Impact Assessment of the Moldovan Law on State Guaranteed Legal Aid

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Martin Gramatikov and Nadejda Hriptievschi

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Acronyms:

LAA – Legal Aid Act, Law on State Guaranteed Legal Aid of 2008
NLAC – National Legal Aid Council
TO or NLAC TOs – Territorial Offices of the National Legal Aid Council
MoJ – Ministry of Justice
CPC – Criminal Procedure Code
SFM – Soros Foundation – Moldova
ICT – Information and Communications Technologies

Preface and acknowledgments

This assessment was carried out within the framework of the project “Promoting a sustainable legal aid system in Moldova”, implemented by Soros Foundation – Moldova, with financial support from Human Rights Grants and Governance Program of the Open Society Foundations, in 2010 – 2011.

Soros Foundation-Moldova has been working on legal aid issues since 2003 and was one of the main civil society actors that partnered with the Government to carry out the legal aid reform in Moldova. It supported the first research on quality and accessibility of legal aid in 2003 and 2004; established the first pilot Public Defender Office in 2006 and supported it until the end of 2011; lobbied for a new law on legal aid, engaging in advocacy and technical assistance to the Government in drafting and implementing the legal aid law, providing significant support to the National Legal Aid Council and its Territorial Offices from 2008 until the end of 2011. The Soros Foundation – Moldova’s efforts have primarily focused on improving the quality and accessibility of criminal legal aid and establishment of a functional legal aid management institution. The assessment was initiated in this context.

The main purpose of the assessment is to obtain an understanding of the impact the legal aid law and its institutions on access to legal aid in criminal cases, the extent to which the legal aid law has achieved its statutory goals and the challenges that the new legal aid system is still facing. It is hoped that the findings of this assessment will be useful for the Government of Moldova to improve its access to justice policies. The assessment can also assist the National Legal Aid Council and its Territorial Offices to streamline the processes related to management and delivery of legal aid. It is also believed that the findings of the assessment will be useful for the legal aid providers, the Moldovan Bar and the other justice sector stakeholders involved in the legal aid system. Lastly, it is hoped that the findings of the report will help local and international donors and civil society organisations to develop their agenda in line with key priorities and needs of the legal aid system.

The assessment was carried out by Martin Gramatikov, expert with significant experience in reforming the legal aid system in Bulgaria and conducting access to justice research in a number of countries, and Nadejda Hriptievschi, a Moldovan lawyer, who has been collaborating with the Soros Foundation – Moldova since 2003 on the projects related to the legal aid reform in Moldova. She has been engaged with legal aid reforms in Bulgaria, Georgia, Lithuania, Mongolia and Ukraine.

The authors would like to thank all interviewees for their time and eagerness to share during the data collection process. The assessment would not have been possible without their invaluable contributions. We would also like to thank Victor Zaharia, Chairman of the National Legal Aid Council, Victor Munteanu, Director of the Law Program, Soros Foundation – Moldova, Alexandru Cocirta, independent expert, Veronica Mihailov, public defender and Iurie Cuza, project coordinator of the Soros Foundation – Moldova, for their useful comments on the draft report.

Lastly, we would like to thank the staff of the Soros Foundation – Moldova, in particular Tatiana Danilescu, for her dedication and invaluable help with arranging the interviews and managing other aspects of the assessment process, and Marcel Varmari, for his supervision and management of the project.

Executive summary

This report assesses the impact of the Law on State Guaranteed Legal Aid (Legal Aid Act) on the legal aid system and in general on access to justice in Moldova. The law was adopted in 2007 and is effective from July 2008. The overarching finding of the assessment is that the reform led to a greater commitment of Moldova to the principles of access to justice. Between 2008 and 2011 the legal aid budget has almost doubled. If we compare between 2007 and 2012 the budget increased almost five fold. The significantly increased budget for 2012 is a clear indication that access to justice in criminal but also in civil, misdemeanour and administrative matters is a priority. In comparison with 2006 there is almost quadruple increase of the number of people who receive legal aid per year.

Quantitative indicators are not the only objective of the new legal aid system. Assurance of the quality of subsidized legal services takes a central role in the new act. Although there is no conclusive evidence yet, the report claims that there is an overall improvement of the quality of the publicly funded legal aid as compared to the pre-2008 system. This conclusion is based on the opinions of the interviewed lawyers, criminal investigation bodies, judges and legal aid managers. What is clear from this assessment is that important prerequisites that were missing before the LAA are currently in place, which should cause an increase in the quality provided by legal aid lawyers. For example, legal aid lawyers are not appointed anymore by the authorities leading the criminal or civil procedures. Thus the practice of 'pocket lawyers' is significantly reduced compared to the situation before 2008. Legal aid lawyers are also becoming more independent from criminal justice actors and can more actively challenge their actions or inactions. Remuneration of lawyers has slightly increased and the payment system places a premium on lawyers' punctuality and responsibility. Still many lawyers complain of the low remuneration of legal aid and limited number of defence actions paid by the state, but also many acknowledge an improvement as compared with the situation before the LAA. The new system has established clear rules for appointment of legal aid lawyers. In an attempt to increase access to justice, the legal aid was unbundled into qualified and primary legal aid. Qualified legal aid, consisting of legal advice and representation, has been provided only in criminal cases until 2012. Primary legal aid, or consultations available to everyone without any merit tests, is only functioning in 30 villages where Soros Foundation – Moldova supports paralegals. Hence, primary legal aid as well as introduction of alternative service providers is an area of great opportunities for the future.

Most importantly, the legal aid reform set up a framework of national institutions which took political leadership on access to justice in Moldova. National Legal Aid Council was established and energetically took over its responsibilities to steer the legal aid system. Like never before there is an authority which central mission is to provide and guarantee access to justice. We can say that there is an "access to justice champion" present at the Moldovan institutional, legal and political scene. There is also a unified legal aid budget which clearly shows the demand and supply for legal aid. Together with NLAC there is a network of regional institutions, Territorial offices, which implement in practice the legal aid policy. In addition to that the Ministry of Justice plays an important role in as the main policy maker in the field.

Along with the achievements of the LAA, there are also serious challenges. The administrative capacity of the legal aid institutions is still fragile. In the case of NLAC, the lack of administrative support raises great concerns about the sustainability of the institution. Lack of administrative capacity also questions the rigidity and scalability of the legal aid system. Until 2012 the scope of legal aid was limited to criminal cases. Expansion towards non-

criminal legal aid, where the needs are much more voluminous, has been initiated since January 2012. It remains to be seen how it will be implemented.

Lack of rigorous means testing, which is one of the pillars of a comprehensive legal aid system, puts an enormous strain on the system for criminal legal aid. Means testing is even more critical for the proper functioning of the non-criminal legal aid. Own contributions will also be vital for the feasibility of a large scale legal aid system which covers criminal, civil, misdemeanour and administrative needs. It has to be noted that both means testing and own contributions are directly related to the administrative capacity of NLAC and TOs. Another contingency of the strengths of the institutional system is the ability to introduce primary legal aid as a mechanism for reaching out to more people and making legal aid more cost-effective.

Although certain improvement of the quality of legal aid has been identified, there are numerous concerns that quality is mostly related to the ethical values of the individual lawyers participating in the legal aid system. Quality of publicly funded legal aid should be part of a comprehensive system of formulation, implementation and re-assessment of the access to justice policies. The quality of legal aid has been on the agenda of the National Legal Aid Council, but it needs to become more active in developing appropriate quality assurance mechanisms. Active involvement of the Bar in the quality assurance of legal aid is also crucial.

1. Report objectives

Moldova is among the first countries in Central and Eastern Europe to redesign thoroughly its legal aid system. Major milestone in this reform is the Law on State Guaranteed Legal Aid (hereinafter LAA). The law was adopted on 26 July 2007 and is effective from 1 July 2008. Its provisions aim to guarantee equal and affordable access to justice for the citizens of Moldova, as well as foreigners and stateless persons in proceedings conducted by Moldovan authorities. Explicitly, Art. 1 relates the objectives of LAA to the attainment of the fundamental human rights of the people.

Before LAA, Moldova had a legal aid system typical for all countries from the former Eastern bloc. In a nutshell, legal aid was portrayed not as an element of the access to justice policy but as a special protection for a limited number of particularly vulnerable participants in court procedures. In a sense it was mostly viewed as a guarantee for the smooth development of adjudication proceedings and not as a safeguard of individual rights. As a rule of thumb, the "free" or publicly funded legal advice and representation was reserved for criminal justice procedures. Philosophically, legal aid was based on the recognition that the defendants in criminal proceedings have much less powers (if any) in comparison to the mighty state apparatus represented by the police and prosecution.

In 2011 the Soros Foundation Moldova undertook an assessment of the implementation of LAA. The main questions of the assessment are:

- How does LAA impact access to justice in Moldova?
- To what extent the institutional framework established with LAA guarantees the provision of affordable and competent legal aid?
- What is the impact of the law on the providers of legal aid services?
- How LAA changed the process of delivery of legal aid services?

2. Approach and Methodology

In order to answer the questions the research team adopted a comparative longitudinal approach in which the situation before the law is contrasted to the situation at the moment of the study (i.e. three years after LAA took effect). It should be noted that the time period of about three years between the passage of LAA and the moment of study is not enough to assess all important impacts that the new regime might have on the overall access to justice picture in Moldova. Many of the advantages and disadvantages of LAA will take place in the years to come. Nevertheless, it is important to observe and assess the effects of the newly established legal aid system.

Another important aspect of the research approach is that the research team opted for an empirical assessment of the degree of implementation. More than 20 individual in-depth interviews were conducted in order to estimate the effects of LAA from the perspective of all actors involved in the legal aid system. Several focus groups were used to complement the information obtained from the individual interviews.

In addition, statistical information from official sources was collected whenever possible about different aspects of the judicial systems and particularly about its intersection with legal aid. Not all data sources responded entirely or even partially to all our requests.

In order to enrich the evaluation we used also data from recently conducted study of the met and unmet legal needs of the people of Moldova.[1]

The various data sources listed above will be used to depict the differences between the situation before LAA and after LAA. In this study, the focus falls on the impact of the law on the institutional and operational aspects of the legal aid system. It should be acknowledged that the study does not explore the individual effects of legal aid. For instance, it is not discussing how individuals and communities benefit from availability of legal aid. Gender is also not used as a perspective to assess the impact of LAA. The main focus of this report is on the extent to which LAA affects the Moldovan legal aid system.

Following this premise, we employ a dualistic approach. First, we construct the main features of the previous system of legal aid. As it was said above, the old system is not unique. Many if not all of its properties can be seen in many countries which continue to rely on the old Soviet-style model. Therefore the description of the old system will not be thorough as its shortcomings have been documented in multiple studies. Our attention will be placed on the achievements and challenges of the reformed system. At the end we will discuss the challenges as well as the opportunities which will follow in the nearest future and will outline policy recommendations.

3. Legal Aid system before LAA

3.1. Limited scope

There are no reliable numbers about availability of legal aid before 2006. It was estimated that in 2006 there were about 6 000 cases of legal aid.[2] Allegedly 99% of these instances of legal aid were criminal legal aid. The system was based on the old model of court or police appointed private attorneys who were underpaid from various parts of the public budget. As mentioned above, almost all appointments were carried out as mandatory criminal legal aid. Specifically problematic was the appointment of legal aid at the pre-trial in which a dubious legal framework allowed police and investigative officers and prosecutors to appoint legal aid outside the cases in which legal aid is mandatory.

In 2003 the Soros Foundation - Moldova commissioned an analysis of the legal framework related to the legal aid system[3] and carried out an empirical study on legal aid delivery in 2004[4] in two district courts of the country. The 2003 legal analysis has identified important shortcomings, among which the vague norms on entitlement for legal aid, lack of procedural norms for implementing the right to legal aid in non-criminal proceedings, lack of rules on appointment of legal aid lawyers which, in practice, put the latter into dependence to the criminal investigation bodies and judges, cumbersome rules for payment for legal aid and low fees that did not motivate lawyers to do a good job for their defendants/clients. The 2004 study revealed additional appalling details about the practice of legal aid delivery, namely that legal aid was delivered only in criminal cases where the presence of a lawyer was

[1] The study of met and unmet legal needs in Moldova was based on a national representative survey conducted in August 2011, conducted with a project of the Soros Foundation-Moldova. The study in Romanian and English will be available on www.soros.md from April 2012.

[2] According to sources from NLAC.

[3] See the legal analysis of the legal aid system, drafted by Eugen Osmochescu, Ion Vizdoaga and Viorel Rusu, based on the methodology provided by the Open Society Justice Initiative, Budapest and Law Program of the Soros Foundation – Moldova, October 2003, report available upon request (Romanian or English).

[4] See the statistical study on criminal legal aid delivery in Moldova, carried out by Victor Munteanu, Victor Zaharia and Ion Jigau, Soros Foundation – Moldova, 2004. The methodology was developed based on methodologies used in the studies on access to a lawyer carried out by the Bulgarian Helsinki Foundation in Bulgaria in 2002 and the Open Society Justice Initiative's recommendations. Findings available upon request (Romanian).

mandatory, although by law it should have been delivered also in civil cases where legal assistance was mandatory; legal aid lawyers were appointed in a very high percentage of cases, while in practice some of these lawyers would often require additional payment from the clients (in-kind or monetary), making impossible to do any reliable estimation on the needs and actual costs for legal aid; lawyers appointed in legal aid cases were defending very passively their clients; low payment for legal aid cases did not motivate solid professional work, but rather resembled a social assistance scheme for a category of lawyers that would not have otherwise a steady flow of private clients.

3.2. Lack of transparency and deficient institutional framework

Due to the lack of institutional framework and institutions whose primary mission is legal aid, the system in place before LAA was not transparent. No organization was responsible to oversee the functioning of the legal aid system nor was monitoring the existing needs. Consequently, there was little information available about the resources which the state spent annually on legal aid. For example, a high level legal aid official said: “Before the law, no one knew how many cases of legal aid there are, except for 2006 and 2007 when these were counted at the request of the Soros Foundation - Moldova.” The budget for legal aid was not available publicly. There were no estimations on the costs of the typical legal aid cases. Quality for legal aid was not on the agenda of any public institution, nor the Bar.

Policy making and implementation was largely dispersed among many different actors in the justice system: MoJ drafted the budget; the Bar was compiling lists with providers and paying the participating lawyers. Since 2006 the payments to individual providers of legal aid were processed by the MoJ. Criminal justice actors (police officers, investigative officers; prosecutors; judges) were appointing the lawyers from these lists and not only – there was no consequence if the invited lawyer was not on the list.

