Legal Aid Assessment and Roadmap (LAAR)

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Project Direction

The Asia Foundation & The Ministry of Justice

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<tr>
<td>AIBA</td>
<td>Afghanistan Independent Bar Association</td>
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<td>AGO</td>
<td>Attorney General’s Office</td>
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<td>ALAAN</td>
<td>Afghanistan Legal Aid and Advocates Network</td>
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<td>AWN</td>
<td>Afghan Women’s Network</td>
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<td>CMS</td>
<td>Case Management System</td>
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<td>CNJC</td>
<td>Counter-Narcotics Justice Center</td>
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<td>CPC</td>
<td>Criminal Procedure Code</td>
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<td>CSO</td>
<td>Civil Society Organization</td>
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<td>DQG</td>
<td>Da Qanoon Ghushtony</td>
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<td>FLPS</td>
<td>Faculty of Law and Political Science</td>
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<td>GIZ</td>
<td>Die Deutsche Gesellschaft für Internationale Zusammenarbeit</td>
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<td>GoIRA</td>
<td>Government of the Islamic Republic of Afghanistan</td>
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<td>IDLO</td>
<td>International Development Law Organization</td>
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<td>ILAB</td>
<td>Independent Legal Aid Board</td>
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<td>ILF-A</td>
<td>International Legal Foundation – Afghanistan</td>
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<td>INL</td>
<td>Bureau of International Narcotics and Law Enforcement</td>
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<td>Justice Center in Parwan</td>
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<td>JFAO</td>
<td>Justice for All Organization</td>
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<td>Justice Sector Support Program</td>
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<td>Legal Aid Department</td>
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<td>Legal Aid Grant Facility</td>
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<td>OSA</td>
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<td>United Nations Assistance Mission in Afghanistan</td>
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<td>United Nations Development Programme</td>
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<td>WAW</td>
<td>Women for Afghan Women</td>
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ACKNOWLEDGMENTS

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The Asia Foundation is grateful for the cooperation of the many organizations who took part in this assessment. The field analysis questionnaires were lengthy, and structured interviews lasted upwards of three hours, yet respondents were generous with their time and patient with questions. Many organizations such as IDLO, ILF, and UNDP aided in the creation of the questionnaires, and provided expert insights into the challenges legal aid providers face.

This assessment was a team effort and included a number of departments at The Asia Foundation, including the Survey Team who manage and author the Survey of the Afghan People. A special thank you is extended to the field assessors who travelled to provinces in sometimes dangerous circumstances, and have spent years defending indigent accused as legal aid providers in Afghanistan.
1. EXECUTIVE SUMMARY

In the last several years, Afghanistan has committed to developing a modern legal aid system, with all the attendant rights and responsibilities that it suggests. The Afghan government, civil society, defense bar, and the donor community have piloted and experimented with nearly every existing style of legal aid service delivery. By the end of the first quarter of 2017, there were reportedly just over 300 defense lawyers working for legal aid institutions (including the government) and approximately another 2900 licensed defense lawyers. However, after nearly a decade of legal aid expansion and development, the question remains as to what is the most effective means of ensuring that meaningful legal aid is available to people facing criminal charges throughout Afghanistan.

This is an important question for fundamental fairness reasons, but also because the rule of law – and the stability, peace, and security it heralds – relies on widespread confidence in reliable and effective access to justice. The Afghan Ministry of Justice, in cooperation with The Asia Foundation, the Open Society Foundation, and the World Bank, launched a study in April 2016 to assess the current status of legal aid and indigent criminal defense in Afghanistan and to determine a series of recommendations for the Afghan government, the legal aid and defense bar, and the donor community. The Legal Aid Assessment and Roadmap (LAAR) was a coordinated effort to situate Afghanistan’s legal aid system in context, and to provide clear analysis of its capacities and avenues for investment and growth.

The LAAR process involved a wide-ranging review of law, policy, and practice involving the quality of legal aid in criminal cases in Afghanistan. A comprehensive assessment instrument was deployed in Kabul and eight additional provinces and surveyed over 400 people involved in the criminal justice system such as legal aid providers, managers, executives, experts, prosecutors, police, judges, private counsel, or clients (criminally accused suspects and defendants). General understandings among Afghans not necessarily involved in the justice system were incorporated using additional data review and analysis. The LAAR findings reveal a great deal about the perceptions and experiences of criminal justice system actors throughout Afghanistan, and extending far beyond Kabul to the major regional hubs, rural areas, and remote and insecure provinces.

The LAAR process conclusively demonstrates that, amidst considerable and ongoing challenges, Afghanistan has grown its 1964 constitutional guarantee of the right to counsel into a thoughtful and comprehensive framework for a modern system of legal aid today. Although this framework is poorly implemented and fails to meet the need for legal aid in most provinces, several legal and policy instruments have codified the right to counsel as meaningful and responsible for protecting public rights as well as the rights of individual clients. Despite considerable challenges, public legal awareness of legal aid, and use of the state courts as a conflict resolution mechanism is growing, and legal aid is increasingly seen as a vital part of the justice system and the rule of law. Robust legal aid may be impacting, and has the capacity to greatly influence, anti-corruption and gender equality efforts.
Key Findings

Certain key findings were identified during the analysis:

Strengths: High Level of Awareness and Substantial Impact

Despite ongoing insecurity and conflict in many provinces, fluctuating and inconsistent funding commitments to legal aid organizations and initiatives, and systemic obstacles that impact meaningful access to counsel and effective legal aid service delivery, the right to legal aid is safeguarded and well-enmeshed in Afghan law and policy. It is also well-understood by Afghans inside and outside the justice system. In addition, there is a legal aid presence, even if nominal, in every province in Afghanistan. Considerable investments by Afghans and the international community have developed a mixed model of legal aid in which the government’s obligation to ensure indigent persons have access to counsel is applied in varied models across Afghanistan. This investment has also benefitted the justice system by enhancing efficiency and increasing legitimacy of the system, as Afghans demonstrate greater trust and acceptance of the court system over time.

Key strengths were identified in the existing system:

- **Afghan Law and Policy Safeguards Legal Aid**
  
  Afghanistan has strong policy, legislative, and regulatory commitment to legal aid. Established frameworks and controls exist for financial, legal, programmatic and organizational management, and institutional structures that can promote independence are in place. Afghanistan has also embraced capacity-building efforts to advocate for legal aid among leadership.

- **Afghans Understand the Right to Legal Aid**
  
  Throughout Afghanistan, public legal awareness is increasing. While, unfortunately, it may remain lowest among those most in need of counsel, among citizens and government officials, there is widespread recognition of the importance of legal aid. Almost 80 percent of Afghans believe in the right of an accused person to have defense counsel regardless of guilt. Inside the justice system, non-legal aid personnel easily articulate legal aid principles, rules, and regulations and cite the importance of counsel in criminal cases. Almost all prosecutors and police understand their role in providing notice and ensuring early access to counsel. Perhaps most importantly, the LAAR fieldwork revealed widespread consensus on best practices for legal aid representation. This consensus existed within the legal aid community, but also among judges, prosecutors, police, experts, and others.

- **Afghanistan’s Justice System Profits from Robust Legal Aid**
  
  Over time, the formal justice system is gaining legitimacy in Afghanistan. An outdated, yet popular, statistic that 80 percent of Afghans do not access the formal justice system is mitigated by increased use and satisfaction with the state courts, including their fairness and accessibility, throughout Afghanistan. Women, particularly, have reported satisfaction in
their dealings with the formal justice system. These beliefs exist despite a general pessimism regarding the direction the country is going and a recognition of significant ongoing corruption inside the justice system. Overall, Afghans expressed trust and satisfaction with respect to their lawyer, including government and civil society lawyers. In addition, judges, prosecutors, and others acknowledge that cases flow more quickly and efficiently through the justice system with defense counsel involved early.

Weaknesses: Lack of Implementation, Availability, and Coordination

Nevertheless, and despite a commitment to legal aid and a surprising amount of awareness, the legal aid system continues to suffer from poor implementation of important practices and inadequate commitment to execution of justice principles. Throughout the justice system, legal aid guidelines, law, and policy are ignored by the same justice system officials who easily articulate their importance on demand. There are shortages of legal aid in every province, a challenge that has seemed intractable and which is magnified in virtually every district court in Afghanistan.

In addition, legal aid providers and defense counsel do not universally embrace a culture of zealous representation, which further limits their impact in a severely resource-constrained context. A severe need for coordination of legal aid, at local and national levels, also impacts service delivery considerably. While funding shortages and ongoing insecurity exacerbates this situation, these challenges also have roots in the lack of coordination of legal aid delivery and policy objectives and the ongoing conduct of justice system actors, including inconsistent and inadequate demand that court and justice system practices reflect the spirit and the letter of legal aid law and policy.

Key weaknesses were identified in the existing system:

- **The Afghan Justice System Ignores Many Legal Aid Requirements in Practice**

  Although legal aid providers, judges, prosecutors, and police demonstrate widespread knowledge and understanding of their roles, this understanding was not reflected in their practices. Actual notice of the right to counsel and the right to legal aid, as well as access to counsel was systematically unreliable. In addition, early access to counsel, which is a significant component of rendering the right to counsel meaningful, was erratic in practice.

- **There are Shortages of Legal Aid in Every Province**

  Even at its height, Afghanistan’s legal aid providers were never able to provide counsel to all indigent persons facing criminal prosecution or investigation. Today, people facing criminal charges in courts at the provincial center can access counsel. However, representation by legal aid providers in districts is extremely scarce. In addition, although there is de novo review at the appellate level (which is held at provincial centers), ongoing harm accrues in the case as the appellate court is bound by the record, investigation, and examinations conducted below.
Zealous representation is not standard in Afghan legal aid practice. There is no culture of written pretrial motions and objections; meaningful defense investigation is a rarity; supervision and evaluation, as well as other quality control mechanisms, are not effectively implemented; most legal aid organizations and providers eschew a holistic approach; legal education, training, orientation, and continuing education are inadequate; and client-centered practice is not routine. In addition, the lack of coordination impacts service delivery and provider caseloads reflect entrenched structural challenges that challenge practice daily.

These issues implicate both the resources and culture of the legal aid community. Even without additional resources, the various legal aid agencies and coordination entities have considerable latitude to undertake efforts to reform the legal aid culture in Afghanistan and ensure it is consistent with the high standards set forth in its legal and policy instruments.

Lack of Coordination Impacts Service Delivery

Macroscopically and microscopically, legal aid is also impacted adversely by the lack of clear and accountable coordination mechanisms. The Independent Legal Aid Board (ILAB) is a nominal coordination authority whose capacity is exhausted by a perfunctory and redundant licensing practice. By all accounts, the ILAB was badly adapted from its South African equivalent and model. While several formal and informal coordination authorities have stepped into the coordination vacuum, important gaps in legal aid coordination remain and large-scale strategy has suffered.

Threats and Opportunities

The legal aid system, as developed, has also presented ancillary opportunities in the specific context of Afghanistan. Certain cross-cutting policy objectives, including anti-corruption, gender equality, and harmonizing informal justice imperatives through priorities like increasing alternatives to incarceration, have been furthered and developed with robust legal aid. In some cases, legal aid can be linked to rethinking the ways Afghans understand legitimacy of the formal justice system. In the context of corruption, for example, satisfaction with (and use of) the court system exists irrespective of an ongoing culture of graft. With respect to gender, legal aid community offers indigenous change agents, steeped in actual stories of injustice, who can develop option and understandings that balance realities of traditional beliefs and new social developments.

The empirical analysis done in LAAR suggests some key policy objectives could be rethought in light of the Afghans’ flexibility and resiliency toward these issues. The analysis also suggests that some conclusions on the intractability of gender and corruption issues may be overly reductionist and that the legal aid community is positioned to contribute to stability, effective rule or law, and access to justice more broadly than through courtroom representation. In addition, increasing cooperation with legal aid authorities has also revealed increasing avenues for referral and for legal aid leadership to have a voice in social policy.
Finally, the increasing capacity to collect and analyze data has created new opportunities to measure and deploy legal aid resources strategically.

Key threats and opportunities identified in the legal aid system include:

- **Cross-Cutting Policy Objectives Demand Robust Legal Aid**

  Major policy goals, specifically with respect to anti-corruption, gender, and traditional justice, are furthered by a well-resourced and robust legal aid system. For example, despite a pervasive culture of graft, or kommission kari, most Afghans expressed satisfaction with the formal justice system and affirmed its legitimacy and credibility. Another example is how legal aid providers, as indigenous change agents, are uniquely positioned to observe and articulate the injustices women face as defendants, as victims, and as professionals within the justice system in a way that is compelling and inspiring to Afghan communities and leaders. Similarly, traditional justice mechanisms and forums can find some purchase in mediated alternatives to incarceration, common elsewhere, that save the Afghan government substantial costs of incarceration while also serving substantive justice in individual cases.

- **Increasing Support for Legal Aid in the Government**

  The increased visibility of legal aid as a justice system priority has also increased support for legal aid throughout the Afghan government as it becomes clear that effective legal aid has benefits beyond representation in individual cases, including benefits to the efficiency and effectiveness of government. Current decision makers such as the Attorney General, Chief Justice, and Minister of Justice are committed to expanding defense services and legal aid. In addition, increased community outreach by legal aid providers has enhanced public legal awareness and significantly increased the number of community-based referrals and requests for counsel.

- **Data Collection and Analytical Capacity**

  As certain system-wide resources like the case management system have come online, the Afghan justice system is well-positioned to enhance its quality through the development and analysis of key data from all providers. The legal aid community itself is working a significant effort to have all legal aid providers record and maintain specific data with respect to their cases, their providers, and their policies. The increased data capacity and the increased use of analytics will allow for measurable, data-driven solutions to be proposed and funded with reference to actual, local, relevant information and statistics. In the same vein, pilot programs and demonstration projects can develop data that efficiently support or refute claims of widespread viability in the Afghan context.

- **Ongoing, Pervasive Security Problems**

  Ongoing violence and instability impacts every aspect of Afghan rule of law, particularly as many of the targets and threats are toward formal justice system institutions and personnel. For legal aid, one significant impact of the ongoing security situation is the difficulty of providing representation in remote or insecure districts where attorneys are unable or
unwilling to travel or to practice. The security situation also impacts defense investigation and aspects of quality representation.

- **Funding and Sustainability Challenges**

Legal aid in Afghanistan has been largely donor-funded. However, in the last few years, the funding climate has tightened substantially, a trend that is expected to continue. The challenge of maintaining adequate services, expanding to meet the legal mandates, and creating sustainable access to legal aid looms in this context and impacts programming, planning, and expansion possibilities.

- **The Institutionalized Defender Problem**

As repeat players in the court system, most legal aid providers work in predetermined, geographically-linked courthouses and have long-term, close relationships with the judges, prosecutors, and others who frequent their courthouse(s). Most clients, on the other hand, work with a lawyer only once and for the (relatively short) duration of the case. While relationships with justice system personnel may be beneficial to legal aid clients at times, they also raise a common concern that the interests of the client (the best possible outcome of the case) and those of the defense attorney (to keep the judge, prosecutor, and court personnel with whom s/he has a long-term relationship happy) may become adverse and/or misaligned. Although attorneys have a duty of loyalty to their clients, a strong culture of zealous defense is necessary to combat this problem.

- **Logistical Barriers to Case Management**

Effective legal aid is also threatened by routine practices that create logistical barriers to zealous representation. One of these is the routine unavailability of physical evidence in cases. For a variety of reasons, including chain of custody demands, most physical evidence (blood, weapons, etc.) never are turned over to the prosecution or the defense. This evidence is proffered to the court but the defense has no opportunity to verify, corroborate, or challenge the prosecution’s claims. Viewing and challenging the viability of the prosecution’s theory of the case using the physical evidence recovered is a core responsibility in legal aid advocacy, yet it is mostly absent from Afghan practice.

**Key Recommendations**

Throughout the assessment process, strengths, weaknesses, opportunities, and threats were identified based on various relevant and existing factors. The roadmap lays out forward-looking strategies based on these analyses and sequences them:

- **Immediate Priorities**

The government of Afghanistan, legal aid organizations, and the donor community have made great strides in developing the criminal justice system with a robust role for defense counsel. This momentum may be maintained and leveraged by adhering to the many strategies that have been working and are still needed as the system matures.
To create an adaptive mixed model of legal aid that can adjust to challenges and develop context specific policies, the core structure of the regulatory framework needs to be adjusted. In addition, the government should make further adjustments to laws that drain legal aid resources or allow for rights violations. Further, stakeholders should work together to develop policies on several outstanding issues, and civil society and their donors should adopt strategic advocacy principles when implementing capacity development initiatives.

- **Retain and Support the Mixed Model of Legal Aid Service Delivery**

  The policy of the Government of the Islamic Republic of Afghanistan to develop and support a mixed model is well-entrenched in the regulatory framework and the best option for Afghanistan for the foreseeable future. Changes to some structures could create a more coordinated and adaptable model. However, the mixed model system allows for policy makers to maintain flexibility and to leverage the strengths of the different providers to meet the changing needs of Afghans.

