
Integrated Access to Justice for Middle Income Seniors: Whitby Legal Services Assessment Project

Final Report
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Report Prepared with a Grant From the Law Foundation of Ontario

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Executive Summary

This report is our final report prepared with a grant from the Law Foundation of Ontario for the project entitled “Integrated Access to Justice for Middle Income Seniors Community: Whitby Legal Services Assessment Project.”

It is clear that middle income seniors in Ontario are not accessing justice due to awareness, financial, physical, navigational and attitudinal barriers embedded in the legal system. This project is a small preliminary step towards better understanding justice issues for middle income seniors and identifying potential approaches to improving access. The overall purpose was to focus on one community – Whitby Ontario – to better understand the legal service needs of seniors, their challenges in accessing those needed services, and to explore innovative approaches to better meet those needs and facilitate removal of identified barriers to access. The project also sought to make recommendations for future work in this area.

This report is a summary report of highlights from three detailed reports prepared as part of this project. The first report examined legal needs, barriers and potential solutions from the perspective of middle income seniors in Whitby. Thirty-two (32) seniors and their proxies (including health, law enforcement, and social service providers) were interviewed to collect this information. The second report examined needs, barriers and potential solutions from the perspective of the legal services community. Twelve (12) individuals were interviewed, including provincial legal resources and those local to Whitby. The third report explored innovative delivery and funding models which have the potential to address financial, physical, and navigational barriers to legal services.

Our preliminary findings show that middle income seniors may not recognize an issue as one with legal implications, and even when they do, don’t know the right questions to ask. Once aware they could benefit from legal advice, they find the legal system hard to navigate with a patchwork of services that are not integrated across legal, health and social services. Challenges of ‘referral fatigue’, case management and follow up appear to be exasperated by a ‘crisis’ in the client’s life which has triggered the need for legal services. In this respect, legal services are used in a reactive way rather than as a preventative service. There appears to be little ‘preventative’ legal services demand by clients in spite of the fact that these services would be much less expensive. It is worthy of note that these themes (interconnectivity of health and legal issues, and barriers to access) are not unique to this population of seniors, but have been identified across many population groups and in many regions across Canada.

The legal system itself has acknowledged the growing problem of access to justice, and is interested in exploring new ways to deliver and fund legal services.

Our preliminary findings also suggest that there are multiple opportunities to address the challenges presented. First, there is a growing interest in proactive, integrated legal-health-social services for middle income Ontarians. Second, there is interest in innovative and alternative ways to deliver and fund legal resources. Third, in terms of the legal services themselves, there is an acknowledgement of a need for “customer service” approaches, client follow up and legal

service evaluation. Fourth, the role of technology is seen as a potential way to assist legal practitioners and clients navigate the legal system.

This area needs further research and these preliminary findings need to be validated. However this should not be an excuse for inaction. The many barriers identified can, in the meantime, be addressed by pilot testing integrated legal services delivered and funded in novel ways.

The following recommendations for next steps are offered:

Recommendation #1:

It is recommended that a Proactive Model for basic and preventative legal services be developed and offered on a pilot basis to a defined community of middle income seniors in Whitby. As such, trained professionals would provide a) assessment services, b) prevention, education and intervention services in areas of law commonly confronted by seniors such as Power of Attorney, Elder Abuse, Pensions, Tenancy, Long Term Care, Home Care and Wills/Estates, and c) referral services to more specialized legal services where needed together with follow-up/case management.

Recommendation #2:

It is recommended that information technology be developed and utilized for assisted navigation of the legal system as well as assisted integrated case conference navigation across the health, social service and legal system.

Recommendation #3:

It is recommended that further research be undertaken regarding potential alternative funding models.

First, research and stakeholder discussions should take place regarding the possibility and implications of funding basic-preventative legal services through a rider to an existing insurance policy (preferably an insurance policy overseen by an outside advocacy organization such as the Canadian Association for Retired Persons - CARP).

Second, research and stakeholder discussions should take place with the CAW and PrePaid Law Inc. regarding bundling of legal-medical services through those organizations in conjunction with a defined middle income community of seniors in Whitby.

Third, as an alternative to the billable hour funding model - but not as a replacement – further research should be undertaken to examine Primary Health Care models for reimbursement of multiple providers as a possible funding model for consideration for legal professionals.

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Disclaimer

Any opinions expressed in this report are those of the authors and do not necessarily reflect the opinions of Law Foundation of Ontario.

1.0 Introduction

The Schlegel-UW Research Institute for Aging received a Grant from the Law Foundation of Ontario (LFO) of \$25,000 for the project entitled “Integrated Access to Justice for Middle Income Seniors Community: Whitby Legal Services Assessment Project.” The objectives of the project were to:

- Assess legal service needs and barriers to access experienced or anticipated by the residents, the community and the legal network in Whitby.
- Identify and analyze existing and potential legal service delivery mechanisms and legal service funding models.

The Project also sought to make recommendations regarding future work in this area.

A number of important observations inspired and guided this work:

1. Legal and health issues tend to cluster in seniors and therefore access to appropriate legal services at the right time will improve health and overall quality of life for seniors in Ontario.
2. Seniors too often wait too long before accessing legal services. Early access at a preventative stage would minimize cost and negative consequences for many seniors. For example, having Powers of Attorney defined for personal care and property prior to a health crisis can prevent a situation from escalating into a legal controversy.
3. Legal services in Ontario are typically available for low income clients who qualify through Legal Aid Ontario (annual income of \$18,000 or less for a single person) and for wealthy clients who can afford to use their own resources. However, the majority of seniors fall between these extremes and make up an increasing number of unrepresented litigants within the legal system.
4. The majority of middle income seniors do not utilize the legal system or provincial legal resources. Cost is one reason, as described in the previous point, but a number of other barriers to access also exist.
5. The number of seniors, particularly middle income seniors, is growing rapidly. Pressures on already overextended health and legal systems will increase substantially in coming years. Thus new models of service delivery are needed that improve access and use of preventative legal services.

It is clear that middle income seniors in Ontario are not accessing justice due to awareness, financial, physical, attitudinal and navigational barriers embedded in the legal system. This project is a small preliminary step towards better understanding justice issues for middle income seniors and identifying potential approaches to improving access. The overall purpose is to focus on one community – Whitby Ontario – to better understand the legal service needs of seniors, their challenges in accessing those needed services, and the legal system’s capacity to meet those needs and facilitate removal of identified barriers to access.

This report is a summary report of highlights from three detailed reports also prepared as part of this project. The first report examined legal needs, barriers and potential solutions from the

perspective of middle income seniors in Whitby. Seniors and their proxies (including health, law enforcement, and social service providers) were interviewed to collect this information.

This second report examined needs, barriers and potential solutions from the perspective of the legal services community. Existing legal resources available to those living in Whitby are also identified in this report.

The third report explored innovative delivery and funding models which have the potential to address financial, physical, and navigational barriers to legal services.

It is important to stress that this work is preliminary in nature and is not a comprehensive examination of these issues; rather it is as a starting point for further research and discussions.

2.0 Definitions

For the purpose of this preliminary work, the following working definitions were used:

‘Legal services’ were defined as the full continuum from information and education, to legal advice, to specific assistance to resolve a legal issue.

‘Seniors’ were defined as those individual at or over 65 years of age.

‘Middle income’ was defined in two ways. For the interviews of seniors, their proxies, and legal service providers, ‘middle income’ was defined as those individuals who have incomes above what would qualify for Legal Aid Ontario services (assumed to indicate ‘low income’) but not willing or not able to retain a lawyer to deal with legal issues (willingness or ability was assumed to indicate ‘high income’). For the document review of financial and delivery models, ‘middle income’ was defined according to the Canada Revenue Agency (CRA) taxation categories. Given geographic differences in federal CRA calculations, cut off points between low income and high income were not possible. Instead, middle income was defined as the two federal taxation quadrants between low income and high income.