As a result, the different functions were dispersed among various institutional actors. Without clear leadership the system was patchy and basically responsive to the interests and needs of the different professional actors. Little if any concern was given to the public interest or the interests of the people who needed or used legal aid. Issues such as quality, effectiveness, planning and development of the system were largely neglected because there was no institutional power to stand behind and drive further. An apparent result of the lack of political leadership was the lack of professional standards of legal aid work. As a matter of fact it was up to the individual lawyers to make sure that their work meets standards which are deemed sufficient with respect of the interests of justice and that of the particular client. For instance, the lack of monitoring of the services provided by legal aid lawyers, coupled with low payment, led to many misuses conducted by ex-officio lawyers. Not surprisingly, the perception that legal aid lawyers were collecting additional payment from beneficiaries of legal aid was quite a strong one. It is still a question if this practice ceased with the new LAA.

The lack of a clear and functional framework led to substantial uncertainty regarding the legal aid budget. Scattered among different budget lines before 2008 it was virtually impossible to estimate with high degree of certainty how much is being spent for legal aid. Low rates of lawyers’ remuneration were another factor which made legal aid work unattractive for lawyers. Significant and sometimes huge delays of already approved legal aid fees additionally decreased the enthusiasm of lawyers to pursue legal aid work. For instance, in 2003 the system was in a virtual collapse when legal aid lawyers refused to take more cases because of arguments over remuneration.

3.3. Quality of legal aid

Before LAA the quality of legal services was mainly seen at the level of the disciplinary liability of an attorney towards her clients. Data from the Bar, however, proves that disciplinary proceedings were not potent mechanism to guarantee that the clients receive top-notch legal services. Moreover, the remuneration was rather low which additionally unmotivated lawyers to apply the same standard of work to legal aid clients and private clients. Because legal aid was mostly seen as a duty to lawyers and not as a right to individuals who are entitled to legal advice and representation there were limited attempts to guarantee quality. Lawyers were appointed by criminal investigation bodies or courts in legal aid cases and needed their signatures confirming their presence in the case / at the procedural action in order to receive the payment for legal aid. This put them in a significant dependence towards the appointing authorities, which affected negatively the quality of services they delivered. The perception that legal aid lawyers would not "beat the drums" and would "close their eyes" to many violations of the defendant's rights and that they are much less active than privately retained lawyers have been strongly embedded in the Moldovan legal and social culture. To a great extent, regretfully, this perception is still wide spread today.

> "Usually (in most of the cases) the apprentices were coming – without significant experience etc; very often I had to ask questions instead of the lawyer because they were not good." [Interview with a prosecutor]

3.4. Dependencies between legal aid lawyers and appointing authorities

Almost exclusively the previous system of legal aid focused on criminal cases. Particular challenge for the pre-trial investigation in criminal cases was the potentially close relationship between the appointing authorities – police officers or prosecutors and the defence counsel. By law, criminal investigators, prosecutors or courts had to call the local bar association's coordinator to appoint a lawyer for a mandatory case. In practice, there were lists of lawyers providing ex-officio legal aid and any prosecutor, criminal investigation officer or judge could call anyone form that list. There were no legal or organizational consequences if they called a lawyer who was not on duty. Lawyers who were friendlier to the appointing authorities had bigger chances to be called, as the criminal investigators or prosecutors could either suggest to the defendant or call directly a lawyer they knew. Hence, in order to receive an appointment, the lawyers had to be "known", "recognized" and called by the appointing authority. Without a system based on clear and objective appointment criteria, the practices fluctuated a lot. For some clients lawyers were called immediately, for others later during the process.

> "In the old system there was a direct link between prosecutor, investigator, lawyer – any investigator and prosecutor could ask for his/ her friend lawyer and in this tandem the result was that the quality of legal aid was very low. Lawyers were closing eyes to many violations, for example lawyers without even seeing the defendant they could sign the interview protocol etc. This system was destroyed by the new LAA." [Interview with public defenders]

> "If the person had money – the prosecutor / police would immediately call the lawyer(s) he was working with." [Interview with private lawyers participating in the National register for legal aid providers]

In other cases, especially in routine cases where the client would not have any funds, criminal investigators could have encountered difficulties securing a lawyer, as there was no authority to ensure the lawyer's participation in the criminal proceedings.

> "I had to call the territorial office of lawyers and call the duty lawyer. He was not always on the spot and not many people wanted to replace. Because there were big arrears in payment for legal aid lawyers and they simply were not willing to come." [Interview with a prosecutor]

In summary, the legal aid lawyers before 2008, when LAA took effect, were perceived as rather formal than real defenders of the rights of their clients. It should be noted here that such a generalization is certainly not valid to all and perhaps most of the lawyers who delivered legal aid before 2008. We heard numerous accounts of legal aid lawyers who protected the interests of their clients with integrity and professionalism despite the low and delayed pay, lack of monitoring and control and low pubic profile of legal aid work. What the attitudes signify is that before 2008 there were little mechanisms and resources to guarantee that the effectiveness and quality of the publicly funded legal aid is not dependent solely on the personal integrity of every individual lawyer who does legal aid work.

4. Implementation Process

4.1. Scope of the legal aid system

On July 26, 2007 of the Law on State Guaranteed Legal Aid (Legal Aid Act hereinafter) was passed. It completely revised the existing arrangements and scope of provision of publicly funded legal aid in Moldova. First, in contrast to the previous regime under which legal aid was understood as appointment of a lawyer to provide legal advice and representation in mandatory defence / representation cases, the LAA set out two types of legal aid:

- Primary legal aid – basic information about law and assistance for drafting different acts, provided by paralegals and specialised NGOs.[5]
- Qualified legal aid – legal consultation and representation before criminal investigation bodies, in courts in criminal, misdemeanour, civil and administrative proceedings, representation before public authorities,[6] which is provided by lawyers, irrespective of their type (public defenders or private lawyers providing legal aid on request),[7] and non-governmental organizations (*NGOs hereinafter*). NGOs can provide legal aid in any case except representation in criminal and misdemeanour proceedings.[8] Since January 2012 only qualified lawyers can represent in court, which reduced significantly the areas NGOs can provide legal aid, practically reducing it to legal advice and any out of court proceedings.

Primary legal aid is provided to any person in any issues s/he might have, without being limited to a certain legal field. Any person can benefit from primary legal aid without having to prove his or her financial status. The legislator has chosen the „open" option for the primary legal aid based on the considerations of promptness: the issues falling under primary legal aid are supposed to be simple issues that can be promptly clarified by a person with some education but not necessarily a qualified lawyer. The purpose is to give a quick solution to a

[5] See Articles 2, 15-17, LAA.

[6] See Art. 2 of LAA.

[7] See Articles 2 and 29, LAA.

[8] See Art. 35, LAA.

question that can be quickly solved, without imposing some eligibility requirements that would only deter the population from using this opportunity. Hence, primary legal aid should be provided immediately upon request or the latest in 3 days after the request was filed with the paralegal/NGO.[9] If the client's issue is a complicated one or the paralegal/NGO does not know the answer, the person should be advised to contact a lawyer or invited to come later if the provider can have an answer in maximum 3 days. The paralegal / NGO providing primary legal aid should explain the person the possibilities to apply for qualified legal aid.

Although not requiring any proof for the financial status, primary legal aid is intended for poor persons who can not afford to hire a lawyer. To prevent misuse, the legislator has provided that the same person cannot benefit from legal aid twice on the same issue, unless there are new circumstances.[10]

To date primary legal aid is not provided, except in 30 villages where the Soros Foundation-Moldova has supported paralegals during the year of 2010 and 2011.

Qualified legal aid is provided in criminal, civil, misdemeanour and administrative cases (further in the text non-criminal legal aid will be used to refer to legal aid in civil, misdemeanour and administrative matters).[11] Financial and merit tests have to be applied by the NLAC and its bodies before appointing qualified legal aid. In order to benefit from legal aid the beneficiary should have income lower than the level provided by the Government for benefiting of legal aid,[12] except those persons who can get legal aid irrespective of their financial status. For calculating the level of the income for qualifying for legal aid the income received in the last 6 months of the month preceding the request for legal aid is taken into account. The detailed methodology for calculating the income and determining the level for benefiting from legal aid, as well as the template declaration that should be filled by the person requesting legal aid are provided for in the Government's Decision Nr. 1016 of 01.09.2008.[13] The bylaw is based on a presumption of trust in the data provided by the applicant. Thus, for making a decision about the financial suitability of the applicant, it is sufficient for the latter to complete and sign the template declaration about financial means and submit it to the Territorial Office of the National Legal Aid Council. The respective office can request additional documents proving the financial status in cases when the sincerity of the person raises concern. Also, it can take a decision to provide legal aid and request the respective proofs to be brought later on during the case examination. This presumption is very important, as gathering the necessary proofs of the financial status might take up to 2 weeks, while TO has to take a decision about legal aid in maximum 3 days from the moment of receiving the request. To ensure that the applicant provides the correct information, the declaration has a provision stating the personal responsibility of the applicant for the accuracy of the provided information and the obligation of the applicant to recover all costs for received legal aid in case the information provided is false or his/her financial situation is improved while receiving legal aid since the moment s/he provided the respective declaration.

Depending on the procedure and stage when provided, the qualified legal aid in Moldova can be of two types:

[9] See Art. 18, LAA.

[10] See Art. 18 para (3), LAA.

[11] See Art. 19 , LAA.

[12] See Art. 20, LAA..

[13] See the Government's Decision Nr. 1016 from 01.09.08 regarding the approval of the Regulation on the methodology for calculating the income for providing state guaranteed legal aid, published on 05.09.2008.

- Ordinary legal aid[14] and
- Urgent legal aid[15]

The two types of legal aid do not differ substantially, the difference being only in the procedure of appointing lawyers to provide it and the eligibility requirements. Urgent legal aid is provided to any arrested person in a criminal or misdemeanour procedure and it is provided up to the moment when the person's status is clarified when: released or detained during pre-trial proceedings. Usually, it is provided up to the first hearing when the arrested person is brought before the investigative judge, unless the criminal investigation body or the body that arrested the person decides to let her free before bringing the case to a judge. The purpose of the urgent legal aid is to involve a lawyer as soon as possible after person's arrest, ensuring the fundamental right to defence, as well as preventing any possible abuse by the detaining authority. Urgent legal aid should be provided within maximum 3 hours from the moment the person was arrested. The body that arrested the person shall contact immediately, maximum within 1 hour from arrest, the TO which appoints a lawyer immediately, but not later than 2 hours from the moment it received the request for appointment from the body that arrested the person.[16] In localities outside the place where TOs are located as well as outside the normal TO office hours, the criminal investigation body or the court calls directly the lawyers participating in the duty schedule. This schedule is drafted monthly by TOs and distributed to all criminal investigation bodies and courts. The same 3 hour time limit for appointment of a lawyer is applied.

In terms of how much of the cost of legal aid the client pays, qualified legal aid can be of two types:

- *Free qualified legal aid* – the costs are fully covered by the state, and
- *Partially free qualified legal aid*, which is provided in cases when the person's income is higher than the income level established by the Government for benefiting from legal aid and the person can cover partially the legal aid costs.[17] Such a provision is a good one for the clients that do not have sufficient resources for covering fully the legal aid fees. It is also a good provision for the state as it gives it a chance for covering a bigger proportion of legal aid needs in the country. A partial contribution can also deter clients that do not really have a valid claim from going to court. To date this provision is only on paper (provided by law but not implemented yet; see the discussion below in the Challenges chapter).

Legal aid is provided irrespective of person's financial status in the following circumstances:

1. Persons is in need of urgent legal aid upon arrest in a criminal or misdemeanour procedure,[18]
2. Cases where the presence of a defence lawyer is mandatory (mandatory defence cases) according to article 69 para (1) subpar. 2– 12 of Criminal Procedure Code, and

[14] The legal aid law does not use the term „ordinary" legal aid, but I use it here for a better distinction from the urgent legal aid.

[15] See Art. 28, LAA.

[16] See Art. 28 and 26, LAA, as well as the amendments to the CPC. Also see the Regulation of the National Legal Aid Council on the procedure for requesting and appointing a lawyer to provide urgent legal aid, approved on 16.07.08.

[17] See Art. 22, LAA.

[18] See article 19 para (1), LAA.

3. Cases where legal assistance is mandatory according to Art. 304 and 316 of the Civil Procedure Code of Moldova.[19]

As far as the *merit test criteria* required by the law is concerned, in criminal cases „the interests of justice" should call for the appointment of a lawyer. An additional criterion is provided for civil, misdemeanour and administrative cases, namely „when the case is complex from the legal or procedural points of view".[20] The „interests of justice" criteria is based on the jurisprudence of the European Court of Human Rights (*ECtHR hereinafter*), which usually refers to the gravity of the allegation and the possible sentence, complexity of the case and the person's ability to represent herself.[21] The ECtHR has further found that "when liberty is at stake, interests of justice in principle require that the person is represented".[22] Based on these conclusions and the analysis of LAA's provisions on urgent legal aid and proceedings when mandatory legal assistance is necessary, one can conclude that legal aid in Moldova should be provided in any criminal case where the person is detained or risks deprivation of liberty or where legal assistance is mandatory in any criminal or civil case. Legal aid should also be provided to any arrested person in a misdemeanour procedure.

4.2. Institutional Framework

NLAC is, on the one hand, responsible for formulating and elaborating the legal aid policies in the country and, on the other hand, responsible for their implementation. Indeed, MoJ remains the policy making body in the field, with NLAC helping MoJ to adopt relevant legal aid policies.[23] At the same time, NLAC reports annually directly to MoJ, the Government and the Parliament[24] and submits quarterly reports to MoJ regarding the way it spends the finances allocated for legal aid.[25]

When NLAC was established, the main rationale thought to be behind its creation was to alleviate MoJ from service delivery functions which are not appropriate for a Ministry, e.g. administering legal aid fees to all lawyers doing legal aid throughout the country. In that sense, MoJ is and should focus on policy making and not service delivery. This separation of functions between MoJ and NLAC is also important for ensuring a correct and independent application of LAA, as well as for portraying an impartial image of the legal aid system in the country. NLAC, being a separate entity from MoJ, decides, through its TOs, about who is and who is not eligible for receiving legal aid, including in cases against public authorities, including against MoJ. The establishment of NLAC also spares the national Bar from administering the legal aid system, a function which is not appropriate for the body concerned with ensuring high standards of representation rather than watching over the effectiveness of spending the legal aid budget. It is believed that the main purposes for which NLAC was established will prove right and implementable, and it will indeed contribute to the set up of a rational policy making in the field of access to justice. As reported by a NLAC manager, MoJ does not interfere within the NLAC decision making process. Furthermore, MoJ leaves sufficient room for NLAC to implement and initiate policies related to legal aid.

[19] See article 19 para (1), , LAA.

[20] See article 19 para (1) l. a) and l. e) of the Legal aid law.

[21] See *Quaranta v. Switzerland*, 24.05.1991

[22] See *Benham v. United Kingdom,* 10.06.1996.

[23] See article 9 of the Legal aid law.

[24] See Art. 12 par. (1) let. f), LAA.