- **Preserve and Support Institutional Service Providers**

  The donor community should continue to support civil society organizations that are institutional service providers. These organizations have made great strides in organizational health in recent years, developed functioning supervision systems, and provide better quality services. In addition, they serve as important members of the civil society of Afghanistan and essential partners on issues such as gender rights, human rights, transparency, and anti-corruption. These organizations should continue to be encouraged to experiment with sustainability models and required to improve their quality even further.

Similarly, the Ministry of Justice (MoJ) should support the further development of the Legal Aid Department (LAD) by seeking to enhance its management, supervision system, and administration. For logical reasons, the LAD’s quality of service is lower than civil society institutional providers. However, the LAD still provides better quality services than individual service provider systems such as pro bono services and the assignment model of Legal Aid Grant Facility (LAGF). It is an institution that is open to improvements, and its reach and sustainability are major benefits to the legal aid system and should be taken full advantage of.

- **Continue to Develop and Use Information Management Systems**

  The GIRoA has developed a case management system with the assistance of Justice Sector Support Program (JSSP) that can begin tracking criminal cases at the arrest stage. The Asia Foundation and IDLO have been assisting Afghanistan Legal Aid and Advocates Network (ALAAN) to create a legal aid specific case database. These efforts should continue and be strengthened so that future coordination, supervision, monitoring, and evaluation can be more information based and systematic. Legal aid service providers should continue their efforts to increase the use of these tools both at the management and the provider level and train their professional and administrative personnel to comply with these systems.
Continue to Support and Expand Law Clinics, Internships, Externships, Fellowships and Apprenticeships

The quality of university legal education remains weak and there continues to be substantial uncertainty about the development of a scalable and sustainable defense lawyer staj. Donors and implementers should continue supporting legal clinics and other programs that provide experience and experimental learning opportunities to law students and novice lawyers, while simultaneously increasing access to legal aid for indigent and vulnerable populations. With the recent approval of a law clinic guideline by the Ministry of Higher Education (MoHE) and a six-party memorandum of understanding, the development of sustainable legal clinics may become easier.

Substantially Amend the Legal Aid Regulation

The Legal Aid Regulation should be amended as soon as possible to create a more streamlined and clear legal aid coordination mechanism for Afghanistan. It should retain the ILAB, but substantially change its membership to reduce the potential for conflict of interest, to enhance its relationship with law enforcement and justice institutions, and potentially add greater expertise and independence. The regulations should clearly delineate the responsibilities and supervision structure between the MoJ, LAD, and ILAB. Further, the revised regulation should modify the relationship of the ILAB with service providers to a more cooperative system based on mutual service instead of the current licensing-based system. The revised Legal Aid Regulation should build on the strengths of the ILAB such as its independence and regulatory ability to raise and spend funds flexibly and direct the ILAB to create the necessary policies to experiment with individual and institutional contract models.

Staff the ILAB Secretariat

The MoJ should immediately begin taking steps to staff an ILAB secretariat. The MoJ should take advantage of the recent approval for an expansion of the LAD tashkeel to create a core secretariat for the ILAB including a database manager, quality monitoring officers, a finance and administration specialist, and a substantive specialist/team lead. It should seek assistance in developing terms of reference and begin the hiring process as soon as possible.

Create a working group on LAD salaries and incentives

The MoJ should establish a working group to find innovative means of creating incentive structures for LAD defense lawyers. Even considering their benefits and the job stability, LAD staff is underpaid. This problem is exacerbated by the fact that project-based lawyers, civil society providers, and potentially even new LAD new hires, are paid sometimes substantially greater salaries. Thus, the MoJ’s administration departments create a working group of relevant departmental specialists, outside experts, and representatives from the Ministry of Finance (MoF) to develop a strategy to solve or at least mitigate this situation.

Amend and Clarify the Criminal Procedure Code
The GIRoA should bring changes to the Criminal Procedure Code (CPC) to significantly reduce the number of *in absentia* cases, or at minimum, prevent the use of legal aid resources during such cases. It should also clarify that notice requirements and preservation of the rights of accused and defendants also applies to the National Directorate of Security and all other detection and investigation authorities and any authority that has the power to arrest or detain individuals.

- **Draft a Detailed Policy for the Pro Bono Requirement**

The MoJ and the Afghanistan Independent Bar Association (AIBA) should work together to create a detailed but flexible policy that will clarify the *pro bono* requirement for licensed defense lawyers. The policy should deal with general issues of logistics, management, and registration, but it should also address challenges like a lack of experience or capacity among private lawyers to handle criminal cases and how lawyers working for institutional legal aid providers may meet the requirement, if required.

- **Bring Training and Strategic Litigation in Line with Specific Advocacy Goals**

Projects that involve training defense lawyers and legal aid providers, should cease covering general doctrinal law and practice principles. Instead, training should focus on developing and using pretrial motions and formal objections in line with specific advocacy goals.

The AIBA, ALAAN, and other civil society organizations have identified several specific issues facing all legal aid providers and defense lawyers across Afghanistan. These include the need for better access to clients and case files, lack of adequate notice of trial dates, the absence of prosecutors at trials, and the persistent failure of the authorities to release accused individuals from detention as prescribed under the law. The MoJ itself has identified the need for greater use of alternatives to incarceration in minor criminal cases and cases involving juveniles in conflict with the law.

**Medium-Term Investments**

If a more responsible and responsive ILAB can be created and coordination needs are better met using a legal aid case management database, further progress can be made on developing systems that can expand access to legal aid for indigent accused. The ILAB and legal aid providers can also work more efficiently towards facilitating lawyers’ access to clients, case files, and evidence. They can develop clear indicators to measure impact and set realistic and progressively better minimum standards. The ILAB can also create consistent monitoring policies, create uniform templates and experiment with contract models.

- **Create of ILAB Policies, Manuals, Reports, and Templates**

A restructured and staffed ILAB should be assisted to create detailed policies, manuals, reporting templates to meet its own duties and to set standards for legal aid providers and service delivery institutions. These can be adapted from current institutional providers and implementing agencies or created with their assistance. They should include detailed policies
on seeking and using funds, grant making, contracting, monitoring and evaluation, case auditing, practice standards, indigency standards, budget templates, and reporting templates.

For example, the ILAB secretariat should leverage its ability to directly coordinate with the Supreme Court, Attorney General’s Office, Ministry of Interior (MoI) and other government institutions, its access to CMS, and its management of the legal aid case management database to create strategies and reports on expanding access to legal aid.

Another example is the creation of workload guidelines to replace case caps. At a minimum, these indicators should clarify workload, productivity, quality, rule of law / access to justice, and compliance issues. Further, the development of forms and templates from which to tailor specific court filings will also facilitate routine advocacy.

➤ **Support the ILAB Fund**

Once ILAB has a functioning secretariat and created the necessary policies, GIRoA and donors should begin providing it funds for grant making and contracting purposes. Initial funds should be modest and may need to concentrate on advocacy aligned training, fellowship programs, or monitoring missions. However, if ILAB shows responsible and transparent financial management and makes intelligent policy decisions, further funds could be allocated for service delivery and to contract with institutional or individual providers.

### Ongoing Goals

In the long-term, the legal aid system should build a culture of zealous defense, and increase access and options for indigent accused.

➤ **Build Culture of Zealous Defense**

Various concrete and abstract interventions create a culture of indigent defense that focuses on rigorous, client-centered representation. This will include long-term investment in a more unified and skills oriented legal education system. There is also a need to develop investigation guidelines that can help promote an essential component of zealous representation—defense investigation. In addition, many jurisdictions worldwide are recognizing the importance of adopting a holistic approach to effective client representation, as well as developing relevant indicators that measure and promote this approach. Other practice-based interventions should be used to promote minimum practice standards, including guidelines to promote adoption of a theory of the case, the use of demonstrative evidence in court and other advocacy, and the development of themes and defenses according to common case types or issues.

➤ **Use Contract and Certification Model to Enhance Access and Choice**

Using contract and grants in a mixed model allows a coordinating body to increase and decrease service delivery depending on the resources that are available. It also allows the body to experiment with different delivery models and providers and meet the needs of specific communities.

Certificate systems allow clients to shop for and pay for counsel via voucher system. In Afghanistan, this might displace some corruption in the justice system as criminally accused
suspects and accused persons would have the same choice of counsel that non-indigent persons enjoy and counsel’s interests would lie with their client.
2. METHODOLOGY

To meet the objectives of this assessment and roadmap, the Foundation and Open Society Afghanistan employed a consultation process, desk research, and qualitative and quantitative field work.

Consultation

Open Society Afghanistan was generally responsible for the consultative process, which had two main goals. First, to bring all stakeholders into the process and leverage their experience and expertise to inform the assessment and the recommendations that will be made; and second, to educate stakeholders on theoretical legal aid systems, comparative models, and current efforts in Afghanistan. The goal was to create an informed basis that provides experts, researchers and policy makers the ability to critically examine both the data and the recommendations arising out of this project.

The first consultation conference was used to inform stakeholders of the goals of the assessment and to assist in the creation of the field work assessment instrument (please see Annex 1 for all the consultation conference reports). The second conference introduced stakeholders to legal aid systems in three different jurisdictions (South Africa, Ukraine, and New York City) and allowed participants to engage in a comparative analysis and critical scrutiny of the current structures of the legal aid system in Afghanistan. In February 2017, the team gave a presentation on short term interventions to the Rule of Law Board of Donors. At the final consultation conference, held in April 2017, the preliminary findings of the assessment and the most controversial recommendations were discussed and subjected to criticism.

In addition, the assessment includes information and discussions from conferences organized inside and outside of Afghanistan by The Asia Foundation (Legal Clinics, August 2016 and April 2017), UNDP (Early Access to Legal Aid and The Role of Justice Institutions, November 2016), INL (covering funding for legal clinics, November 2016), Afghanistan Legal Aid and Advocates Network (ALAAN) (covering advocacy and coordination, March 2017). In addition, assessment representatives attended the Second International Conference on Access to Legal Aid in Criminal Justice Systems (November 2017). At the latter conference, the team interviewed legal aid experts that had advised the government of Afghanistan in the past, such as Prof. David McQuoid-Mason, who assisted in the development of the Legal Aid Regulation and the Legal Aid Grant Facility.

Finally, the assessment team met with stakeholders on numerous other occasions. This included two sessions with the Independent Legal Aid Board (December 2016 and January 2017), and several meetings with legal aid NGOs, UNDP, AIBA, ALAAN, Justice Sector Support Program (JSSP), United States Institute of Peace (USIP), and donors such as the European Union, Italian Cooperation, Swiss Cooperation, USAID and US Department of State, and the World Bank.
**Desk Research**

The assessment included a wide-ranging desk review of the laws and regulations of Afghanistan, international treaties, UN guidelines and model laws, expert analysis, academic articles, legal aid assessments of other systems, and indicator studies and surveys.

In addition to the data collected independently in this project and the sources and analyses cited, the assessment extensively used one specific source that offered recent, empirical analyses of Afghan perspectives. The Human Rights and Elimination of Violence Organization (HREVO) conducted a 2015 study of the UN Rule of Law Indicators for Afghanistan. HREVO, a local Afghan nongovernmental organization (NGO) conducted this study with the support of OSA. The project involved a mandate to “assess and evaluate different aspects rule of law in Afghanistan based on some international indicators as capacities and abilities of criminal justice system, transparency in policy and decision making and accountability.”¹ In their study, HREVO also recognized the need for attention to the integrity of the data adduced:

> The most important assessment challenge is to improve the qualitative variables and tie them to measurable indicators. Despite efforts made towards complying with current quantitative trends in criminal justice indicators and international norms, redefining qualitative concepts, such as police misconduct, unnecessary delay, or access to the courts, as quantitative variables lead to undue simplification of these concepts.²

The HREVO study involved a general survey on perceptions and performance within the criminal justice system and a survey of experts on rule of law in Afghanistan.³ The general survey involved a sample of nearly 15,00 people from the five major regions of the country.⁴ The survey of experts involved both official experts, i.e., police, prosecutors, lawyers, judges and others officially affiliated with the criminal justice system, and unofficial experts, i.e., professionals whose work is linked directly or indirectly to the justice system, like civil society actors, human rights professionals, academics, etc.⁵

**Field Assessment**

The fieldwork in this assessment was conducted over the course of five months in nine provinces (listed below) throughout Afghanistan. These provinces reflect various conditions and challenges of legal aid service delivery in Afghanistan. The data was gathered through onsite⁶, in-person interviews using a common, comprehensive survey instrument (discussed below in section 3.3), and a total of 405 respondents were surveyed. At times, sensitive topics

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² Ibid., at 2.
³ Ibid., at 3.
⁴ Ibid., at 4.
⁵ Ibid., at 53-54.
⁶ LAAR Fieldwork Question m5
were discussed; off-the-record responses are reflected in this report as anonymized responses collected in the data debrief with the assessment team.

The selected provinces’ 2016 criminal caseloads ranged in size:  

- Kabul – at least 12,190 active cases
- Kunduz – at least 2660 active cases
- Paktia – at least 3611 active cases
- Balkh – at least 4570 active cases
- Herat – at least 6564 active cases
- Kandahar – at least 5934 active cases
- Nangarhar – at least 7905 active cases
- Badakhshan – at least 4043 active cases
- Bamyan – at least 2480 active cases

Design

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7 JSSP, CMS Report: Criminal Type by Kabul and Provinces (October 2016). NB: CMS is still being implemented throughout Afghanistan and is a parallel case management system to the paper system traditionally used in the courts. Actual case volumes per province may vary.
The fieldwork assessed key areas impacting legal aid: awareness of the legal framework (rights of the defendant, role of counsel), independence of counsel, accessibility for those in need, quality of service, and management of legal aid organizations. Within these categories, the assessors also examined how different providers deal with factors like efficiency, leadership, human resources administration, financial controls, etc.

The field assessment involved a ‘within subject design’ that sought to capture the knowledge and understanding on criminal justice actors, i.e., people with expertise in the criminal justice system, throughout Afghanistan. The assessment used local and international concepts and norms familiar to Afghan law enforcement and justice professionals, and used explanation to ensure translations preserved meaning and for respondents who did not have experience in the criminal justice system. Thus, some questions and lines of inquiry may appear to touch upon more than issue, yet allows only for one answer. However, these questions were reviewed for necessity and language but offer important context for terminology and/or jargon that might have been unfamiliar to some respondents. For example, the fieldwork assessed the prevalence of holistic representation, which is not common in Afghanistan. In describing several social service ancillary interventions, an argument that the question is touches on more than one issue is properly viewed as putting terminology in context, i.e., irrespective of which holistic interventions are used (e.g., drug treatment, education, parenting skills, etc.), any affirmative answer is relevant to determine how often organizations consider any additional services as important.

In addition, the fieldwork sought to assess the validity of anecdotal data and priorities that have floated throughout the Afghan legal aid community for years, such as the claim that many non-indigent defendants receive representation. Throughout, the design favors establishing common understanding over a precise catalogue of day-to-day activity. Again, using the example of ‘holistic representation,’ which involves a wide range of conduct, any construction of this term is useful, such as a referral to shelters or access to medical assistance.

The assessment also sought to minimize forcing an answer choice, seeking to capture information and opinion, even if it involved multiple answers. By focusing on the responses least/most selected, the assessment was designed to minimize forced choice that often results in a middle-ground decision that may be less accurate. Instead, the instrument was designed and implemented with the intent of enhancing the respondents’ options and incentivizing honesty and forthrightness. Most commonly, this decision as expressed in allowing respondents to choose multiple entries (including all entries or no entries) in the multiple-choice portion of the assessment. Thus, the data is sometimes cast in terms of the most frequently selected responses, as opposed to responses chosen by the most respondents.

See, e.g., Dhar, R., and Simonson, I., The Effect of Forced Choice on Choice, Journal of Marketing Research, Vol. 40, No. 2 (May, 2003), pp. 146-160 (“options that are selected under preference uncertainty to comply with the forced-choice task tend to be those that are “safer” and help alleviate decision conflict, discomfort, and potential regret associated with making a choice despite the lack of a clear preference. In other words, such options are not selected solely or primarily because of the utility embedded in their attribute values, but rather because they help consumers resolve difficult choices. One basic implication is that using forced choice among a fixed set of alternatives to forecast choice shares may generate systematically biased predictions.”).
One key area for data collection involved day-to-day activities of legal aid providers. The assessment team sought to develop the possibility of developing a granular set of best practices governing the work and priorities of a legal aid provider, and specifically whether the data collection in ten provinces throughout Afghanistan could develop some consensus on what best practices could entail. This method was used successfully to develop consensus-based best practices in other assessments of legal aid systems. A set of best practices was drafted, revised by the attorney-experts on the assessment team (see infra at 0) and presented, in relevant part, to legal aid-affiliated respondents and other relevant respondents (experts, private counsel, executives, judges, and prosecutors). Overwhelmingly, respondents endorsed the proposed best practices as activities a legal aid provider does (where the legal aid provider is the respondent) or should do (where the respondent was not a legal aid provider) some of or all the time. In rare cases, certain activities like viewing physical evidence in a case—not routine in Afghan practice—were considered unimportant or “not part of the job.”

**Field Assessment Instrument**

The assessment instrument was developed following a consultation conference organized by Open Society Afghanistan (OSA). The conference asked participants to create questions under several categories: independence, accessibility, organizational health, organization resources, quality and efficiency. Close to 40 legal aid practitioners and access to justice experts worked in five groups to discuss the goals of this assessment and what types of information they considered necessary to contribute to a better understanding of the legal aid landscape of Afghanistan (see Annex 1 for the consultation conference reports).

