DRAFT FOR DISCUSSION

FUNDING
CRITERIA, CONDITIONS, PRIORITIES AND PROCEDURES

FUNDING:

Criteria, Conditions, Priorities and Procedures

THE GENERAL APPROACH

The arrangements for the provision of funds to community clinics in Ontario can be understood only in the context of the history of clinical funding. Prior to late 1975, The Ontario Legal Aid Plan provided no funding for such clinics; however, despite the absence of funding by the Plan, a small number of community clinics had been in operation for a number of years. For example, Parkdale Community Legal Services had commenced operations in September, 1971, with funds provided from a number of sources including the Federal Department of Justice. By mid-1975, the funds available for the clinics then in existence had all but disappeared, and negotiations were undertaken at that time to permit the funding of clinics through The Ontario Legal Aid Plan. In September, 1975, an emergency payment was authorized to Parkdale Community Legal Services to enable it to continue operations pending the outcome of negotiations with The Law Society and The Ontario Legal Aid Plan. Later, in January, 1976, the Clinical Funding Committee Regulation was proclaimed.

The Regulation proclaimed in January, 1976 established a Clinical Funding Committee and provided for it to make recommendations to the Director regarding funding and the terms and conditions of funding of independent community-based clinical delivery systems. "Clinical delivery systems" was defined in s.148 of the former Regulation:

> "Clinical delivery system means any method for the delivery of legal or paralegal services to the public other than by way of fee-for-service, and includes preventive law programmes and

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> educational and training programmes calculated to reduce the cost of delivering legal services".

A number of clinics received funding between January and March, 1976 pursuant to this Regulation, and funding was subsequently approved for the fiscal year April 1, 1976 to March 31, 1977 for 13 clinics, amounting to a total of just under $1,000,000.

In subsequent years the Clinical Funding Committee continued to provide funding for most of the clinics originally funded, in addition to new clinics. The Clinical Funding Committee authorized payment of approximately $1,700,000 in the year ended March 31, 1978 and approximately $2,500,000 in the year ended March 31, 1979. The funds authorized for the fiscal year ending March 31, 1980 amount to approximately $3,500,000.

The manner of funding adopted by the former Clinical Funding Committee was considered by Mr. Justice Grange in his report; he described the procedure adopted as follows:

> "What now happens is that the Committee estimates in November the requirements for the following fiscal year which commences the 1st April. It makes this estimate based on the allotment to clinics of the previous year and its knowledge or prediction of future requirements including provision for new clinics. The Committee tempers the request to the Attorney General with a consideration of what is available or what it is likely to get and submits its funding request accordingly. To date, the Attorney General has been able to meet the full request".

Mr. Justice Grange was critical of this procedure in two respects. In the first place, he indicated that the submission by the Committee was based necessarily on "blind guesswork" because the clinics were not asked to submit their budgets until after the date when the Committee was required

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to provide estimates to the Ministry. As a result, Mr. Justice Grange recommended that the clinics be asked to submit estimates prior to the date when the overall estimates of the Committee are required to be submitted to the Ministry. Secondly, Mr. Justice Grange was critical of the "political tempering of the budget". He indicated that he did not think the Committee's role should be a political one; he stated:

> "Its task, as I see it, is to estimate the need and then, if the funds are inadequate for that need, to establish priorities among the applicants. It may be that political consideration will always affect the allotment. I cannot see why it should affect the request; the amount requested should represent the amount genuinely considered by the Committee to correspond with the need".

These comments must be considered carefully in the context of the funding procedures adopted by the former Committee. In preparing its estimate for the Minister, the Committee directed the staff to assess the cost, in relation to each clinic, of salary increases, additional staff, relocation of the clinic, and new equipment, etc. The Committee also directed the staff to consider costs in relation to proposals for new clinics. Although the Committee's submission was an "estimate" of its requirements for the next fiscal year, it was not simply "blind guesswork", and reasonable efforts were made to ensure that accurate information about future needs was obtained from clinics.

However, the clinic funding staff and the Committee exercised discretion in the preparation of its estimate of funds required, and did not include amounts which the Committee judged unnecessary; thus, the preparation of the estimates was a screening process. However, the Committee's request for funds from the Ministry, based on its estimates, was very successful

and the requests were fully met. In the Committee's opinion, its success was due in large measure to the fact that the Ministry was confident that a screening process had taken place prior to submission of the estimates, and that the "estimates" reflected careful consideration and sound practical judgment.

By contrast, the comments of Mr. Justice Grange might be taken to suggest that the Committee should simply add up requests of clinics, instead of screening them, and forward the total amount as a request for funds to the Ministry. According to this procedure, any screening process required would necessarily take place in the Ministry which would have to assess the validity of each clinic's request. Such a process would represent a major departure from the present arrangements, which vest in the Clinic Funding Committee (with members appointed from the Ministry, The Law Society, and the clinics) the authority for exercising discretion and deciding on matters of clinic funding.

In comparing these approaches, it is clear that there is an assumption in both cases that a "screening process" may be required at some stage. The issue is essentially whether it should take place prior to the Committee's submission of its estimates or during the Ministry's consideration of the estimates. The inherent danger that the Ministry may fail to meet the Committee's full request <u>after</u> the Committee has conducted a screening process has caused clinics to view the Committee's screening process with alarm. However, in practice, the Committee's request has been fully met, after a full assessment of the request by the Ministry. Such an assessment must, of course, take place as part of the Minister's accountability for public

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spending, but a detailed examination of the needs of individual clinics by the Ministry need not occur so long as the Minister is confident that the Clinic Funding Committee has exercised careful judgment in formulating its submission. Moreover, given the composition of the Clinic Funding Committee, it is more appropriate for any detailed examination of individual clinic needs to be assessed by the Committee rather than by the Ministry. It is, therefore, recommended that the Committee continue to conduct a "screening process" in relation to the submission of estimates to the Minister, subject to the procedures described next.