There are several challenges in further defining ‘middle income’. The first challenge with this definition of ‘middle income’ is the word ‘income’. Most individuals 65 years of age or older do not have income from employment but rather have some form of pension income. Second, individuals may also be ‘asset rich’ and ‘income poor’. For example, an individual may have a very modest pension income but own a house, cottage, car, etc. In the extreme, ‘income’ from employment or pensions may be considered low income and yet assets could place the individual in a high income bracket. The third challenge with the definition of ‘middle income’ is that it is not standardized by geographic location within Ontario or Canada, across government Ministries or even within a given government Ministry. Given this variation in defining ‘middle income’ – particularly the differences and means testing for those qualifying as ‘low income’ – we have adopted a broad definition.

‘Client’ refers to those middle income seniors who are accessing, could be accessing or should be accessing legal services. It includes those living in congregate settings (in particular those

living at the Village of Taunton Mills retirement community in Whitby) as well as those living in the community.

‘Key informant interviews’ refer to the interviews of seniors, their proxies (caregivers, family, health and social service providers) and legal service providers (see Reports 1 and 2).

‘Key informants’ refer to those interviewed for Reports 1 and 2, including seniors, formal and informal caregivers, health and social service providers and legal service providers.

‘Legal resources’ are organizations that provide legal education, basic legal services and/or legal referral services and are available to middle income seniors in the Whitby area. This includes:

- a) existing Lawyers servicing the Whitby area and the residents of the Village of Taunton Mills,
- b) existing resources servicing the Whitby area i.e. Financial Advisors, Investment Advisors, Police Fraud Units, Paralegal services,
- c) provincial legal resources available to the Whitby area.

‘Delivery Models’ was defined as those methods of delivering legal services to the client.

‘Funding Models’ was defined as those methods of funding legal services. The funding models covered how the client pays for legal services as well as how the legal provider receives payment for the legal service. Funding models also included a review of fee-for-service alternative models in the health care sector.

3.0 Methodology

This project was completed in three parts. The first two parts sought to understand the legal service needs of middle income seniors in Whitby, and barriers to access. Part 1 explored these issues with seniors and those proxy to seniors (caregivers, organizations that work closely with seniors). Part 2 explored these issues with legal service providers. Part 3 explored existing and innovative funding and delivery models to improve access to legal services for middle income seniors.

Part 1. The needs assessment instrument used for the interviews in Part 1 (of seniors, caregivers, health and social service providers who work closely with seniors) was an open ended and closed ended questionnaire developed in consultation with RIA researchers, the Legal Consultant¹ and from a review of existing instruments used in Canada. In addition to several open-ended questions, the interviews specifically probed six topic areas of relevance to seniors:

- pensions and income
- capacity, health care consent and substitute decision making
- tenancy and retirement homes
- long term care
- home care

¹ Lydia Stewart-Ferreira

- elder abuse

This questionnaire was implemented through a combination of group and individual interviews held between February and April 2009.

To identify needs and barriers of seniors, thirty-two (32) individuals, representing seniors or their proxies (e.g., family, caregivers) were interviewed in eleven separate group or individual sessions. All interviews were conducted over a six week period ending the first week of March 2009. After obtaining informed consent to participate, the structured sessions lasted between one and three hours depending on the size of the group. The individuals invited to participate were selected to represent a variety of backgrounds including: retirement home residents, caregivers, nurses, police, social worker, supervisors/managers, chaplain, neuropsychologist, coordinators/case managers. Perspectives represented in the interviews included seniors living independently in the community as well as those living in congregate settings, seniors in hospitals and other treatment facilities, caregivers, families, those with Alzheimer Disease or related dementias, community service providers, parish nursing, residential care staff, elder abuse, seniors centre, and the Community Care Access Centre.

Part 2. The same interview process and instrument was used to identify needs, barriers and potential solutions from the point of view of legal service providers. Twelve (12) individuals were interviewed in March and April 2009. Verbal consent was obtained before conducting the interviews. Respondents recognized that complete anonymity was not possible given the provincial scope of some resources. However, comments are not directly attributed to individuals. Individuals interviewed agreed that their opinions were theirs and not necessarily those of the organization to which they were affiliated. Each interview or focus took approximately two (2) hours. The responses were recorded and a summary of responses produced.

Part 3. The third component of this project used a snowball method of document review and key informant interviews (12 expert interviews were completed) to explore existing and innovative funding and delivery models for legal services. In contrast to the localized focus of the needs assessment (Whitby only), we explored models across Canada, in the US, Britain and Australia. While not comprehensive, the models reviewed included:

- Pro Bono Law Ontario's Child Advocacy Project
- Family Legal Health Program at Toronto's Hospital for Sick Children
- USA PrePaid Legal Service initiative via the American Bar Association's Standing Committee on Group and PrePaid Legal Services
- American Prepaid Legal Services Institute (API)
- Legal Expense Insurance (LEI) on common law countries
- CAW Legal Service Model
- Private sector health care models.

4.0 Limitations

The reader is asked to keep the following limitations in mind when reading this report:

Scope. This work is preliminary in nature and is not a comprehensive examination of these issues; rather it is as a starting point for further research and discussions.

Interviews. The interviews were asked for their perceptions as individuals (as opposed to the represented views of their organization) on the legal resource needs of middle income seniors.

Instruments. The questionnaires used for the interviews were not designed to be scientific survey instruments but rather a set of questions to foster discussion and examples. As such, the questions were not always asked in sequence as several of the key informants digressed to subsequent questions and provided useful and insightful information. In several cases one or more questions did not apply to a given key informant and in these cases were not asked.

Implementation. Interviews were carried out in person and by phone, in group format and also one-on-one. Where the interviews were carried out by phone, a copy of the questions was emailed to the interviewee so that they might follow along. Where the interviews were carried out in person, a copy of the questions was provided to the interviewee. The interviews were not taped and a transcript version was not verified by the interviewee.

Timeframe. The interviews were conducted between end of February and April 2009. This timeframe of two and a half month was very short. Identification and scheduling interviews with both provincial and local resources proved extremely time consuming. In the case of Whitby legal resources, contacts were often non-responding, unavailable or incorrect.

5.0 Results

5.1 The Need as Described in Key Legal Reports

Middle income Ontario seniors are not accessing justice due to awareness, financial, physical, attitudinal and navigational barriers embedded in the legal system. The demographic segment of middle income Ontarian “baby boomers” over the age of 65 years of age is a significant portion of those impeded from accessing justice. Why is this important? If Ontarians cannot access the justice system to effectively exercise their rights under the law then public confidence in the justice system may be compromised.

‘Access to Justice’ is a major concern in Ontario. The Law Society of Upper Canada has made ‘Access to Justice’ a priority for 2007-2011.² Several other key reports have recently been released which discuss the concern regarding residents’ access to justice. While not an exhaustive list, these reports include:

² The seven other LSUC Priority Areas for 2007-2011 include: Small firm and Sole practitioners, Paralegal Regulation, Strategic Communications, Governance, Governance, Diversity within the Profession, Discipline, and Maintaining high standards and ensure effective competence. Ontario Lawyers Gazette, Spring 2009, Vol. 13, No. 1 p. 26.

- the Civil Justice Reform Project, 2007 – “The Osborne Report”,
- the Legal Aid Review, 2008 – “The Trebilcock Report”,
- Chief Justice of Ontario, Justice Winkler, Speech 2008,
- Law Commission of Ontario, 2007 – “The Sossin Report on Priorities”,
- Law Commission of Ontario, The Law As It Affects Older Adults, 2008 and
- The Special Senate Committee on Aging – Final Report on Canada’s Aging Population: Seizing the Opportunity, 2009.

Each of these is reviewed in more detail in Report 3 accompanying this report³, with select highlights summarized below. Across these reports, there is consensus regarding the problem of access to justice and an interest in new ways to deliver and fund legal services.