The results of the conference were combined with an exhaustive review of other legal aid and rule of law assessments and literature. These sources were formed into preliminary questionnaires with intensive participation by the Legal Aid Assessment Roadmap (LAAR)
team, which included Afghan and international lawyers and rule of law/policy personnel. The instrument was designed in English and distributed to national and international legal aid experts and providers. It was reviewed and revised by the LAAR team and others in English and in Dari. The assessment questions were revised, streamlined, and translated to Dari and Pashto. The finalized instrument was tailored to nine respondent types (judge, prosecutor, police, client, legal aid provider, legal aid supervisor, legal aid executive, private defense lawyer, and legal expert) and administered throughout the country by two Assessment Teams each made up of two legal experts.

Field Assessors

The finalized instrument was administered through in-person interviews throughout Afghanistan by two field assessment teams. Each team consisted of two Afghan lawyers who worked on the instrument design, revision, and translation, and had received training on how to administer a survey. Each member of these teams is an expert on Afghan law with over ten years’ professional experience.

Security concerns mandated that all members of the field assessment teams were male, a common issue for researchers in Afghanistan due to travel restrictions for women. However, each assessor’s professional experience reflected a commitment to gender equality through years of related defense work, their academic papers, and their advocacy experience. While the lack of female assessors can hinder access to female respondents, most respondents were criminal justice professionals accustomed to interacting with men and women during their advocacy and legal or judicial practice. This may have mitigated the impact of the absence of women.

Beyond interviewing respondents, field assessors observed the legal aid offices, justice facilities, and legal systems in each province. They also had informal conversations with law enforcement and justice professionals that added to their understanding of the situation in the provinces. After the field assessment was complete, a thorough debriefing was conducted with the field assessors and their findings and analysis incorporated into this assessment report.

Respondents

13 The draft assessment was shared with a large number of local and international stakeholders. The LAAR team received feedback from United States Institute for Peace (USIP), Open Society Foundation (OSF), Medica Afghanistan, Da Qanoon Ghustunky (DQG), the International Legal Foundation (ILF), United Nations Development Programme (UNDP), and the International Development Law Organization (IDLO).
In total, 405 people were surveyed. Interviews were conducted in Dari and Pashto using the field assessment instrument involving wide-ranging questions about the structure, content, and scope of legal aid services in their provinces. All respondents were affiliated with the criminal justice system, including consumers of the system, i.e., legal aid clients or criminally accused suspects or defendants, as well as legal aid providers (defense attorneys), legal aid managers, executive directors of institutional legal aid providers, judges, prosecutors, police, and selected experts. As respondents represented every organ of the justice system, there was substantial, but not complete, overlap in the surveys administered to these related groups. Notably, 69 percent of those surveyed were working in their native province (while 23 percent of those asked stated they were not working in their home province and eight percent did not answer the question).

The respondents had strong education and experience. While 57 percent of the respondents had less than five years’ professional experience, about 36 percent of respondents had between five and nine years’ experience, and eight percent of respondents had more than 10 years’ professional experience. Consistent with current credentialing requirements for most justice system officials, a significant majority (70 percent) of respondents were college-educated. At the outer extremes, holders of Master’s degrees and people without any formal education each comprised seven percent of the respondents. Three percent of respondents had attended the police academy, nine percent held a high school diploma, and five percent had a primary school education only. 75 percent of respondents had been in their current job at least one year. A few veterans claimed 15+ years’ experience, indicating they worked in the justice system during the Taliban rule as well. Half of the respondents had related

LEGAL AID PROVIDERS

14 LAAR Fieldwork, Question x86
15 Ibid., Question x61
16 Ibid., Questions x57, x88
17 Ibid., Question x54
18 Ibid.
19 Ibid.
20 Ibid., Questions x57, x88
21 Ibid.
experience, including university teaching, social work, training or research, or prosecution/judicial experience.\textsuperscript{22}

Of the 70 respondents who represent consumers (clients) of the criminal justice system, 73 percent were currently in custody and an additional seven percent had spent time in custody at some point during the pendency of their case.\textsuperscript{23} All clients were contacted with the assistance of their legal aid providers. Most clients, 61 percent, indicated they appealed a judgment in their cases.\textsuperscript{24} Of those who appealed, only 51 percent indicated that the same defense attorney represented them on appeal as during the primary trial.\textsuperscript{25}

The respondents were demographically diverse, but only 19 percent of those interviewed were women.\textsuperscript{26} The major ethnicities of Afghanistan were well-represented with 31 percent of respondents reporting their ethnicity as Pashtun, 29 percent reporting as Tajik, and six percent reporting as Hazara, in addition to a wide range of other ethnicities.\textsuperscript{27} Another, 20 percent of respondents, when asked, gave their ethnicity as “Afghan,” a statement subject to multiple interpretations according to the field assessors, including inter-ethnic “Afghan” national identity, Pashtun nationalism, and/or resistance to the question as personal or inappropriate.\textsuperscript{28} Out of the total number of respondents who did indicate specific ethnicity, 40 percent were Pashtun, 38 percent were Tajik, eight percent were Hazara, and five percent were Uzbek, generally reflecting the actual demographic proportions of Afghanistan.\textsuperscript{29}

Finally, while almost half (49 percent) of the respondents were 30-39 years old, overall ages ranged from early 20s to mid-60s.\textsuperscript{30}

The surveys were lengthy, but most respondents were very generous with their time and recognized the importance of the LAAR. Typically, respondents interviewed spent two to three hours with the surveyors.\textsuperscript{31}

\textit{Case File Review}

Defense attorneys maintain client files for each case. These files capture important substantive details about legal aid cases, but also reflect the training and procedures mandated for 1) maintaining and recording case data and information, and 2) legal aid providers’ conduct and activities in their cases. The assessment and fieldwork for LAAR included qualitative examination of forty-seven legal aid providers’ case files selected in cooperation between the assessors and the legal aid providers.

For each case file, the assessors recorded basic case information, substantive allegations, and key details. The files were scored on a scale from the lowest score of one (1) to a high score.

\textsuperscript{22} Ibid., Question x59
\textsuperscript{23} Ibid., Question x72
\textsuperscript{24} Ibid., Question x163
\textsuperscript{25} Ibid., Question x164
\textsuperscript{26} Ibid., Question x53
\textsuperscript{27} Ibid., Question x55
\textsuperscript{28} Assessment Team Debrief, December 26-27, 2016
\textsuperscript{29} LAAR Fieldwork, Question x55; See The Asia Foundation, \textit{Survey of the Afghan People}, 204 (2016).
\textsuperscript{30} LAAR Fieldwork, Question x52
\textsuperscript{31} Ibid., Question m5; Assessment Team Debrief, December 26-27, 2016.
of five (5) by assessors, according to a series of metrics, which included (a) adequacy of case file, i.e., presence of contract, indigency form, official reports/memoranda from the prosecution, police, and other justice system agencies, client registration forms; (b) client interview and intake information; (c) understanding and use of applicable law; (d) defense investigation; (e) defense statement; and (f) court-based activities and procedures. The scores were averaged out to determine an overall score. The accusations in the case files included cases of traffic crime, larceny, running away, prostitution, possession of explosive materials or contraband, murder, membership in anti-government groups, malversation and fraud, adultery, bribery, carrying a gun without a license, drinking alcohol, drug trafficking, and assault. The assessors reviewed cases from the following organizations and programs: Da Qanoon Gushtonky (DQG), International Legal Foundation-Afghanistan (ILF-A), Justice for ALL Organization (JFAO), Ministry of Justice’s Legal Aid Department (LAD), Legal Aid Grant Facility (LAGF), Medica Afghanistan, and Women for Afghan Women (WAW).

Survey of the Afghan People

In addition to the field assessment which sought data from law enforcement and justice professionals, experts, and legal aid recipients, the LAAR team sought to understand the attitude of the general population of Afghanistan on legal aid. The Foundation’s annual Survey of the Afghan People is Afghanistan’s longest-running nationwide survey of the attitudes and opinions. It has been conducted since 2004 and, in total, over 87,000 men and women have participated in the survey. As part of the LAAR, the Foundation added five legal aid-specific questions to the Survey, which was carried out between August 31 and October 1, 2016. These questions covered the awareness of the general population about defense lawyers, how often the general population was using defense services, whether defendants should be given defense lawyers, and what types of lawyers are trusted the most.\(^3\)

The Survey is based on a sample of 12,658 men (52.7 percent) and women (47.3 percent) above 18 years of age from all 34 provinces of Afghanistan.\(^3\) For more comprehensive information on methodology of the Survey please visit: http://asiafoundation.org/afghansurvey.

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33 Ibid., at 189.
3. BACKGROUND

The provision of legal aid to indigent persons facing criminal prosecution is a standard institution of modern governance. Most modern states have adopted a right to counsel, consistent with domestic and international legal obligations, and have developed procedures to provide indigent persons with access to counsel. In Afghanistan, a meaningful right to counsel and the right to legal aid are constitutional and reaffirmed throughout Afghan law and policy. In addition, Afghanistan’s accession to the International Covenant on Civil and Political Rights in 1983 rendered the right to counsel an international treaty obligation.

Implementing the right to counsel necessarily involves a legal aid scheme. As is discussed throughout this report, most legal aid schemes include three clearly-defined building blocks: providers, or the individuals with the legal capacity to represent indigent suspects and accused persons, service delivery mechanisms, structures or organizations through which legal aid funding may flow and which train, monitor, and deploy legal aid providers in individual cases, and coordination mechanisms, or formal and/or informal means of organizing and managing the legal aid system. In its 2013 Five Year Strategy, the MoJ cited its most significant challenges in ensuring access to justice; these included “ambiguity of managerial and legal framework of [the] Legal Aid System” and “non-existence of an effective coordinating system for legal aid to use the available resources and address the minimum requirements.”

Afghanistan meets its service delivery obligations via a mixed model of legal aid that includes institutional indigent defense providers, including a state-sponsored public defender (the Legal Aid Department in the Ministry of Justice), NGOs that provide legal aid to suspects and accused persons in criminal cases, and an appointed counsel mechanism. Some NGOs, like the International Legal Foundation of Afghanistan (ILF-A), focus exclusively on indigent

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criminal defense and have been involved in the development of policy and practice in the legal aid sector. Others, like Medica Afghanistan (Medica) and Women for Afghan Women (WAW), focus on specific constituencies (e.g., women and children) and provide legal aid representation within a broader scope of services to a limited population. Individual indigent defense providers are private counsel appointed as per a mandated pro bono requirement and via the Legal Aid Grant Facility (LAGF), a judicare system that makes case-by-case appointments. By the end of the first quarter of 2017, there were reportedly just over 300 defense lawyers working for legal aid institutions (including the government) and approximately an additional 2900 licensed defense lawyers.

The United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems, an important resource, were adopted by the U.N. General Assembly in 2013.\textsuperscript{35} These guidelines cite legal aid as a core responsibility of the state that involves (1) creating and resourcing an effective legal aid scheme, (2) ensuring independence of legal aid providers, and (3) enhancing public legal awareness of individual rights, the criminal law (including criminalized acts), and the justice system generally.\textsuperscript{36}

As is discussed throughout this analysis, Afghan law and policy are consistent with many provisions in the UN Guidelines. In addition, Afghanistan already has several institutions favored in modern legal aid development, including an independent coordination body, credentialed lawyers, and a mixed model of legal aid. Afghanistan’s embrace of international human rights norms is a resource in the development of legal aid.


\textsuperscript{36} Ibid., at 8-9. (Principle 2, Responsibilities of the State).
In Afghanistan, it is well-settled law, policy, and practice that the government has the ultimate responsibility for ensuring legal aid is available to those who need it in criminal cases. It is also well-settled law, practice, and policy that the Afghan government’s duty to ensure indigent persons have access to counsel, i.e., to provide legal aid, does not necessarily mean the government must deliver all (or any) legal aid services itself. While the government retains the responsibility to make sure adequate legal aid exists, it may meet that responsibility in a variety of ways; namely, the government may choose to deliver legal aid services directly, or to engage private individuals or organizations to deliver legal aid on behalf of the government, or both.

Independence, efficiency, quality, and costs are all implicated in the determination of who delivers legal aid representation to indigent persons facing criminal prosecution. Consequently, some legal aid experts believe the government should provide no legal aid services directly, to preserve attorney independence, and that the governmental role should be limited to assessing quality and/or monitoring legal aid funding. Others believe only government providers should provide legal aid services and that contracting out legal aid services unnecessarily attenuates the government’s responsibility. Nevertheless, both government and NGO legal aid providers may legally and legitimately represent indigent suspects and accused persons in the current system. In addition, the mixed model is popular internationally as a flexible and context-specific way of delivering legal aid, significantly, it has been effective in Afghanistan.

Importantly, this ongoing tension regarding who should provide legal aid also reflects the pace and the scope of reform to legal aid and the justice system since 2002. Although the right to counsel has existed in Afghanistan for some time, intense focus on building rule of law and access to justice in the past fifteen years has accompanied efforts to promote effective governance and stability. Today, Afghanistan has a modern legal aid framework, as well as an increasing awareness and acceptance of civil law and the formal justice sector as credible sites of conflict resolution. This is a significant improvement since 2002, when the judiciary and the justice ministry lacked regular access to the Afghan Constitution, laws or statutes, expressed disinterest in education or training, and cited the Holy Quran as suitable for the adjudication of ordinary criminal cases.

However, as some disconnects between policy and practice illustrate, Afghan legal aid institutions did not evolve simultaneously with legal aid mandates in law and policy. The legacy of rapid development of the justice system in parallel with the mandates of international aid remains evident in the legal aid system. Afghan legal and justice institutions have struggled to implement and prioritize development interventions and to balance a drive to deliver services versus a need for organization and coordination. It has also been difficult to understand when there is a need for increase public legal awareness, and when such

37 See UNODC and UNDP, *Global Study on Legal Aid, Global Report* 41 (2016) (hereinafter cited as UN Global Study)
38 Fourth Consultation Conference, Opening Remarks of Ashraf Rasooli, April 11, 2017.
awareness simply leads to frustration due to unmet demand for legal services. Afghanistan’s legal aid sector remains challenged to maintain practices nationwide that realize its legal and policy commitments to widespread availability of high-quality legal aid. The government’s core duty to create and resource an effective legal aid scheme, is a much bigger question than who providers legal aid representation (government or NGO). Instead, the government’s core responsibility to create a legal aid scheme includes a responsibility to meaningfully address widespread issues like availability of legal aid, quality, and independence.
4. AFGHANISTAN’S LEGAL AID FRAMEWORK

In Afghanistan, the right to counsel is well-enmeshed in law and policy, having existed in codified law for over fifty years. In addition, the right to legal assistance has roots in Islamic jurisprudence as well as Afghan culture and history. While the right is constitutional, Afghanistan has repeatedly re-affirmed the importance of the right to counsel in its subordinate legislation, its policy commitments, and its international treaty obligations. One strength of Afghanistan’s legal aid landscape is a strong legal and policy framework setting forth a meaningful right to counsel in criminal cases, as well as the expectation of legal aid to indigent persons. There are also several laws, rules, and regulations covering notification, adequate and zealous defense standards, exclusionary rules, indigency determination, confidentiality, access to clients, and licensing of advocates. Nevertheless, the regulatory framework identifying the types of providers, models of delivery, governance systems, appointment systems, quality monitoring, and general coordination faces considerable challenges in achieving its core objectives, revealing flaws on multiple levels and specific areas in need of amendment.

Policy Landscape

With the overthrow of the Taliban in 2001 and the adoption of the 2004 Constitution, Afghanistan has made great strides in the justice sector and specifically on criminal defense and legal aid. Article 31 of Afghanistan’s 2004 Constitution sets forth the right to legal aid in criminal cases, including the right to counsel and the right to appointed counsel in the case of indigency and gives rise to several legal and policy instruments. Since then a number of domestic and international policy instruments and plans have formed the legal aid policy landscape of Afghanistan, which has enjoyed significant international support from access to justice initiatives through donor funds and international advisors. The importance of legal aid has been reflected consistently in key policy instruments.

Justice for All, the Afghan Government’s 12-year rule of law development framework, published by the in May 2005, identified inter alia the need for the development of a national legal aid system in Afghanistan. In 2007, a co-authored study by IDLO and the MoJ, Models and Options for Legal Aid Delivery, recommended a mixed-model approach for legal aid in Afghanistan, partly in recognition that NGOs had assumed most of the burden of legal

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40 Article 31 of the 2004 Constitution of Afghanistan provides in pertinent part,

Upon arrest, or to prove truth, every individual can appoint a defense attorney. Immediately upon arrest, the accused shall have the right to be informed of the nature of the accusation, and appear before the court within the time limit specified by law. In criminal cases, the state shall appoint a defense attorney for the indigent. Confidentiality of conversations, correspondence, and communications between the accused and their attorney shall be secure from any kind of violation. The duties and powers of defense attorneys shall be regulated by law.


aid delivery. One year later, the Afghanistan National Development Strategy (ANDS), a guide to Afghanistan’s development objectives, set forth the National Justice Sector Strategy (NJSS), and charged the MoJ with establishing a legal aid system for indigent defendants in every province and implementing a public awareness campaign.