The comments of Mr. Justice Grange were directed, at least in part, to the fact that the Committee's submission of estimates might appear to take place without consultation with individual clinics. This problem has now been alleviated to some extent by the decision of the former Committee to request estimates from individual clinics prior to September 15 for the next fiscal year. In 1979, for the first time, the Committee will be able, if it wishes, to have access to written estimates from individual clinics as well as the estimates prepared by the clinic funding staff. In deciding on its submission to the Ministry, it is recommended that the Committee should examine the estimates submitted by clinics and by the clinic funding staff, and exercise its judgment as to the appropriate request for funds. Such a procedure will ensure that the Committee's decision as to the amount to be submitted to the Ministry will be made only after consideration of the estimates prepared by the clinics as well as the clinic funding staff.

If estimates to be used this way, should they be the formal ones, thus applying other time problems

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The submission of estimates must also include projections of costs with respect to new clinics to be established in the next fiscal year. Ideally, all initial decisions should be made by the clinic funding staff on such applications prior to submission of the Committee's estimates to the Ministry; however, in reality, there will probably be some applications not finally decided by that date, and the clinic funding staff will have to include its estimate of costs for such clinics. Because the initial decision has not been made, it is inappropriate for such clinics to provide estimates to the Committee. It is, therefore, recommended that the Committee determine the costs of new clinics based on the estimates prepared by the clinic funding staff, and include these costs in its estimates to the Ministry.

A. Criteria for Clinic Funding

"Funding" in the Regulation is defined in s.146(2) as follows:

> "The payment of funds to a clinic to enable the clinic to provide legal services or paralegal services or both, including activities reasonably designed to encourage access to such services, or further such services and services designed solely to promote the legal welfare of a community on a basis other than fee-for-service".

"Clinic" is defined by s.146(1)(a) as:

> "Clinic" means an independent community organization providing legal services or paralegal services or both on a basis other than fee-for-service".

"Community" is defined by s.146(1)(d) as:

> "Community" includes a geographical community, persons who have a community of interest, and the general public".

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The inter-relationship of these three sections generates criteria for decision-making with respect to funding of clinics. The criteria are as follows:

1. The funding must require the payment of funds to a "clinic"

There must be an independent community organization providing or capable of providing legal services or paralegal services or both on a basis other than fee-for-service to receive the funding allocated. There is no definition of the word "independent" in the Regulation, although the word "independent" also appeared in the former Regulation. In his report, Mr. Justice Grange suggested that the use of the word independent "recognizes that clinics are to be free from any governmental control and are to be allowed to run their affairs, in affect, like a private law firm, subject to their duty to account for public funds". In the context of the new clinic funding Regulation, a reasonable interpretation of this phrase is that the community organization must be independent of the clinic funding process. Essentially, the idea of providing funds to independent community organizations represents a philosophy of decentralization in the provision of legal services in Ontario. By reference to s.146(1)(d) it is clear that the community organization may be one which is representative of a geographical community, a community of interest or, indeed, the general public but, by implication, the above definition would preclude funding being provided to The Law Society or The Ontario Legal Aid Plan for the purposes of clinic funding.

Should elaboration be given here to ensure clinics not subject to political pressure

The definition of "clinic" in s.146(1)(a) potentially limits the kinds of independent community organizations which may receive funds. The definition indicates that the independent community organization must be

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one "providing legal services or paralegal services or both on a basis other than fee-for-service". The definition appears to suggest that only those community organizations which actually provide legal services or paralegal services or both are fundable; a narrow construction of this section might exclude an organization whose function is the provision of public legal education. In that the interpretation of this phrase is ambiguous, it is arguable that the provision of legal services or paralegal services may include public legal education; since this matter relates to the rest of the definition of funding in s.146(2), it will be dealt with below.

What of law reform? s.146(2) says "and services designed solely to promote the legal welfare of a community"

2. The payment of funds must be for the purpose of enabling the clinic to provide legal services or paralegal services

This part of the definition in s.146(2) appears to require that funding must be for the specific purpose of providing legal or paralegal services. However, in contrast to s.146(1)(a) this section includes (but is not limited to) in the definition of legal or paralegal services:

> "activities reasonably designed to encourage access to such services or to further such services and services designed solely to promote the legal welfare of a community".

Should assume this

Although it is not entirely clear, it is at least arguable that this definition is applicable to s.146(1)(a). Moreover, the expanded definition makes it clear that clinics are to undertake measures to encourage accessibility to legal or paralegal services, leaving to the clinics the choice of methods to achieve these objectives in their own communities. By contrast, the former clinical funding Regulation attempted to delineate clinic services more precisely in that s.148 of that Regulation suggested specific kinds of activities which might qualify for clinic funding.

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The definition in s.146(2) of the new Regulation makes it clear that clinics are to provide services which encourage access to the law, but without delineating specific methods of doing so. The latter part of the expanded definition ("services designed solely to promote the legal welfare of a community") appears designed to include activities which assist a community as a whole to understand legal rights and responsibilities as well as services which assist individuals in relation to particular problems.

Should see this as being broad enough to include law reform.

However, the definition in s.146(2) does appear to exclude the possibility of clinic funding for an independent community organization which does not provide "legal services or paralegal services" according to the expanded definition. Clinic funding is reserved for clinics providing such services, and applicants for funding whose objectives do not fall within this definition do not qualify for clinic funding.

Should amend reg. to include services provided by CLEO, for. eg.