[25] See Art. 12 par. (1) subpar. g), LAA

On the other hand, NLAC members shared that it needs more involvement and support from the MoJ, especially for policy formulation. Perhaps a more active role of the MoJ in the policy making process would be useful in terms of demonstrating political engagement and commitment to the system of legal aid in Moldova.

NLAC is a collective body with status of a legal entity of public law, composed of 7 members. Its members are nominated as follows: 2 – Ministry of Justice, 2- Bar Council, 1 – Superior Council of Magistrates, 1- Ministry of Finance and 1 member is chosen by the Ministry of Justice through a public nomination process among members of NGOs and academia.[26] A model of diverse representation in the National Council was chosen on purpose, as an additional guarantee for its institutional independence. Members of NLAC are not in employment relationships with neither NLAC nor MoJ. In that sense the members of NLAC are not committed full time to managing the legal aid system. They only meet for the Council's meeting, which shall be organized not less than once every three months.[27]

The main functions of NLAC are:

- Implements the legal aid policy in the country;
- Determines financial criteria and mechanisms for benefitting from legal aid;
- Establishes admission criteria for lawyers willing to be included in the National register for legal aid providers;
- Determines rules of remuneration, amounts of fees and other costs to be paid to legal aid lawyers;
- Ensures the quality of legal aid services, including by establishing standards for activity of the subjects involved in the legal aid system and determining assessment criteria for monitoring the legal aid services, in cooperation with the Bar, etc.;

In accordance with LAA, five Territorial Offices (TOs) were established in the 5 appeal court districts to support NLAC and implement locally the legal aid policy. The TOs are responsible for determining eligibility, appointment of legal aid lawyers, making the duty schedules of lawyers for urgent legal aid, reviewing lawyers' reports and making the payments, coordinating the primary legal aid in their respective region, collecting necessary statistical data and submitting activity reports to NLAC every three months.
The establishment of NLAC did not go without difficulties and challenges. Especially difficult were the first years after LAA was adopted. Numerous bylaws and administrative regulations had to be drafted in 2008.

Recruitment of lawyers was also a challenge. In some places there were (and still are) simply not enough lawyers present to serve the needs. In other places, there was mistrust and sometimes hostility towards the new system. During the first two years the main task of NLAC and its Territorial offices was to guarantee that there are enough providers of legal aid to make sure that the principles and provisions of LAA are put in place.

> "The first 2 years our main task was to ensure with sufficient lawyers; now – we went from quantity to quality – verifying how the services are provided. Our main priority now is quality." [Interview with a coordinator of Territorial office]

[26] See Art. 11, LAA, as well as the Regulation of the National Legal Aid Council, adopted on 24.01.08, The Regulation regarding the procedure of selecting the member of the National Legal Aid Council from the NGOs and academia, approved on 11.02.08.

[27] See Art. 13, LAA.

4.3. Delivery models

LAA provides a mixed system of delivery of legal aid. Qualified legal aid can be provided by private lawyers registered in the National register for legal aid providers and public defenders. NGOs can also provide non-criminal qualified legal aid (reduced in courts after the amendment of the civil procedure effective since January 2012). Under certain conditions primary legal aid can be delivered by paralegals and specialised NGOs.

The reason for choosing a mixed model was mainly to increase the quality and accessibility of the legal aid system well as to ensure that legal aid services are provided on a cost-efficient basis. It is believed that the competition between different types of providers will contribute positively to the cost and quality of the legal aid. In addition, it is believed that public defenders and paralegals, funded with public resources, would ensure a reliable back-up for the legal aid system in a scenario in which the fees of private lawyers escalate or they refuse or are unable to provide legal assistance for any particular reason. To date there is only one public defender office supported financially by the state since January 2012, until then the Soros Foundation – Moldova supported the public defender office from 2006 to 2011 (see more about the PDO below in 5.8).[28]

5. Impact of LAA

5.1. Scope of legal aid

Since the adoption of the Legal Aid Act in 2008 there is a steady increase of the public funding of the Moldovan system of legal aid. Between 2006 and 2011 there is 143% (or 2.4 increase in funding available. In absolute numbers the legal aid budget in 2006 was 3.5 million MDL, 2007 - 4.6 million MDL, 2008 – 3.84 million MDL, 2009 – 5.7 million MDL, 2010 – 6.5 million MDL, 2011 – 8.5 million MDL (see Figure 1). This increase means that more people in Moldova received legal aid and thus access to justice which they would have otherwise not been able to afford.

Furthermore, the actual budgets as well as financial projections for the period 2011-2014 suggest an significant increase in funding (see Figure 1). Notably, the public funding of the Moldovan legal aid system visibly surged in 2012. The confirmed legal aid budget for 2012 is 22.8 million MDL – almost three times more than the budget in 2011. In 2012 the legal aid system should be significantly expanded in order to cover non-criminal legal needs. According to the budgetary forecasts the legal aid system will keep growing – the prognosis for 2013 is 23 million MDL and for 2014 – 23.3 million MDL.

[28] Other 10 public defenders, specialized in juvenile cases, were supported by UNICEF-Moldova for approximately a year in 2009-2010, but their office was closed when the external funding was stopped.

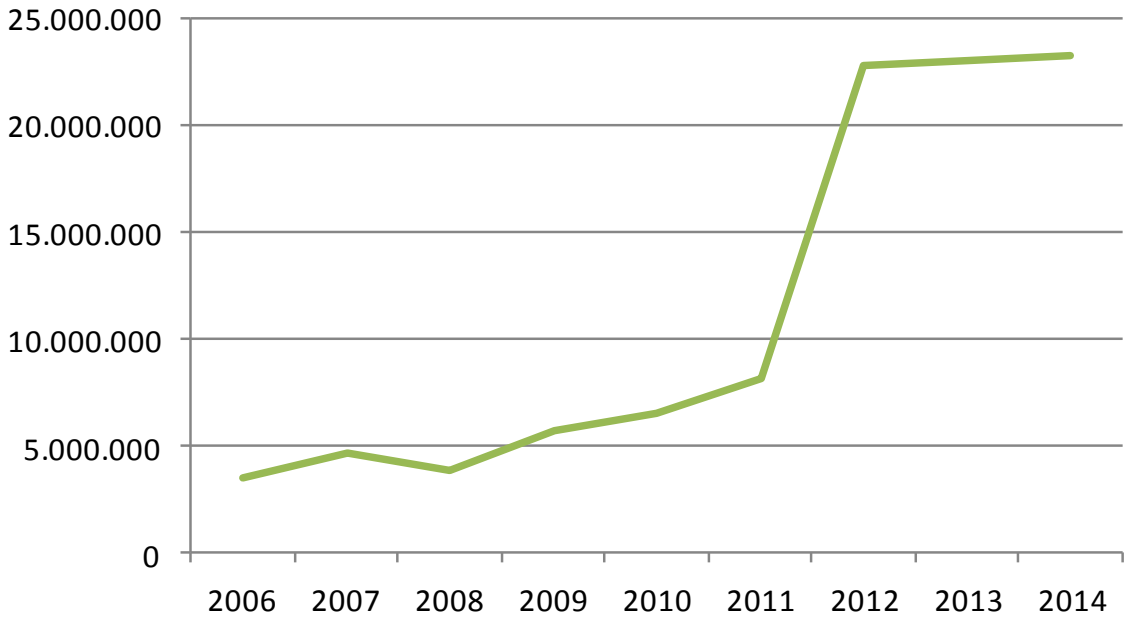

Figure 1: Legal aid budget
Note: Figures for 2013 onwards are projections

Not only is more money available for free legal aid after 2008. There is also an increasing trend in the number of legal aid cases as well as the people who benefit from legal aid. If we take 2006 as a baseline year, when approximately 6 000 beneficiaries received legal aid,[29] and compare to 2009, when there were 18 096 cases in which legal aid were provided to 20 096 beneficiaries, we see an increase of 235% in terms of number of beneficiaries. For 2010 legal aid was provided to 23 007 beneficiaries which is 283% increase compared to baseline year and 15% if 2009 is used for comparison. In 2011 there were 26 056 legal aid cases provided to 25 587 beneficiaries, which is an increase of 326% compared to 2006 and 11% compared to 2010. As for urgent legal aid, there were 1 500 decisions[30] for appointing lawyers for urgent legal aid in 2009, 1 835 in 2010 and 2 123 in 2011. Notably, the non-urgent legal aid cases increase at significantly faster pace than urgent legal aid (see Figure 2). This might be an indication that the urgent legal aid cases are somewhat limited in terms of numbers and fluctuations, mostly upwards, can be expected in the category of ordinary non-urgent legal aid. Another explanation could be the fact that arrested persons call their own lawyers and /or criminal investigation bodies continue calling other lawyers than those registered on duty lists or some of these lawyers simply do not use the official process of appointment of duty lawyers, acting as private lawyers and hence billing their clients. As explained below, increased awareness of beneficiaries and decision makers will inevitably create more and more demand. In addition, the anticipated enlargement to civil cases will add to the increase.

[29] According to the NLAC chairman.

[30] Some decisions contain the appointment of 2 or more lawyers or the appointment of one lawyer in 2 or more cases or the appointment of 1 lawyer for more beneficiaries in the same case, therefore one decision does not mean one case or one defendant.

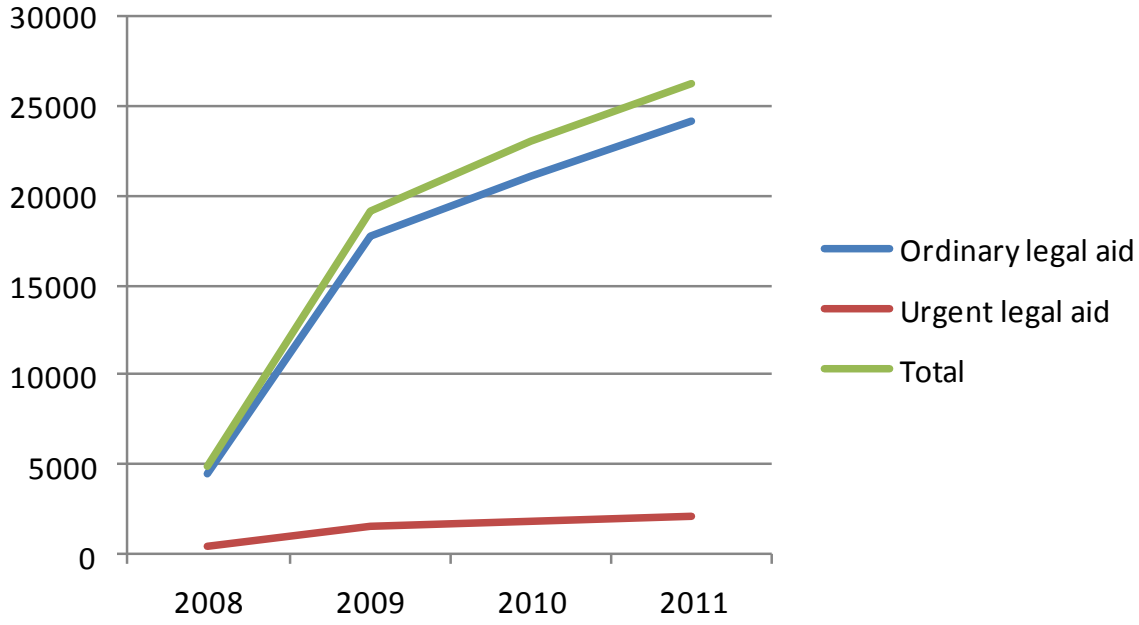

Figure 2: Number of legal aid cases

Another area of gradual increase is the number of lawyers who take part in the Moldovan legal aid system. In 2008 there were 267 lawyers eligible to provide legal aid (258 lawyers on request and 9 public defenders), 296 lawyers (277 lawyers on request and 19 public defenders) registered in 2009, 350 in 2010 (331 on lawyers request and 19 public defenders) and 508 in 2011 (501 lawyers on request and 7 public defenders). Apparently the initial problems to convince private lawyers of the potential and benefit of the new legal aid system are largely overcome. Shortage of legal aid lawyers is more visible in remote areas where in general the number of practicing lawyers is small. The shortage of lawyers outside Chişinău is an important constraint that the NLAC is facing, as it affects the possibility of NLAC to select adequate lawyers. Selection of lawyers is practically impossible in regions where with a small number of lawyers. In fact, there is little competition among lawyers except in Chişinău.[31]

> "Our main problems – we have enough lawyers in Chişinău, approximately 30 per district, in some districts we don't have enough lawyers (and they work – but have too many cases) or they do not want to work on legal aid. We can appoint lawyers from other districts – but the payment rules for transportation are very burdensome and they don't want to deal with this." [Interview with a coordinator of Territorial office]

What are the factors that contribute to the increased scope of legal aid? First of all, it is the new institutional framework which streamlines the process of management, appointment, payment and audit of publicly funded legal aid. Related reason is that the lawyers are more motivated to provide legal aid under LAA. Third, there is increased and improving awareness of the availability of legal aid.

> "Awareness about legal aid is increasing. Before it had a very bad reputation, now it is increasingly recognized that legal aid lawyers do some work actually. Even in court – judges say: "I cannot give you advice, but go to the legal aid lawyers" – so this referral is also evidence of trust." [Interview with a manager at NLAC]

[31] See also NLAC annual report for 2011, p. 11, referring to this issue.

Urgent legal aid reveals separate dynamics. Indeed, Figure 2 suggests that the increasing trend there is not as dramatic as in non-urgent legal aid. The fact of the matter is that for urgent legal aid (appointed in police stations) there is no means test. Using this liberal provision of LAA police and investigative officers are overly eager to have the legal aid lawyer present for all sorts of procedural actions even when the action itself cannot be classified as urgent. In different interviews we identified that criminal investigation officers (but also prosecutors) claim that CPC stipulates presence of lawyer at the pre-trial stage at various procedural actions, which do not fall under mandatory defence cases. For them these are the most difficult situations to deal with when the defendant does not want to or cannot call a lawyer on his/her own means. In such cases the criminal investigation authorities have to find a lawyer in order to carry out the respective procedural action. Aware that the means test procedure might be cumbersome and time-consuming, the authorities conducting the pre-trial investigation tend to call lawyers claiming the case is an urgent legal aid case, hence bypassing the procedures for appointing lawyers for ordinary legal aid. Thus police and investigative officers are overzealous to request legal aid lawyers far beyond the scope of mandatory legal aid.

According to some police officers and prosecutors we interviewed this practice guarantees better protection of the rights and entitlements of suspects and defendants. Lawyers have somewhat different opinion, claiming that criminal investigation authorities are driven not so much by the aspiration to ensure the access to criminal defence of the defendant, but to ensure they have a lawyer present in order to fulfil the requirement of the law for the respective procedural action. They often call the lawyer after the procedural action has in fact been carried out and expect the lawyer simply to sign the respective protocol. For example, one lawyer told us she was called for an arrest procedure during the night but was “kindly suggested” by the criminal investigator that she can come in the morning to sign the interview protocol. It should be noted here that by law, the lawyer has to be present and have a confidential discussion with the arrested person before the first police interview.