That same year, the National Legal Aid Policy, an effort at organizing legal aid development sustainably, was ratified by the MoJ. Detailing legal aid efforts of the MoJ and others, the National Legal Aid Policy informed the drafting of the 2008 Advocates’ Law and the Legal Aid Regulation and set forth key roles for the MoJ and an Independent Legal Aid Board (ILAB). In 2012, the MoJ released a new Legal Aid Policy, drafted with the assistance of the Justice Sector Support Program (JSSP). The 2012 policy explicitly identifies the ILAB as the primary implementing organ charged with fulfilling the MoJ’s and government’s constitutional and statutory duty to provide legal aid.

By this time, the government and its partners in the development community were exploring means to increase the access, efficiency, quality, and sustainability of legal aid delivery. The 2013 National Priority Program for Law and Justice for All (NPP5), one of 22 National Priority Programs articulated by the Afghan government at the Kabul Conference in July 2010, set forth priorities and indicators for rule of law development in Afghanistan. The stated goal of the now-expired NPP5 was, “[t]o restore the trust of Afghan citizens in the ability of the justice system to protect and defend their personal, economic, social and national interests through its demonstrated and faithful adherence to the rule of law.” It specifically linked access to legal aid to effective rule of law: “The Government believes that providing competent defense counsel is not only a Constitutional imperative, it also contributes to a more efficient, rights-based, and rehabilitative criminal justice system.” The NPP5 made several recommendations that addressed primary secondary obstacles to increasing access to legal aid services.

For example, the Afghan government made a specific commitment to increasing the number of legal aid providers in Component 3 of NPP5, the Afghan national priority to Increase Meaningful Access to Justice. The provision further acknowledges that significant numbers

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44 Ibid.
48 NPP5 was drafted by the Supreme Court, the MOJ, the Attorney General’s Office (AGO) and the AIBA in 2013 after extensive deliberation over strategic approaches to improving justice delivery system. Government of the Islamic Republic of Afghanistan, *Governance Cluster, National Priority Program Five (NPP5), Law and Justice for All* (23 June 2013) available at [http://moj.gov.af/Content/files/GOV-NPP5-JFA.pdf](http://moj.gov.af/Content/files/GOV-NPP5-JFA.pdf). (hereafter cited as NPP5)
49 Ibid., at 5.
50 Ibid., at 26.
51 See for example the discussion of *in absentia* trials *infra* 4.3.4
of Afghan citizens are arbitrarily detained without legal basis and commits to ending this practice.\textsuperscript{52} NPP5 also highlighted the need to balance increasing the number of practicing lawyers with enhancing the quality and skills of all legal aid lawyers.\textsuperscript{53} The importance of early access to counsel is also cited as an important mechanism to increase the efficiency of the judicial system and to prevent unjust pretrial detentions.\textsuperscript{54} More recently, the Self-Reliance through Mutual Accountability Framework (SMAF) of September 2015, commits the government broadly to improving access to justice and to bringing the rule of law to all parts of the country.\textsuperscript{55}

Together, these policy instruments and others exhibit a longstanding, comprehensive, and meaningful commitment to legal aid while acknowledging significant and persistent inadequacies in implementation of legal aid. To its credit, Afghanistan continues to promulgate legal aid policy that is consistent with international standards but also 1) aspires to reach admirable goals for the quality of services provided to indigent persons facing criminal prosecution, and 2) acknowledges serious deficiencies in current implementation. For example, in its 2013 Five Year Strategy, the MoJ cited its most significant challenges in ensuring access to justice; these included “ambiguity of managerial and legal framework of [the] Legal Aid System” and “non-existence of an effective coordinating system for legal aid to use the available resources and address the minimum requirements.”\textsuperscript{56}

\textbf{The Right to Counsel}

Historically, the right to counsel and the right to legal aid have been codified in Afghan constitutional law since 1964, and Article 31 of Afghanistan’s 2004 Constitution also sets forth the right to legal aid in criminal cases, including the right to appointed counsel in the case of indigency.\textsuperscript{57} Furthermore, a series of additional interlocking and overlapping

\begin{itemize}
\item NPP5, at 31.
\item The NPP5 provides, in pertinent part:

The constitutional right of persons charged with crimes to be provided an attorney is still largely unmet. For many reasons, there are simply not enough lawyers available to competently represent all arrested indigent people in Afghanistan. Furthermore, providing a defense attorney does not necessarily signify that the Government’s constitutional obligation has been satisfied. The defense counsel must be reasonably capable, properly resourced, and have sufficient cooperation from [other justice sector institutions]. Attorneys who cannot afford or choose not to travel to meet their clients in detention are not able to provide the sort of legal services anticipated by the Constitution and expected by the people. \textit{The Government recognizes that improving the quality of legal aid must be prioritized with the same emphasis it places on increasing the number of legal aid lawyers.} (emphasis added)

Ibid, 33.
\item NPP5 at 25: “defense attorneys should be involved at an early enough stage in the criminal process to influence decisions about whether defendants are released from pre-trial detention.”
\item Constitution of Afghanistan, Article 31.
\end{itemize}
regulations seek to ensure that Afghans’ right to counsel and right to legal aid offer meaningful protections.

Afghan domestic law further details and strengthens the right to defense, the right to counsel, and the entitlement to legal aid for indigent persons in the laws and codes that govern every organ of the justice system.\(^{58}\) Articles 7(8) and 9 of the 2014 Afghan Criminal Procedure Code (CPC)\(^ {59}\) guarantee the right to counsel for criminal suspects and accused persons at every stage of the prosecution of a case. Article 9(4) creates an absolute requirement for the presence of a defense attorney at all prosecution proceedings in criminal cases where the accused person faces long-term imprisonment.\(^ {60}\) In addition, the Afghan Law on the Organization and Authority of the Courts of the Islamic Republic of Afghanistan, adopted in 2005, affirms the absolute right to counsel immediately upon arrest.\(^ {61}\) The 2007 Advocates’ Law also refers to an absolute right to counsel, including in cases of indigency, as well as affirming advocates’ commitment to their clients’ right to choice of counsel.\(^ {62}\)

Afghan law also affords special protections to traditionally vulnerable groups (in addition to indigency). As with adults, children facing criminal charges also have an absolute right to counsel and to free legal aid in cases of indigency, pursuant to Article 22 of the 2005 Juvenile Code.\(^ {63}\) Article 10 of the CPC sets forth the requirement that any suspect or accused person who is indigent, deaf, mute, blind, or has any mental disorders should be appointed a legal aid provider.\(^ {64}\) The Legal Aid Regulation also prioritizes legal aid in criminal cases for children,

\(^{58}\) Under the Advocates’ Law, Article 5(3) defines the term “indigent” as meaning “any person who cannot afford to pay a defense attorney in criminal cases.” Art 5(3), Advocates’ Law, Official Gazette No. 934 (Dec. 17, 2007) (hereinafter cited as Advocates Law). The Legal Aid Regulation defines an indigent person as: “a person whose income is not sufficient to cover his/her livelihood.” Legal Aid Regulation, Official Gazette No. 950 (2 July 2008) (hereinafter cited as Legal Aid Regulation), Article 4(3).


\(^{60}\) Ibid.

\(^{61}\) The Law on the Organization and Authority of the Courts of the Islamic Republic of Afghanistan provides, in pertinent part:

Every person upon arrest has the right to appoint a defense counsel to defend himself in regard of the accusation and evidence against him. In criminal cases a defense counsel shall be appointed for destitute persons according to the provision of the law.


\(^{62}\) Article 2 of the Advocates’ Law, promulgated in 2007, provides that: “Every person has the right from the time of arrest to appoint an advocate of his/her choice to defend and represent his/her rights.” Advocates’ Law.

\(^{63}\) The 2005 Afghan Juvenile Code provides in pertinent part:

In all stages of the investigation and trial, the child shall have the right to a defense counsel and interpreter. In case the parents or legal representative cannot afford a defense counsel or interpreter, the juvenile court shall appoint a defense counsel and interpreter on government costs. The legal representative, defense counsel or the interpreter of the child has the right to be notified and participate in all stages of legal proceedings carried out by the prosecutor or the court.


\(^{64}\) Ibid.
women, disabled persons, and internally displaced people. Finally, the Legal Aid Regulation also affords women and children a right to legal aid in civil cases, where resources exist.65

**Special Populations: Women and Children**

Certain special populations have specific and complicated interactions with the right to counsel and the right to legal aid. All women and children are entitled to legal aid and “presumed indigent,” as discussed infra at Section 0. In addition, women and children’s entitlement to legal aid extends beyond criminal defense to include a right to counsel in civil matters.66 Several NGOs operate exclusively on behalf of women and children, including but not limited to legal representations and/or do not take cases that place them in an adverse position to women and children is certain types of cases (like domestic violence), as discussed infra at Section A.ii. There has been a significant investment by Afghan civil society, the Afghan government, and the donor community to ensure that women and children have enhanced access to resources given the challenges these populations face navigating the justice system given their particular status. It is rare to enter an Afghan detention facility for women or juveniles and find significant numbers of detainees unrepresented by counsel.

**A. Women**

The substantial investment in procedural justice for women and children has had impact. By all accounts, discrimination against women in Afghanistan has been systematic and severe. However, as discussed infra at Section Error! Reference source not found., there is some belief that the criminal justice system is increasingly considered a fair and accessible forum, particularly for traditionally vulnerable groups like women. In addition, most women who approached the courts for conflict resolution reported their belief that courts treat men and women equally.67 Yet, despite these gains, women continue to face systematic intolerance and complex challenges that impact and extend far beyond the criminal justice system. In fact, a recent study from the U.S. Institute of Peace opined that “[l]ack of awareness and lack of resources are certainly significant hurdles to women’s access to justice, but they are only part of the problem. Even when women are aware of and physically close to the resources, they often are prevented from using these resources or choose not to use them...”68 In 2011, Afghanistan was named the most difficult country in the world to be born a woman.69 In addition, “[w]omen’s overall skepticism that they would have their rights enforced, or even have a fair chance to explain their view, was itself a major deterrent and obstacle to justice.”70

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65 Legal Aid Regulation, Articles 4, 11, 13, 17, and 29,  
66 See e.g., Legal Aid Regulation, Article 4.  
70 Luccaro and Gaston, at 24.
public legal awareness and directed funding toward women’s access to justice has not mitigated these problems.

In the criminal justice system, the overwhelming majority of women prosecuted face charges of morals crimes, including adultery, attempted adultery, running away, or general morals crimes.\textsuperscript{71} For example, in the last year, 968 cases of “running away” from home were charged in criminal courts of at least 30 provinces, including Kabul.\textsuperscript{72} These cases exist, and Afghans face incarceration, despite the fact that “running away” is not a crime under either Afghan law or under the Hanafi jurisprudence that could be substituted absent any affirmative civil law.\textsuperscript{73} “Women who have reported being raped have often found themselves being charged as accomplices to the rape and so guilty of a zina [adultery] crime.”\textsuperscript{74} While women typically approach family, community, or external (e.g., state) mechanisms to redress conflict, each of these comes with considerable barriers.

**B. Juveniles**

Like women, juveniles also face significant prosecution for morals crimes. These prosecutions conflict international norms in a variety of ways, including the detention of juveniles in adult prisons in some cases.\textsuperscript{75} “No consideration is taken of the circumstances of the offence, the ability of the child to give consent, the use and abuse of children by adults, and the use of the juvenile justice system for punitive not rehabilitative purposes.”\textsuperscript{76} In addition, UNICEF notes that “[i]n a large number of cases children who are the victims of sexual abuse or sexual exploitation are punished in the justice system.”\textsuperscript{77} Thus, the juvenile justice system is populated with child victims being treated as offenders.

As is the case with women, it is rare to enter a juvenile rehabilitation center (facilities used for detention of juveniles) and find a significant number of detained children who are not represented by counsel. The legal, policy, and financial imperatives that guarantee legal aid to women and children do effectively ensure access to representation. However, although juveniles have enhanced rights to legal aid, there is no concomitant protection against prosecution as victims or prosecution for petty offenses.

**Special Courts**

\textsuperscript{71} Ibid., at 19.
\textsuperscript{72} Source: Justice Sector Support Program CMS Report, CMS Criminal Type by Kabul and Provinces (produced Oct. 22, 2016).
\textsuperscript{74} Luccaro and Gaston, at 19.
\textsuperscript{77} Ibid.
Afghanistan has several special courts with subject matter jurisdiction over specific areas of the law and with nationwide jurisdiction from a centralized seat located in or near Kabul. While some of these courts operate within the dewan structure of the Supreme Court,78 like the courts in each province adjudicating issues involving violence against women,79 other special courts are stand-alone justice centers. These include the Counter-Narcotics Justice Center (CNJC), the Anti-Corruption Court, and the Justice Center in Parwan (JCIP), which focuses on national security cases. These courts have limited jurisdiction over specific types of crimes, but hear cases from throughout the country and are allocated special resources and personnel to maximize their quality and efficiency. In some special courts, like CNJC which was created by statute,80 the prosecutors have enhanced salaries and benefits to deter corruption. In all cases, the rights to counsel and to legal aid are preserved, although these courts have shown varying commitment to ensuring the presence of counsel for all defendants appearing there, and the presence of a centralized court presents sometimes insurmountable barriers for investigation and other aspects of an effective defense.

**Alternative Venues**

Beyond its civilian courts, Afghanistan maintains several alternative venues for conflict resolution and arbitration of justice in Afghanistan. Military personnel are tried in military courts, if accused, under the Military Crimes Code. When military personnel are charged with other types of crimes, they may face prosecution in military or civilian courts.81 Thus, although exceptions for crimes “in the line of duty” apply, the CPC also applies to criminal matters covering Afghan National Security Forces (ANSF), NDS operatives, and military personnel.82 Irrespective of the forum, military, NDS, or ANSF personnel have a constitutional right to defense counsel.83 In addition, as discussed infra at 0, nearly all government employees and military personnel are presumed to meet indigency requirements for free legal aid.84

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80 The CNJC was created by statute to address certain cases of trafficking, possession, and distribution of narcotics: “Under Afghanistan’s 2005 Counternarcotics Law, amended in 2010, the CJTF prosecutes all drug cases that reach certain thresholds… before the Counter Narcotics Tribunal. The Counter Narcotics Justice Center (CNJC) houses the Tribunal and CJTF, and is the central facility for the investigation, prosecution, and trial of major narcotics and narcotics-related corruption cases.” U.S. Department of State, Bureau of International Narcotics And Law Enforcement Affairs, 2016 International Narcotics Control Strategy Report, Section B.1, available at https://www.state.gov/j/inl/rls/nrcrpt/2016/vol1/253235.htm.
81 Military Crimes Code, Article 47.
82 CPC, Article 145(8). The provision states that: The investigation of crimes, not related to their duties, committed by police, Afghan National Forces, National Directorate of Security officers/employees and the military personnel of Civil Departments which have military personnel within their organizational structures shall be conducted based on provisions of this law.
83 CPC, Article 145(8). The CPC sets forth a general right to counsel for accused persons and suspects, which is incorporated into detections, investigations, and prosecutions of military, ANSF, and NDS suspects and accused persons.
84 ILAB Indigency Form
Access to counsel in traditional forums is currently unregulated in Afghanistan. A draft Reconciliation Law intended to legislate the relationship between traditional dispute resolution forums and the judicial system is currently under consideration by the Council of Ministers of Afghanistan.\textsuperscript{85} However, this draft law consciously and deliberately lacks avenues for traditional forums to legally handle even the most minor of criminal offenses.\textsuperscript{86} As a result, there is no discussion of defense advocates or legal aid provision. In practice, traditional forums handle fewer and fewer criminal matters unless the government maintains weak control over a given jurisdiction.\textsuperscript{87}

**Access to Counsel**

Simply being assigned a legal aid provider does not guarantee that suspects and accused are meaningfully represented. The right to counsel is made meaningful, in law and in practice, through various guarantees, including early access to counsel, notice, and the appointment of counsel to every person in need. In Afghanistan, Article 31 of the Constitution contains notice and confidentiality provisions, signaling strong intent to ensure a meaningful right. Additionally, several laws and regulations incorporate, reinforce, and further interpret the notion of a meaningful right to counsel in setting forth the duties of legal aid providers and other justice system actors. As is further discussed infra at 0, responsibility for notice and access to counsel is well-distributed under Afghan law.

**Duty to Provide Notice**

Article 8 of the CPC obligates the police (at the time of arrest), prosecutors (prior to commencing an investigation), and judges (before the start of the trial) to inform suspects and accused persons of their rights, including the right to a defense lawyer or to receive a legal aid provider.\textsuperscript{88} The Legal Aid Regulation extends this notice obligation to officials in adult detention centers and juvenile rehabilitation centers.\textsuperscript{89}

**C. Judicial Officers, Police, and NDS**

\textsuperscript{85} Interview with Ashraf Rasooli, Senior Adviser to the Minister of Justice, April 10, 2017.
\textsuperscript{86} Ibid.
\textsuperscript{87} Ibid.
\textsuperscript{88} CPC, Article 7(8) and 8. See also, CPC Article 148. Further, under Article 6 of the CPC, even crime victims have the right to a legal representative. In the context of victims of crime, this right incorporates the right to notice by the police, prosecution, and the courts, but does not extend to the provision of free legal aid.
\textsuperscript{89} Legal Aid Regulation, Article 24.
Aside from the enumerated criminal justice personnel above, the CPC does not clarify the scope of other government personnel who must inform suspects of their right to counsel, i.e., what general notice obligations exist. While legal aid policy language evinces clear intent that the right to counsel (and the attendant notice rights) should attach at the detection stage, i.e., to officials detecting crime and making arrests, the statutory language is less clear and, at times, conflicting.