3. The clinic must provide services on a basis other than fee-for-service

This part of the clinic funding Regulation requires that funding will be used by clinics to provide services on a basis other than legal aid fee-for-service programs. The Ontario Legal Aid Plan now includes two programs: fee-for-service and clinic funding. However, the definition also expresses a basic philosophy of clinics in the sense that clinics are intended to complement the fee-for-service program; and to provide legal services in situations where legal aid certificates are not available or where, despite their availability, the community is not aware of its legal rights and responsibilities and, therefore, does not obtain legal assistance. The provision of legal services by a community

organization enhances trust on the part of a segment of the community which has not traditionally used lawyers' services. In providing services without the formality of legal aid certificates, the clinic may generate greater accessibility to services as a result.

It is implicit in the definition of funding that clinics will have some relationship to the fee-for-service part of The Ontario Legal Aid Plan. However, the funding definition also requires each clinic to determine what activities will promote access to legal services in its community, and this decision may affect the clinic's relationship to the overall scheme of The Ontario Legal Aid Plan. The fact that clinic services are to be provided on a basis other than fee-for-service need not necessarily exclude a clinic from acting in some cases where a legal aid certificate is available in order to make legal services more accessible.

The issue of when a clinic should take a case for which a legal aid certificate may be available is one that cannot be resolved except on the basis of general guidelines for all clinics. In each case the issuing of a certificate may depend upon the discretion of the local Area Director. As a result, the decision to issue a legal aid certificate for a similar fact situation may differ substantially from one legal aid area to another. To the extent that a particular community clinic wants to provide services not otherwise available by means of legal aid certificates, it is desirable for an individual community clinic to consult with the local Area Director and to reach agreement about the services to be provided by the clinic to fill existing gaps.

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In some situations, however, community clinics have decided that a legal aid certificate, while potentially available, may not be appropriate in terms of the overall objective of accessible legal services. In circumstances where the clinics have community legal workers, perhaps multi-lingual, who are involved with the community and trusted by its clientele, clients who would not otherwise use traditional legal services may take their problems to clinics. Since individual cases may well differ and the situation from one clinic to another may vary considerably, the Clinic Funding Committee should require each community clinic to develop its own policy guidelines for staff action on behalf of these clients. Clinics should be encouraged to engage in discussions with their local Legal Aid Director in developing this policy and should subsequently forward a copy of policy guidelines to the Clinic Funding Committee.

It is important to recognize that the development of this policy by some clinics in the past resulted from their desire to provide services in a convenient and accessible way to individual clients, who for one reason or another might not have received legal services through the fee-for-service program because of difficulties with language, accessibility to the legal aid certificate office, or distrust of lawyers with whom they have not previously been involved. In addition, however, the practice also developed because of the desire of clinic lawyers to undertake such work for their own professional development. The professional development of clinic lawyers is of concern to the clinic system as a whole and to its viability in the long term, and the need to provide an outlet for their professional development is a legitimate concern of clinics. It is appropriate for the community and The Law Society to recognize this factor in relation to

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a clinic's determination of its policy and the connection between fee-for-service program and clinic funding. The Committee should, however, require that clinics determine their policy on certificate cases on the basis of the need of the community clientele rather than the professional development needs of staff; while professional development should have some consideration, it should not be the primary factor in the clinic decision.

4. The need for clinic services

The clinic funding Regulation does not refer particularly to the requirement of need for clinic services. However, the entire Regulation is based on an implicit assumption that the fee-for-service program is not an appropriate means of providing legal services in all matters.

The need for legal services, therefore, becomes an implicit criterion, and an organization which is applying for funds must demonstrate this need in its community.

The former Clinical Funding Committee proceeded to deal with applications on the basis that there was a need for services which could not be provided by clinics; however, sometimes there was opposition from the members of the local Bar Association and the local Area Director in an assertion that no need existed. Although the evidence required to illustrate the existence of need or otherwise has not been well defined, those who have been involved with clinic services for some time are of the opinion that the need is there in virtually every case, but that it is difficult to document it prior to a clinic's opening. Such an assertion is, of course, not very compelling to members of the Bar who are of the opposite opinion. Since the issue of need is relevant to both cities of

funding and priorities, this matter is more fully discussed later in this paper.

B. Conditions of Funding

The Regulation provides in s.148(1)(c) that the Clinic Funding Committee may impose such terms and conditions of funding as it considers advisable. S.148(2) of the Regulation includes a list of terms and conditions of funding which the Committee may recommend in respect of any clinic, but without limiting its recommendations to the list provided. The terms and conditions of funding can, of course, be recommended only in relation to a clinic which otherwise qualifies for funding according to the criteria above. The terms and conditions of funding become, therefore, additional criteria which may result in the de-funding of a particular clinic as a result of the breach of one of these conditions.

S.153 of the Regulation is concerned with the situation of a breach of a condition by a clinic. Sub-section (2) provides that the Committee may report the breach of a condition to the Director in respect of any clinic which has failed to abide by or has contravened a condition of a clinic's certificate. Sub-section (1) of s.153 requires the Director to revoke the clinic's certificate in circumstances where the Committee reports a breach of condition to him. The determination of whether there is a breach of a term or condition of funding, however, cannot be made by the Committee "unless it has given notice of the proposal to the clinic together with written reasons and has provided to the clinic an opportunity to be heard by the Committee" (s.153(3)).

The terms and conditions of funding which may be imposed by the

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Committee in relation to a particular clinic may become additional criteria. To the extent that the Committee decides that there are generally applicable conditions of funding which must be imposed to ensure the overall quality of the clinic system, a community organization may be judged at the time of its initial funding application in terms of its potential ability to meet terms and conditions of funding which may be imposed in the clinic certificate. As a result, the organization's ability to meet these terms and conditions of funding, which are generally applicable to all clinics, will become additional criteria for funding. As well, in the event that terms and conditions of funding are imposed and are contravened by a clinic or not achieved by a clinic, it will be de-funded after the proper procedures have been carried out, technically because of the breach of a term and condition of funding, but practically because of a failure to meet criteria established. For this reason, it is appropriate to consider the terms and conditions of funding in the context of overall funding application criteria. The following are three terms and conditions of funding suggested in s.148(2) of the Regulation:

1. <u>The clinics shall be under the direction of a community Board of Directors</u>

This term or condition of funding which may be imposed by the Committee is linked to the definition of funding and to the definition of "clinic", in that s.146(1)(a) provides that a clinic is an independent community organization. This condition requires that the clinic be under the general direction of a community Board of Directors.

