); The provision of legal representation in national, regional and international courts, for adults or juveniles, as well as in customary and informal systems of justice (11.1.4); Legal education (11.1.5); Legal drafting (11.1.6); and Legal advocacy (11.1.7).

³⁹ UN Principles, *supra* notes 32 and 37.

⁴⁰ Special measures adopted to facilitate equality in access to legal aid for vulnerable persons or to ensure the right of women to access legal aid shall not be considered discriminatory.

⁴¹ Particular attention should be paid to ensuring prompt and effective access for women, children, Indigenous people, persons who have been subject to torture, marginalized and vulnerable populations, persons living in rural, remote and economically and socially disadvantaged areas, and persons who are members of economically and socially disadvantaged groups.