The basis for the notice obligations applied to the police is their duty to detect crime, which includes investigating, speaking with witnesses and suspects, and conducting searches and arrests pursuant to applicable law. As this role involves custodial and quasi-custodial situations where a suspect is questioned or interrogated without being free to leave, the police have a duty to provide notice of the right to counsel to suspects.

However, the statutory and legal context mandating the right to counsel in policing is erratic and incongruous. For, example, Article 134 the Constitution delegates the duty to detect only to the police. This is, of course, the basis for the police obligation to inform suspects of their right to counsel.90 Conversely, Article 4(2) of the CPC invests all judicial officers with the authority to detect crimes, collect incriminating evidence, and question witnesses and suspects. Judicial officers extend beyond the police to include operatives of the National Directorate of Security (NDS), inspectors of the High Office of Inspection, internal auditors of ministries and government institutions, and officials from anti-corruption institutions. Problematically, as previously discussed, the notice requirement of Article 8, cited above, only lists the police, prosecutors, and judges, but not judicial officers. However, the responsibilities and power of judicial officers clearly implicate the legal and policy imperative of notice of the right to counsel.

Yet another alternative provision of statutory authority, CPC Article 80(1) stipulates that crime detection shall be conducted only by police and national security operatives, a distinction absent from CPC Article 4(2). Notably, in addition to searching for evidence and other detection duties, these two types of judicial officers may arrest (and search) suspects.91 These overlapping inconsistencies may operate to obscure important rights within conflicting obligations and to facilitate the abuse or misuse of power. At minimum, the CPC facilitates NDS officials’ claim that they may arrest individuals who are “flight risks” without being obligated to inform these detainees of their rights under Article 7 of the CPC, including the right to counsel. Some CPC drafters have claimed that this is a mere oversight, best managed by adding commentary to the law.92 In addition, other laws, such as Article 11 of the Law on the Organization and Jurisdiction of the Courts (right to counsel attaches at arrest)93 or

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90 Constitution of Afghanistan, Article 134. An exception to this provision applies in cases involving official misconduct by military, police, and security operatives
91 CPC, Article 80(2)(3) and Article 81.
92 Interview with Ashraf Rasooli, Senior Adviser to Minister of Justice, April 16, 2017.
93 The Law on the Organization and Authority of the Courts of the Islamic Republic of Afghanistan provides, in pertinent part:

Every person upon arrest has the right to appoint a defense counsel to defend himself in regard of the accusation and evidence against him. In criminal cases a defense counsel shall be appointed for destitute persons according to the provision of the law.
Presidential Decree 129 instructing the Ministry of Interior and the NDS to make defense counsel available to suspects and accused,94 may be employed to resolve this inconsistency within the CPC. However, in practice, this notification gap in the CPC continues to be exploited.95 Resolving these inconsistencies through amendment or the publication of a commentary that clearly sets out the notification duty for NDS operatives is one key condition to align the policy landscape, the spirit of the law, and the letter of the statutory text.

Distribution of Responsibility

Under Article 3(1) of the Advocates’ Law, the responsibility for appointing legal aid providers resides with the MoJ.96 This responsibility lies with the Legal Aid Department (LAD), which was transferred to the MoJ from the Supreme Court pursuant to Presidential Decree 111 in 2007.97 The Legal Aid Regulation sets forth a process whereby the police, prosecution, and courts are obligated to introduce indigent suspects and accused persons to the MoJ or, if the MoJ is unavailable, to other “legal aid authorities.”98 These may include AIBA, NGOs licensed to provide legal aid, and legal clinics.99 The Regulation indicates that legal aid is available at the request of the police, prosecution, or the courts, or upon direct request of suspects/accused persons or their relatives. The MoJ and “other legal aid authorities” are obliged to assign a legal aid provider once such a request is made.100

The CPC requires prosecutors to take affirmative steps to ensure access to counsel; the prosecution must call for defense counsel at the investigation stage and, in the absence of counsel, obtain a written waiver from the accused. In the case of indigent accused persons, prosecutors have an affirmative duty to introduce them to the LAD.101

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95 This presents additional problems as well, here and elsewhere. The approval of various similar laws in areas criminal justice and anti-corruption, as well as the adoption of inapposite or irrelevant to legal provisions vis-à-vis the Afghan context, creates confusion and an enabling environment in which conflicting guidance promotes apathy. HREVO ROL Report at 115.

96 Article 3(1) of the Advocates’ Law provides that “pursuant to Article 31 of the Constitution, the Ministry of Justice shall be obliged to appoint a legal aid provider for indigent persons at any stage of the prosecution.” Advocates’ Law, Official Gazette No. 934 (Dec. 17, 2007).

97 Presidential Decree 111, Article 3, Official Gazette, Issue No: 934, Date: 17/12/2007

98 While the Legal Aid Regulation refers to “authorities,” international guidelines and studies usually refer to the organizations that employ or manage legal aid providers as “legal aid service providers.”

99 Legal Aid Regulation, Article 5.

100 Ibid., Article 6.

101 Article 152 of the CPC provides in pertinent part:

The prosecutor shall prior to investigation request the accused person to have a defense lawyer with him/her. If the accused person refrains from having a defense lawyer, the issue shall be recorded in the registry and the accused person’s signature obtained. If the accused person states that he/she is financially unable to have a defense lawyer, he/she shall be introduced to the Legal Aid Department according to provisions of the law and the relevant regulation.

Not introducing a defense lawyer or refraining from having a defense lawyer in misdemeanor crime shall not avert investigation or lead to destruction of evidence.
In practice, however, appointment of counsel is quite different. Although the police,
prosecution, and courts are legally obligated to introduce indigent defendants to counsel, it
has never been a consistent practice.\footnote{102 LAAR Fieldwork, Question x145} In addition, as discussed below, while the Regulation
also requires that these entities determine indigency, this is rarely done. In actuality, legal aid
providers frequently retain clients through visits to detention and juvenile rehabilitation
centers where the legal aid provider signs up clients proactively.\footnote{103 If the requests are made by the accused or suspects directly, they should use the request form of the particular service provider. While this should occur with the consultation of the ILAB, but this has not been practically feasible. ILAB Procedure, Article 16.} LAD personnel also
complain that the lack of a clear point of contact in the Regulation has created a situation
where authorities can claim to have contacted other providers (AIBA or NGOs) and met their
regulatory duty.\footnote{104 Fourth Consultation Conference, April 11, 2017.}

Capacity issues exist among legal aid providers as well, which limit the legally-prescribed
process; many institutional providers are challenged in providing legal aid for a long list of
defendants, appearing suddenly and simultaneously. Assigning multiple counsel at most
locations throughout Afghanistan can be difficult due to the reality of resource constraints,
lack of coordination, the need to assess indigency, and other factors. Thus, at times, this
appointment obligation cannot be enforced reliably, particularly within AIBA, NGOs, and
legal clinics.

\textit{Mandatory Obligation in Felony Case}

In two circumstances, the obligation to appoint legal aid is particularly firm; the first of these
involves felony cases. Under Articles 9 and 152 of the CPC, prosecutors \textit{must} ensure that
there is a defense lawyer present at the beginning of any prosecution that could result in a
felony conviction and, if the accused is found to be indigent, the prosecutor \textit{must} seek the
appointment of a legal aid provider from the LAD. This rule, although seemingly redundant,
reflects the reality of the scarcity of defense lawyers throughout Afghanistan, and especially
legal aid providers, and legislative attempts to reasonably prioritize legal aid delivery.

\textit{Mandatory Obligation for Trials In Absentia}

In Afghanistan, there is a routine practice of administering cases \textit{in absentia}, where the
suspect or accused fails to appear.\footnote{105 This practice is reflected in Articles 209-212, 223, 244, 271, and 273 of the CPC.} Recognizing this, the CPC creates another specific
obligation to appoint legal aid under Article 209(2). These cases proceed without the
defendant present but with assigned defense counsel, pursuant to CPC 209(2), and typically
result in a conviction.\footnote{106 Article 209(2) of the CPC provides:}

\begin{quote}
For misdemeanor and felony crimes, if the accused person does not appear for the judicial session on
the due date in spite having been notified, the court shall suspend the case proceedings and issue a
\end{quote}

\hspace{1cm}In a felony crime, the prosecutor shall be duty-bound to assign a defense lawyer for the accused person
and if the accused person’s indigence is proved, a legal aid or a defense attorney shall be provided for
him/her by the Legal Aid Department according to provisions of the relevant regulation.
were being tried *in absentia*, \(^{107}\) and refers to these cases as “a significant burden on all justice sector institutions” without an evident contribution to public safety. \(^{108}\) Often, these cases receive priority over cases with defendants in custody to clear up backlogs. \(^{109}\) Alternatively, many other jurisdictions employ a tolling provision, *i.e.* suspending activity in a case (and resources devoted to the case) once a defendant absconds or otherwise fails to appear in court. The NPP5 attributes this common practice to misunderstanding of the law, lack of training, and perverse financial incentives (*e.g.*, routine payments made to court staff to expedite cases). In the end, significant court resources are devoted to cases that could otherwise be tolled until the absent defendants return to custody. \(^{110}\)

Practically, the administration of *in absentia* cases is bureaucratic and routine, and suitable for delegation to clerical staff of the court as in other jurisdictions. In addition, the outcome lacks finality as it is only the defendant, not his attorney, who may appeal the result in the second and third courts. \(^{111}\) Significant court and lawyer resources are routinely devoted to the administration of cases without defendants in an ongoing context where the need for legal aid generally exceeds the available resources and without a lasting benefit to judicial economy.

NPP5 acknowledges that Afghanistan’s *in absentia* practice “drains the human and financial resources available to the [justice sector institutions] and increases the number of persons who are illegally detained pre-trial far beyond permissible time periods.” \(^{112}\) In most provinces, judges and attorneys spend significant courtroom time and resources administering *in absentia* cases, a largely bureaucratic exercise in determining legal sufficiency.

*In absentia* trials also force defense lawyers to deliver services that would not otherwise be permissible under the Code of Conduct. Defense lawyers should always meet with clients, interview them, and seek their input on all decisions. The notion that defense lawyers can simply write a defense statement based on the prosecutions indictment or appeal diminishes the role of defense lawyers and feeds into the perception that they are an unimportant element of criminal trials in Afghanistan.

Under Article 209(2) of the CPC, LAD legal aid providers must accept *in absentia* assignments from the court, greatly reducing their availability for indigent criminally accused clients who are present and in need of legal assistance in ongoing cases. Reportedly, a common practice of satisfying annual attorney *pro bono* requirements by taking three *in absentia* cases also displaces the donation of attorneys’ resources from the indigent public to the routine administration of the courthouse. Most importantly, the ongoing preponderance of *in absentia* cases in the justice system in most provinces operates to deny legal and judicial

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\(^{107}\) NPP5 at 29.

\(^{108}\) Ibid., at 25.

\(^{109}\) Ibid., at 29-30.

\(^{110}\) Ibid., at 30

\(^{111}\) CPC, Article 271. “The prosecutor, plaintiff and defendant, in criminal cases which the decision has been issued in the absence of the accused person, may object to the issued decision before the Supreme Court on the issues related to them.”

\(^{112}\) NPP5 at 30.
assistance to indigent persons in need and to use resources the justice system could allocate toward meaningful legal aid and justice services for indigent persons. As NPP5 recognizes, in the in-absentia context, “an unsustainably large amount of Government resources is used to prosecute persons who are not in custody, without a corresponding increase in public safety.”

Recognizing that in absentia trials create “a substantial efficiency challenge” for the Afghan criminal courts, Afghanistan committed to a significant reduction in in absentia trials as a specific deliverable and ongoing indicator for the national priority of enhancing efficiency in the justice sector in Component 2 of NPP5. In addition, donor interventions have sought to address this problem, including a World Bank project which funds contract attorneys for in absentia cases. While a staggering backlog of in absentia cases was resolved through these initiatives in recent years, an ongoing in absentia “caseload” usurps considerable legal and judicial resources in most provinces.

At this point, it is well-demonstrated that training, discrete efforts to clear the backlog, and policy initiatives have not altered in absentia practice as a significant burden on criminal court dockets. In addition, the current law’s requirements that “the court shall appoint a legal aid provider to him and issue a decision” where a defendant is continuously absent, and that “a decision shall be issued” after one month’s notice in the case of an absent defendant living abroad, offers no meaningful relief.

No part of the CPC, the Advocates’ Law, or Legal Aid Regulation requires AIBA, NGOs, or legal clinics to provide legal aid for in absentia cases. Nor is there any legal or policy support for the MoJ to require these other legal aid authorities to assist it in its unwanted task of providing representation for in absentia trials. Obviously, the MoJ can sign agreements with any entity it wishes to provide this service to the courts, however, it cannot legally force an organization to enter into such an agreement.

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113 Ibid., at 29.
114 Ibid., at 29.
115 Ibid., at 25-30. Although NPP5 contemplates this reduction will occur through training of prosecutors and judges, there is no data to suggest that training alone has produced a meaningful decrease in the in-absentia practice.
116 The World Bank completion report on this project cited this as a preliminary step:

MoJ developed a system for subcontracting private lawyers for cases in absentia. The system was piloted under the project preparation grant for the second phase. It is currently used by the UNDP in their legal aid project [LAGF]. Both service delivery arrangements included specific M&E systems which allowed the MoJ to oversee and reimburse [individual] service providers for their services.

117 CPC, Article 209(2) and 210.
118 Obviously, the MoJ can sign agreements with any entity it wishes to provide this service to the courts, however, it cannot legally force an organization to enter into such an agreement.
solution is to amend the CPC to allow the courts to toll the statute of limitations, issue a warrant for arrest, and return the case to the prosecution until the defendant can be brought before trial. In many other jurisdictions, cases are tolled by statute when a defendant has absconded or is otherwise absent. Yet another avenue would be to seek an advisory opinion from the AGO and the Supreme Court defining and strictly limiting the circumstances in which in absentia cases should proceed.

This legally-sanctioned, ongoing depletion of judicial, legal aid, and other human and financial resources contributes significantly to the shortage of legal aid and criminal justice resources without any coordinate benefit to public safety. Moreover, the in-absentia practice is uniquely suited to a coordinated solution focusing on both law and practice. Redressing this ongoing concern and achieving the Afghan national priority clearly requires additional, concrete coordinating efforts and both legal and practice amendments, including offering additional discretion in administering these cases.

**Ability to Choose Defense Advocate**

*In absentia* cases, where the court requires the LAD to appoint a lawyer, obviously make it impossible for the accused to choose their defense lawyer/legal aid provider until they appear and appeal their cases. Nor does Afghanistan have a certificate system which, in other jurisdictions, allows suspects and accused persons to affirmatively choose their counsel. However, unless there are no other lawyers available, suspects and accused persons currently have some discretion to change their defense lawyer/legal aid providers. Under the Advocates’ Law, “[e]very person has the right from time of arrest to appoint an advocate of his/her choice to defend and represent his/her rights.” In fact, a person may request to be represented by an unlicensed individual if they fit within a specific set of familial and business relationships. Clients also have the right to dismiss their advocate at any stage of the investigation or trial. The CPC also gives suspects, accused and defendants the right to object and require a review of their defense lawyer.

The Legal Aid Regulation reiterates this right for indigent suspects and accused. Suspects and accused persons who wish to dismiss their advocate must inform the legal aid authority providing the legal aid provider. The authority is supposed to appoint another legal aid provider in such cases.

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120 Advocates’ Law, Article 2.

121 Ibid., Article 34. The article covers vast familial relationships and “partners in a partnership”.

122 Ibid., Article 17(2).

123 Ibid., Article 7(20).

124 Legal Aid Regulation, Article 12(2).
In practice, this may not consistently result in meaningful choice of counsel, particularly if the specific institutional provider or location may not have additional providers available. However, the LAD, NGOs, and AIBA often cooperate to resolve this issue, where possible. Still, in some jurisdictions, the available choice of defense lawyers—much less legal aid providers—is so limited that it makes a real choice among providers impossible.125

**Indigency Determinations**

With the exception of physically or mentally disabled persons126, entitlement to legal aid relies on a showing of indigency.127 Afghanistan is one of the poorest countries in the world, with 62 percent of its population living at or near the poverty line (although the urban poor represents a smaller percentage).128 In 2016, significantly higher inflation, lower average monthly incomes, and higher unemployment fed 37 percent of Afghans’ belief by that their financial situations had worsened in the last year.129

This data suggests that a solid majority of Afghans should receive some kind of legal aid. Nevertheless, indigency determinations are an important means of safeguarding legal aid resources for those in need and supporting a fledgling private legal market. Thus, prior to the appointment of a legal aid provider, an indigency finding is a required.