During the Grange Commission hearings, community clinics addressed themselves to the importance of community Boards of Directors. In his

report, Mr. Justice Grange indicated his general acceptance of the briefs submitted and stated:

> "Most of the clinics are indeed community-based and community controlled generally by a Board of Directors elected or drawn from the community served by the clinic. The object is two-fold: first, to give the community, the intended beneficiaries, some control over the delivery of legal services; and second, to involve the deliverers of those services in the affairs of the community. If they are to be effective services to the poor, the traditional distrust felt by the poor towards lawyers, the legal profession and even towards the law itself must be reduced...If the movement is to develop and progress with the continuing confidence of the clients, that role must not be eroded. The Boards must continue to govern the affairs of the clinics, both as to policy and administration, subject only to accountability for the public funds advanced, and for the legal competence of the services rendered. The public which advances the funds for the delivery of legal services has a legitimate interest in ensuring that they are spent for that purpose and that the services rendered are of an acceptable professional level. I think the matter should be viewed in this light: the Boards have control over the operations of their clinics and the Committee may interfere in that control only if it can bring the interference within one or other of the public's legitimate spheres of interest".

Mr. Justice Grange went on to consider the nature of the control to be exercised by the Clinic Funding Committee. He suggested that control should exist only in relation to the following matters: (1) financial accountability; (2) competence of legal services; (3) participation in ongoing training of staff; and (4) the definition of the nature of services to be rendered to the public by clinics.

Subject only to these limitations, the Grange Report recommended that the direction of and responsibility for the affairs of individual community clinics should be in the hands of community Boards. This

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recommendation is consistent with the historical development of community clinics in Ontario. As community organizations separate from and independent of The Ontario Legal Aid Plan, they operated with funding from various sources which permitted them to respond to the particular concerns of individual communities rather than become carbon copies of a single institutional model. The dynamism and vitality of the clinic movement is a result of their independent development.

The preservation of the decentralized form of clinics in the province now depends upon the development of strong community Boards of Directors in order to counterbalance the single source of funding. Therefore, the extent to which any community organization appears capable of developing an effective community Board of Directors should be taken into account in the application for funding process. While it is not a necessary criterion for funding pursuant to the Regulation, it should be considered an important condition of funding which should routinely be applied to all applicants, and only in exceptional cases should an organization which does not have the potential to develop an effective community Board of Directors be considered for funding pursuant to the Regulation.

The effectiveness of a community Board of Directors and, indeed, its representative character is a difficult problem. The idea that community representatives can and should direct the operation of legal services where there are staff lawyers and community legal workers is difficult to implement. Among the existing clinics, several have community Boards with members of the community elected in annual community meetings. However, in some clinics there are appointments to the Board of members of the legal profession and others with an interest in the affairs of

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community clinics. In particular, about half of the existing community clinics have on their community Boards one or more members of the clinic staff. The former Clinical Funding Committee disapproved of staff domination of community Boards of Directors; although the statistics indicate that it is only in a very few cases where the number of staff members is as high as 25% of the total membership of the Board, there is continuing concern about domination by staff members over and above their numerical representation on the community Board. Since the idea of a community Board of Directors has never been the subject of specific guidelines about the nature of representation, the manner in which members of the Board should be chosen, and even the effective responsibilities of the Board of Directors, there is substantial variation from one clinic to the next in terms of the role performed by existing community Boards.

Why is staff not a member of community Need staff incentive

However, given the need for effective responsibility on the part of the community Boards and in order to justify the maintenance of the existing clinic system, it is proposed that considerable effort should be expended to ensure that community Boards understand the responsibilities placed upon them pursuant to the existing Regulation. In particular, a community Board should be responsible for its clinic's financial accountability, delivery of effective legal services, and overall administration. Such a responsibility is, of course, very onerous and cannot be carried out in the absence of commitment on the part of community members, although hopefully the assistance of other clinic Boards and, from time to time, the clinic funding staff will be forthcoming. In the event that a particular community organization appears to have no potential for

Point out to Bd.

developing a community Board which can handle such responsibility, it may detrimentally affect the overall strength of the community clinic system if it receives funding. As a result, it is recommended that this condition should be a general condition of funding and, therefore, will be a criterion of eligibility for clinic funding for the future, to be applied to both new and existing clinics with due regard to the need for time to develop it.

2. The clinics shall employ a solicitor in the work of the clinic

The employment of a solicitor may also be imposed as a condition of funding pursuant to the new Regulation. At the present time, there are eight clinics which do not have a salaried solicitor. Five of these clinics rely for advice and assistance on part-time duty counsel paid at the tariff rate by The Ontario Legal Aid Plan, and the remaining three clinics use other lawyers for guidance.

Concern has been expressed at various times about the viability of such arrangements. Mr. Justice Grange adverted to the recommendation of the Osler Task Force on Legal Aid which recommended that "regardless of the mix of staff employed, every clinic will be under the immediate direction of a lawyer". Mr. Justice Grange considered this recommendation in the context of existing community clinics and stated"

> "The size of some clinics militates against the employment of a full-time lawyer on staff, but I think it is an objective which the Committee should always have in mind. Certainly, the employment of duty counsel is better than nothing but it seems to me there are two inherent difficulties in the practice. Firstly, supervision of the paralegals becomes very difficult and the quality of the work may consequently suffer. Secondly, duty counsel are paid out of the fee-for-service

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> share of the total Legal Aid Fund and, consequently, are responsible neither to the Boards of the clinics nor to the Committee. Additionally, there may be an accentuation of the problems of confidentiality and insurance...The solution, in my view, is to aim to follow the Osler recommendation for a full-time lawyer on staff. With some of the smaller clinics it may be necessary to require one lawyer to do double or triple duty. I concede that it may be impractical to implement this recommendation in full immediately".