- According to the Osborne Report⁴ unrepresented litigants in Ontario’s civil justice system are growing. However, there is no formal study on the number, socioeconomic profile and nature of the legal problems and service gaps for this group.⁵ Unrepresented litigants may be due to rising legal costs making legal representation out of reach for low and middle-class Ontarians, or litigants may choose to represent themselves despite legal advice otherwise. Civil justice staff also experience unique challenges when unrepresented litigants access the legal system. Charitable services have limitations on continuity, scope and geographic availability of service. Self-Help Centres⁶ vary in service scope – ranging from providing print material to summary advice. The PBLO self-help service for Superior Court unrepresented litigants is staffed by volunteer lawyers, which involves procedural print, on-line and referral information, procedural advice as well as summary advice. In the case of Pro Bono services, the Osborne Report states:
“... the needs of the unrepresented should not and cannot be met by the spirit of volunteerism of the Ontario bar alone.”⁷
- The Trebilcock Review of Legal Aid in Ontario⁸ found a lack of service integration, challenges to the legal tariff system as well as with the financial eligibility criteria allowing few to qualify for legal aid service. The major lack of integration was particularly problematic as individuals tended to have “clusters” of legal problems whereby one problem triggered a cascade of other legal, social service and/or health care problems. Early intervention to pre-empt these cascades was seen as fiscally, socially and

³ Stewart-Ferreira, d’Avernas & MacDonald, Integrated Access to Justice for Middle Income Seniors: Whitby Legal Services Assessment Project. Report 3 - Legal Services Delivery and Financial Models. Prepared with a grant from the Law Foundation of Ontario, July 2009.

⁴ http://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/cjrp/080_unrepresented.asp

⁵ Unlike Alberta, British Columbia, Nova Scotia and Quebec who, according to the Osborne Report, have conducted a needs assessment and studied how these needs may be met.

⁶ Such as the self-help centres in British Columbia, Quebec, Alberta and the Family Law Information Centres in Ontario

⁷ Osborne Report p. 48.

⁸ <http://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/trebilcock/execsum.asp>

personally more cost effective. The clusters of interrelated problems also led to endless referral processes and the subsequent “referral fatigue” and unsolved problems.

- The Winkler Report highlighted the importance of keeping processes simple and making procedural rules for ‘navigating the justice system’ more understandable,
- The Sossin Report, commissioned by the Law Commission of Ontario, identified a need for innovation and recommended that projects be undertaken in six areas: Access to Justice, Social Rights, Family and Estates Law, Administration of Justice, Corporate and Commercial Law, and Law and Government.
- In the December 2008 Report on the Law as it Affects Older Adults, the Law Commission of Ontario outlined a “Pre-Study” to outline the scope and key issues for examination.⁹ One of the key areas for Elder Law was identified as “Access to the Law”. Many concerns were raised with respect to the ability of older adults to meaningfully access the law and to ensure that legal standards and protections are complied with. Issues of contract law related to place of residence, Substitute Decision Making, Powers of Attorney, the Health Care Consent Act were ‘complex, slow and expensive’. Laws are well intentioned but are so ‘cumbersomely or confusingly designed that they are very difficult to implement.’”

The Ontario Bar Association submitted the following comment:

“We are concerned not only that our current legislative framework is inadequate, but also that the processes and in the implementation of the laws, and both the laws and procedures are misapplied. A prime example is the Substitute Decisions Act (SDA), which is intended to protect the vulnerable. However, it makes the delay in the curtailing of abuse of these powers is almost certainly justice denied. These breaches of the spirit and intent of the law involve fundamental Charter rights.¹⁰”

The report further identifies that physical, financial and attitudinal barriers exist, including a lack of awareness of legal rights and remedies not only for elders but also amongst those who provide service to this group. Lawyers who are not familiar with elder law issues may provide incompetent representation.

- The Special Senate Committee on Aging released their Final Report Canada’s Aging Population: Seizing the Opportunity on April 21, 2009.¹¹ While the Final Report focused primarily on health and social service needs, the committee did learn that seniors are often unjustly stripped of their rights. The committee learned that more than

⁹ LCO Report on the Preliminary Consultation, December 2008 p.1.

¹⁰ Ontario Bar Association p21

¹¹ The committee members are the Honourable Senators: Sharon Carstairs (Manitoba), Chair; Wilbert Joseph Keon (Ottawa - Ontario), Deputy Chair; Maria Chaput (Manitoba); Anne C. Cools (Toronto Centre-York - Ontario); Jane Cordy (Nova Scotia); Terry M. Mercer (Northend Halifax - Nova Scotia); Terry Stratton (Red River - Manitoba)

just navigation was needed, receiving unanimous support across the country for integrated care. Two areas were of particular interest for this Project: Power of Attorney and prevention. The Committee found that:

“[t]he duties and responsibilities under a Power of Attorney may be very poorly understood. Power of Attorney fraud is one of the fastest growing areas of crime in Canada” and that:

“[e]ducating Canadians about the importance of advanced planning should be an integrated part of a prevention program on elder abuse, and the federal government should incorporate such education into its efforts to address elder abuse.”¹²

In summary, these expert reports point to the general consensus that there is a problem in ‘Access to Justice’. The legal system is seen as complex, lacking in navigation, expensive and full of delays. According to one report,¹³ the challenges of system complexity, expense and delay being “... so overwhelming that they [litigants] should not even bother to seek recourse in the court system. So they simply walk away from their rights; they never walk through the door of a lawyer’s office.” Unrepresented litigant profiles, needs assessment, and the coordination of legal services is needed.

5.2 The Need as Shown in Demographic Trends

The demographic of citizens approaching 65 years of age is growing.

“In 2001, one Canadian in eight was aged 65 or over. By 2026, one Canadian in five will have reached the age of 65.”¹⁴

“As a result of the increase in the number of seniors since 2001, their proportion relative to the total population reached a record 13.7% in 2006. That proportion, the best indicator of the aging of Canada's population, has been rising steadily since 1966, when it was 7.7%. According to the most recent population projections, the proportion of seniors in the Canadian population could nearly double in the next 25 years, while the proportion of children is expected to continue falling. If these demographic changes occur, they will have a major impact on the labour force, on public pension and health insurance plans and, in general, on the Canadian economy and society.”¹⁵

The large current and future cohort that is and will be over the age of 65 years of age, and the large component of this cohort that is and will be in the ‘middle income’ tax bracket, portends an upcoming “silver tsunami” of need and demand for legal and other services – at a time when the legal services system is already severely stretched.

¹² Senate 2008 report p.18 quoting CCEL, Frequently Asked Questions www.ccels.ca/forolderadults.htm

¹³ Chief Justice of Ontario, Justice Warren Winkler, in his April 30, 2008 address to the Canadian Club of London

¹⁴ P1 Canada's Aging Population, Health Canada 2002. http://www.phac-aspc.gc.ca/seniors-aines/pubs/fed_paper/pdfs/fedpaper_e.pdf

¹⁵ 2006 Census: Portrait of the Canadian Population in 2006, by Age and Sex: National portraitolder <http://www12.statcan.ca/census-recensement/2006/as-sa/97-551/p3-eng.cfm>

Given these significant demographic trends, it is surprising how little research has been done to profile the legal needs of this cohort. For example, it is not clear if middle income seniors are disproportionately included in the group of unrepresented litigants in the justice system. According to the Civil Justice Reform Project (the Osborne Report) while the media and senior members of the judiciary have reported a growing incidence of unrepresented litigants in the Ontario civil justice system, there were no formal studies conducted (at the time of that Report) on the number of unrepresented litigants, their socioeconomic profile, the nature of the legal problems they face and the gaps in serving them.