What is the motivation of police officers and/or prosecutors to advice detainees to exercise their right to legal assistance in urgent cases? From the evidence collected we can conjecture that the pre-trial authorities feel more secure about the further development of the investigation if there is a lawyer appointed from the very beginning. In that way they think there will be fewer grounds to challenge their actions and acts at later procedural stages.

Despite that such practices increase nominally the scope of legal aid delivered, not everyone agrees with their positive effect. The argument here is that in the legal aid domain the quantity should not trump quality. Lawyers believe that as long as they continue being requested for urgent legal aid, while this is an ordinary procedure, the criminal investigation authorities will keep working in a hectic way, without respecting the law regarding the notice to be given to the lawyer before a procedure action is carried out. Moreover, those lawyers who continue signing the protocols for actions carried out before they arrived or without being present at all are themselves infringing the rights of the defendants and undermine the credibility in the entire legal aid system and legal profession.

> “It was more difficult before because when we were on duty everyone - court, prosecutor, police – were calling that lawyer. We were taking part in 8-10 cases or procedural actions. It was especially difficult at the end of the month. Everyone was avoiding being on duty at the end of month. The state was not paying enough – 36 lei for one participation. Now it is easier. When we are on duty we participate only when the person is arrested, the rest – only if we are free. We have contract. So the duty service now is much better.” [Focus group interview]

Criminal Procedure Code needs to be analyzed, together with LAA. On the one hand, there is a long list of cases in which legal aid is mandatory at the pre-trial stage. On the other hand, there are numerous procedural activities in which the law requires the presence of a lawyer. A careful balance must be made between the need to guarantee fair trial and access to justice but also to make sure that the limited public resources are spent to provide legal aid where it most needed. In addition, when considering the balance, the Moldovan policy makers should take into consideration the 2008 ECHR Salduz rule which provides that access to a lawyer should be "practical and effective" from the first police interview of a suspect.

Means testing is an important pillar of the Moldovan system of legal aid.[32] It is difficult to estimate what proportion of the legal aid provided since the LAA took effect in 2008 was means tested. However, it is clear that indigence is the single category in which legal aid will expand since the mandatory and urgent cases (see above the discussion about urgent legal aid) are relatively limited and well defined in the law. In that respect indigence will play ever more important role in the functioning of the Moldovan legal aid system. According to interviewees, the broad interpretation of mandatory legal defence is detrimental to the overall legal aid system. Main concern here is that too many people receiving legal aid because it is mandatory means that there are other cases in which legal aid is not mandatory but might be much more important for the rights and interests of this defendant, the interests of justice as well of the society. Similar issues are the matters of means testing and own contribution which are discussed in detail below as well as in the Challenges section. Also the practice of diagnosis and triage calls for more flexible and merit-based approach to identification of cases and areas in which legal advice and legal representation matter the most.

At the moment of preparing the report there are significant challenges with regard to the regulation and implementation of the means test. Assessing the *de jure* and *de facto* level of deprivation of each and every individual who claims eligibility for legal aid on the ground of indigence is a daunting task. It was established that TOs do not have access to the databases of tax authorities to ascertain income and property. They also do not have the necessary human resources to verify even a small sample of the requests. As a result when deciding whether a person is eligible or not, they have to rely purely on declarations compiled and deposited by the applicants. Territorial office coordinators shared that sometimes it is apparent that the person claiming indigence can afford a lawyer but is simply misusing the administrative gap. Some interviewed lawyers, judges and prosecutors think that between 20%-50% of legal aid beneficiaries could in fact pay for legal aid, or at least partially. This inevitably leads to allocation of publicly funded legal aid to people who are not indigent and can afford legal advice and representation. Considering the limited resources available this means that others who actually cannot afford legal aid are excluded from benefiting from the system.

[32] Qualified legal aid is provided to persons whose average monthly income is lower than the minimum existence level per capita in the country. The Government nr. 1016 of 1 September 2008 regulation regarding the methodology for calculating the income for receiving legal aid regulates the methodology for calculating the income that qualifies a person to receive state guaranteed legal aid. According to the regulation, qualified legal aid is provided to persons whose average monthly income is lower than the minimum existence level per capita in the country. When calculating the average monthly income, the income for the past 6 months prior to the month in which the legal aid application was submitted are considered. The average monthly income is calculated from the monthly average income of the family to the number of family members. The amount of the minimum existence level is determined on the basis of National Bureau of Statistics data and is calculated according to the Regulation approved by Government decision nr. 902 of 28 August 2000. For the 3rd quarter of 2011 the average minimum level of existence was 1386.4 MDL (approximately $118 or 84.49 Euro (average exchange rate for 2011, according to National Bank data).

Despite the identified gaps and shortcomings of means testing, people engaged in the administration of the legal aid system are wary about reconsideration of the eligibility rules. Above it was mentioned that administrative and technological solutions (i.e. connection to the databases of tax authorities) are envisaged as a possible workaround. Other line of reasoning is the expansion of legal aid which is partially paid by the beneficiary (own contribution). The amount of own contribution should be based on estimation of income. Wider use of the own contribution model, however, is also contingent on the need to establish within certain degree of validity the actual level of need of each and every applicant for legal aid.

At the moment of preparing this assessment, the scope of the Moldovan legal aid system is mostly limited to criminal cases. The right to legal aid in non-criminal cases became effective on 1 January 2012 but these amendments are still in their embryonic phases and the report does not review them thoroughly. Traditionally legal aid originates in the imbalance of powers in criminal proceedings. However, numerous studies show that civil legal needs might be not less important for the people involved. Losing a job, family house, parental rights, welfare benefits or right to pension is as dramatic as being accused of committing a crime. Looking at the legal problems from the perspective of the people involved it is not difficult to see how important access to justice in the civil domain could be. A recent study showed that almost one in four Moldovans (22.8%) faced a serious and difficult to resolve non-criminal legal problem in the past 3.5 years. Only a small proportion of these problems ever reach the stage of professional advice or help. In that respect, the expansion of the legal aid system to civil law is a major challenge in terms of resources, organisation and outreach. The draft law for amending the LAA, submitted to the Parliament in late December 2011, provides for an increase in the categories of people that are eligible for legal aid irrespective of their level of income. The proposed categories include: persons who need urgent legal aid or mandatory representation / defence regulated in the Criminal Procedure Code and Civil Procedure Code; persons suspected of having committed a misdemeanour for which administrative arrest can be applied; persons who might be extradited following a misdemeanour procedures; persons for whom is requested to replace community work or fine with deprivation of liberty; persons who have benefitted in the past 6 months from social aid. It is commendable that the list of persons eligible for legal aid without a means test is increasing. One needs, however, to evaluate whether this increase is sustainable, especially when corroborated with the provisions regarding mandatory legal representation / defence.

The same draft law for amending LAA provides the following reasons for refusing a request for appointing a lawyer in non-criminal cases: the request results from the applicant's commercial activity; the value of the claim is less than the minimum existence level calculated according to the Government's approved methodology; claims for damages for defamation; the request relates to the payment of taxes in other cases than when the applicant is a defendant in the respective proceedings; the request refers to a breach of neighbouring rights, except when it relates to removing the danger of a falling or collapsing construction, disputes over borders and distance between building. The current law also provides the following four reasons for refusing the granting of qualified legal aid: the request for legal aid is manifestly ill-founded; the applicant doesn't have the right whose protection is required, which results from the presented documents; the claim's value is considerably lower than the legal aid costs; the applicant has the possibility to cover the legal aid costs from his/her property, except what cannot be taken into account according to the law.

Perhaps one cannot judge at the moment if the criteria provided by the law and the proposed draft are sufficiently elaborated to ensure that the most needy get legal aid and that the state can afford to meet the existing needs for legal aid. It seems that NLAC has so far chosen the strategy of not raising awareness about non-criminal legal aid, so that the TO do not get flooded with legal aid applications (see below the Awareness raising section in Policy recommendations). The draft law is not yet approved by the Parliament. What is clear is that NLAC and its TOs need to careful analyse the available data and assess whether further limitations or, on the contrary, increase of filters to non-criminal legal aid is needed. For instance, the abovementioned survey of civil and administrative legal needs shows that the disputes between neighbours are the most frequently occurring problems. Family related problems, consumer disputes and land related disagreements are other categories which people experience frequently in their everyday life. Poor people report more family problems. Also people from rural areas (which also tend to be poorer on average) report more frequently problems related to land disputes, family problems and claiming of welfare benefits. About thirty percent of the people who reported experience with a serious and difficult to resolve problem did not look for any sort of legal assistance. Findings like these might significantly enlighten the development of the Moldovan legal aid system.

5.2. Political ownership and institutional framework

One of the most credible achievements of LAA is the established institutional framework for organising, budgeting, planning and controlling the legal aid system in Moldova. In contrast with the situation before the law in 2011 the legal aid system has well defined organizational structure and shared responsibilities. Most importantly, there is political leadership and ownership over the legal aid system. NLAC is an institution whose core mission is to guarantee the accessibility of high quality legal aid in Moldova. NLAC proposes the budget, collects supply and demand data and takes care about the administration and delivery of publicly funded legal services. Before 2008 there was no political ownership. In a sense, the legal aid system was collectively managed by different institutions, all of them trying to avoid responsibility. Under LAA it is clear who is to credit for the successes and who is to blame for the failures of the legal aid system. Therefore, the vested political ownership, understood as involvement in and responsibility for access to justice in Moldova, is one of the most significant and tangible achievements of the reform introduced by LAA.

However, NLAC has two major deficiencies since its establishment, namely it has no administration to properly implement its functions. Second, paradoxically, NLAC members do not receive remuneration for the work they do. In a way they perform their functions on altruistic basis.

Despite these limitations, to date NLAC has performed many of the tasks LAA entrusted it with. The members seem to have taken their job seriously. For instance, during the first year of its existence the NLAC gathered for 20 meetings. According to LAA the Council has to meet 4 times per year at minimum. In 2009 there were 12 meetings, in 2010 and 2011 – 7 meetings each year. During the interviews we also detected innovative solutions to the existing challenges. A manager from the NLAC shared that one of the strategies to cope with the administrative deficiencies is to “use” administrative support from the Chişinău territorial office. As much as such an arrangement is innovative, it also indicates gaps with the administrative capacity of the Moldovan legal aid system. Such gaps inevitably affect its performance and reliability.

Although being *de facto* volunteers, the NLAC members demonstrate high level of commitment. This ensures that in the long term NLAC will not be perceived as dependent or

biased organization. However, the voluntarism can be a challenge for the continuity and stability of the organization that manages the overall legal aid system in Moldova. One also has to take into account the significant contribution that SFM provided to NLAC by supporting its chairman, extending symbolic fees to the members and support for TOs. In addition, other development agencies provided different type of support to the new legal aid system, varying from assistance with drafting legal aid regulations to supporting specialised public defenders to provide legal aid to juvenile offenders. It is questionable if the system would have achieved the results it obtained so far without this external support. However, for the system to further develop and cope with the current and new challenges, the administrative capacity of NLAC has to be strengthened.

Apart of the fact that more people benefit from legal aid and the fact that the interests of justice are better ensured, there is another important institutional effect. The current system provides transparency with regard to duties and responsibilities. Before 2008, the appointment of *ex officio* lawyers caused significant problems for all institutional and individual actors involved – police, prosecution, courts, Bar Council, attorneys and most of all – people who need legal advice and representation. LAA brought certainty and predictability to the legal aid system.

> "From the criminal investigation officers' perspective they are freer now – if before 2008 they needed a lawyer for the defendant and no one wanted to come, they could not do anything, sometimes had documents signed before. Now, they know that if the office is not providing a lawyer, it is not their problem but it is already our, the system's problem. So the mechanism of appointment was improved." [Interview with a manager at NLAC]

TOs are the second tier in the administration of the legal aid policy. Just like NLAC, people from TOs complained they are understaffed and have to deal with many outstanding challenges. For instance, the office in Chişinău is responsible for 16 districts but had only one coordinator, four consultants and one accountant until mid 2011. Besides, TO Chişinău has carried out several functions and activities related to the organization of the entire system, not only limited to their area of jurisdiction. It should be noted that particularly the Chişinău TO is overloaded with demand which outpaces its administrative capacity. Nevertheless, TOs have crucial role for the functioning of the overall legal aid system.

> "Lawyer's participation in the case is very strictly regulated, hence we need to ensure the proper conditions for this – at least formally the criminal investigation bodies/judges are very strict regarding the lawyer's participation." [Interview with a coordinator of Territorial office]

> "The new [legal aid system] is better as we can call any moment of the day and night and find a lawyer." [Focus group interview]

Every three months TOs submit reports or brief information notes to NLAC regarding the amount of legal aid appointed, monitored and paid. According to NLAC's annual activity report for 2011, 5 coordinators and 12 consultants have processed legal aid applications of 27 587 persons, which included receipt of applications, verification of means, appointment of lawyers, communication of the decision, monitoring and verifying the lawyer's activity report and approval of the payment. These requests concerned only criminal cases. It is important to note that the majority of criminal cases fall under mandatory defence provisions and hence the means test is not verified in these cases. With the entry into force of non-criminal legal aid since 1 January 2012, one needs to carefully assess the capacity of the system to

respond to the new challenges, which at minimum will include such new functions as determining the eligibility according to the means and merits tests.

5.3. Legal aid policy

The Ministry of Justice is the main policy maker in the field of access to justice. This distribution of authorities is based on LAA provisions, which left the policy making functions to the MoJ and established NLAC as policy implementation authority. NLAC has direct access to the Government and the Parliament through their annual activity reports, but so far this seems to be rather nominal function.

Government seems committed to legal aid, judging from the allocated annual budgets and the main policy documents. In particular, relevant provisions are included in the Government program for 2011-2014; National development strategy for 2008-2011; National Human Rights Action Plan for 2011 -2014 and Strategy for Justice Sector Reform for 2011 – 2016.

> "Legal aid is on our agenda – Government program, justice reform strategy, so we consider this an important area." [Interview with a senior official from Ministry of Justice]

In practice, it seems that the MoJ support to NLAC has varied. Judging from the way the LAA was implemented; preparatory actions for implementing the law were taken with some delay, leading to delays in implementing the law back in 2008. Afterwards, an active period during late 2008 and 2009 followed when most of the regulations were adopted and several awareness raising initiatives were carried out. This period was followed again by a less active one in late 2009 – mid 2011.

At the same time, MoJ relies heavily on NLAC proposals for relevant legal aid policies. At the same time, NLAC, in its current format, does not have sufficient resources to formulate policies and initiate actions. Therefore, on its turn NLAC is reliant on MoJ's initiative and action. For example, a working group for amending the legal framework regarding provision of legal aid in non-criminal cases was established recently on 21 September 2011. The proposals were submitted to Parliament only late December 2011. No wonder, when interviews were conducted for this assessment (August 2011) the TO personnel, lawyers and even NLAC representatives were quite worried about 1 January 2012, when legal aid in non-criminal cases came into force. Very few preparatory actions have been taken prior to the entry into force of provisions regarding non-criminal legal aid.