Some existing clinics feel strongly about this issue. They are opposed in principle to the idea of full-time staff lawyers. Some of these are specialized clinics with community legal workers trained on-the-job to provide specialized services for clients, and have developed expertise in these areas which may or may not be characteristic of traditionally-trained lawyers. Moreover, many of the community legal workers have expressed the view that they regard themselves as a separate but equal profession with lawyers. The idea that they must continue to be supervised by lawyers, regardless of the expertise of a particular community legal worker as compared to the lack of experience of a particular lawyer, is completely unacceptable to them. The imposition of this term and condition of funding will, therefore, have a serious impact on the roles of community legal workers in relation to lawyers in clinics.

There are a few options available. One option is to decide that a general service clinic requires a lawyer, while a specialized clinic may not. To the extent that existing paralegal staff in specialized clinics have developed expertise in particular matters, they may be competent to deal with those matters and those matters alone without the

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overall supervision of a full-time lawyer on the clinic staff. However, by contrast, a clinic which attempts to do work in a number of different areas needs the overall expertise of a lawyer who is able to deal with the multi-problem client. To the extent that the Clinic Funding Committee decides to fund general clinics rather than specialized ones, it will mean that this term and condition of funding will be routinely imposed.

The second option may be to decide that this term and condition of funding will be routinely imposed on all clinics regardless of whether they are specialized or general service clinics. However, the Committee could attach a proviso that this condition of funding will not apply to existing clinics in the foreseeable future, at least until a proper assessment of the work of the clinic and the need for a full-time staff lawyer can be carried out. The result of adopting this latter proposal would be that this condition will effectively become a general criterion of funding. The necessary assessment of existing clinics which will result from the adoption of this position will have to be carefully designed. If the assessment concludes that a staff lawyer is necessary, future funding of the clinic will depend on the clinic's acceptance of the recommendation.

The foregoing analysis focuses specifically on the problems relating to the supervision of community legal workers by lawyers and the role of the staff lawyer in the clinic. However, it is important to recognize that the employment of lawyers may also be relevant to the issue of liability insurance. At the present time negotiations are underway to ensure that all clinic workers have liability insurance, but the details

of the arrangements for insurance may have a significant impact on policies concerning the employment of lawyers in clinics.

There is one additional problem in relation to this condition: the size of some of the clinics may not support a full-time lawyer. While this may be a problem resulting from past funding decisions, it may be cured for the future by a decision to fund only those applicants with a potential clientele sufficient to warrant the hiring of a full-time staff lawyer. Again, it may be that some existing anomalies will need to be tolerated at least for a brief period to allow a complete assessment and to determine whether funding should continue for such clinics. In this context, however, it may be arguable that a small staff, even without a lawyer, which is providing an effective service should be continued. Certainly, uniformity in size and method of delivery of service in clinics is not consistent with the philosophy of clinic development which has prevailed to this date.

3. Personnel of the clinic shall be trained to a standard approved by the Committee

This condition of funding is directed to the overall competence of the staff of the clinic and the quality of services to be provided. It is implicit in the Regulation that the Committee have overall responsibility for the quality of legal services provided by clinics; the Committee's confidence in clinic services will be enhanced if each clinic's staff is willing to participate in ongoing training to ensure that they are always abreast of new law.

However, the Boards of clinics also have an individual responsibility

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to ensure the competence of clinic staff and the quality of legal services. As a result, the Boards have a legitimate role to play in training. In their submissions to Mr. Justice Grange, a number of clinics felt that their individual Boards were more capable of making decisions about training than was the Clinic Funding Committee. In particular, Mr. Justice Grange stated:

> "Many of the community law workers in established clinics have already acquired an expertise unequalled in their specialty in any law office. It is also apparent that new employees of those clinics can probably obtain no better training for the task they are to perform than on-the-job with the clinic and its trained workers".

Mr. Justice Grange recommended that, although the Committee should not compel attendance at training sessions, the Boards of clinics should encourage staff to participate in training programs, and a Board that did not do so, "might have much to account for". As a result, this condition of funding may be pertinent to the funding decision for a particular clinic. However, because of the Committee's overall responsibility for quality legal services in clinics, it should be a criterion of funding that clinics demonstrate commitment to high quality services by encouraging staff and Board to participate in ongoing training. Particular aspects of training are dealt with at greater length in the policy paper on training and education programs.

Can't demonstrate this before funding given

C. Priorities for Funding

Priorities for funding must be established only where there are two qualified applicants (i.e., two applicants who meet the criteria set out in the Regulation), but only sufficient funds available for one. The idea of priorities is thus predicated on an assumption of insufficient funds to meet the needs of all qualified applicants pursuant to the Regulation.

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As a matter of practice, it is likely that there will always be insufficient funds. As Mr. Justice Grange stated:

> "The only bar to the expansion of clinics is the lack of funds. I suppose it is only realistic to concede there will never be enough funds, and that the clinics being dependent on the public purse must always be subject to consideration of political priorities".