5.3 Needs and Barriers from Seniors’ Viewpoint

This section reports highlights from Part 1 of this project – interviews with 32 individuals in Whitby Ontario, including seniors themselves and those working closely with seniors. More detail can be found in Report 1 accompanying this report¹⁶.

5.3.1. Priority Topics

There was remarkable consensus about the legal needs of middle income seniors in Whitby. From the client perspective, the priority topics were: 1) capacity and consent, 2) elder abuse, and 3) pensions and income (see Table 1).

TABLE 1: Perceptions of Legal Service Priorities for Middle Income Seniors

Legal Topics	Percent of Total Respondents*	
	Ranked as First Priority	Ranked in Top Three Priorities
Capacity, Health Care Consent & Substitute Decision Making	72%	83%
Elder Abuse	6%	62%
Pensions and Income	11%	50%
Tenancy / Retirement Homes	0%	23%
Long Term Care Homes	6%	23%
Home Care	6%	23%
Wills	0%	6%

* Only 18 individuals completed this interview question, where respondents were asked to complete a table.

¹⁶ MacDonald, d’Avernas & Stewart-Ferreira, Integrated Access to Justice for Middle Income Seniors: Whitby Legal Services Assessment Project. Report 1 – Needs Assessment from the Client Perspective. Prepared with a grant from the Law Foundation of Ontario, July 2009.

Power of Attorney. Within the capacity and consent category, the most common identified need was Power of Attorney for personal care and property. This is a legal area where seniors and those who are responsible for accepting or making decisions regarding seniors are not fully aware of the rights and responsibilities associated with these legal documents. Although on-line and bookstore “kits” are widely promoted, many examples were given of situations where they were not able to provide the intended outcome. Most of those interviewed felt seniors, families, bank employees, health caregivers and those designated as substitute decision-makers, often did not clearly understand when these documents can be used and when specific powers commence and end.

Competency. A related important issue in this category is that of capacity/competency. Those interviewed reinforced that many seniors perceive competency as a battle to be fought, where losing means total loss of control. Competency is often thought to be a black and white issue, and that once a senior is labeled incompetent, they lose all rights. Few seemed to clearly understand who determines capacity, and the specific roles of health care providers, lawyers, assessors and the Public Guardian and Trustee in determining capacity. Some questioned if lawyers have the skills to assess competency, especially with new clients or in situations where dementia or other disease processes may cause changes in competency from hour to hour. Others gave examples where coercive caregivers took seniors to a lawyer in order to have their will changed, and the lawyer completed the process without ever independently consulting with the senior. In Whitby, there are no local assessors for financial competency.

Financial Abuse. Within the elder abuse category, financial abuse was identified as most common, with indications that it accounts for about 80% of all reported abuse. Another statistic cited in interviews was the estimate that over 50% of financial abuse goes unreported, with the rationale that ultimately it will be the perpetrator’s inheritance. Many of the examples given were situations where a senior gave money or property to family members with an “understanding” that their needs will be taken care of. Neglect was another commonly reported issue in this category. Several of the stories told of situations where a caregiver may have started off with good intentions, but became quickly overwhelmed by the significant demands and skills required for this role. Key informants indicated that abuse is seldom reported as the caregiver is often the isolated senior’s only link with the outside world and there may be fear of further retribution if the situation is known outside the home.

Pensions, Income and Benefits. The most common issue in this category was the all-consuming number of financial and legal issues that have to be dealt with on separation, divorce, or the death of a spouse or partner. The complexities of the system, the myriad of forms that need to be completed, and the ubiquitous voicemail all present significant challenges, even for seniors who know where to start and have the necessary personal documents available. Stories included situations where assets were frozen, a survivor’s income changed drastically because of a recent change in a spouse’s will, company pensions disappeared (bankruptcy), benefits were denied or ended, etc. For seniors who are dealing with grief, have recently relocated, are not literate in English, or have significant health issues, it can be overwhelming. Depending on prior experience, seniors may be unaware that they qualify for specific pension or income benefits (e.g. veterans, survivor benefits, insurance etc.).

Other. Other issues identified included tenancy issues (lack of understanding of legal agreements, not understanding their rights and fear of being kicked out if they complain), long term care (being forced into long term care against their wills, affordability of long term care), home care (wait times, lack of awareness of supports available), selecting an executor and role of the executor, and making banking/investment decisions.

5.3.2. Barriers from Seniors Viewpoint

Lack of awareness. The vast majority of those interviewed felt that most older adults were not well informed about their legal rights. The key barriers to accessing legal services were seen as this general lack of awareness about legal issues and not knowing how to find appropriate (and reasonably priced) local legal services. These are not just issues with seniors but also extend to families, healthcare workers, social service providers, bank employees, etc.

Timing. As many legal issues for seniors seem to be crisis driven, urgency was seen as a significant barrier to seniors making informed and thoughtful legal decisions. Other barriers are magnified when legal services must be accessed in situations where seniors are very vulnerable and already overloaded with other issues (relocation, loss of a spouse, health crisis etc.)

System complexity. The general complexity of legal issues, documents, and the system itself makes it difficult to know what questions to ask, who to go to and how to get started. Many spoke of situations where seniors found legal topics overwhelming and therefore avoided them.

Privacy and confidentiality. There were several examples given where concerns about privacy and confidentiality took precedence over legal realities and logic. These issues were cited as limiting access specifically related to legal issues of capacity, consent, and substitute decisions. It was seen as a significant barrier in situations of potential elder abuse. In addition, privacy and confidentiality were perceived as presenting further barriers to accessing personal documentation needed for legal services.

Attitudes. Attitudinal barriers were reported to limit access, with respondents identifying that not only do seniors have biases against lawyers and the value of legal advice, but also that lawyers may not understand seniors' issues and sensitivities. Given the reluctance of highly trained health care professionals to determine capacity, it is not surprising lawyers are cautious, especially when specific health conditions can make capacity assessment very difficult.

Practical barriers. In general, most felt that getting specific documents (medical, legal, income, identification, citizenship etc.) presented a problem for some seniors and that it can be very time-consuming to get or replace some of these documents. Cognitive impairment, death of a spouse who "took care of those things", complex immigration or family issues, language barriers, and lack of family supports were seen to make it more difficult to get necessary documentation.

Physical access and transportation were identified as other key barriers to seniors accessing legal services.

Perceived Lack of affordability was also reported as a barrier. Most admitted that they don't really know about the specific costs of legal services, but think that lawyers are generally very expensive. With the exception of legal aid clinics and the Advocacy Centre for the Elderly in Toronto, most felt that the only legal services available are those offered by lawyers. Ideally seniors would like to get some initial help and direction without being charged.

It is worthy of note that these themes (interconnectivity of health and legal issues, and barriers to access) are not unique to this population of seniors, but have been identified across many population groups and in many regions across Canada.

5.4 Needs and Barriers from Legal Service Provider Viewpoint

This section reports highlights from Part 2 of this project – interviews with 12 legal service providers, some local to Whitby Ontario and some who work at a provincial level. More detail can be found in Report 2 accompanying this report¹⁷.

5.4.1. Priority Topics

There was remarkable consensus about the legal needs of middle income seniors between seniors and their proxies on one hand, and legal service providers on the other. From the legal service provider perspective, the top two priority topics were the same as those identified by seniors and their proxies: power of attorney, and capacity/competency.