**A. Indigency Forms**

The Advocates’ Law broadly defines indigent as one “who cannot afford to pay for a defense attorney in criminal cases.”130 The Legal Aid Regulation, defining indigency more rigorously in requiring a finding that the putatively indigent person lacks sufficient income to cover his/her living expenses,131 delegates the task of creating specific indigency criteria and forms to the ILAB. The police, prosecution, and courts are required to fill out an indigency form for each person they introduce to the legal aid authorities. The indigency form also must be completed before proceeding with legal representation of an indigent suspect or accused person. Using false information on these forms is a criminal offense.132

The current indigency form, published by the ILAB, defines indigency consistently with the Advocates’ Law.133 It includes all women, children, “workers,” students, teachers, military personnel, farmers, low-income shopkeepers, laborers, vendors, and unemployed persons, as

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125 Fourth Consultation Conference, April 11, 2017.
126 CPC, Article 10.
127 Legal Aid Regulation, Article 4; ILAB Procedure, Article 13.
128 According to the International Fund for Agricultural Development, “The [Afghan] government estimates that 42 per cent of the country's total population lives below the national poverty line. Another 20 per cent of the people live just above that line and are highly vulnerable to the risk of falling into poverty.” Rural Poverty Portal, available at https://www.ruralpovertyportal.org/country/home/tags/afghanistan.
130 Advocates’ Law, Article 5(3).
131 Legal Aid Regulation, Article 4(3).
132 Ibid., Article 5. The Legal Aid Regulation fails to cite under what specific article of the penal code this infraction would be prosecuted. Chapter 26 of Section 1, Book 2 of the Penal Code sets forth several infractions which, theoretically, could be used to charge persons lying on an indigency form.
133 An indigent individual is defined as “a person who is unable to hire an attorney in criminal and family issues due to financial inability.”
well as most government employees (“high ranking officials” are excluded). In addition, individuals outside the enumerated categories may access legal aid pursuant to an eligibility finding after completing the indigency form. Although these the categories used are extremely inclusive, the diminishing income, assets, and purchasing power among Afghans suggests broad categories of eligibility for legal aid may be appropriate. However, beyond basic identification information, the form seeks income and employment information, but fails to ask applicants about dependents, property ownership, monthly expenditures, assets, debts, or other information that could add accuracy to indigency determinations.

**B. Legal Aid Reaches Eligible Recipients**

One frequently-repeated concern, particularly by private lawyers, raised throughout the assessment, was whether all individuals represented by legal aid providers were entitled to free legal aid. However, it appears that aid providers do conduct at least some financial eligibility assessment before representing clients as required by law. Overall, 42 percent of legal aid providers interview in the field assessment used the ILAB form. Another 20 percent use different eligibility forms, and eight percent use informal means to assess indigency (as is done in many jurisdictions). Another eight percent of the respondents noted that they represented specific vulnerable populations that do not require indigency status such as women, children, the disabled, etc. 135

![](image)

Legal aid clients generally confirmed widespread financial eligibility assessment by legal aid professionals. While one-quarter of clients were unsure of whether they had undergone a financial eligibility assessment in advance of being assigned a legal aid provider, nearly half indicated they were aware of a financial eligibility determination. Another 15 percent of clients indicated no assessment of financial eligibility occurred because they fit a target population that their attorneys represent irrespective of financial status. 137 Of those who were

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134 ILAB Indigency Form (English translation).
135 LAAR Fieldwork, Question x15
136 Ibid., Question x15
137 Ibid.
 aware of a financial eligibility determination, 23 percent of clients stated that their attorneys did their assessment using a written form, such as the ILAB form,\textsuperscript{138} and 20 percent indicated that their attorneys did their assessment without using a written form.\textsuperscript{139}

**Public Rights Delegated to Defense Counsel**

A meaningful right to counsel involved certain structural guarantees, or precursors for effective defense representation. Protections must exist to facilitate independence, various forms of privilege, access to clients, development of a theory of the case and associated evidence, and involvement in the investigation stage. To that end, Afghan law specifically protects the confidentiality of the conversations, correspondence, and communications between accused persons and their attorneys.\textsuperscript{140} In addition, defense counsel must have access to all documents and information pertaining to their clients’ cases. The defense must be allowed to participate in all phases of a case including detection (police stage), investigation, and trial. Defense counsel must also be allowed to visit, interview, and confidentially communicate with clients held in custody.\textsuperscript{141}

Defense counsel are also charged with asserting and protecting certain aspects of the public right to an effective defense. The CPC provides strong protection for attorney-client privilege, rendering testimony of lawyers who have represented a client inadmissible.\textsuperscript{142} The CPC denies the prosecution access to communications between a client, defense lawyer, and their expert witness.\textsuperscript{143} The right to access evidence, information, or testimony\textsuperscript{144} is reiterated throughout the CPC, with specific reference to defense lawyers as protectors of these rights. For example, Article 145 of the CPC requires investigations of misdemeanors and felonies must be performed in the presence of the defense lawyer.\textsuperscript{145}

In addition, violations of *basic proceedings* in the course of the arrest or investigation leads to mistrial or nullification. Basic proceedings involve the core jurisdictional, notice, and other requirements prior to trial and include notification rights at arrest and investigation, as well as the right to counsel.\textsuperscript{146} Violating basic proceedings requires the court to declare a mistrial *sua sponte*, an obligation that exists even absent request by the parties.\textsuperscript{147}

Other evidentiary or investigative violations (not basic proceedings) are redressed via defense objection. For example, if defense counsel is present at evidence-gathering and/or investigation and witnesses misconduct, s/he must object at the time of the violation.\textsuperscript{148} Violations of these provisions leads to inadmissibility.\textsuperscript{149}

\textsuperscript{138} Ibid.
\textsuperscript{139} Ibid.
\textsuperscript{140} Constitution of Afghanistan, Article 31.
\textsuperscript{141} Advocates’ Law, Article 10.
\textsuperscript{142} CPC, Article 26(4)(1).
\textsuperscript{143} Ibid., Article 131 CPC.
\textsuperscript{144} Ibid., Article 7(11), CPC, See also Article 53(3).
\textsuperscript{145} Ibid., Article 145, CPC. See also, Article 175 (access to indictments), Article 212 (presence during trial).
\textsuperscript{146} Ibid., Article 289(2).
\textsuperscript{147} Ibid.
\textsuperscript{148} Ibid., Article 290.
\textsuperscript{149} Ibid., Article 21.
However, there are exceptions to these nullification and exclusion rules. Prosecutors may seek to deny a suspect or accused person access to materials in his/her own case via Article 7(11) of the CPC. Specifically with respect to misdemeanor cases, evidence may remain admissible even where notice or access to counsel is not provided during the investigation.

Conflicts of Interest

Conflicts of interest are under-examined in the language and practice of the Afghan criminal justice system. For example, the CPC allows defense attorneys to defend multiple suspects in one case, if there is no conflict of interest. However, it fails to explain how a defense lawyer could determine, at the outset of the case, whether such a conflict exists. Similarly, the Legal Aid Regulation suggests clients may be appointed a new attorney from the same office in the case of conflicts of interest, but fails to address conflicts that could apply to an institutional provider that could arise in sensitive or confidential cases.

Afghan law does not address all – or even most – of the situations where conflict of interests may arise. “Positional conflicts of interest…tend to surface once the case has partially progressed through the criminal justice system.” Thus, in addition to direct conflicts easily identifiable at the outset of a case, positional conflicts and evolving conflicts, associated with a specific theory of the case, piece of evidence, or a defense or multi-defendant cases with inconsistent defenses, also implicate a meaningful right to counsel.

Conflicts are overwhelmingly handled in ad hoc and informal manners that may be inconsistent across provinces, districts, or legal aid providers or delivery mechanisms. In the fieldwork, half of respondents indicated that conflicts of interest were investigated using an informal process whereby the lawyer determined individually whether there is any reason not to represent a particular client. Only 34 percent of respondents stated they used a written form for conflicts of interest at some point in the pendency of the case.

Quality of Services

Ethics and professional conduct rules seek to inject the right to counsel with enhanced meaning. Defense counsel in Afghanistan must “respect the best interest of his/her client based on the interests of justice, observance of the rule of law and ethical standards.” The Advocates’ Law requires defense counsel to “practice law with honesty and sincerity,

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150 Ibid., Article 7(11).
151 Ibid., Article 152.
152 Ibid., Article 9(3).
153 Article 7 of the Legal Aid Regulation provides in pertinent part: “Whenever, there is a conflict of interest between the advocate and his/her client or the client is not happy with the advocate, the client or advocate shall be obliged to inform in writing the Legal Aid Department of the issue so that the Legal Aid Department assigns another legal aid provider.”
154 Taylor, Thompson, Kim, Alternating Visions of the Public Defender, 84 Geo. L.J. 2419, 2447 (1995-1996);
155 LAAR Fieldwork, Question x32
156 Ibid., Question x32
157 AIBA Code of Conduct, Article 10.
respecting the dignity of all individuals” and that unless specifically authorized by law, that “no person, including the state, can interfere or oppose the exercise of the profession” of law by a defense attorney. They must attend hearings, avoid conflicts of interest, maintain case files, etc. Similarly, the AIBA’s Code of Conduct requires lawyers to be independent, ethical, and fair and non-discriminating. It also addresses, relations with clients, relations with the court and other advocates, and referrals and assignments. Currently, the AIBA Code of Conduct is under revision to reflect the lessons learned of the past eight years.

Additional governing criteria and standards of practice specific to legal aid providers are set forth in the Legal Aid Regulation. Legal aid providers are charged to maintain independence, client confidentiality, and adhere to standards of effective representation, including in activities outside of the court, in addition to their duties of honesty, faithfulness, and respect for their clients. The ILAB is also charged with ensuring that legal aid providers provide quality legal aid, and establishing evaluation and monitoring mechanisms for the LAD, AIBA, licensed NGOs, and legal clinics (at the organizational level).

The CPC also demands respectful conduct from defense attorneys. For example, it requires that defense advocates refrain from delving into personal matters when questioning a witness. Defense lawyers can be referred for disciplinary measures by the court for misconduct during trial.

**Licensing and Accreditation**

All defense lawyers, regardless of where they work in Afghanistan, must be licensed to practice. A primary function of the AIBA is to distribute licenses according to the Advocates’ Law and AIBA’s By-Laws. The Advocates’ Law sets forth a set of entry requirements for practicing law including citizenship, bachelors’ degree (law or sharia), passing the bar entrance exam, and completion of a training course, usually referred to as the *staj* and discussed *infra* at 0. Certain *staj* exceptions apply to those who have worked for three years...

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158 Advocates Law, Article 13.
159 AIBA Code of Conduct, Article 3.
160 Advocates’ Law, Article 13. The article also stipulates broader societal duties, such as paying of income tax, refraining from harm to other advocates, and adherence to the Code of Conduct. *Id.*
161 Article 32(6), 38 of the AIBA By-Laws sets forth an obligation on the part of the private bar and AIBA membership to adhere to the AIBA Code of Conduct.
162 AIBA Code of Conduct, Article 3.
164 *Ibid.,* Article 9.
165 Phone conversation with Peyton Cooke, Senior Rule of Law Officer USIP, Kabul, Afghanistan, January 16, 2017. Currently, the updated version of the Code of Conduct is being reviewed by the leadership committee of AIBA. It is expected to be discussed and, ideally, adopted at AIBA’s next general assembly. *Ibid.*
166 Legal Aid Regulation, Article 18.
168 *Ibid.,* Article 20(8). See also, ILAB Procedure, Article 6(9).
169 CPC, Article 36(2).
171 AIBA By-Laws, Article 2(5).
in either the judiciary, the AGO, or the MOJ.\textsuperscript{172} Graduates of madrassas can also seek a license, if they work for three years under the supervision of a licensed attorney, pass the entrance exam for the bar, and take the \textit{staj}.\textsuperscript{173} Civil servants are restricted from practicing law unless they are law or sharia faculty members or legal aid providers “who may practice as advocates.”\textsuperscript{174} Since its creation under the Advocates’ Law, AIBA has licensed over 3200 defense lawyers.\textsuperscript{175}

In addition, the Legal Aid Regulation requires legal aid providers working for the LAD, AIBA, licensed NGOs, and legal clinics to be “accredited” \textit{(etebar nameh)} by the ILAB.\textsuperscript{176} While there is no description of what this accreditation process entails, its purpose appears to be to ensure quality representation and to hold providers accountable their \textit{pro bono} obligations.\textsuperscript{177} As discussed \textit{infra} at A.i the ILAB has not implemented this accredited process.

\textbf{Education}

Principle 13 of the UN Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems states ensure that all legal aid providers have the necessary education and training necessary to deliver quality services.\textsuperscript{178} Principle 9 of the UN Basic Principles on the Role of Lawyers requires that governments, professional associations of lawyers and educational institutions create an education and training system that provides advocates appropriate capacity necessary to meet their duties. This system must also instill the ideals and ethical duties of the legal profession.\textsuperscript{179} In Afghanistan, this system is divided into undergraduate studies and the \textit{staj} meant to prepare lawyers for their specific roles (judge, prosecutor, and private/defense lawyer).

\textit{University Education}

Under the Constituent of Afghanistan, “[e]ducation is the right of all citizens of Afghanistan, which shall be offered up to the B.A. level in the state educational institutes free of charge by the state.”\textsuperscript{180} In addition the Constitution places the duty to establish and administer higher education on the state.\textsuperscript{181} All public universities are under the jurisdiction of the Ministry of Higher Education (MoHE). The MoHE oversees the staffing plan, and budgets for every

\textsuperscript{172} Advocates’ Law, Article 6.
\textsuperscript{173} Ibid.
\textsuperscript{174} Advocates’ Law, Article 7(1).
\textsuperscript{175} Phone conversation with Nasir Ahmad Nadiri, Executive Director of AIBA, February 8, 2017.
\textsuperscript{176} Legal Aid Regulation, Articles 15(2) and 20(6). See also ILAB Procedure, Article 11(2)(1).
\textsuperscript{177} See ILAB Procedure, Articles 6(1) and 18.
\textsuperscript{178} UN Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems, 2013. Available at: https://www.unodc.org/documents/justice-and-prison-reform/UN_principles_and_guidelines_on_access_to_legal_aid.pdf
\textsuperscript{179} Basic Principles on the Role of Lawyers, 1990. Available at: http://www.ohchr.org/EN/ProfessionalInterest/Pages/RoleOfLawyers.aspx.
\textsuperscript{180} Constitution of Afghanistan, Article 43.
\textsuperscript{181} Ibid, Article 46.
public university. The MoHE also regulates private universities of which there were over 80 by early 2014.\footnote{182} It regulates law school curricula.

In 1938, Kabul University created the first Law Academy offering a three-year course of study. It changed its name to the Faculty of Law and Political Science (FLPS) and added another year to its course of study in 1939. A Faculty of Islamic Law and Islamic Studies (Sharia faculty) was not created until 1952.\footnote{183} Currently, both FLPS and Sharia students (in Kabul and provincial universities) receive four-year undergraduate degrees, and both faculties are divided into two departments. FLPS has a Judicial and Legal Sciences department and a Political and Administrative Sciences department. The Sharia faculty is divided into Qanoon and Fiqh department and an Islamic studies department. Only males can study at the Qanoon and Fiqh department of Kabul University, and these students are selected from madrassas. All four departments provide a mix of classes made up of law courses, Islamic studies, political science, sociology, history, economics, foreign languages, and philosophy.\footnote{184} The MOHE also regulates the curricula of these faculties. For example, it recently ordered the FLPS of Kabul University to create greater distinction between the curriculums of Judicial and Legal Sciences department and the Political and Administrative Sciences department.\footnote{185}

However, in a 2015 assessment by The Asia Foundation, 88 percent of respondents (professors, legal professionals, and students), stated that the legal education system needed fundamental reform.\footnote{186} Specifically, respondents noted that curriculums must be adjusted to include greater emphasis on experiential learning, practical skills, and clinical experiences.\footnote{187}

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\footnote{184} Ibid at 138.

\footnote{185} Interview with Prof. Rateb Mozafary, November 10, 2016.


\footnote{187} Ibid.
Thus, as discussed *infra* at A.iii the MoHE has responded by drafting a Guideline on Legal Clinics, which is due to be published in mid-2017.188

More broadly, the bifurcated legal education system causes a bifurcated legal system in which those who concentrated their studies on sharia use a different set of legal terms and reasoning as those who study law. Even if the two different faculties delivered exceptional education to their students, the separation between them would continue to cause issues once they graduated. Judges, who are usually Sharia graduates, complain about the lack of understanding of Fiqh by prosecutors and defense lawyers, and the latter accuse judges of failing to understanding the laws and procedures of the country.189 In the 2015 Foundation assessment, 89 percent of respondents agreed or strongly agreed that all lawyers, whether working in private practice, legal aid, as prosecutors or as judges should receive generally the same education. Additionally, 86 percent believed that a more unified legal education system would be beneficial for the Afghan legal education system.190

*Staj*

The Advocates Law confers responsibility for creating and administering the defense lawyer *staj* to AIBA.191 However, neither the Advocates Law nor any other regulation or procedure provides clear guidance on how the defense lawyer *staj* should be administered. The AIBA By-Law places the responsibility of all training and examination procedures with its Education Committee, but does not specifically address the *staj*.192 Instead it obligates the Education Committee to create a procedure to be approved by AIBA’s Leadership Counsel. AIBA shared an undated Education Committee procedure that explains the committee’s general duties (creating and approving education and training plans) but does not specifically discuss a *staj*.193

AIBA continues to struggle to create a sustainable and accessible *staj* program. Years ago, the *staj* was donor-funded and held at the Independent National Legal Training Center (INLTC) at Kabul University, but even then, it did not cover all new applicants. Currently, most applicants take an entrance exam to demonstrate their understanding of the laws of Afghanistan. AIBA licenses those who pass the bar exam conditionally; they must report to take a six-month *staj* course if asked.194 Unlike prosecutors and judges who receive a salary while attending their corresponding *staj* courses, it is unclear how defense lawyers would support themselves during this *staj* period.