Even if the budgets of existing clinics can be reasonably controlled, new applicants must always be funded according to priorities, since there will probably never be sufficient funds to meet all requests for new clinics. This is so especially because the clinic funding Regulation gives funding preference to existing clinics by requiring special procedures prior to any decision by the Committee to de-fund "established clinics". Moreover, funding policies in public administration generally require that priorities be established. Although some priorities were established by the former Clinical Funding Committee, the new Regulation, which represents a substantial commitment to clinics as part of Ontario's legal aid system, offers an excellent opportunity to reconsider these priorities at this time.

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1. A province-wide network of clinics

The clinic system in Ontario is heavily concentrated in Toronto. In the year ending March 31, 1977, there were 13 clinics receiving funds, of which 10 were located in Toronto, one in Hamilton, and the other two were university-based clinics in Windsor and London. In addition to the strong Toronto emphasis, it is apparent that 100% of the clinics in 1977 were located in southwestern Ontario. By the end of the following fiscal year, clinics in Kenora and Thunder Bay had been established in northwestern Ontario. Two additional clinics in Hamilton as well as one in Halton Hills, and tenant clinics in Oshawa and Mississauga had also received funding. Further, the Correctional Law Project at Queen's and the Preventive Law Program at Ottawa University had been funded. During the fiscal year 1978/79, a new clinic was opened in Sudbury, and another in Welland. As well, funds were provided to Queen's Rural Legal Assistance Program based in Sharbot Lake, which serves the Counties of Frontenac and Lennox-Addington.

Despite this expansion, however, the clinic system remains centred in Toronto. At the present time, approximately half of the clinics are located well within the limits of the City of Toronto. In addition, there are clinics in northern Etobicoke (Rexdale), in the Borough of York (York

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Community Services), and in Peel County (Mississauga). The Oshawa clinic is no longer receiving funds. At the present time, the provincial distribution is as follows:

Toronto	-	14 clinics (an additional 2 clinics actively engage in province-wide legal services and activities)
Southwestern Ontario	-	8 clinics
Northwestern Ontario	-	2 clinics
Central Ontario	-	1 clinic
Eastern Ontario	-	3 clinics
Special grants	-	2 clinics
Total		32

Attempts to open a clinic in Sault Ste. Marie in 1977 were unsuccessful.

Whether the Committee should attempt to create a province-wide network of community legal clinics depends on whether the need for clinics is province-wide. Based on the experience of clinics both within and outside Toronto, it is submitted that there is a need for legal services which can be best met by the clinic model in both large and small urban centres. Moreover, the experience of those working in the clinic system suggests that the need for a clinic generally exists whether or not it can be readily established prior to the clinic's opening. The rationale for clinics, that those who use clinic services do not use the traditional services of the local Bar, has been frequently validated. The effect of opening a clinic, especially one which is actively responsive to the community needs, is to reach into the community in a way which the traditional practice of law is unable to do and to provide services otherwise unavailable. The clinic's activities tend to increase work for the local Bar by channelling to them clients who would otherwise not seek

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out a lawyer. The above suggests that the Clinic Funding Committee should adopt a goal of creating a province-wide network of clinics.

Serious adoption of this goal would require the clinic funding staff to promote the idea of clinics to individual communities. In the past this did not happen, and, in fact, was discouraged due to the commitment to the initiation of applications by communities rather than by the clinic funding staff. The clinic funding staff would receive initial enquiries from interested community groups, discuss the applications with the Committee, and, on approval, would assist in the development of applications. Not surprisingly, most of the applications came from southwestern Ontario where clinics had become reasonably well known and where community organizations were, therefore, likely to be aware of the clinic concept. By contrast, the recent application from Ottawa will be the first clinic on the eastern perimeter of the province. As well, the clinics in Kenora and Thunder Bay were opened only after substantial efforts by the clinic funding staff in conjunction with the communities. Thus, a philosophy which requires the staff to wait for the enquiries to come in will not necessarily advance the goal of a province-wide network, at least in the foreseeable future.

The decentralization philosophy can remain intact, however, if the clinic funding staff are directed to discuss the clinic concept with interested local groups in areas where clinics do not now exist. Moreover, the goal of a province-wide network of clinics requires that priority be given to communities other than Metropolitan Toronto. However, where there are isolated pockets of high density with pressing problems on the outskirts of Metro, there will need to be exceptions to

this general objective.

2. The question of need

As indicated above, an implicit assumption of the clinic funding Regulation is the existence of need for clinic legal services. This need must be seen in the context of limited resources and thus priorities must be established according to relative needs. The difficulty is that no reliable system for measuring the extent of need prior to the introduction of a clinic into a community has been developed. Nor is it necessarily clear that such needs can be measured precisely enough to be of much assistance. However, by looking at the general work which clinics can potentially undertake - landlord/tenant, unemployment insurance, immigration, workmen's compensation, etc. - it may be possible, using available demographic information, to measure the potential need. For example, by looking at statistics of those persons receiving welfare assistance, unemployment insurance,or who are tenants, it may be possible to predict with some degree of precision the extent of existing needs. In the past, interviews with social service agencies and representatives of community organizations have been helpful in revealing the extent of legal and quasi-legal problems faced by their clientele for which no services appear to exist.

Ironically, proof of the existence may be forthcoming only in communities where some of the need is already being met by local activities. In those areas where there are few community organizations, the need for legal services as well as other services may be very great. However, because of the absence of community organization, the need is not highly visible, and there is no group to seek clinic funding; a substantial network of community services is often in a good position to make an application

for clinic funding in that it can document the need because of the availability of opinion and advice from those already providing some community services. The irony then becomes one in which a community which has some services may be in a better position to demonstrate its need for an additional one (such as clinic legal services); a community without any organizations may fail to be able to muster the concerted effort required to obtain a legal service. The question of how to respond to this particular problem is especially difficult for clinic funding staff, and requires a substantial amount of active application development in these communities. The danger, of course, is that the clinic will reflect the perceived needs of the clinic funding staff instead of those of the community, and the staff must be sensitive to the community and its desires. However, a genuine response by the Clinic Funding Committee to the need for legal services requires that the need be met in those areas where it is substantial, regardless of whether or not a community organization exists at the outset. Where the Clinic Funding Committee decides to meet these needs, it must direct the clinic funding staff to take an active role in promoting such applications.