Power of Attorney. The Power of Attorney system is not well understood or utilized. It is also an area not always done correctly by legal resources. Currently, people are using Power of Attorney and Substitute Decision Making kits because they don't have the money for a lawyer. There are problems with Power of Attorney for Personal Care due to misunderstandings about confidentiality. Several legal resources commented that Powers of Attorney should be done by a qualified lawyer. However lawyers may not be qualified in the area. The Power of Attorney was also seen as a key area that relates to financial issues. For example, interviewees mentioned concerns over abuse of Power of Attorney privileges that amount to theft – as per Theft by Person Holding Power of Attorney, section 331 of the Criminal Code.¹⁸

Capacity/Competency. A related important issue is that of capacity/competency. There are challenges with the current Capacity Assessment process. Provincial and local resources addressing these and other issues do not appear to be formally linked. Capacity Assessments, especially as it relates to Power of Attorney, was also considered to be a problem area. Interviewees questioned who assesses if someone may no longer be capable of handling their own affairs. According some interviewees, there is no capacity assessor in Whitby. The Ministry

¹⁷ Stewart-Ferreira, d'Avernas & MacDonald, Integrated Access to Justice for Middle Income Seniors: Whitby Legal Services Assessment Project. Report 1 – Needs Assessment from Legal Services Perspective. Prepared with a grant from the Law Foundation of Ontario, July 2009.

¹⁸ S.331 Theft by Person Holding Power of Attorney

Every one commits theft who, being entrusted, whether solely or jointly with another person, with a power of attorney for the sale, mortgage, pledge or other disposition of real or personal property, fraudulently sells, mortgages, pledges or otherwise disposes of the property or any part of it, or fraudulently converts the proceeds of a sale, mortgage, pledge or other disposition of the property, or any part of the proceeds, to a purpose other than that for which he was entrusted by the power of attorney.
R.S., c. C-34, s. 291.

of the Attorney General (MAG) has not done capacity assessment training and as a result, capacity assessors must be brought in from Toronto with each capacity assessment, costing \$600 to \$2000.

5.4.2. Barriers from Legal Services Viewpoint

Target Group. There appears to be at least four clients for legal resources: lawyers/legal service providers, organizations/agencies, the actual middle income senior client and the senior client's proxy. Legal resources appear to be often requested by the senior client's proxy on behalf of the senior client. This raises possible issues of conflicts of interest for the legal professional. It also raises the issue of the communication strategy directed at the client and proxy in terms of issues of awareness and resources available to meet the legal need.

System complexity. Interviews indicated that there is little or no information or support available to assist the client in navigating multiple areas of law, multiple courts and the multiple legal resources available. There is also no formal legal referral mechanism to possible legal resources or connections with the private bar. There is no follow-up to determine if the client accessed the referred resource or an evaluation of the process and/or impact of the legal resource and/or referral of the clients' legal issue. Clients generally need legal resources at a time of crisis. This time-sensitive legal need is made more difficult not only by challenges of physical and financial access to justice but also by the difficulty of navigating through the legal resources that may be available. The system is complex even for lawyers. Adding to the navigation challenges is the fact that legal services tend to specialize so that specific legal services are provided by certain legal resources. For example, a legal resource may advise on Powers of Attorney but not provide advice or drafting of Wills. Resources involved in litigating Wills may not perform the Drafting of Wills. This leads to significant "referral fatigue". The referral pattern itself and the actual completed referrals by the client are unclear. While the informal 'word of mouth' appears to be the prime referral mechanism, there is no formalized referral process. There also does not appear to be a formal link between legal resources, legal advice, government agencies, tribunals and the courts.

There is not a 'one stop shop' or 'Community Supercentre' for all legal, health and social service issues affecting seniors. For example, there were services providing assistance with Powers of Attorney, health care and housing issues but not wills and estates. Other resources may provide legal services but not legal services specific to seniors. This partial service delivery by any one service is seen as a barrier.

Timing. Legal service providers reported that clients tend to access legal information when a problem or dispute has reached crisis proportion or just prior to the crisis. An example given regarding a situation 'prior to a crisis' was when a senior was about to get married on the weekend and the adult children of the senior were concerned about the marriage, the senior's capacity and the 'foreseen' divorce and asset confiscation by the new spouse shortly thereafter. Proactive legal advice or assistance to prevent a legal problem is not a major trend in legal resource access. However this could become more common if more community awareness and education was done. If no education is done, legal needs tend to be more reactive than proactive. It was commented that proactive legal work is more cost effective than reactive legal work.

Quality Control of Legal Information and Service. Clients appear to be unclear what resources are available and the quality of these resources.

Cost. Cost is a barrier to legal services. Clients appear to be unclear how the private bar and the non-private bar interact not only in terms of services but also the cost of the services. The overall cost of a set of legal services to assist a client and the potential of unbundling of legal services needs to be further explored. The cost of preventative legal services, such as developing Powers of Attorney while the client is capable, versus reactive legal services for this client group needs to be further assessed.

Priority Areas. The Power of Attorney system is not well understood or utilized. There are challenges with the current Capacity Assessment process. Provincial and local resources addressing these and other issues do not appear to be formally linked.

Low versus Middle Income. The link between provincial resources, local legal aid clinics, specialized legal aid clinics and the middle income senior is unclear. The ‘means test’ to qualify for low income services provided by the federally and the provincial services is unclear. It is unclear where ‘middle income’ begins and ‘low income’ ends.

Technology. Those interviewed reported that seniors tend not to access legal resources via a computer interface but prefer face-to-face and print material. If this is correct, there may be challenges to provide legal resources and/or services remotely. While clients may be unfamiliar or unable to access technology resources it is unclear if legal service providers also lack this access. This is an area that is rapidly changing. It appears that all formats should be available to accommodate individual preferences (computer, face-to-face and print).

Strategic Plan, Evaluation and Continuing Legal Education. There does not appear to be an overall strategic plan, a needs assessment and/or evaluation of middle income senior legal needs at the provincial and local level. In terms of legal continuing education, there does not appear to be comprehensive strategy for the training for existing and new lawyers and legal services as it relates to middle income seniors.

Other. Practical barriers such as personal barriers (eyesight, language, physical access, literacy) were also cited as restricting seniors’ access to legal services. Attitudinal barriers and perceptions of cost were also raised by legal service providers, mirroring the same concerns raised by seniors and their proxies.

6.0 Towards Solutions

Many ideas to break down barriers to access were generated throughout the interview, including the following:

Consumer Information and Education. The greatest need is for information and education. There was consensus that all adults need to be better educated about the questions that they need to ask with regard to potential legal issues. Without this basic knowledge, seniors can’t move to the next step of proactively addressing legal issues. A significant concern is the large grey area

where many of the issues have legal implications, but at least initially, are not seen as legal issues. When things go wrong however, things can quickly escalate to become a legal issue.

Most of those interviewed thought that interactive group sessions with knowledgeable presenters would be the ideal way to educate seniors. Ideally the locations would be where seniors are already gathering (seniors centres, retirement homes, community & day programs, churches). Ideally these sessions would be low or no-cost, the content should be developed to reflect the relevance for the audience (i.e. senior-centred), and plain language handouts should accompany the sessions.

Educating the Full “Circle of Care”. A necessary part of protecting vulnerable seniors is providing basic education on key legal issues to the full spectrum of providers that form the “circle of care” for seniors. A broad educational initiative should include healthcare, social service, family, and community supports that work with seniors (e.g. hospitals and institutions, emergency services, community agencies, banks, family members, accountants, clergy).

For example, both healthcare providers and lawyers need to better understand their roles and responsibilities in assessing capacity. The government also needs to offer opportunities for Whitby providers to be trained as capacity assessors. Many in health, financial, and social service roles are unclear about how privacy legislation and confidentiality concerns influence issues related to capacity, consent, and even elder abuse. These topics need to be included along with the broader issues of legal rights and responsibilities related to seniors.

Health and social service providers as well as bank employees etc. need to better understand the implications when they are handed a power of attorney document or someone is taking over decisions for a senior.

Assisted Referrals and Navigation Support. Most of those interviewed thought that there would be significant value in having local services that could help determine the most appropriate starting point for an individual with a legal service need. Assisted referrals would be extremely valuable, as often the senior just needs to be directed to the appropriate starting point. Along the same line, a ‘case management’ system would help to ensure follow up and “connecting the dots” as seniors navigate from one legal service to another.