*Mixed Model of Legal Aid*

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190 Ibid.
191 Advocates Law, Article 6.
192 AIBA By-Law, Article 16.
193 Procedure of the Education Committee of AIBA shared by AIBA on April 17, 2017.
Afghanistan’s progress on legal aid, after the adoption of the 2004 Constitution, depended on NGOs funded by international donors. International experience with mixed models of legal aid service delivery heavily influenced the development of the Afghan legal aid system, where need has always outstripped available resources. A mixed model of legal aid involves the use of both public defenders and private parties, including individual practitioners and NGOs, operating under a common set of standards and a central coordination mechanism, to deliver legal aid services.\^195 “Mixed models offer an optimum level of flexibility, allowing governments to choose how legal aid can best be delivered in different parts of the country from any combination of public defender staff attorneys, private lawyers individually assigned to cases, blocks of cases contracted out to firms or other NGOs”.\^196 Typically tailored to the specific needs of a given jurisdiction, mixed models involve governmental and non-governmental, as well as individual and institutional, indigent defense providers\^197 in context-specific combinations.

Internationally, mixed models are considered an effective way to meet legal aid obligations; in some cases, costs are reduced and the level of practice is elevated by diversifying the market of service delivery mechanisms.\^198 The mixed model has several advantages other than flexibility, including promoting accountability and independence, enhancing a culture of access to justice throughout the entire legal profession, an efficient economy of scale from centralized management (when properly implemented), and leveraging existing resources within the sector.\^199 The principal disadvantage of a mixed model is the importance of a capable, independent coordination entity that can promote quality and efficiency while also enacting policy and legislation and serving an important administrative function.\^200

In Afghanistan, with the transfer of the LAD from the Supreme Court to the MoJ, the MoJ’s subsequent expansion to the provinces, and the establishment of AIBA, a *de facto* mixed model was established and later codified in legal and policy instruments, as discussed *supra* at 0.\^201 The mixed model can include the use of public defenders (legal aid department legal aid providers), NGO legal aid providers, paralegals, university clinics, and private lawyers as case by case paid legal aid delivery.\^202

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\^195 The International Network to Promote the Rule of Law defines “mixed model” as follows: “The mixed model, also known as the “contracting model,” involves provision of legal aid by both private practitioners and public defenders who are supervised and managed by a single legal aid entity. This model can also involve contracts between the legal aid entity and other non-state actors such as nongovernmental organizations (NGOs) and private law firms, which may be contracted to serve a certain category of person and/or in certain geographical areas.” McKay, Leanne, *State-Sponsored Legal Aid Systems*, at 21 INPROL (December 2015) available at http://inprol.org/publications/15233/state-sponsored-legal-aid-schemes.

\^196 UN Global Study, at 51.

\^197 See infra at 4.10.2.

\^198 For example, the Chilean mixed model legal aid system has been built on a roughly similar timeline to Afghanistan, beginning with significant legal reforms (including the introduction of the right to counsel) between 2001 and 2005. “According to a 2012 report, the Office [of the Public Defender, which facilitates the mixed model] ‘is viewed favorably by the public and is seen as providing high-quality defense to defendants who otherwise could not afford such services.’” McKay, Leanne, *State-Sponsored Legal Aid Systems*, at 23 INPROL (December 2015) available at http://inprol.org/publications/15233/state-sponsored-legal-aid-schemes.

\^199 Ibid., at 22.

\^200 Ibid.

\^201 See, Fox, Gerry, *Models and Options for Legal Aid for Legal Aid Delivery in Afghanistan*, IDLO (2007).

\^202 Ministry of Justice, Legal Aid Policy, Article 6.
The 2012 Legal Aid Policy issued by the MoJ affirms its ongoing commitment to a mixed model of legal aid, citing a 2007 analysis conducted with the support of IDLO: “[b]ased on the Models and Options for Legal Aid Delivery in Afghanistan, the Ministry of Justice made the decision to develop a mixed legal aid system. The decision was based on [the fact] that this is the most cost effective, accessible and allows for the best use of the existing resources as according to the main principles for legal aid.” Just as in other states, Afghanistan’s government can either meet its legal aid obligations directly, using government personnel, or through assignment and cooperation with non-governmental entities and individuals. This is acknowledged by the MoJ in the Legal Aid Policy as well: “[t]he Government is responsible for funding of legal aid services and should develop a budget and a legal aid fund that can be used to fund the mixed model.”

Building Blocks of Legal Aid

A state’s constitutional obligation to provide legal aid creates concrete responsibilities, including the legal representation, appointment and supervision of providers, and management of the system, including monitoring, coordination, and policymaking. As discussed infra at C, these duties may be discharged by the government directly or through assignment or cooperation with independent actors or organizations.

Most legal aid systems are made up of three building blocks that correspond to these responsibilities:

1) Legal aid providers advise and represent indigent persons and may include attorneys, paralegals, students, or others, depending on the jurisdiction;

2) Legal aid service delivery mechanism(s) involve the institutional or individual service delivery systems of providing and paying for indigent criminal defense; and

3) Legal aid coordination mechanisms may include legal aid boards, bar associations, informal networks, or other coordination mechanisms. These entities are involved in systemic activities, including resource management, quality assurance, and attention to overall consistency of practice.

These building blocks are typically set forth in law and policy and may vary widely from jurisdiction to jurisdiction. However, most jurisdictions that provide legal aid discharge the responsibilities in discernible ways, using formal and informal institutions and procedures. By tailoring the structure of these fundamental building blocks to a specific context, states create legal aid models that are meant to optimize how they meet their responsibilities.

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203 Ibid.
204 This is discussed further infra at 4.10.2.
205 Ministry of Justice, Legal Aid Policy, Article 6.
206 Han, S., Assessment of Afghanistan’s Legal Aid System, Open Society Afghanistan’s 2nd Stakeholder’s Conference, Kabul, Afghanistan, November 2016.
In Afghanistan, all legal aid providers are lawyers or students working under the supervision of licensed lawyers. Afghan law refers to a legal aid provider as any advocate who defends the rights of indigent suspects or accused in criminal proceedings. An advocate must be a member of the bar.

In addition, legal aid providers can be unlicensed attorneys and university students pursuing a law or sharia degree who work in a law clinic under the supervision of a licensed attorney. Along with the LAD, the bar association, and licensed NGOs, the Legal Aid Regulation refers to legal clinics as an “authorized” institution for legal aid (these service delivery institutions are involved in the second building block of legal aid, discussed infra at 0).

Neither the Advocates’ Law nor the Legal Aid Regulation considers paralegals as legal aid providers. The ILAB’s policies and procedures refer to a “legal aid assistant” with legal training and the ability to refer indigent accused to a licensed advocate or assist advocates in all aspects of the case. The policy also requires that such an assistant be accredited by the ILAB, though it does not explain how. In addition, while AIBA’s by-laws permit advocates to recruit paralegals to assist them, the private bar has opposed professionalizing a paralegal system through curriculum or licensing mechanisms. In addition, years of ad hoc donor projects intended to mobilize a cadre of paralegals as a means of increasing access to justice have had underwhelming results.

Service Delivery Mechanisms

Most jurisdictions try to meet their domestic and international obligations to offer legal aid through systematic legal aid interventions that ensure cost-effective and efficient deployment of available resources. Over time, varied service delivery mechanisms have evolved and may be employed on their own or as part of a mixed system. These service delivery

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208 An earlier legal provision, Article 5(2) of the Advocates’ Law, defines a legal aid provider as an advocate appointed by the Ministry of Justice to defend an indigent client in a criminal case. Advocates’ Law, Article 5(2).

209 Legal Aid Regulation, Article 4(1). This term is also applied to indigent children and women in civil matters.

210 Advocates’ Law, Article 5(1); Legal Aid Regulation, Article 4(4). In some international jurisdictions, a legal aid provider may refer to paralegals and law students in addition to barred lawyers.

211 Ibid., Articles 4(7) and 15(1). See also AIBA By-Law, Article 44.

212 ILAB Procedure, Article 11(2)(1).

213 AIBA By-Law, Article 47.

214 Interview with Shaharzad Akbar, Country Director, Open Society Afghanistan, April 18, 2017.

mechanisms fall within two broad categories: institutional indigent defense providers that include varied types of organizations of lawyers, which may also play an important systemic advocacy role (in addition to representation of indigent defendants in individual cases), and individual indigent defense providers, where private lawyers are compensated per-lawyer, per-case for providing legal aid services on behalf of the state.

In Afghanistan, the delivery of legal aid services involves both institutional and individual indigent defense provider mechanisms funded by the Afghan government and the donor community. Afghanistan’s institutional indigent defense providers include 1) public defenders working directly for the LAD of the MoJ, 2) salaried lawyers working for legal aid NGOs or salaried lawyers working for NGOs for whom legal aid is a secondary service, and 3) lawyers and supervised students and graduates working in legal clinics. Afghanistan’s individual indigent defense providers are lawyers who are 1) unaffiliated, 2) compensated via an appointment system (also called a judicare system) where private lawyers are compensated via case-by-case contracts through the LAGF managed by AIBA, or 3) representing indigent clients in satisfaction of the mandatory pro bono requirement for all licensed advocates.

One service delivery mechanism that spans across the individual/institutional divide, is the contract model or public-private partnership. In Afghanistan, this mechanism comes under specific regulations dealing with the powers of the ILAB and the MOJ, and it has been implemented with mixed results. Therefore, the contract service mechanism will be thoroughly examined in Section C infra.

A. Institutional Indigent Defense Providers

Institutional indigent defense providers largely involve organizations where salaried lawyers represent indigent defendants free of charge. Funding may come from the government or from the donor community, but the attorneys are compensated based on an institutional role, rather than case-by-case. Increasingly, institutional defender offices also play an important systemic role. “To advance and safeguard the interests of their clients most effectively, public defender offices [have begun] … to seize the opportunity to articulate an institutional vision that extends beyond the crisis at hand….and develop strategies in line with that perspective.” Where “a public defender office grounds its strategic choices in an internally coherent vision of its role in the system, it may ultimately increase its power to defend its clients effectively.”

216 The vision of a public defender as an institutional force involves “promoting a broader political vision, governing decisions both about how to represent clients and about the office's tactics within the environment in which it operates. As these offices develop a unifying ideology of practice, they choose strategies, even in individual cases, that reflect and flow from that vision.” See generally, Taylor-Thompson, Kim, Individual Actor v. Institutional Player: Alternating Visions of the Public Defender, 84 Geo. L.J. 2419, 2420 (1995-1996) (“… implicit in these case-by-case judgments are two principles, largely inchoate visions of the role of the office: as an aggregate of individual actors, and as an institutional force in the defense of its clients.”)

217 Ibid., “… implicit in these case-by-case judgments are two principles, largely inchoate visions of the role of the office: as an aggregate of individual actors, and as an institutional force in the defense of its clients.”

218 Ibid.

219 Ibid.
institutional providers, including the capacity of institutional providers to play a systemic role in shaping legal aid and to become an advocacy group on behalf of their criminally accused clients, in addition to representing individual clients.

Furthermore, institutional providers typically can create economies of scale, synergies that can amplify available time and resources (from supervision to strategic development to investigation to common forms and pleading templates) with the added potential to elevate the level of practice and leverage additional resources into the practice of indigent criminal defense. In some jurisdictions, this cooperative role of institutional defenders grew from recognition that, as in Afghanistan, the need vastly outpaced the resources available for indigent criminal defense.\(^{220}\)

Afghanistan has a number of institutional service providers. These include the LAD of the MoJ, a traditional public defender office staffed by government employees, and several NGOs whose core function is the delivery of legal aid to indigent suspects and accused persons.\(^{221}\) In addition, ad hoc institutional legal aid providers are found among NGOs, which focus on particular service areas or client populations and offer legal aid ancillary to their core services.\(^{222}\) There are also legal clinics where salaried lawyers supervise law and sharia students who assist in the provision of legal services and legal aid. As discussed below the government may legally subcontract legal aid service delivery to institutional providers, including NGOs, legal clinics, but also for-profit private law firms.

This ability to represent not just an individual client, but also a constituency, and to serve as a powerful voice to ensure the justice system includes the perspective of the least powerful, is increasingly recognized as an important role for institutional defender offices. In Afghanistan, in addition to the ILAB, many institutional indigent defense providers, including the MoJ and NGOs, have embraced this role. This includes advocacy by the MoJ on access to detention centers, and work by NGOs on detainee rights.\(^{223}\)

i. MoJ’s Legal Aid Department

The MoJ’s LAD is a classic public defender office comprised of salaried staff attorneys working for the government throughout Afghanistan. The LAD maintains 193 legal aid providers, with at least one attorney in each of Afghanistan’s 34 provinces. It recently added

\(^{220}\) Ibid., at 2431:

To respond to the imbalance between the number of cases and available resources, many defender offices began retreating from a vision of work that was grounded on a radical commitment to individual clients. Feeling the pressure to get more for less, defenders for the first time deliberated collectively about budget priorities, streamlined their operations, and made internal adjustments to compensate for changes in the policy environment. Far more frequently, defenders began collaborating on issues common to the clients they represented.

\(^{221}\) Currently, NGOs providing primarily legal aid include: Da Qanoon Ghushtonky, International Legal Foundation – Afghanistan, Justice for All Organizations.

\(^{222}\) Some examples of NGOs that offer legal aid among core services provided to a specific population (e.g., women and children) include: Women for Afghan Women (39 attorneys), Medica Afghanistan (10 attorneys), Humanitarian Assistance for the Women and Children of Afghanistan (6 attorneys).

\(^{223}\) This is often done in the context of working groups or networks such as the Detention Working Group (DWG) and ALAAN.
another 30 positions to its structure with the stated intent to deliver more services in the districts.

The Advocates’ Law tasks the MoJ with the provision of legal aid at all stages of a prosecution, a duty it may assign or delegate. At the time the Advocates’ Law passed, a presidential decree transferred the LAD from the Supreme Court to the MoJ in 2007. This was followed by the Legal Aid Regulation, which also assigns the task of providing direct legal aid services to the LAD and reiterates the structure of the LAD within the MoJ. LAD providers must be licensed by AIBA. Under the Legal Aid Regulation the LAD providers must also be accredited by the ILAB and are accountable not only to their supervisors and the head of the LAD, but also to the ILAB, and directly to the Minister of Justice. However, in practice, there is no accreditation process and advocates do not interact with the ILAB.

The LAD is the only legal aid provider currently operating in every province in Afghanistan. Moreover, at times, it has assumed the systemic advocacy roles important among institutional defenders described above, including by convening conferences, advocating for and sponsoring this assessment, piloting an innovative mixed-model partnership with ILF-A in 2011, and advocating for the development of the LAGF. The structure, quality, and capacity of the LAD is discussed in detail at infra at 5. In addition, the MoJ’s coordination role, led largely by the LAD, is discussed infra at 0.

### ii. Non-Governmental Organizations

All NGOs must be registered with the Ministry of Economy’s (MoE) NGO Department and regularly report their activities to the MoE and a ministry that corresponds to their work, such as public health, education, justice, etc. In addition, NGO’s must also submit tax filings with the MoF and can be audited by the government at any time. NGOs are regulated through the Law on Non-Governmental Organizations (NGO Law), which sets out rules for the governance, structure, and administration of NGOs.

Most, international and national NGOs working in Afghanistan are financed through donor funding. NGOs are directly accountable to these donors. Most donors require financial and

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224 Advocates’ Law, Article 3(1).
225 Presidential Decree 111, Article 3.
226 Legal Aid Regulation, Article 6(2).
227 Ibid., Article 14.
228 Ibid., Article 16.
229 Ibid., Article 20(6). See supra at Section 4.7.
230 Legal Aid Regulation, Article 18(19).
231 For example, the MOJ piloted a project with ILF-A to subcontract its legal aid obligations, in part, to ILF-A as well as gaining training and technical assistance for its legal aid providers. See infra at 4.10.2. Later, the MOJ advocated strongly for the development of a legal aid fund, which ultimately became the LAGF.
233 Ibid.
234 Ibid., Article 1.
235 Some NGOs conduct independent fundraising as well, but this makes up a very small percentage of funds spent by NGOs in Afghanistan.
narrative reports that show whether the NGO has performed and delivered results as promised in its agreement. In addition, donors often require NGOs to submit to financial audits and cooperate with outside monitoring and evaluation.