In the overall legal system NLAC is perceived as an organization which takes the credit for the success as well as the responsibility for the failures of legal aid. NLAC is institutionally committed to the cause of access to justice. Even though it is still a new and somewhat weak institution it is obvious that NLAC is leading the legal aid agenda. But, it does seem to need more support from MoJ and the Government:

> "It seems legal aid is not yet on the top priority, but we hope to be on the process. It could be that they decide to postpone the entrance into force of the law. If all preparations will not be done till December then there is a possibility to postpone the law, but it would not be a very smart thing to do in case the minimum preparations are done. I think we are an important part of the justice system and need to be within the track of the current reform in the justice system. "[Interview with a manager at NLAC]

Perhaps in the longer term NLAC will not need as much support from the MoJ, but as long as this is an institution run by non-salaried members and not equipped with administrative staff, at this moment the MoJ input has to be much more substantive. Even when NLAC becomes a fully functional body and most of the access to justice policies are initiated and/or

formulated by MoJ, NLAC will have to build capacity and develop resources for effective policy work as it is difficult to imagine that the policy implementation agency will be separated from the process of policy making.

5.4. Process of appointment of legal aid lawyers

The process of selection and appointment of legal aid lawyers in a particular case bears massive importance for the interests of the clients but also for the interests of justice. With the implementation of LAA this process has been significantly streamlined. The decision making has been clearly outlined in the law and most of the participants in the system know how it works.

For a lawyer to provide legal aid, s/he must apply to NLAC, which reviews the applications on a ongoing basis. The lawyer must submit the following documents: a request to participate in the provision of legal aid, a copy of his/her identity papers and a copy of his/her lawyer's licence. These are very easy conditions to be met, so that virtually every candidate is accepted. This system of almost guaranteed acceptance was chosen to ensure that sufficient number of lawyers join the system, as the lawyers were initially resistant to the new system and boycotted it for the first several months. NLAC can change the criteria and conditions for selection should the system generate sufficient number and diversity of providers. Urgent legal aid is provided by duty lawyers, who are legal aid lawyers that agree to apply to be listed in the list of duty lawyers, drawn by TOs for each region/sector (court jurisdiction) on a monthly basis. Public defenders are required to provide urgent legal aid, all other lawyers only if they wish to take part in the duty lawyers' roaster.

The stakeholders in the legal aid system seem to know the new procedures, to a varying degree. Although their perception regarding the effectiveness of the new procedures differs, one seems to be common for all, namely that the process is more organized than before 2008.

> "For instance at 9am I was called by the Territorial Office coordinator – they tell us who the investigator is and who is defendant. I take the power of attorney and I go to the commissariat. First, I get to know the client and I ask if the qualification of the case is the correct one, then I have a confidential meeting with the client. They tell me the case – if they are willing to talk (many clients think if the police called then it is a police lawyer and are not willing to talk honestly). Then I get acquainted with the documents that exist. Next my client is interrogated. Then I leave my business card to the client – they rarely call. Then there is a decision about my appointment on the case. When the case is finished – we make the report about what we have done on the case." [Interview with private lawyers participating in the National register for legal aid providers]

> "Not a big difference, only that it is much more organized. No chaos as it used to be. There are lists." [Interview with a prosecutor]

> "The new [legal aid system] one is much more organized and there is an account for what is happening, we as lawyers are required to do more; to be more responsible for our clients; we are waiting for 2012 to be able to do non-criminal legal aid." [Focus group interview]

> "For urgent legal aid it is very easy, while for ordinary legal aid the procedure is too complex, forms – what they need legal aid for, if you made a mistake, then it is difficult. Faxes are not available." [Interview with a prosecutor]

> "The difficulty is that the TO asks for information on the financial status of the person, but the judge cannot provide this, there is no information on the case file. There were cases

when the request for a lawyer was refused. But it is not clear what body can demonstrate about the financial status of the person. This would take too long. The judge would have to ask for information from the cadastral bodies etc., because there is no access to the database. Until I send requests and get the response, it takes too long. And we need to give the lawyer at least 5 days notice before coming. So, the law is good but the modality to verify the financial status is not very good." [Interview with a judge]

Another challenge noted by some lawyers relates to the lack of effective cooperation among TOs, Courts of appeals and the Supreme Court as well as problematic procedures at these courts. These courts usually hear many cases in the same day and request the appointment of lawyers without checking if the defendant on the case has a private lawyer or not. As a result, it happens that legal aid lawyers are appointed and when appear in court there is a private lawyer already present. Public resources are wasted because the legal aid lawyer has been already appointed and has to be paid. Although LAA states the principle of continuity of legal aid, this does not seem to be followed in every case. Because of the way in which payment rules are designed, legal aid lawyers are not sufficiently motivated to carry out the case until the end and hence are usually representing clients by procedural stages. Needless to say, changes of lawyers are not serving well the interests of the clients but also affect negatively the process of delivery of justice. This is another example how suboptimal regulation might lead to ineffective provision of legal aid services.

5.5. Quality of legal aid

Quality of legal services is difficult to measure and assess. One of the biggest questions of the assessment of the implementation of LAA is to what extent it has impacted the quality of the legal services. From the perspective of the people who are entitled to legal aid the three important aspects are accessibility, affordability and quality. If we think of the interests of justice, it is the quality of legal advice and representation that matters most.

The data that we collected for the purposes of this assessment is not unambiguous with regards to the quality question. Some actors think that the quality has improved; others maintain the position that there is no significant change as compared to the previous regime.

Those who maintain that the quality has improved bring forward several arguments. First, it is alleged that the current system employs control mechanisms that reinforce quality of legal aid.

"…in relation to their clients the legal aid lawyers are now more responsible as they know that there is someone who is checking them. Some lawyers have taken the case file model from the public defenders and follow them. Compared to the previous system now there is much more responsibility." [Interview with a manager at NLAC]

"Very much, as in the old system even when there were reasons to lodge an appeal – they didn't lodge an appeal, even if it was meritorious. Now they are using all prospects – they are much more active." [Interview with a senior official from Ministry of Justice]

"A good lawyer was good in the old and the new system, but the LAA made it possible that the majority of lawyers started being more responsible to the client. Why? For example, in the old system I was receiving very little per day and it did not matter how many actions per case. In the current system, each procedural action is paid and the lawyer is interested to do all these actions so that he can do the case file and prove that he did the work. Only if he proves what he has done he will receive money. And the money is a bit more than previously. Plus, the lawyers now know that they might be checked and hence they are more responsible. This system has disciplined the criminal

investigation officer too, as they don't know what lawyer might come and might challenge, hence they need to be more careful." [Interview with the public defenders]

In the previous system there was little documentation to ascertain the quality of legal aid. After the implementation of LAA the territorial legal aid offices require the participating attorneys to collect and present information about their services. Understandably this practice is not met with a lot of enthusiasm by the lawyers, although others are content with the system.

"Lots of time is wasted on preparing papers and reporting a simple case, i.e. for 500 lei. After each procedural action – I have to write down in the register, then I write them in the report at the end of the month." [Interview with private lawyers participating in the National register for legal aid providers]

"Today's system is more ordered. As a result, the work for the lawyer is also not that chaotic. Reporting does not take time, but if you are well organized, it is really easy. I usually fill in this report immediately after I do the procedural action. If you are disciplined – then it is really easy." [Interview with a private lawyer participating in the National register for legal aid providers]

NLAC had adopted a series of templates to be used by the legal aid providers, such as the registry of services and the models for reports for qualified and urgent legal aid. NLAC adopted at the end of 2009 the concept for monitoring the quality of state guaranteed legal aid, based on which the Territorial Offices monitor the quality of providers within their jurisdiction. For the time being the quality is monitored by TO exclusively based on reports prepared and presented by the providers of legal aid.

There is some ex-ante quality control functions related to the lists of providers. At this stage, purposefully the lists are not really used as a filter to select good providers.

"Our strategy – we get everyone and then we see what we do with them." [Interview with a coordinator of Territorial office]

NLAC can also receive complaints regarding legal aid. Complaints regarding the quality of legal assistance have to be forwarded to the Bar for initiation of a disciplinary procedure. So far this does not seem to be an effective mechanism.

More thorough quality monitoring mechanisms are needed. NLAC itself acknowledges in its annual 2011 report that the quality of legal aid provided by legal aid lawyers is below the NLAC expectations. At the same time, NLAC cannot do much without Bar's involvement. As long as there are no standards for legal assistance adopted by the Bar and effective quality assurance mechanisms within the Bar, it is extremely challenging to work on quality of legal aid. In 2011 the Soros Foundation Moldova together with NLAC and the Chişinău Bar carried out a project for testing a peer review model in Moldova. In a nutshell, the idea of peer review quality mechanism is that the work of lawyers is checked by other lawyers – independent but also knowledgeable and experienced in the subject matter. The project concluded that the peer review model is applicable for Moldova and recommends that the Bar and NLAC consider it for implementation in criminal legal aid cases. At the moment of completion of this report, however, the peer-review model, as well as other elaborated schemes to ascertain the quality of legal services, is still to be developed and implemented in Moldova.

"What we do so far is only an administrative, document, financing control. We cannot do quality control – peer review is being developed now by the Soros Foundation Moldova and the Bar." [Interview with a coordinator of Territorial office]

Of course, better quality of legal aid means more prepared active, assertive and aggressive lawyers. This is what guarantees the rights and interests of the user of legal aid as well as the interests of justice. For police officers and investigators such an activity, however, might mean more work to investigate and prove rather than rely on self-evidence. Therefore the quality of legal aid might have different connotation for the different actors of the criminal justice system.

> "If the criminal investigation body complaints about the lawyer, this means s/he is good. This is one indicator. And we already have requests from criminal investigators not to assign a public defender, which indicates about the quality of the public defenders." [Interview with a coordinator of Territorial office]

5.6. Remuneration

Everywhere in the world, legal aid work is less lucrative than private work. However, the previous system with its cap of 160 lei per day was obviously not motivating even for the most enthusiastic lawyers. Certainly, under LAA there is still quite a gap between the tariffs paid by the state and the private market tariffs. However, there are improvements in several dimensions. First, under the current regime the cap has been set at 200 lei. In some circumstances (i.e. more up to 5 cases per day) the cap can be even exceeded.

Second, the process of disbursing the due legal fees has improved which is believed to have a motivating effect on the lawyers. A direct consequence of the redesigned processes is that now legal aid lawyers are less reliant on other institutional actors as it comes to receiving their fees.

When asked why private lawyers engage with legal aid, the responses mostly referred to the stability of the source and the possibility for getting experience.

> "It is a stable source and a good way to accumulate experience." [Interview with a private lawyer participating in the National register for legal aid providers]

> "I was always serious towards legal aid provision, but now they [Territorial office] request more paper. No lawyer has left the system because of the monitoring. The lawyers need this legal aid because it is still some payment." [Focus group interview]

A negative side of the increased accountability is the presence of bureaucracy. Lawyers participating in the legal aid scheme complained about burdening bureaucratic procedures. Some shared that they were not used to fill in forms to ascertain the type and amount of work. For some lawyers this is still a problem; others shared that they are getting used to the idea of reporting.

> "Payment procedure for lawyers has improved, making them more independent: now they don't need anyone's signature, they present the reports under their responsibility. From the adversarial perspective – the lawyer is not dependent anymore on the investigators / prosecutors / judges." [Interview with a manager at NLAC]

> "In legal aid cases – they are paid a more or less a fair amount, compared to the previous system, but even now, compared to the private practitioners legal aid work brings less." [Interview with a senior official from Ministry of Justice]

Although remuneration has increased in general and procedures became easier for lawyers, the providers of legal aid are still not satisfied with the rules for legal remuneration as these do not cover, in their view, all procedural actions that would ensure an effective defence for the client. For example, only a maximum of five meetings with the detained client per case

are covered. The waiting time, according to lawyers, is often cut by the TO when reports are being presented.

> "Most often the Territorial Offices cut off waiting time from the lawyers' reports – i.e. 3 hours at Appeal. In the court protocol there is no note about the time – when the hearing started and ended. TO cut the waiting time from the reports, although it is included in the regulation." [Interview with private lawyers participating in the National register for legal aid providers]

Many lawyers complained that the travel compensation rules are too bureaucratic and inadequate, which practically means that the lawyers are not really claiming travel expenses. This, in turn, raises questions about the services provided by legal aid lawyers, for instance when the lawyers visit their clients in detention centres or are limiting travel time to the minimum due to compensation concerns.

Above it was discussed that one of the major failures of the previous system of guaranteed state funded legal aid was the dependence between lawyers and appointing authorities, namely police officers and prosecutors and the phenomenon of "pocket lawyers", that is lawyers who work in some form of cooperation with appointing authorities.[33] This practice undermined the integrity of the criminal investigation and was an obvious challenge to the principles of fair trial, equality of arms and the right to competent legal advice. With the adoption of LAA and its implementation, the linkage between criminal investigation bodies and legal aid lawyers was halted to a significant extent. A senior NLAC manager deems this as the most valuable achievement of LAA:

> "[The biggest achievement is that] the link was broken between the *ex officio* lawyer and the criminal investigation officer."
>
> "Now there is no dependency between legal aid lawyers and criminal investigation body/courts, only we are responsible for appointment." [Interview with a coordinator of Territorial office]

5.7. Accountability

In the current system one of the roles of TOs is to monitor the quality and to make sure that all participants in the legal aid system follow the rules. Especially important is the role of TOs with regard to controlling the work declared by lawyers. Inevitably there are controversies involved in the exercise of this type of control. Independence is one of the most coveted characteristics of the legal profession. On the other hand, in the case of legal aid public money are being spent and the interests of the justice are at hand.

Many of the interviewed lawyers explained how the accountability mechanisms functions. Understandably there were tensions between the principles of independence and accountability.

> "In 2009 in the beginning they were afraid, but now they understood the limits and that we only look at how they keep the contract requirements and the law, hence they got used to this." [Interview with a coordinator of Territorial office]
>
> "According to the new system you can see more what the lawyer actually does on the case. For this reason lawyers are more careful about what they do on a case and

[33] For example lawyers that could be called any time by criminal investigation bodies to certify a certain protocol, although they were not present at the respective procedural action. The lawyers agreed to do such "favours" to the criminal investigation bodies in order to receive further appointments.

later on report and claim money for." [Interview with a private lawyer participating in the National register for legal aid providers]

Some lawyers complained that the procedures are redundant, for example they have to write what they do every day in the registry for legal services and then again copy the same actions, classified per each case, when they submit the reports to be paid per case. This seems to serve the purpose of verifying that the lawyer does not "invent" actions in the report for payment. This report can be checked by the TO by comparing the reports on individual cases and the actions listed in the registry. At the same time, it is questionable if this is the most effective way of ensuring lawyer's correct and valid reporting, since this system does not give any guarantee against over-reporting activities once these are properly registered in both the register and the report. The current system for monitoring the scope of work achieves certainly one thing – it makes sure that a lawyer cannot report more that what is physically possible to do within one day.