Innovation. Given the practical challenges for vulnerable seniors needing access to legal services, most felt there would be value in co-locating legal services with health services used by this population. As there are clear health impacts related to ongoing worries about legal issues, having some legal services provided in the same location allows delivery of truly client-centred care. This is also seen as a practical way to expand awareness of seniors legal issues across the broader “circle of care”.

Many suggestions for innovative costing arrangements were also suggested. These included development of payment scales geared to ability to pay, “2 for 1” specials with Power of Attorney (health care & financial) documents, seniors discounts on legal services, volume discounts for seniors residences, etc. As the cost of legal services is often perceived to be expensive, just having a basic price list (similar to what a car repair shop might provide) might help encourage seniors to proactively address legal issues.

Also mentioned was the need to systematically simplify forms, the fine print of agreements, phone systems and website navigation for users. This would obviously enhance the system and add value for all.

The legal reports reviewed as part of this project proposed solutions complementary to those proposed by seniors, their proxies and those working in legal service organizations:

Osborne Report. This Report recommends a needs assessment of unrepresented litigants (profile, legal needs, legal information and assistance methods), coordinating the delivery of legal information and resources (legal system, procedure, summaries of substantive law, court order enforcement and compliance information) and resource allocation. The resource allocation may be prioritized relative to area, procedural, substantive and/or geographic need. While the Osborne Report recommends accessible communication media, it also encouraged the continuation of pro bono services, expanded self-help pilot projects and innovative billing methods.¹⁹

Trebilcock Report. Section VII of this report entitled ‘Innovations in Service Delivery’ points to the need for innovative service delivery mechanisms. An accessible system should build on high quality, cost effective staff and expanded duty counsel to foster file continuity and strong lawyer-client relationships to facilitate early case resolution. Advice centres, online and telephone information, education, legal advice hotlines and legal insurance schemes – but not competitive block tendering – could be examined more closely for application in Ontario. With respect to the funding model legal insurance. The Trebilcock Report indicates

“I conclude that legal insurance may be one means to significantly improve access to justice in Ontario, particularly in civil matters, including family law. The Law Society of Upper Canada and LAO should accord a high priority to promoting the role of legal insurance in Ontario. For example, one idea worth exploring is to offer legal insurance as an optional rider on all mandatory third party liability auto insurance policies. In order to keep premiums to moderate levels, such coverage would require a significant deductible, e.g. \$5,000, to discourage frivolous actions, as well as a cap on coverage, e.g. \$50,000, to prevent protracted litigation. It would also need to carefully define the classes of civil areas that would be covered.”²⁰

Law Commission of Ontario – The Sossin Report on Priorities.²¹ This report recommended projects and initiatives that the LCO might undertake as its initial research priorities. In terms of Access to Justice, several comments were made regarding the degree

¹⁹ The Osborne Report makes reference to the Review of the 1997 McCamus recommendations. The McCamus recommendations were reviewed by Prof. Trebilcock in his report *Legal Aid Review 2008* www.attorneygeneral.jus.gov.on.ca/english/about/pubs/ outlined later in this report.

²⁰ Trebilcock Report p.97

²¹ The LCO purpose is to recommend law reform measures to:

- a) enhance the legal system's relevance, effectiveness and accessibility;
- b) improve the administration of justice through the clarification and simplification of the law; and
- c) consider the effectiveness and use of technology as a means to enhance access to justice.

citizens can access and participate in the procedure by which substantive law is made. These might include affordable legal representation (pro bono, specialized courts), replacing courts with tribunals, promoting ADR and Collaborative Law, community and public education, self-help and the prevention of disputes.^{22 23} A short list of priorities included, among other recommendations, a study of Elder Law possibly incorporating Powers of Attorney.²⁴ Also, according to the Report:

“... the Law Foundation of Ontario encouraged the LCO [to] undertake projects with the goal of bringing fresh and dynamic voices into the law reform discussion and should, wherever appropriate, undertake research in partnership with other academic and/or public interest organizations.”

The next section of this report briefly reviews legal service delivery and funding models that may be of interest to this client group and the professionals that serve them.

7.0 Delivery and Funding Models

Several innovative legal service delivery and funding models were reviewed for this Project. This review, while not intended to be comprehensive, included:

- Pro Bono Law Ontario’s Child Advocacy Project Family Legal Health Program located in Toronto’s Hospital for Sick Children
- Legal expense insurance
- PrePaid Legal Services (including the CAW Legal Service Model).²⁵

7.1 Family Legal Health Program at Toronto Hospital for Sick Children

The Family Legal Health Program is located in Toronto’s Hospital for Sick Children and provides help to young patients whose families have legal problems. Eligible families access this program through SickKids clinical staff (i.e. social worker, doctor or nurse.) The program is focused on low-income children which incorporates legal advocacy, where appropriate, into health care at the hospital.

“The Family Legal Health Program combines the best efforts of clinicians and lawyers in the pursuit of better child health outcomes. The model allows clinical staff to see beyond biological factors of patient illness to social causes and consequences. Through this program, nurses, social workers, and doctors at SickKids have access to legal resources to redress detrimental social conditions and resolve persistent issues that prevent low-

²² Law Reform Bodies: The Law Reform Commission of Canada, The Law Reform Commission of Nova Scotia, the British Columbia Law Institute, the Canadian Centre for Elder Law Studies

²³ Comments from stakeholders included the need to address self-represented litigants in civil justice, alternatives to self-representation in Family Law, coherent approaches to elder law, reviewing the Power of Attorney System in Ontario.

²⁴ The review of the Power of Attorney System in Ontario was suggested by a Bencher of the Law Society. The Manitoba Law Reform Commission has undertaken several reviews – e.g. the Power of Attorney System Elder Abuse, Wills and Succession, Substitute Consent to Health Care <<http://www.gov.mb.ca/justice/mlrc/pubs/publications.html>>

²⁵ Several additional models of legal service delivery and financing can be found in the Trebilcock 2008 Review of Ontario’s Legal Aid System.

income families from focusing their full attention on a sick child. As a result, clinical interventions are more effective and sustainable.”²⁶

This initiative is the first of its kind in Canada, with a partnership that includes The Hospital for Sick Children (SickKids), Pro Bono Law Ontario (PBLO), law firms McMillan Binch Mendelsohn and Torkin Manes Cohen Arbus, and Legal Aid Ontario.

The model is an interdisciplinary initiative that uses legal remedies when appropriate to address issues that adversely impact child health within low-income families. The program aims to improve the health outcomes of low-income pediatric patients and, at the same time, enhance the capacity of health care professionals such as social workers, physicians, nurses and dieticians by incorporating legal advocacy and legal services into clinical practice.

7.2 Legal Expense Insurance

In a 2001 journal article,²⁷ the use of and lessons learned regarding **Legal Expense Insurance** by Commonwealth Countries, such as the U.K. and Australia, was reviewed. According to the article:

“Legal Expense Insurance (LEI) is one of the ‘access to justice’ mechanisms that was considered in many societies in the 1980s and 1990s. Governments, legal professions and legal reformers in rich western societies highlighted the potential of mechanisms such as LEI, contingency fees and class actions to improve citizens’ access to justice by controlling the cost of legal services. By controlling these costs, LEI and the other mechanisms promised to improve citizens’ access to legal services and the courts. LEI was particularly popular because it promised to improve access to legal services for the ‘in between’ of middle income groups. That is to say, it promised to improve access to legal services for the income groups that were not poor enough to qualify for legal aid but not rich enough to easily afford the costs of legal services. The evidence from the last two decades suggests, however, that LEI has been a qualified success in improving citizens’ access to justice. In general, it seems that the reformers had unrealistic expectations about the ease of developing LEI. The result is that while LEI is successful in some societies, the cost of legal services continues to be a problem for the ‘in between’ in many others.”