In relation to the measurement of comparative needs among applicants, it is preferable for the Clinic Funding Committee to require demographic information, as well as assessment from various individuals in the community in a position to offer opinions about the need for legal services. When the need priority is considered along with the goal of a province-wide network, it will be necessary to consider the needs of various communities in the context of demographic statistics. In this light, it is not unreasonable that there exists a high concentration of clinics to meet legal needs in southwestern Ontario. Given the number of clinics in this area

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already, however, the need may now be greater, on a comparative basis, in northern and eastern Ontario because of the relative absence of clinics in those areas.

3. The nature of services to be provided

a. General or specialized services

A small number of clinics provide services only in specialized areas of law. For example, there are two clinics in Toronto and one in Hamilton which specialize and work primarily in workmen's compensation law. There are also two clinics in Toronto which provide services primarily to tenants as well as one which provides advice and assistance to low-income landlords. CELA is also a Toronto clinic concentrating on environmental law for the entire province, and the Queen's Correctional Law Project, located in Kingston, specializes in correctional law and particularly sentencing law.

The former Clinical Funding Committee adopted a policy of encouraging general law clinics rather than specialized ones, particularly where the clinic was to be located in an area where no other clinic existed. On this basis, the tenants' clinics and the workmen's compensation clinics in Toronto can be justified because of their proximity to other general law clinics. For this reason, the Mississauga tenants' clinic was expanded to become a general law clinic. In addition, there has been a tendency not to fund any additional specialized clinics on the ground that they should provide services to everyone in relation to problems, without regard to the specialization priorities of staff or the applicants.

All of the specialized clinics presently being funded came into existence prior to the 1976 Regulation. Except for CELA and the Correctional

Law Program, the specialized services developed as a result of funding criteria of other grant bodies which encouraged the provision of quasi-legal services delivered by lay people in areas of law not traditionally served by the Bar. This was particularly true in relation to the workmen's compensation and tenant clinics, where a number of community legal workers have now developed an expertise frequently lacking in the practising Bar. Moreover, the trend to such specialization is consistent with the concept of the community legal worker trained to play a specific role in relation to defined areas of law with the overall supervision of a lawyer. In the case of the workmen's compensation clinics, virtually no supervision of the Appeal Board work is given by lawyers since the community legal workers have greater expertise in the workings of the Board and its decisions than most lawyers.

The decision to foster more general law clinics, however, may have serious repercussions in relation to the quality of services which community legal workers may be expected to provide. Particularly in the first years of a clinic, and in the first years of training a community legal worker, it is virtually impossible to imagine that a community legal worker will be capable of providing general legal services. Indeed, most lawyers would have difficulty in a general law practice, despite three to five years of training. Because general service clinics require closer supervision of community legal workers than specialized ones, the decision to favour general service clinics will have a serious impact on the status and role of community legal workers. Some clinics for the first few years confine their community legal workers to limited problem areas, and still others have confined the overall problems which the clinic will undertake. The general clinic needs to be carefully organized so that the community legal

worker can handle particular problems, but in the absence of a large number of community legal workers, these general clinics probably cannot provide adequate services on a general basis without imposing a reasonable ratio of lawyers to community legal workers. Increasing the number of lawyers rather than adding additional community legal workers is, of course, more costly.

A combination of the goal of the province-wide network and the goal of responding to the most pressing needs seems to require emphasis on a general rather than a specialized clinic. However, it is also important for the clinic to define priorities for itself at the outset and to undertake legal problems in defined areas in the early years while legal staff are being trained. A requirement that the clinic handle all legal problems from the outset may have serious implications for quality which will not, in the long run, assist the development of the clinic movement as a whole. It should be possible for the clinic funding staff to consult with Boards to set up a pattern of growth of services responsive to the needs of the community while allowing its staff to develop expertise in different problems over a manageable period of time. However, it is important for the Board to understand that the goal is to provide general legal services and the Board should generally commit the clinic to achieving this goal.

b. Services for specialized communities

The lack of accessibility of particular community groups to legal services in the past has prompted a response from certain clinics to this need. In particular, there are now clinics providing special services for inmates of federal penitentiaries (the Queen's Correctional Law Program), for Blacks (Black Resources and Information Centre), and for natives

(Thunder Bay and Kenora).

(i) Native clinics

Both the Thunder Bay and the Kenora clinics do not restrict their services to the native population, but Thunder Bay, in particular, was designed especially to respond to the particular accessibility problem encountered by the native population of northern Ontario. The native population has a crying need for the kind of legal services which might be provided by community legal workers in a clinic setting. There is some legitimate concern that the potential cost of clinics on the Thunder Bay model cannot be justified, and also suggestions that the existing clinic model is not as appropriate as a model involving decentralization of native community legal workers on reserves. It is suggested that the Committee should defer making a specific decision on the issue of expanding native services until it has had an opportunity to reflect more carefully about the nature of services required for the native population. However, where an application is submitted by natives for needed services on the clinic model, it is suggested that it should generally be accorded priority.

(ii) Other specialized communities

At present, there are some clinics serving specialized communities because of a special need to make services accessible to such groups. However, it is suggested that applications for clinic funding to serve specialized communities should, in general, be carefully considered in light of relative needs in the province as a whole.

c. Caseload vs. other legal services

The former Clinical Funding Committee funded three organizations which do not provide services on a case-by-case basis. In particular,

Community Legal Education Ontario (formerly Toronto Community Law Program) was established to provide informational seminars and publish materials for lay people on the law, and has continued to receive funding. In recent years the Clinical Funding Committee also approved funding for the Preventive Law Program in Ottawa which also provides seminars and published materials on law for lay people. In addition, COSTI has received a grant from clinic funding to produce community television programs on the law for the Italian-speaking community.