From the perspective of TOs the issue of accountability takes the form of monitoring the quality of the provided legal services. In the Territorial offices there is a list of indicators for quality monitoring and assurance.

> "We are constantly monitoring the delivery of services; we are verifying the quality - every 3 months we are asking from the lawyer – 3 cases from the criminal investigation stage, 3 from court phase; we are particularly keen on verifying if the lawyer has a case file for the client. The problem is that not all lawyers have these files! By law they are required to keep files, but there are no standards about what a defence file is, hence quality is very different. We are recommending them to look at the PDO case file." [Interview with a coordinator of Territorial office]

5.8. Diversity of providers

In terms of provision of legal services LAA goes beyond the traditional model of services provided exclusively by members of the Bar. For instance, the legal institute of primary legal aid allows paralegals to provide certain services. LAA defines that a paralegal is "a person who is respected by the local community, with incomplete legal studies or completed higher education studies, who does not practice as a qualified lawyer and who, after a special training, is qualified to provide primary legal assistance to members of the community from the budget allocated for state guaranteed legal aid, according to a regulation on the status and qualifications of paralegals".[34] Until the end of 2011 there were 30 paralegals who were trained and supported to provide legal aid in 30 communities within the framework of the project "Improving Good Governance in Moldova through Increased Public Participation", implemented by Soros Foundation – Moldova (SFM) with the financial support of the Swedish Government in the timeframe covering December 2009 – 31 January 2012). The project was carried out in partnership with the Ministry of Justice, the Ministry of Labour, Social Protection and Family and the National Legal Aid Council. Paralegals are provided in several policy documents and it is hoped that they will be continued in the future. From the interviews for this report, it seems that paralegal services are necessary in Moldova, in particular in areas outside of Chişinău and other bigger towns, where there are significantly fewer lawyers and specialised NGOs that might provide legal advice.

LAA also provides that NGOs can provide primary legal aid and qualified legal aid in non-criminal cases. However, to date there has been no mechanism developed for engaging NGOs in the legal aid system. It is an issue on the NLAC's agenda.

[34] Art. 2, LAA

For qualified legal aid LAA also provides an important innovation for the Moldova legal services landscape, namely the introduction of public defenders. The law defines a public defender as a person who has qualified as a lawyer according to the Law on Bar and was admitted to provide legal aid on the basis of special admission criteria. For acting as public defenders, they receive a fixed monthly remuneration from the relevant TO. Public defenders' activity is also regulated by the regulation for public defenders adopted by NLAC. All public defenders are requested to provide urgent legal aid.

There is only one Public Defender Office (PDO) in Chişinău, established in 2006 with the support of SFM. The PDO opened with 4 lawyers, had 9 lawyers during 2008 – 2009 and since then employs 7 lawyers. Until 2012, the PDO was paid for by public and private funds: office maintenance and rent were covered by the legal aid budget, while the lawyers' honoraria were paid by SFM. In 2009 – 2010 there were other 10 public defenders specialized in juvenile cases. They were supported by UNICEF-Moldova and worked for approximately one year, when the funding was stopped.

Although the number of the public defenders was very small compared to the private Bar, the PDO had a special role in the legal aid reform. In fact, the PDO was opened prior to the adoption of LAA and served as a pilot office. The main idea behind the opening of the PDO was to try a new model of delivery, bringing together a few lawyers who share similar values and standards for defence, placing quality of representation as the main goal of the office. In addition, the office had the role to develop standards for effective defence and try them in the Moldovan context. Criminal defence practice in Moldova has been dominated by solo practitioners who depended to a large extent on the system. Besides, active defence has not been a tradition in the Moldovan Bar and lawyers had always had a weak position in the criminal justice system.

The PDO has proved as a viable and necessary model for Moldova in terms of quality. To date the public defender office has integrated well in the justice system. The public defenders are well respected in the respective districts for their professionalism towards clients and other justice stakeholders. The justice actors, particularly criminal investigators, are significantly more careful regarding the procedures when they know that a public defender is appointed on the case. A proof of this is the few instances when the TO was particularly asked to appoint any lawyer but a public defender.

The clients' feedback regarding the services of the public defenders is positive or very positive. The office has consistently applied various practices in order to ensure an effective defence to their clients. For example, the public defenders consistently insist on a private meeting with the client before the first police interrogation; they insist on having sufficient time for preparing the defence and demand that the law enforcement agencies and courts respect the terms provided by law. The PDO treats all clients with respect and tries to represent the client holistically, addressing the other needs that brought the client to the system rather than only the criminal case aspects.

> "[Why do you think the Government should pay the PDO] We provide high quality representation to our clients. ... All public defenders got used to write up their motions, their list of evidence, their closing arguments. For example in one case, the PG annulled the decision of the Prosecutor General's deputy, due to the lawyer's very well drafted motion. ... We have filed numerous complaints for the criminal investigation officers to follow the rules. In the sectors we work the police officers know that one of the lawyers can come from this office and complain if the procedure is not followed, so they are more careful; the quality of the documents of criminal investigation bodies has increased as well. … We are a reliable source of information

for the NLAC about the system's problems and possible solutions etc." [Interview with the public defenders]

The PDO represented mainly criminal defendants. However, in certain types of cases, the office lawyers also represented victims, i.e. victims of police ill-treatment. The public defenders represented several clients who were victims of the April 2009 events in Moldova.[35] As a matter of experiment before provisions regarding non-criminal legal aid entered into force, the PDO lawyers provided legal aid in civil or family matters. The data from this experiment were presented to the Chişinău TO for analysis.

Besides the work with individual clients, the PDO addresses systemic issues related to the legal aid delivery and criminal justice system in Moldova. Hence, it is the first law office in Moldova that has developed standards of defence and integrated a quality management system within its operation. Five lawyers of the office were involved in developing a peer review system as a quality assurance mechanism for services provided by lawyers in Moldova. Regarding their criminal defence practice, public defenders periodically organize meetings with the relevant stakeholders (Ministry of Interior / police, Prosecutor General Office / prosecution, Supreme Court of Justice, Supreme Council of Magistrates / judges, Ministry of Justice) presenting proposals on overcoming systemic barriers towards effective defence in Moldova.

The PDO practice was used for developing the regulation for legal aid remuneration and their internal practices were used for developing the quality monitoring concept by NLAC. Due to lack of standards for defence within the Moldovan Bar, TOs usually recommend the private lawyers to look at the PDO Manual. Similarly, the templates developed by the public defenders for defence case files are adapted by many private lawyers from the PDO.

The managers at NLAC and TOs are positive about PDO's advantages. Most important advantage is that for the PDO lawyers the legal aid cases are primary business. Unlike many other lawyers, those working in the PDO do not see the legal aid work as distraction.

> "It is recommendable to organize more PDOs so that lawyers can only work for legal aid and not mix private and legal aid cases." [Interview with the public defenders]

It took 4 years since the LAA was adopted until the Government allocated funds for the PDO lawyers from January 2012. It is a significant achievement of the LAA. However, it needs further monitoring and improvement in order to make the PDO model a sustainable one for Moldova. The budget so far provides only for fees for the lawyers and no office management costs. The funding is conditioned by the number of cases processed by the PDO lawyers, which do not cover any public interest activities of the PDO. The public defenders are receiving a fixed honorarium that is comparable to the other justice sector actors, but no social guarantees and other benefits characteristic to justice sector actors apply to the public defenders. If the principles for state financing of the PDO remain the same, the office needs to fundraise for additional funding and resources for fulfilling its mission entirely. Otherwise, there is a risk of focusing too much on quantity and a risk of burn out from routine.

[35] On 7 April 2009 violent protests against the alleged forged elections took place in Chişinău. During these protests, the buildings of the Parliament and of the Presidency were seriously damaged and many policemen were wounded. Between 7 and 9 April 2009, more than 600 persons were arrested by the police over the course of several days, through brief judicial proceedings. Many of those arrested complained of being savagely beaten and denied justice.

6. Outstanding challenges

6.1. Quality of legal aid

Despite the established institutional mechanisms for planning, disbursement and auditing, there are plenty of concerns about the quality of the legal aid services funded by the state. Indeed, the primary challenge for the new institutional framework for the first 2-3 years after LAA was adopted was to ensure that the institutional and service provision framework is operational. A lot of energy and resources were spent to ensure that people who need legal aid in the most pressing cases (i.e. urgent legal aid and criminal proceedings requiring mandatory legal assistance) and indigent people that cannot afford a lawyer in criminal proceedings will be assigned legal aid lawyer in due course. In the stride to reform thoroughly the legal aid system, quality was less of an issue. This does not mean that quality of publicly funded legal services was and is not a priority for the institutions and people managing the system. As one TO manager shared with us, the first two years the main priority was to make sure that there are sufficient lawyers to meet the demand. Now, when the system is more or less stable, the focus shifts from existence of a structure to quality.

There are different views about quality after 2008.

> "There seems to be the same lawyers at the pre-trial stage, sort of friends with the criminal investigation body. And when I see these friendly relations, I have doubts that the assistance is very qualitative. This was more during the old system. The lawyer signs that there are no requests at the end of the criminal investigation. S/he did that not to worsen the relation with the criminal investigation body. And then the lawyer submits all sorts of requests in the court. We accept this, but then the problem of evidence appears: which to believe, how to check etc. It is a problem that the defence lawyer did not ask for some procedural actions, eg crime scene examination, new evidence, to be done at pre-trial. After a long time they can ask this in court but it is already late." [Interview with a judge]

> "If the lawyer does not do a good job, the client he knows where he can come to complain. The lawyers are more responsible". [Interview with a private lawyer participating in the National register for legal aid providers]

> "Actually for us it is easier to work with legal aid lawyers because they are not getting so much into the details of the case; so the difference between private and legal aid lawyers is big; the legal aid lawyers are actually there for formality. But actually – there are also good legal aid lawyers. In the end of the day it really depends on the person." [Interview with a prosecutor]

> "There are legal aid lawyers that are doing a very good job – but they are few. When they are well paid, their performance is much better. When they appear on legal aid cases, they are much less motivated." [Interview with a prosecutor]

> "For more profitable defendants, the lawyer is more active. For minor cases and vulnerable defendant – the lawyer is less active… But, we had private lawyers that were also not very active and the client refused and asked for a legal aid lawyer. Such cases are rarer but still there are such cases" [Interview with a judge]

Good professional work of a defence lawyer might mean more work for the pre-trial or prosecutorial authorities. In the words of a manager of the legal aid system: "if police officers and investigators are complaining about the lawyer, this is a sign that this lawyer is doing a

good job". Therefore the issue of quality should be viewed as objectively as possible and accounting for the possible institutional biases.

Still the remuneration of legal aid is lagging massively behind the fees charged on the private market. For some lawyers this remuneration might not be sufficient motivation for a qualitative work. One might expect that when lawyers are being paid differently for the same type of work there will be a differentiation. Practicing lawyers but also other actors from the justice system seem to be in an agreement that the legal aid work is paid significantly lower than the comparable private work. Inevitably less payment is affecting the motivation for providing high quality legal advice. At the same time, according to some of the people to whom we spoke money is relatively limited motivational factor for some lawyers who take part in the legal aid system. According to some the actual incentive to work on publicly funded cases is 1) the opportunity for young and/or inexperienced lawyers to accumulate experience and 2) the prospect to build a clientele base. Even more cynical view is that a small proportion of legal aid lawyers use the system to charge both the legal aid system and the client.

> "Of course still the private lawyers are more qualified and legal aid is not paid good enough. Lawyers for legal aid are still not very interested." [Interview with a prosecutor]

> "The lawyers also when they come, they ask – "Do you have money for a contract?" If not – he might give up and can refuse to continue with the legal aid." [Interview with private lawyers participating in the National register for legal aid providers]

> "100 lei for interrogation – for some this is not money. Some lawyers just got registered with legal aid to go there to see if there is a contract. If no contract, they just sign interrogation protocol and that's it." [Interview with private lawyers participating in the National register for legal aid providers]

> "In the beginning some lawyers tried similar practices to the old system – took legal aid cases, reported them and got payment from the TO, but in parallel was taking money from the client. Now, after one lawyer was really misbehaving, rumours reached the coordinator, then he started checking the lawyers (random) and the criminal cases – these notes were not coinciding with some lawyers, one lawyer was kicked out of the legal aid system. I think this was a good signal for the others." [Interview with a private lawyer participating in the National register for legal aid providers]

These quotes are worrying as these indicate that continuity of legal aid is not really ensured, which is can negatively affect the quality, especially if there an action that needs to be taken urgently, but there is no one to take it as the procedure of appointing a legal aid lawyer starts anew. However, we could not assess if this is a widespread practice. The Territorial Offices might check if this is an often occurring practice and consider appropriate actions for deterring this practice.

The above quotes also contain quite a serious allegation regarding the possibility of legal aid lawyers to request payment from the client and even to get parallel payment from the state and the client. Our approach and methods do not allow us to make any claims whether this is a very rare and isolated event or more frequent practice. We also have to note here that the evidence that we have has not been triangulated nor has been validated in any rigorous way. It is just an opinion corroborated by a few actors in the justice sector. It has also been acknowledged that that very few lawyers might have ever engaged in such practices. For us it is not that important whether double charging takes place or not. Even if there are such cases, they should be relatively rare and not really affecting the system. What is more

important is that such practices might be an indication that underfunding of publicly funded legal advice might be twisting the goals and principles of the LAA.

As discussed above in the Cahul TO we identified a case of a lawyer expelled from the National register of legal aid providers exactly on the ground of double charging. Actually, this was the only case we heard of an expulsion of a lawyer from the legal aid register. Two conclusions can be drawn from this occasion. First, apparently the practice exists. Again, we do not know how rare or frequent it is. What is more important, however, is that the LAA and its institutional framework provide for some mechanism to counteract unethical and plainly unlawful behaviour. One case is not an evidence for a trend but is a clear suggestion that the legal and administrative mechanisms are in place and can be enforced in other similar cases.

Secondly, particularly often we heard the statement that there are diligent lawyers and opportunistic legal aid lawyers. In other words – good lawyers are always performing their duties according to high standards and regardless of the mode and amount of compensation. On the other hand, less capable and/or motivated lawyers will always find a way to compromise the system in order to reduce efforts or maximize remuneration. We cannot make generalization about the number, distribution or characteristics of neither of the groups. With the current data and methods any implications in that direction will be a mere speculation. What is important is that the Moldovan legal aid system is still about to structure a potent and viable system for assurance of the quality of the provided legal advice. The first steps and perhaps most difficult in terms of acceptance steps have been taken – development of quality criteria, reporting mechanisms and monitoring practices from the TOs. The fact that still the quality of legal aid might be contingent on the ethics of the individual lawyer suggests that the quality monitoring system has still to be developed in such a way as to ensure that no matter how motivated the particular lawyer is, all necessary elements of legal advice and representation have been performed at satisfactory level.