The article analyzes LEI developments in a number of societies. It describes the development of LEI in a group of common and civil law societies. LEI was found to fare best in the societies with civil law traditions but that the picture was more ambiguous in the common law societies. The article concluded that LEI had the potential to improve access to justice but it was not a panacea. LEI must be promoted by significant groups, target specific markets, grow incrementally and be tailored to the specifics of the particular society. Interestingly, stand-alone legal service policies are unlikely to be successful and the close involvement of the legal profession seemed to hinder the development of the LEI.²⁸

²⁶ <<http://www.childadvocacy.ca/flhp/>>²⁶ (accessed May 5, 2009)

²⁷ Regan, Francis, *Whatever Happened to Legal Expense Insurance*, *Alternative Law Journal*, Vol. 26, No. 6, December 2001.

²⁸ <http://dspace.flinders.edu.au/dspace/bitstream/2328/1031/1/Francis%20Regan%20LEI.pdf>

7.3 Prepaid Legal Services

Two forms of prepaid legal serve were reviewed: PrePaid Legal Service Plans offered by Law firms, and the CAW Legal Services Plan.

PrePaid Legal Services Plans offered by Law Firms. The American Prepaid Legal Services Institute (API) is a nonprofit organization founded in 1976 by the American Bar Association to act as a clearinghouse and technical assistance source for the prepaid legal services industry, as well as supporting this method of delivering legal services to clients of moderate means. The API, also acts as a membership association for those involved in the field.²⁹

According to their website:

“Legal plans come in many shapes and sizes. A "prepaid legal plan" is any type of arrangement in which a participant prepays or an employer pays on behalf of employees for legal services participants may require in the future. In many respects, a prepaid legal plan is similar to a medical benefit plan: A consumer pays a fixed amount each year or month in exchange for certain service benefits to be used as and if needed.”

Almost every legal plan provides legal advice and consultation by telephone as a basic service and may also include brief office consultations, review of simple legal documents, preparation of a simple will, and short letters written or phone calls made by a lawyer. Other plans offer more comprehensive coverage for trials, marital problems, bankruptcy, real estate matters and the like. In addition to the member, most plans include or offer coverage for his or her spouse and dependent children.

The API publishes Guides for lawyers who are contemplating becoming a legal service provider and for others who are in the initial stages of designing a legal service plan. It also publishes a Technical Assistance Packet Series on how to design different legal service plan elements, how to structure legal service provider and administrative service agreements, what enrollment forms to use, how other plans evaluate the quality of their services and similar questions.

The Prepaid Legal Service Inc. plan is now operating in five (5) Canadian provinces. The plan is not aimed at “significant, urgent matters’ but rather it is aimed at more day-to-day legal matters.

Prepaid services must be divided into the membership marketing component and the actual legal service component. The membership marketing component is sold through independent agents who may not clarify the scope of the legal service/product and are ‘very passionate’ and ‘cult-like’.

The actual legal service component is subcontracted to legal firms who are not involved with the marketing component. The legal service allows clients to receive legal services at a discounted

²⁹ <http://www.aplsi.org/about/history.cfm>

rate. The rate is established by the Prepaid service. This model makes sense for new lawyers but not for senior lawyers. The service is based on a monthly and/or yearly rate. The ‘family plan’, which costs \$25/month and can be cancelled at any time, covers Will preparation, powers of attorney, legal consultation, document review, letter writing and discounts on certain legal issues. The legal service component may be sold as an ‘add on’ to existing insurance packages for professionals. Clients are both businesses and individuals.

The service is typically provided by phone with a copy of the service provided and the relevant documents subsequently mailed to the client. Approximately 90% of cases can be dealt with by phone. If the call needs further assistance, the client is referred to rostered lawyers who have agreed with the plan to provide service according to an ‘Agreement’. Client satisfaction with the service is evaluated by survey.

Typically there is a ‘blip’ in legal service required by a new client such that new clients may request more legal services than existing clients. The client may have assumed that the amount of time for a particular legal issue did not justify retaining a lawyer but if the prepaid service is available, such an issue may come forward.

Prepaid services provide another model to the billable hour which services ‘a diminishing few’ and ‘discourages the pursuit of legal rights’ or causes the client to attempt legal action themselves.

CAW Legal Service Plan. The CAW Legal Service Model is the largest pre-paid legal service program in Canada. The CAW program involves three types of prepaid legal service – prepaid, mixed advice and referrals. The services are provided by staff lawyers and non-staff lawyers – the latter is comprised of “co-operating” and “non co-operating” lawyers. There are approximately 23 staff lawyers in Ontario and 1,100 co-operating lawyers and notaries across the country. Lawyers sign up with the plan for specific areas of practice. Lawyers are paid approximately \$110 per hour – about \$800 per day - plus disbursements. All lawyer services are evaluated by clients. Clients are instructed to ‘call the Plan first’ in order to determine access and coverage.

Client employers negotiate the scope of service (full benefit, entry level, mid-level) that a given CAW Plan will encompass. A Board of Trustees (termed the Administrative Committee comprised of union and employer ‘sponsors’) meets to determine plan policy and the fee schedule. The CAW Plan provides service to over 102,000 families – although only about 20% of those enrolled use the legal service annually. The legal service can be use “a lot or a little’ depending on the client. While retirees use the legal services program less than other clients, the legal areas of Power of Attorney, Estates and Real Estate are used – with less utilization in the area of Family Law. The CAW Model addresses legal issues as of the date of ‘commencement’ in the plan. Clients may choose a lawyer based on their connection or may request a referral from the CAW Plan. Overall, clients are not afraid to ask the CAW Plan for legal advice.

7.4 Key Informant Comments

Key informants felt that a Prepaid legal service model might work for Whitby. The concept of prepaid legal services, on a flat monthly fee, was strongly recommended by several KIs in order to provide the client with predictability of costs, consistency of legal provider and client ‘peace of mind’. A prepaid plan for Whitby could be built ‘piece by piece’. The funding models could be based on supply and demand and allow for flexibility for lawyers. A number of ideas for implementation were put forward:

- It may be possible to undertake a hybrid model of prepaid services and sole practitioner services – the latter of which make up a large component of legal services in Whitby. Such a model could unbundle legal services and provide continuity. Legal services could be provided via booked appointments with particular lawyers similar to booking appointments and follow-up appointments with particular physicians. Young legal associates could be rostered for part of the week with a prepaid plan and part of the week with a small local law firm thus allowing them to be partially paid by the law firm and partially paid by the prepaid legal service.
- Landlord and Tenant issues could be addressed by lawyers, paralegals and Articling students. Such a program may assist practitioners to learn and do their jobs well and attract articling students to the area.
- Law students could be utilized if they were supervised by a lawyer and possibly affiliated with a law faculty program/clinic (e.g. Osgoode’s Public Interest Requirement which requires 40 hours of uncompensated law student time to address access to justice issues). The Osgoode Office could act as a ‘broker’ in terms of pre-screening qualifications and interest as well as supervising students.
- The use of LSUC Specialists and their increased capacity as possible referral lawyers should be considered.
- Referrals from the LAO along with periodic information sessions and print materials should also be considered.
- Hold ‘in-person’ sessions, keep statistics on popular issues, and maximize assistance from non-lawyers/community providers.
- Whitby’s new Court Building may be more physically accessible to middle income seniors and the Court Library could continue to be an important legal resource.
- The government services of the Region of Durham has many resources – such as the Courthouse, the Court Library, administration of Long Term Care Homes, etc. – which should be capitalized upon.

8.0 Conclusions

Our preliminary findings show that middle income seniors a) are often not aware when an issue has or may have legal implications, b) don’t know the right questions to ask to identify their legal service needs and c) find the legal system hard to navigate with a patchwork of services that are not necessarily integrated across legal, health and social services. Challenges of ‘referral fatigue’, case management and follow up appear to be exasperated by a ‘crisis’ in the client’s life which has triggered the need for legal services. In this respect, legal services are used in a

reactive way rather than as a preventative service. There appears to be little ‘preventative’ legal services demand by clients in spite of the fact that these services would be much less expensive.