The Clinical Funding Committee always recognized that legal services on a case-by-case basis was a necessary component of any clinical delivery system. In addition, it recognized the legitimate need to append activities such as law reform, legal education, and organizing similar-interest clients to case services in order to achieve the goal of making legal services accessible. As the new Regulation (in the definition of funding in s.148(2)) allows for the payment of funds to a clinic to enable it to provide "legal services or paralegal services" including activities "reasonably designed to encourage access to such services or to further such services, and services designed solely to promote the legal welfare of a community," clinics should be encouraged to continue to provide other services in addition to case services to further accessibility. In addition, it appears that the new Regulation can be interpreted to permit CLEO, Preventive Law and COSTI to specialize in providing only educational services.

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As a result, the issue becomes one not of criteria but of priorities; the Committee must decide whether community organizations providing services on a case-by-case basis should have priority over those engaged in providing other services. Given the existence of Community Legal Education

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Ontario as well as the existence of Preventive Law in Ottawa, there may be less of a need for additional groups specializing in community education activities when compared to the extensive need for case-by-case services. It is submitted, therefore, that priorities should be given in the future to clinic applications which include a case component.

D. Procedures for Applying for Clinic Funding

The procedures for making applications must reflect the criteria for funding, the conditions of funding, and the priorities established by the Clinic Funding Committee. Procedures relating to such applications from existing clinics, including established clinics, must be fair, well-defined and available to all interested parties. New applications require a different set of procedures, but they should also be fair, carefully defined, and available to all interested parties.

a. Existing clinics

Existing clinics are those which have received funding previously. Applications for annual funding must be submitted by such clinics, containing information required by the Committee in order to assess whether applications meet the Committee's criteria and priorities. The level of funding for existing clinics should be established during the annual funding review, and, except in unusual circumstances, no further applications for funds should be entertained during the remainder of the fiscal year.

The procedures for applying for annual funding for both established clinics (clinics which have received clinic funding for a continuous period of 24 months) and non-established existing clinics are the same although the appeal procedures may be different. The procedures should be as follows:

1. By September 15 each year the clinic submits estimates for the next fiscal year.
2. By January 15, the clinic submits a report on expenditures to December 31 for the present fiscal year, an estimate of expenditures to March 31, and a request for the next fiscal year.
3. The clinic funding staff confers with the clinic.
4. The clinic funding staff makes an initial decision and informs the clinic in writing of the decision with reasons.

5. Within 10 days of the initial decision made by the clinic funding staff, the Board of the clinic informs the clinic funding staff in writing of its acceptance of the initial decision or, in the alternative, of its intention to request an appeal or leave to appeal from the staff's decision.
6. (a) Where the clinic accepts the initial decision of the clinic funding staff, the staff forwards the decision for review and recommendation to the Clinic Funding Committee.

   (b) Where the clinic informs the clinic funding staff of its request for an appeal or for leave to appeal, the appeal procedures (to be more fully explained in the policy paper on appeals)

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must be followed.

b. New applicants

Since the clinic funding staff must also make initial decisions with respect to the funding of new clinics, the staff requires specific guidelines from the Clinic Funding Committee relating to criteria, conditions, and priorities for funding. With new applications there are four stages, and the procedures should be as follows:

(i) Inquiry

The clinic funding staff will respond to all written enquiries relating to clinic funding with a statement of information about clinic funding. It is suggested that the statement of information should refer to the Regulation on clinic funding and explain the procedures for making application as well as the criteria for funding and any priorities adopted by the Clinic Funding Committee.

(ii) Preliminary brief

To avoid the possibility that applicants who do not qualify according to the criteria or the priorities established will be put to the trouble of completing long and detailed application forms, it seems appropriate to request a shorter statement of intent. Applicants should be required to file with the clinic funding staff a preliminary brief by September 15 in relation to funding to be requested for the next fiscal year. The preliminary brief should include information about the organization and its proposed services relevant to the criteria and the Committee's priorities. The clinic funding staff can then assess this brief and determine whether or not to grant preliminary approval. In the event that preliminary approval is granted, an application form will be forwarded to the community

organization for completion, if necessary, with the assistance of clinic funding staff. If preliminary approval is not granted, the community organization will be so informed with reasons; however, a community organization may nevertheless complete a formal application for funding at its option, since no initial decision pursuant to the Regulation is made at this time.

(iii) Draft application for funding

The clinic must next submit its draft application for consideration by the clinic funding staff. The staff will confer with the clinic, and other interested persons in the community, and suggest changes in the application.

(iv) Final application for funding

The final application for funding may then be submitted. The clinic funding staff will make an initial decision on the final application pursuant to the Regulation, and will forward its written decision with reasons to the clinic. Within 10 days, the clinic shall respond in writing accepting the decision or indicating its intention to request leave to appeal. (The procedures for appeal will be dealt with in the policy paper on appeals).

(v) Note on input from clinic funding staff

The clinic funding staff will be involved in assisting the community organization in the preparation of a preliminary brief, a draft application, and the final application. They may assist in establishing statistical information relating to need, and helping to define the nature of the legal services to be provided. They will also assist in determining budgetary

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and staff requirements.

The clinic funding staff also has a special responsibility to consult with and receive advice from Area Directors and members of the local Bar in relation to new applications. The clinic funding staff will routinely notify the Area Director after its approval of a preliminary brief. After receiving a draft application and conferring with the applicant, the clinic funding staff will meet with the Area Director to consider the details of the draft application and arrange further consultation between the applicant and the Area Director and the local Bar Association.