> "Depending on the lawyer – some lawyers have the same performance for all clients, while others offer worse services to legal aid clients. The criminal investigation body sees the difference and then the attitude is similar, they will ask you to sign the papers etc. if they know you allow this. The prosecutor even can often say – you are a legal aid lawyer, so don't waste too much time." [Interview with private lawyers participating in the National register for legal aid providers]

Above we discussed that one of the challenges for the reformed Moldovan legal aid system is to find effective but also efficient mechanisms for ascertaining that publicly funded legal aid is dispensed at sufficiently high level of quality. Currently, the quality of the lawyer's work has been mostly ascertained through written reports. By itself this is a positive development because now lawyers know that there is an institutional interest in the issue of quality. Inevitably this makes the legal aid lawyers more responsible. A challenge is that not all lawyers are enthusiastic about the reporting system. The law obliges the lawyers to report their activities to the TOs but the reporting standards about the content and rigour of reporting are a matter of interpretation. For instance, the Chişinău TO recommends to legal aid lawyers to use the reporting documents developed by the Public Defender's Office.

High quality standards of legal aid necessitate rigorous management system based on self-reports but also on external monitoring mechanisms. NLAC has developed rules for quality monitoring, but it cannot substitute the Bar and develop standards for legal services. NLAC's ability to influence quality is through administrative means. Beyond the requirement to report activities there is little evidence that the legal aid lawyers are motivated to avoid substandard work. Different models for active monitoring of the quality of legal aid are possible. Above we discussed a pilot project of peer-reviewed legal aid.

6.2. Political and institutional challenges

With the LAA a new institutional framework was put in place to guarantee affordable and high quality legal aid in Moldova. The distribution of responsibilities, however, is not completely clear. At policy level the LAA foresees significant responsibilities for the MoJ. In practice, the most important policy making and policy implementation functions are performed by NLAC.

> "The legal aid policy should be formulated by MoJ, but at least so far no other institution has a clear idea about the legal aid system. An example is the civil legal aid. We asked MoJ to make a proposal for expansion in the area of civil justice. We even proposed the budget estimations for legal aid in civil matters. MoJ is expecting from us even details about specific legal aid policies." [Interview with a manager at NLAC]

There are two challenges explicitly expressed in the quote above. First, the legal aid system in Moldova needs a strong political support. Such a support is particularly needed with the legal aid system expanding to non-criminal legal aid. Inevitably, the public expenses needed to sustain the system will increase which will lead to many questions about the need to guaranteed equal access to justice for people who cannot afford it. In such an environment, NLAC will be in dire need of political support. However, NLAC is an executive agency which provides public service. As such there are little chances that NLAC becomes a powerful agency with lots of political clout.

Therefore, NLAC have to rely on political backing by MoJ. This is the second political challenge that we identify at this phase of implementation of the LAA. Once MoJ 'outsources' its legal aid policy to the executive agency NLAC, it is possible that access to justice become less of a priority and more a matter of administrative arrangement. Again, the fact that MoJ is mostly relying on NLAC to take leadership in the formulation of the legal policies might indicate lowering interest. In short term such an arrangement is providing a lot of leeway and discretion for the specialist agency (NLAC) to adjust and experiment with the implementation of the law. In medium and long term, however, the MoJ withdrawal from active involvement in the legal aid system might denigrate the status and political resilience of the legal aid system. As we see after 2008 the global economic crisis is exactly testing the political fundaments of the principle that regardless of their economic means, social and political powers people should have equal access to justice. Had similar crises occur in Moldova, the legal aid system will need strong and solid political backing.

Third political challenge for the legal aid system of Moldova is the administrative weakness of the organizational structure established to manage and implement the LAA and its bylaws. We will discuss this challenge in the section below.

6.3. Administrative capacity

Sufficient administrative capacity is vital for the proper functioning and development of the legal aid system in Moldova. At this moment the administrative capacity to properly organize, budget and control publicly funded legal aid is a serious challenge for NLAC and its TOs. Both levels are understaffed and from day one of the implementation of the law have to deal with multiple challenges. NLAC is significantly impeded to comply with its functions as described in Art.10 LAA due to its severely limited administration. According to a manager at NLAC, who was interviewed, NLAC has an administration of 1 person, employee of the MoJ. This person is not even employed full time for legal aid, being also assigned non-legal aid related tasks. It is difficult to imagine that a body which has to manage a service delivery

system as complex as the legal aid system can do so with only one part-time employee to provide administrative support.

Another example for the inadequate administrative capacity of the NLAC is the process of calculation of the annual budget. NLAC has to propose the annual legal aid budget based on the observed trends in supply and demand of legal aid. However, NLAC does not have positions for financial officer/s and therefore the actual calculations are conducted by NLAC with the support of the Chişinău TO. Later on in MoJ officials get involved in the budgeting process. This result is sub-optimal because functional departments at MoJ are not specialists in the subject matter. On the other hand, NLAC – the institution which oversees the system - does not have the human capacity to translate the need for legal aid into coherent financial framework.

High turnover is already impacting the ability of the legal aid institutions to implement the law.

> "Volume of work / caseload is too high. The 2nd year already we have the promise to get 2 more specialists. We have time only for urgent work, such as appointment and payment. For other work, such as monitoring, talking to lawyers, analysing the trends etc., we do not have enough time. Now we work on quantity, do not have time for quality work." [Interview with a coordinator of Territorial office]

A related serious challenge is the assurance of continuity of institutional knowledge and memory within NLAC. Without administrative structure to support the members of the decision making body it is not possible to make sure that the organization preserves its capabilities in case of personal changes. If for any reason new NLAC members have to substitute the incumbents, the new members will have to start virtually from scratch. Apart of the explicit knowledge codified in bylaws, regulations and other internal documents, the newcomers will have to learn by the method of trials and errors every single aspect of the functioning of the system. One of the most important functions of an administrative structure is to make sure that the management and service delivery knowledge and skills are preserved in the organization even if the persons change. Without such an administrative structure NLAC is exposed to significant vulnerability in terms of continuity.

6.4. Availability of lawyers

Moldovan lawyers are unequally distributed across the territory of the country. Most lawyers are concentrated in Chişinău and other big cities which means that relatively few serve the more isolated areas. Even less are available to the rural population. The problem might become particularly tangible since 2012 when the system expands to non-criminal legal aid.

> "In Chişinău we have too many lawyers so we could easily refuse taking those that do not meet the criteria. But there are still a few districts where the number of lawyers is insufficient, such as Basarabeasca, Taraclia, where we have 4 lawyers but 2 are doing only civil, one cannot work because of health reasons and only one can work on criminal cases. We are afraid this problem can increase next year with civil legal aid." [Interview with a manager at NLAC]

There is no reason to believe that people who live in remote and rural areas are not less likely to experience a civil, misdemeanour, administrative or criminal legal problem. A recent study of the prevalence of non-criminal legal problems in Moldova showed that distance from courts is negatively correlated with reporting a legal problem. What this means is that people who live farther away from courts are more likely to report less legal problems. Do they experience less legal problems? Probably there is a difference in the type of the experienced legal problems but there is no serious evidence that the frequency will differ. What is more

likely to take place is that people from remote and rural areas are simply less optimistic about the chances of solving a legal problem and therefore tend to under report such problems.

The expansion of the Moldovan legal aid system in 2012 towards non-criminal cases, on the one hand is a positive development. On the other hand, the unequal distribution of lawyers might make privilege some people by the mere fact that they live in a place in which this basic public service is available. Others will be effectively denied the right by having to cope with distance and time to travel to receive legal advice and representation.

One of the most important objectives of the legal aid system in Moldova as in any other country is to ensure that access to justice contributes to the overall level of social justice and social equality. Unequal distribution of lawyers might compromise these objectives and actually contribute to widening of the social gap. Therefore the policy makers should think carefully about smart policies and service delivery mechanisms which guarantee that people from the whole country regardless of size and location of the place where they live will have equal access to publicly funded legal aid. Most importantly the system should guarantee that the people will receive equal access to justice whenever and wherever they need it.

6.5. Means testing and own contribution

According to Art.19 (1)(a) LAA eligible for legal aid are individuals who "need legal aid in criminal cases, and the interests of justice require so, but who do not have sufficient means to pay for these services". Similar indigence-based ground is foreseen for civil, misdemeanour and administrative cases in Art.19 (1) (e) LAA. The rationale of the means test is to make sure that only people who cannot afford to pay legal fees on the free market should be helped on their pursuit to justice. In order to prove indigence the people requesting legal aid should demonstrate that monthly income as well as the income for the preceding six months is below the income threshold as defined by the Government In a way, means testing is restricting the categories of people who can rely on publicly funded legal aid in order to access and achieve justice. Very often the means test produces unfair results for the people whose income exceeds just marginally the established level. For instance, if a person has income which is just a couple of MDL higher than the means test threshold, this person will have to obtain legal advice and representation paying the legal fees at the free market.

Even more serious challenge for the legal aid systems of transitioning and developing countries is the so called "middle class trap". Members of the middle class usually receive more than the means test levels and thus are ineligible for legal aid. On the other hand, they are still far away from the social and economic groups who have enough and therefore are indifferent to the cost of private legal services. Thus, even if the middle class might be considered as affluent enough to be eligible for legal aid, many people from this group might be functionally unable to access justice because unaffordable legal fees. The "middle class trap" will become ever more evident with the enlargement of the Moldovan legal aid system towards non-criminal legal aid. Unlike criminal legal aid, beneficiaries of non-criminal legal aid might be people from all walks of live. Therefore the means testing must ensure to guarantee two things. First, it must be flexible enough to ensure that people who really need legal aid and cannot afford to pay for private legal services will be eligible to receive it. Second, the means test must guarantee that publicly funded legal aid is extended to people who cannot afford it and not to everyone. Even the countries with the most generous legal aid systems have to abide to some sort of means (and also merit) testing to ensure that the limited resources are benefiting those who need the most.

With respect to the second function of the means testing there are significant challenges facing the Moldovan legal aid system. These challenges are directly related and we can even

say are effect of the problems with the administrative capacity of NLAC and its TOs. In short, the problem is that the proper means testing requires significant amount of time and efforts. Each request in which a beneficiary claims indigence has to be reviewed and verified. We do not have exact numbers of legal aid appointed on the grounds of indigence (LAA Art.19 (1)(a, e)) but we can imagine what it will mean if each of the dozens and perhaps hundred applications per day are being thoroughly checked to verify that this particular claimant is eligible for legal aid. Undoubtedly such a manner of policy implementation will put immense burden on the scant TO human resources.

According to Art.21 (5) LAA income has to be proven with a declaration of financial means. This declaration is prepared by the person who claims legal aid. As it was discussed above the applicants are expected to make valid and truthful statements in the declarations or might face criminal liability for false statements to public authorities. De facto, the odds that a declaration will be thoroughly reviewed is so minimal that according to many stakeholders the liability reminder is not a potent mechanism for assuring validity of the Art 21 declarations. A TO manager told us about numerous cases in which he had well founded doubts that the applicants were declaring something different from their actual income levels. Other stakeholders also expressed concerns that the declarations of financial means are thoroughly reliable mechanism to ensure that legal aid is extended to people who have low incomes and therefore cannot afford private legal services.

> "I think many beneficiaries are able to pay for their services, but now there are no mechanisms that would allow a control of their means. Theoretically they fill in the declaration that they have no means, but no one verifies this. In practice it is often the police, the criminal investigation body who fills in this declaration" [Interview with private lawyers participating in the National register for legal aid providers]

> "Financial test – even if we have the right to use the tax and other databases, practically we cannot – and we only take the decision based on what the person declares." [Interview with a coordinator of Territorial office]

> "Territorial office has its own regulation, they ask about the financial means / declaration. We don't know about the financial status and basically we are obliged to call the person here, ask about their financial status." [Interview with a prosecutor]

One possible practical solution is to verify automatically the declared income with the information system of the Moldovan tax authorities. Indeed, there are numerous implementation challenges here. Many people might have incomes which for many reasons are not known by tax authorities. Financial, technical and human resources are required to make the connection. Last but not least, access to institutional information systems is more often than not turning into policy tradeoffs or even battles.

Despite the intrinsic difficulties the challenge of effective and reliable means testing is essential for the future of the Moldovan legal aid system. If it is to establish itself as a powerful safeguard of access to justice and social fairness it has to guarantee that legal aid is provided according to the rules. Proper means testing is also a requirement for the financial sustainability of the system. Each year the legal aid budget is planned according to forecasts of demand which is contingent on the volume of legal aid demand and the number of people eligible for legal aid. If the second element of the formula exhibits large variations the legal aid budget will regularly risk to be underfunded or overfunded.

Last but not least, problems with the means testing system might question the overall fairness of the legal aid system. A public perception that the legal aid system is benefiting not

those who are in need of legal aid but free riders might seriously damage the political and social support for the system.

Own contribution is one of the areas in which LAA made no progress. According to Art.22(1) LAA under certain conditions the beneficiaries might use legal aid upon payment of own contribution. The system is intended to provide legal aid to people who are not considered indigent but still are deemed unable to pay the full cost of legal services. There is an important psychological element of own contribution. It is believed that spending own resources to purchase a service, namely legal service, makes the client more demanding and involved into the process of service delivery. Another important consequence is that own contribution could be a mechanisms for filtering out requests for legal aid which are based not on merit of the case but are purely driven by the availability of a free service. Some of the most developed legal aid systems (but also many insurance based public health-care systems) use the mechanism to make sure that the public resources are properly spent.

Own contribution will be a crucial element of the non-criminal legal aid system. By the sheer volume of the existing need for legal advice and representation it is unconceivable that the Moldovan legal aid system will be able to respond even to a small proportion of the demand. A well designed system of own contribution matching the publicly funded part of the legal fees is one of the solutions. However, since 2008 little has happened in that respect. Understandably, the implementation of a system of own contributions is contingent on effective and reliable means testing mechanism. Without reliable way to verify the income of the beneficiaries it is not possible to differentiate in a fair manner who should be fully covered with public expenses and who should contribute towards the costs of the provided legal services. A related aspect to the outstanding challenge is the need to establish and pilot test a mechanism for determining, assigning and collecting the own contribution.

6.6. ICT and document management

Properly functioning legal aid system requires a good deal of co-ordination, exchange of information and knowledge management. For the first three years of its existence the new Moldovan legal aid system achieved to attain important goals. ICT and document management is one area to improve in the future. Above the problem of means testing was discussed. It is unrealistic to expect that the legal aid system and the institutions involved in it will ever develop sufficient capacity to conduct thorough means test on the thousands of people who are entitled. Other parts of the public machinery, however, posses this information. Intelligent connections and innovative use and re-use of already available information is one strategy to cope with the current problems.