The legal system itself has acknowledged the growing problem of access to justice, and is interested in exploring new ways to deliver and fund legal services. There is overwhelming support from academics, all levels of Court, the Law Society of Upper Canada, the Law Foundation and a host of legal aid clinics, professionals and public interest organizations and individuals to address the key issue of “Access to Justice”. One key report indicates that Canadians have a high prevalence of justiciable problems that are not being resolved.³⁰ Definite patterns and “clusters” of economic, family, discrimination, clinical negligence and homelessness tend to spiral off one another yet Ontario’s legal, health and social service sectors tend to operate as un-integrated silos.

“The above-mentioned research indicates that if trigger problems are dealt with at an early stage, possible results include reduced costs for the legal aid system and other social services, and improvements to the client’s quality of life. An important component of access to justice is to provide clients with upfront responses to their problems. Research has underscored the importance of early intervention and early advice. Front end information and assistance has been shown to help empower clients with the means to resolve their problems and to help prevent their problems from multiplying or cascading.”³¹

Our preliminary findings also suggest that there are multiple opportunities to address the challenges presented. First, there is a growing interest in proactive, integrated legal-health-social services for middle income Ontarians. Second, there is interest in innovative and alternative ways to deliver and fund legal resources. Third, in terms of the legal services themselves, there is an acknowledgement of a need for “customer service” approaches, client follow up and legal service evaluation. Fourth, the role of technology is seen as a potential way to assist legal practitioners and clients navigate the legal system.

This area needs further research and these preliminary findings need to be validated. However this should not be an excuse for inaction. The many barriers identified can, in the meantime, be addressed by pilot testing integrated legal services delivered and funded in novel ways.

It was beyond the scope of this project to develop the specifics of an integrated service. However, in the spirit of designing such initiatives, several features were identified:

- These initiatives should recognize the importance of legal service continuity, the ‘one-stop-shop’ or ‘Community Supercentre’ concept and the importance of clients understanding their legal rights and their role and expectation of the legal system. Legal-health-social service resources could be provided in an integrated fashion - a ‘one-stop-shop’ or ‘community supercentre’.
- These initiatives should also build on existing resources, commitments and ideas, the importance of local legal leadership and capacity and the energy of new legal

³⁰ Trebilcock Report p99

³¹ Trebilcock Report p104

professionals as well as creating integrated legal, health and social service advice and information.

- Substantively, the law must be coherent law, provided by competent professionals, capitalize on the prevention and the early mitigation of legal issues.
- Procedurally, legal services must be easy access, less complex and provide navigation assistance.
- While the time appears to be right for innovative approaches, any innovation must balance at least three components: innovation with tradition, experience with ongoing learning, and new models with existing models.
- In terms of delivery models, ‘one size does not fit all’ and choice from competent legal alternatives is important. ‘Assisted navigation,’ client follow-up, service provider continuity and relationship building are all important.
- In terms of financial models – the need for clients to understand and manage legal costs and alternatives to the billable hour funding model, such as prepaid legal service alternative, were key discussion points.

9.0 Recommended Next Steps

There is a clear need for integration within legal services but also across legal, health and social services if we are to meet the identified legal service needs of middle income seniors. The following recommended next steps move us in that direction.

Recommendation #1:

It is recommended that a Proactive Model for basic and preventative legal services be developed and offered on a pilot basis to a defined community of middle income seniors in Whitby. As such, trained professionals would provide a) assessment services, b) prevention, education and intervention services in areas of law commonly confronted by seniors such as Power of Attorney, Elder Abuse, Pensions, Tenancy, Long Term Care, Home Care and Wills/Estates, and c) referral services to more specialized legal services where needed together with follow-up/case management.

Rationale:

In health care our first point of contact is with the primary care system (Family Practice Physician or Nurse Practitioner). The Family Practice Physician/Nurse Practitioner assesses the patient and treats them for basic/common issues, then refers to various specialist services for more complex issues as necessary. A similar model could be applied to legal services, where appropriately trained legal service providers conduct an assessment (akin to the annual physical in health care) of the seniors’ circumstances, recommends and provides preventative legal services, and assists in access to more specialized legal services as required. Key components of this service include:

- a) Prevention and education. Given the cascade effect of legal problems, and the close correlation between legal, health and social issues, prevention and education can avoid much unnecessary escalation by addressing issues before they become serious.

- b) Alternative dispute resolution strategies. Social and health service providers have an important role to play in helping seniors develop strategies that can prevent an issue from escalating into a legal issue requiring expensive legal intervention. Examples include support in talking to family members, social service facilitators to help families or other involved parties work through issues.
- c) Assisted navigation. Streamlining access to a needlessly complex legal system will be a key to success. Overall, there appears to be agreement that the delivery model should include system navigation, consistency and ‘relationship building’ by qualified providers. This can involve a number of providers in the health, social service and/or legal sector to specialized legal advice provided by existing legal contacts or external legal contacts.
- d) The use of paralegals and law students (within their scope of practice), like the use of nurse practitioners and medical interns in medical practice, should be utilized to their fullest within this model. The paralegal profession is now regulated by the LSUC and the operation of their scope of practice should complement the legal services provided by lawyers. A pilot project that demonstrates the complementary roles of lawyers, law students and paralegals, under the regulated auspices of the LSUC, could become a model for integrated legal service in other areas of the province and country. This view of paralegals and law students is not shared unanimously. Questions of legal service quality, scope of practice and accountability across different legal service professions has arisen and will need to be addressed.
- e) Basic service co-ordination across legal as well as health and social service sectors will be important as seniors may not recognize an issue as having legal implications and approach through the health or social services “door” rather than a legal services “door”.

It would take a substantial amount of work to design and trial a comprehensive model such as this. However, one or two topic areas of relevance to seniors could be selected as a start for delivery, together with an assessment tool and assisted navigation and follow-up.

Recommendation #2:

It is recommended that information technology be developed and utilized for assisted navigation of the legal system as well as assisted integrated case conference navigation across the health, social service and legal system.

Rationale:

Technology is providing new opportunities to deliver services, including health and legal services. Seniors are the fastest-growing group of new users of computer technology. While perhaps not the method of choice for many, computer-based service delivery is undeniably more cost-efficient and therefore holds great potential to address the cost barrier experienced or perceived by most seniors when they need to access legal services.

Recommendation #3:

It is recommended that further research be undertaken regarding potential alternative funding models.

First, research and stakeholder discussions should take place regarding the possibility and implications of funding basic-preventative legal services through a rider to an existing insurance policy (preferably an insurance policy overseen by an outside advocacy organization such as the Canadian Association for Retired Persons (CARP)).

Second, research and stakeholder discussions should take place with the CAW and PrePaid Law Inc. regarding bundling of legal-medical services through those organizations in conjunction with a defined middle income community of seniors in Whitby.

Third, as an alternative to the billable hour funding model - but not as a replacement – further research should be undertaken to examine Primary Health Care models for reimbursement of multiple providers as a possible funding model for consideration for legal professionals.

Rationale:

The small-scale study reported herein found support for these alternative funding models but could not probe adequately into them to arrive at a definitive conclusion as to their merit or the specifics of their implementation. Further investigation is warranted.

For example, several models are in place in Ontario and elsewhere within the primary health care system that are variations on, or replacements to, the traditional fee-for-service billing model for physicians. These models include Family Health Teams, Nurse Practitioner-Led Clinics, and Community Health Centres. Various incentives are built into these payment structures that promote more equitable access to care as well as interprofessional care and a focus on prevention. Much can be learned from this experience for possible replication/adaptation to the provision of legal services.