Another issue that leads to organisational slack is the lack of information about the presence of private lawyer. The problem is particularly salient at the phase of court hearings. Most often the judge does not have direct contact with the defendant in a criminal or private case. To secure the right of defence, judges tend to send requests to the Territorial office. Sometimes, however, the defendant has already appointed private lawyer. The Territorial office, unaware of this fact, appoints legal aid lawyers who go to the hearing to discover that there is already a private lawyer. Still, the legal aid lawyer is entitled to a fee. In some cases, it is possible that the lawyer travelled to another city to represent a client.

> “Appointment at the Court of Appeal and Supreme Court of Justice still continues to be problematic. They require 20-30 legal aid lawyers, but then it appears that the client has a private lawyer in almost 15% - 20% of cases. The appointment decision of the TO is valid for the entire case and all stages, while private lawyers usually sign contracts per stage (criminal investigation, first instance, appeal) and this is one of the problem for

requesting for the same case another lawyer. Even in our own system we often get requests for appeal stage and we appoint another lawyer for appeal, while there is a decision that appointed another lawyer at the first instance. But we don't have a system to check (the soft is not yet working)." [Interview with a coordinator of Territorial office]

7. Policy recommendations

The Legal Aid Act of 2008 is contributing to the increase of access to justice in Moldova. More people benefit from legal aid. There are different opinions whether the quality of legal aid has improved. Some actors think that the new system of accountability and quality control affect positively the quality and breadth of the services provided by legal aid lawyers. Others add that increased remuneration is making the legal aid work more attractive although there is a clear difference between legal aid and private work. On the other hand, some actors think that the current system does not provide for better quality. For police officers the prevailing argument is that in the past the appointment of lawyers was easier and more streamlined. This line of reasoning has to be evaluated with caution. Clearly, some police officers were referring to schemes and practices which were making their own work easier and faster but had quite negative effects on the rights of the beneficiaries.

For lawyers who consider that quality has not improved much the main argument is the low remuneration (referring especially to the limit per day and the limited number of actions covered) and the bureaucratic system of reporting. This argument should also be evaluated with caution, although it might be an indicator for the need to dig deeper in what exactly is happening in a case. This assessment did not evaluate the work of lawyers in individual cases, nor did it include interviews with clients, the conclusions about quality being made mostly on the perception of the actors involved in the legal aid system and the analysis of regulations. Certainly different types of evaluations are necessary to adequately respond to the question of quality. Other lawyers have raised the problem of the criminal justice system and the role of the lawyer, which is significantly more limited in practice than it should be and this affects negatively the quality as well. This problem goes beyond the limits of the legal aid system but is an important one for further analysis and thought.

Policy making

NLAC and its TOs have established themselves as public authorities able to administer legal aid system, taking credit for success and responsibility for failures in the system. At the same time, NLAC is not a policy making body and it has limited capacity in this respect. The MoJ needs to devote sufficient resources and attention for policy making in the legal aid field or delegate more policy making functions to NLAC. Given the role of the MoJ as a policy making institution and the NLAC's policy implementation role, it might be more appropriate for MoJ to retain policy making functions, provided it develops and retains sufficient capacity for this.

Capacity building

First of all, the administrative capacity of NLAC and its TOs has to be further strengthened and developed. The most difficult times for the legal aid reform are over but the policy makers must realize that a properly functioning legal aid system entices more access to justice demand. More people will be searching for legal aid if they perceive it as affordable, accessible and qualitative. With that respect, the administrative capacity of NLAC and TOs to implement the legal aid policies is crucial. After the initial wave of structuring and getting the

system going both the central and territorial policy implementation levels have to focus on quality and efficiency. Clearly, the current administrative resources are not adequate to meet the challenges ahead. If the administrative capacity is not reinforced, the expansion of the legal aid system towards non-criminal legal aid might compromise the ability of NLAC and TOs to guarantee efficient and effective delivery of legal aid. For the legal aid system to carry out its mission in middle and long term, NLAC and TOs have to have sufficient human, financial and ICT resources.

Scope of legal aid

A comprehensive legal aid system has to provide access to legal advice and representation whenever and wherever people need it. Currently most of the legal aid is concentrated on criminal matters. Massive and sudden expansion towards non-criminal legal aid should not be recommended. Especially when the legal system has been recently reformed and its political, institutional, financial and service delivery fundaments are still not entirely stable. In 2012 we see a massive increase in the legal aid budget. Ideally, the resources should be enough for responding to the eligible criminal, civil, misdemeanour and administrative needs for legal advice and representation. However, there is also a risk of significant disruption of the system. It is also possible that due to lack of administrative and/or service delivery capacity, as well as lack of awareness the enlargement of the scope of the legal aid system is deferred through non-implementation. Such a development will be particularly harmful for the trust that citizens, lawyers and other stakeholders have in the legal aid system.

A gradual approach in which different problem areas (i.e. family law, welfare law etc.) or categories of people (elderly, children etc.) are covered is more preferable. It is unlikely that anywhere in the near future there will be sufficient resources to cover all legal needs. Therefore what the Moldovan legal aid system needs are smart strategies for targeting the most pressing problems or the problems in which legal aid will make the most impact. The design and execution of such strategies reinforces again the need for political leadership and administrative capacity.

Another possible approach towards the increasing needs for legal advice and legal assistance is the practice of diagnosis and triage. In the field of legal aid, diagnosis and triage can be described as the practice to direct the legal aid resources will make most impact for the clients, the justice system and the society at large. Diagnosis and triage can be tested by NLAC on a pilot basis in some categories which are considered less crucial with respect to the interests of the people who might be seeking legal aid. Such a pilot also has to comply with LAA, its bylaws and the other relevant Moldovan legislation.

Legal aid for victims of crimes

In the 21st century one of the most powerful legal reform movements is the call for balanced criminal justice. Balance is meant in terms of the rights of defendants and victims. Many international instruments, national legislation (CPC, LAA) and case law from international and national courts guarantee certain procedural rights to defendants in criminal proceedings. The right to access to lawyers for vulnerable defendants and high risk proceedings is one of the fundamental rights. The victim, however, is rarely entitled to even a portion of the rights of the defendant. Finding the balance criminal proceedings means that the victims should be also granted access to legal aid when they cannot afford it or the interests of justice require that the victim is properly advised and represented.

Although the CPC provides for the right of victims to legal aid in certain categories of criminal cases, this provision is not mirrored in the LAA. It does not seem to be provided in practice as well. The MoJ and NLAC should revise the relevant laws and policies to include victims as beneficiaries of legal aid. Extension of the scope of the legal aid system and inclusion of victims will be an important step in the direction of balanced criminal justice.

Primary legal aid

Primary legal aid although regulated in LAA is not sufficiently developed yet. This is an important means for increasing the citizens' access to justice and also has the potential to reduce, in a longer term, the pressure and demand for qualified legal aid. Especially valuable will be the primary legal aid in civil, misdemeanour and administrative legal matters. The experience of the legal aid systems in countries such as the Netherlands, England and Wales and Canada shows that the vast majority of the needs for legal advice and information can be solved by means others than expensive personal legal advice provided by qualified lawyers registered in the National register for legal aid providers.

Contingent on increased administrative capacity of NLAC and TOs as well as availability of funding, it could be recommended to step up the efforts to organize a system of providers of primary legal aid. NGOs and students legal clinics are one possible approach especially in urban areas. Public defender offices are particularly suitable form of delivery of competent and cost-effective legal services. As demonstrated by the already discussed pilot paralegals project run by the Soros Foundation – Moldova, paralegals are underused but certainly potent avenue for increasing access to justice in rural areas. Cooperation with different public services might be a good starting point for referral services or even for the design of holistic services in which legal problems are treated together with existing social, health and financial problems. Telephone advice lines are another example of relatively cheap but promising way for reaching out to larger audience. Information technologies and namely Internet (discussed below) are another medium for dispensing primary legal aid.

With the development and expansion of primary legal aid the Moldovan legal aid system can significantly increase its scope and outreach.

Awareness raising

Recent study on legal needs in the everyday life of the people in Moldova found that 61% of the respondents do not know about the existence of the legal aid system. Had the question been asked about knowledge of how to practically use the system most likely the percentage would have been even lower. People do not know a lot about their rights and they cannot be blamed about it. It is the state and its institutions who is responsible to make sure that people know and trust the mechanisms for exercising their basic human rights.

With that respect the public awareness in the legal aid system can be significantly increased. The need for awareness raising will only increase with the expansion of the legal aid system in 2012. If the people of Moldova are really to be empowered, they have to know their rights and know how to exercise them in practice. Another recommendation is to pay attention to training of the justice system institutions involved in the process. Civil and administrative judges, court clerks but also different central and local authorities will have to be made aware

of the right to legal assistance and the concrete mechanisms through people can receive legal advice or representation.

NLAC had a good practice during the first year of implementing the LAA of holding meetings with the criminal justice actors and legal aid lawyers throughout the country, informing about LAA and clarifying its implementation mechanisms. This practice should be continued. NLAC and TOs should continuously hold common sessions with the criminal justice actors regarding the LAA, as well as clarification of issues that appear in practice

Improved means testing of legal aid

Determining who needs publicly funded legal aid will become more and more legal, social and political question. With constantly increasing legal aid budget different political and social groups and interests will raise legitimate questions such as: Are the taxpayers money going to the right people?; Do the beneficiaries of legal aid need it?; Are our money spent with wisdom and integrity? The current approach to means testing is not particularly functional. Non-means tested legal aid is a large and uncontrollable category. Particularly concerning is the broad scope of matters that fall under mandatory defence provision and the lenient way of applying the means test for cases that do not fall under mandatory defence. Further analysis of the Moldovan legal aid system must analyse whether legal aid is provided to people who need it.

Legal needs and ability to pay for legal services have to be determined in a non-controversial manner. At the same time, the test has to be relatively cheap considering the overall value of the service.

Adoption of information technologies is the only way forward. Technologies are not cheap but failing to bridge the means testing gap will cost much more in the future. It also threatens to erode the public trust in the legal aid system. Again, the deployment of technological solution for determining needs and indigence requires political leadership and sufficient capacity to design and implement complex ICT systems.

Implementation of own contribution to publicly funded legal aid

NLAC has to develop the rules for providing own contribution to legal aid based on objectively verified income. Partial payment of legal aid services will contribute to the fairness and sustainability of the Moldovan legal aid system.

Information technologies

One of the most repeated clichés in the last 30 years is how the technologies can or are already changing the lives of people. In many areas it might be true. But technologies and particularly Internet are not very visible in the access to justice domain. Yet almost one in every 6 people who had legal problem in Moldova said that they sought on Internet for legal information. What this means is that the demand outpaces supply of online legal services. What the NLAC can explore in further detail are applications for sharing easy to understand legal information. Compilation of different legal forms and documents online requires relatively low investment for the benefits which can be realised. Numerous off the shelf applications make it relatively easy to connect potential clients to sources of advice overcoming distance barriers. Incremental increase of social media is an area which NLAC

should keep its eye on as potentially channels for dissemination of legal information and eventually legal advice.

Quality of legal aid services

One of the most disputed effects of the 2008 LAA is whether and to what degree the quality of state guaranteed legal aid was affected. Despite the lack of conclusive evidence we think that the new institutional framework coupled with increased financial motivation is raising the level of quality of legal aid services. Quality of legal aid will be a decisive issue in the years and decades to come. To a large extent the success of the reform will depend on the strengths and abilities of the legal aid institutions to design and put in place effective mechanisms to guarantee minimum levels of quality.

Just like the case of means testing it is important that the quality monitoring system is balanced in terms of inputs and outcomes. Checking every single instance of legal advice or representation will effectively stall the system. Too relaxed quality control mechanism will stimulate opportunistic behaviour and will endanger the existence of the institutional infrastructure of the LAA. It is also true that one method of quality control will be likely inadequate to fit the complexities of the legal aid system. Experimentation with multiple methods and approaches and constant rethinking of the challenges is the way to assure reliable system of quality controls.

NLAC should initiate a discussion among the main stakeholders regarding the possible systems for quality monitoring and assurance should be undertook and discussed. Some of the possible systems that can be discussed are: peer review, quality standards and benchmarks, competitive bidding, award of status of trusted provider, client satisfaction surveys etc. Permanent monitoring by TOs of the accuracy of case files and compliance to reporting procedures should be continued.

Involving other stakeholders in the development of a quality assurance system is another avenue to be explored. NLAC's capacity and mandate is insufficient for bringing visible changes to the quality of legal aid. The Bar's involvement is crucial in this respect. The Bar has been quite reluctant towards the legal aid reform in the beginning but it seems to be appreciating the value of a specialised institution to administer the legal aid system. Now when the initial stage of the LAA implementation is over, it is strongly recommended that Bar and NLAC work closer together to improve quality. One way in which this could be done on a short term is to develop practical guides for lawyers and citizens and develop quality assurance mechanisms, for example following up on the SFM's project that developed the concept and recommendations for instituting the peer review method for criminal legal aid cases.

Ensuring sufficient number of lawyers in some areas of the country seems to be an important challenge, which affects inevitably the ability of NLAC to ensure quality. NLAC should explore innovative methods for attracting lawyers in such regions. Such methods could be subsidized apprenticeships, conditioned on a minimum number of years of service in the respective region after getting the Bar licence, covering travel expenses for lawyers to travel to such areas.

Diversity of providers

Diversity of providers and continuing comparison between their performances is an important way for ensuring quality and provision of services at a reasonable cost. The experience of

the Public Defender Office in Chisinau has been given by many of the interviewed as an example of high quality representation provided to clients. The office has had a positive effect on private lawyers doing legal aid that picked up the public defenders' templates and practice standards. Its practice was used by NLAC in developing the bylaws for the new legal aid system. It does not seem clear yet how the PDO model compares to the model of private lawyers providing legal aid in terms of costs. However, it is recommendable that NLAC continues with supporting the PDO model and permanently compare the inputs and outputs of the PDO and private lawyers. NLAC should also reconsider the funding approach towards the PDO to ensure that it maintains quality and provides a fair insight into the legal aid delivery system crucial for NLAC's adequate understanding of the tendencies and needs in practice. Apprenticeships and satellite offices of the PDO could be further explored for covering the gap in the areas what have insufficient lawyers.

Remuneration for legal aid

Closely interrelated to the issue of quality is the question of remuneration of the providers of legal aid services. It is clear that private lawyers will never be sufficiently satisfied with the levels of remuneration. Public funds will also always be limited. On the other hand, NLAC will always be looking for cost-effective remuneration policies. The regulation for legal aid remuneration has been amended already several times to respond to the needs of the lawyers. This is commendable. It is further recommended that an analysis of whether the current payment levels and procedures are motivating sufficiently the lawyers to provide effective legal aid. Also the complete coverage and compensation of procedural activities performed by lawyers in criminal, civil, misdemeanour and administrative cases will make sure that certain activities are not seen as "unprofitable" and thus avoided to the detriment to the interest of clients and justice.