In addition, per the Legal Aid Regulation, only licensed NGOs are authorized to provide legal aid. It defines “license” (jawaz) as “an official written document which is given by the ILAB to the NGOs providing legal aid.” To receive this license from ILAB, NGOs must submit a modest fee, an application, their NGO registration with the MoE, and their reports to the MoE and the MoF. This licensing procedure is not described in the ILAB Procedure, but was established in a meeting of the ILAB and recorded in unpublished meeting minutes. Once an NGO is licensed, the ILAB can enter a cooperation agreement with it, in theory. However, this has never happened.

Legal aid NGOs have been a major part of legal aid service delivery in Afghanistan since 2004. In addition, a number of other types of NGOs, such as organizations dealing with returnees and women’s shelters, have provided legal aid as a part of their services to the special populations they assist. NGO institutional providers have played an active role in advocating for legal aid in Afghanistan to the donor community and to the Afghan government, including advocating for structural change, such as in the ILF-A contracting model pilot project, discussed in section C infra, to promote legal aid quality and coverage.

Several NGO institutional providers are also uniquely positioned to address key policy priorities impacting important segments of the population. While “the individualized

ILF-A Cases in 2016

<table>
<thead>
<tr>
<th>Province</th>
<th>Cases</th>
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<tr>
<td>Helmand</td>
<td>463</td>
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<tr>
<td>Nangarhar</td>
<td>672</td>
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<tr>
<td>Kandahar</td>
<td>774</td>
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<td>Kabul</td>
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<tr>
<td>Balkh</td>
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<td>Baghlan</td>
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While “the individualized
model encourage[s] autonomy and idiosyncratic approaches, the institutional vision attempt[s] to orchestrate positions according to overriding priorities.240 In Afghanistan, certain NGO institutional providers, including Medica Afghanistan, Women for Afghan Women, and Da Qanoon Ghushotonky (which handled 814 criminal and 199 civil cases in 2016), explicitly embrace an institutional advocacy role on behalf of women and children.241 These institutional providers craft their individual representation and their advocacy as an institution to enhance impact in ways that would be impossible for organized groups of individual providers to achieve.

iii. Legal Clinics

Legal clinics are centers where real cases are handled by students who are supervised by licensed lawyers, often in conjunction with for-credit university courses taught by a faculty member.242 Clinics should have the following characteristics:

- Students must work on actual cases or projects.
- Supervision by licensed attorneys.
- Academic component that teaches the skills, values, and ethics of practicing law.
- Academic component is credit-bearing, part of the official curriculum, and taught by a faculty member.
- Service centers providing legal advice and representation for people who would otherwise have difficulty accessing legal representation due to poverty, social marginalization, or lack of independent capacity.243

In Afghanistan, legal clinics that fulfill all of the above requirements are rare. Only Herat University reportedly provides credit to students taking clinical courses. Even the Herat University Legal Clinic is not a wholly subsumed entity within the official structure of the university. While located inside the sharia faculty, it employs staff that are not part of the university tashkeel. The Herat University Legal Clinic is also not registered as an NGO, and it appears to have come into existence by sheer force of ingenuity of the dedicated staff, though the management has recently begun efforts to bring some legal clarity to its status.

There are a number of other legal clinic schemes being piloted in Afghanistan. For example, The Asia Foundation supports four organizations (AIBA, AWN, ILF-A, and JFAO) in four provinces (Balkh, Nangarhar, Kandahar, and Kabul) who maintain legal advice centers inside court compounds where students give legal advice under the supervision of licensed lawyers. Students must first take a semester-long pre-clinical course taught by public university professors on the university campus, where they learn the specific skills to be able to interact with Afghans seeking legal advice.244 However, students do not receive credit for the course or their clinical work. UNDP supports legal clinics in Nangarhar and Helmand where

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240 Ibid.
241 LAAR Fieldwork, Questions x67-68;
242 Presentation on legal clinics, Professor Jon Eddy, Kabul, Afghanistan, August 13, 2016.
243 Ibid.
244 The Asia Foundation, Legal Clinic Conference Report, 14 (August 2016).
students are trained for two to three weeks before being assigned to an individual legal aid provider for another two months.

Legal aid NGOs (such as ILF-A) and donors (GIZ, OSA, UNDP, The Asia Foundation, etc.) have been providing or supporting these different pseudo-clinical programs because universities have not been able to create these programs themselves. Public universities have faced serious bureaucratic and practical challenges in enacting full clinical models. Universities must find or allocate office space that is accessible to the public seeking legal services. They must engage in an administratively burdensome process to change their curriculum and change/increase their *tashkeel* to accommodate the hiring of qualified faculty or adjuncts who can serve as the supervisory lawyers at the clinics. These are all issues related to the Ministry of Higher Education (MoHE), yet this ministry had, until recently, failed to set guidelines and regulations that would clarify how universities may overcome these challenges. Thus, while several universities claim to have legal clinics, they are typically experiential learning centers that, although valuable, fail to meet the criteria for a true clinical experience, especially one that serves a legal aid function.

As institutional indigent defense providers, legal clinics also have licensing and coordination obligations within the legal aid framework. The Legal Aid Regulation includes legal clinics as an authorized provider of legal aid. However it has a restricted definition of legal clinics to “centers, where law, sharia and official *madrasa* students provid[e] legal aid under the supervision of a legal provider or an advocate.” Thus, clinical programs not fitting this definition remain outside of the jurisdiction of the regulation. This would include “street law” clinics and other programs where students do not provide legal aid services: mock trial, moot court, practical knowledge courses, or programs designed around field trips to law enforcement and judicial centers.

The regulation requires that legal aid providers supervising the work of students must have accreditation (*etebar nameh*) from the ILAB. As discussed *infra* at A.i, this does not occur, as AIBA considers this a “double-licensing” scheme and is opposed to it. Instead, ILAB has insisted that legal clinics must receive licenses like NGOs.

However, a close reading of the applicable articles suggests the contrary: throughout these instruments, NGOs are referred to as “licensed NGOs”; this is never the case for legal clinics (or AIBA). Article 4 of the regulation defines the terms *legal aid provider* (“an advocate who is defending the rights of suspect and accused persons in any of the prosecution stages or defending the right of indigent children and women in civil cases according to the provision of this regulation”), *credential* (“an official written document is given to the legal aid

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245 This situation has now been rectified and the Legal Clinics Guideline was approved by the MoHE in April 2017.
246 Legal Aid Regulation, Article 15(1).
247 Ibid., Article 4(7).
248 Ibid., Articles 15(2) and 20(6).
249 Interview with Ruhollah Qarizada, President, AIBA, April 11, 2017.
250 ILAB meeting held on January 3, 2017.
provider by the legal aid independent board”), and license (“an official written document is given by the legal aid independent board to the NGOs providing legal aid”)

Thus, a credential certifies individual advocates engaged in legal aid and a license, as specifically defined, certifies an NGO. If ILAB accredited individuals, legal aid providers working for legal clinics should have credential pursuant to Articles 15(2) and 20(6). In addition, where “legal clinics” are actually legal aid offices established by NGOs (registered with the MoE), they must be licensed as explained in Articles 4(6) and 20(2). If the NGO is already licensed, there is no need for an additional license. However, ILAB lacks authority to license a legal clinic if it is a true branch of a university. Even a legal aid center—with or without students—established by AIBA, is also exempted from needing an ILAB license.

iv. Charging Fees by Institutions

The UN Principles and Guidelines specifically refers to legal aid as “legal advice, assistance and representation for persons detained, arrested or imprisoned, suspected or accused of, or charged with a criminal offence and for victims and witnesses in the criminal justice process that is provided at no cost for those without sufficient means or when the interests of justice so require” [emphasis added]. The UNODC/UNDP Global Study defines it as “legal advice, assistance and/or representation at little or no cost to the person designated as entitled to it.” [emphasis added].

In Afghanistan, the definition of legal aid does not include a reference to cost. However, while the Legal Aid Regulation prohibits individual legal aid providers from charging their clients any fees, it does not mention the institutions employing those providers. Still, the ILAB Procedures does include organizations in the prohibition against remuneration for legal aid provision.

Several legal aid NGOs and donor organizations interested in sustainability have proposed the concept of low-cost or sliding fee scale models as a means to create some income that legal aid NGOs and law clinics could sustainably use to pay for their operations. One question that these concepts face is the likelihood the institutions will be able to find clientele who are poor enough not to afford private lawyers, but rich enough to be able to pay some kind of fee for legal services. Another issue is whether the regulatory framework allows for legal aid service providers to charge any kind of fee.

The question of whether a low cost or sliding scale fee system is viable in practice will need to be answered through pilot projects. Under the law, it appears possible for an NGO or a law clinic to charge for services. The NGO Law allows for charging of modest amounts for legal services. Another issue is whether the regulatory framework allows for legal aid service providers to charge any kind of fee.

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251 Legal Aid Regulation, Article 4 (emphasis added).
252 UNGA Principles and Guidelines on Access to Legal Aid, at 6.
253 UN Global Study, at 8.
254 Legal Aid Regulation, Article 4(1).
255 Ibid., Article 8.
256 ILAB Procedure, Article 3.
profit goals of the organization.\textsuperscript{257} The funds would have to be spent on the objectives of the organization and cannot provide private benefits to any affiliates of the organization.\textsuperscript{258} The prohibition in the Legal Aid Regulation is directed at individual lawyers, and the prohibition against organizations in the ILAB Procedure can be easily rectified by the board without any outside approval as it bears no formal regulatory or legal status. However, the draft Income Tax Law (which has not been approved as of the date of this publication), states that “revenue [from economic activities] shall not be more than 5% of the total receipts of the organization.”\textsuperscript{259} This would create a major hurdle for an NGO if it chose to create a low cost or sliding scale fee system. In such a scenario, an NGO could opt to establish and own a for-profit subsidiary, which is consistent with the funding rules of NGOs,\textsuperscript{260} and the current Income Tax Manual.\textsuperscript{261} This solution could also face substantial tax, reporting, and bookkeeping requirements that may be too burdensome for the scheme to work, but at least it would allow the parent NGO to maintain its legal status.

\textbf{B. Individual Providers of Indigent Defense Services}

Individual indigent defense providers include individual attorneys and aggregates of individual attorneys who work outside the confines of an institution and who are reimbursed based on services performed rather than a salary. The main types of individual indigent defense provider are the assigned counsel model (judicare). Some jurisdictions, including Afghanistan, use \textit{pro bono} services of individual attorneys to supplement legal aid provision. In addition to the two scenarios discussed below, the state is also free to enter contracts for services directly with individual advocates, which the MoJ did with respect to the \textit{in absentia} backlog, as discussed in section C \textit{infra}.

\textit{i. Assigned Counsel (Judicare)}

The assigned counsel (judicare or \textit{ex officio}) model can come in a variety of forms, but at heart it aggregates and organizes individual indigent defense providers. It is one of the most common ways to deliver legal aid services.\textsuperscript{262} Generally, the judicare system involves the assignment of legal aid cases to private lawyers on either a systematic or an ad hoc basis.\textsuperscript{263} The lawyers are retained and ultimately compensated by the government on a case-by-case basis.

The variety of assigned counsel, or judicare, models stems largely from diverse appointment systems that are used in different jurisdictions. In ad hoc systems, the police, prosecution, or courts are given the duty to assign lawyers without much guidance. More structured systems may involve selecting and appointing counsel from a roster or panel of pre-qualified lawyers.

\textsuperscript{257} NGO Law, Article 22.
\textsuperscript{258} Ibid., Article 5. See also Article 10 of the Income Tax Law.
\textsuperscript{259} Draft Income Tax Law, Hut 1394, 10.4.
\textsuperscript{260} NGO Law, Article 25.
\textsuperscript{261} Income Tax Manual, Article 10.4.
\textsuperscript{262} UN Global Study, at 44.
\textsuperscript{263} Ibid., at 41.
Qualification to join the panel may involve minimum practice standards or other quality safeguards, such as supervision and training.\textsuperscript{264} Payment may be hourly or based on flat rates. In addition, most jurisdictions reimburse reasonable necessary expenses incurred by the legal aid provider, such as forensic experts.\textsuperscript{265} In judicare systems, “it is crucial to ensure that the legal aid services provided are consistently effective and of high quality, including access to support services, and that providers are able to practice independently without fear of intimidation by the State or other powerful actors.”\textsuperscript{266} These are serious challenges even for a mature legal aid system.

In Afghanistan, there was no judicare system until the establishment of the LAGF. It was created with support from UNDP Justice and Human Rights for Afghanistan (JHRA) project in 2014,\textsuperscript{267} following the signing of Memoranda of Understanding (MoUs) between UNDP, MoJ, and AIBA. It continues today under UNDP’s Afghanistan Access to Justice (AA2J) project. UNDP emphasizes the role of LAGF as a “legal aid governance framework” that provides grants to non-state legal aid providers such as AIBA, NGOs, and legal clinics.\textsuperscript{268} However, it is more accurately described as a complementary assignment system. Private legal aid providers are appointed to indigent cases individually and given a per-case payment. It is managed by AIBA and funded by outside donors.

LAGF is primarily a rule of law development project implemented by AIBA. The largest part of this project is the delivery of legal aid as a complement to the state’s legal aid system and legal aid NGOs. AIBA is an authorized legal aid institution and does not need to be licensed by the ILAB to deliver legal aid services.\textsuperscript{269} AIBA is also fully authorized to create its own

\begin{figure}
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\includegraphics[width=\textwidth]{LAGF_Cases_in_2016.png}
\caption{LAGF Cases in 2016}
\end{figure}

\begin{itemize}
\item Daikundi: 43 cases
\item Ghor: 61 cases
\item Balkh: 110 cases
\item Helmand: 128 cases
\item Badghis: 65 cases
\item Herat: 86 cases
\item Bamyan: 100 cases
\item Nangarhar: 123 cases
\end{itemize}

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\hline
Province & Cases in 2016 \\
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Daikundi & 43 \\
Ghor & 61 \\
Balkh & 110 \\
Helmand & 128 \\
Badghis & 65 \\
Herat & 86 \\
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Nangarhar & 123 \\
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\textsuperscript{264} Ibid., at 44-45.
\textsuperscript{265} Ibid., at 45.
\textsuperscript{266} Ibid., at 44-45.
\textsuperscript{268} Ibid.
\textsuperscript{269} Legal Aid Regulation, Article 15(1).
internal procedures for the delivery of legal aid services in compliance with donor suggestions and requirements. If viewed from this perspective, the LAGF Procedure is an internal policy for AIBA to deliver legal aid. Both structurally and practically, LAGF is a donor-funded individual indigent defense provider, a case-based lawyer assignment system, rather than a legal aid governance framework.

The LAGF is governed by its own internal procedures and overseen by the LAGF Committee. The ILAB is included in neither the MoU establishing the LAGF, nor the LAGF Committee. Instead, the six-member committee is made up of the president of AIBA and representatives from UNDP, LAD, the Huquq Department, NGOs, and the monitoring board of AIBA. LAGF Procedure is not reviewed by any legislative or regulatory authority nor adopted by either of the official legal aid coordination bodies (MoJ and ILAB). It is not published in an official gazette and carries no force of law.

In addition, no LAGF funds have been granted to any legal aid NGOs. In theory, lawyers working for NGOs may be assigned cases and be reimbursed for them under the LAGF system, but how or why this could work has not been explained in the LAGF Procedure. Further, while LAGF funds can be used to support “accredited” law clinics, only “legal aid providers” and AIBA can make such a request. Thus, LAGF funds (or AA2J project funds) have been used to create/support clinical programs in Nangarhar and Helmand, but they are managed and disbursed through AIBA.

The LAGF assignment system is ostensibly modeled after the Bangladeshi panel lawyer model and originally designed to deliver services to the districts (see infra at 0). The AA2J Project Document notes that “the state legal aid framework has been complemented by a Legal Aid and Services Trust Fund implemented by the Bangladesh Bar Association.” However, the Bangladesh Legal Aid and Services Trust (BLAST) is an NGO that is both independent of the bar association and National Legal Aid Services Organization (NLASO), which has its own panel lawyer system. The NLASO system was established under the Legal Aid Services Act (LASA) adopted in 2000 and governed by a board chaired by the Minister of Law, Justice, and Parliamentary Affairs. Thus, it is unclear which element of the Bangladeshi system LAGF is modeled after and how it best fits into the larger legal aid framework of Afghanistan.

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270 LAGF Procedure, Article 7.
271 The creator of this system, Prof. David Mason, was also the person who designed the ILAB in its original version and sought to make the LAGF into what the ILAB failed to become. Interview with David McQuoid Mason, Buenos Aires, November 17, 2016.
272 Legal Aid Regulation, Article 3.
274 See supra at Section 4.7, for discussion on the confusion between accreditation and licenses under the Legal Aid Regulation.
275 This term is used in a way suggesting individuals not NGOs or other institutions.
276 LAGF Procedure, Article 18(3).
277 UNDP, AA2J Project Progress Report, Q2 and Q3, 9 (2016).
279 See: https://www.blast.org.bd/
280 USAID’s Justice for All Program, Legal Aid Diagnostic Study, 10 (2013).
ii. Pro Bono

The mandatory pro bono requirement in Afghanistan creates another individual service delivery mechanism. Among the duties of advocates as set out in the Advocates’ Law of Afghanistan is the requirement to defend three criminal cases each year, free of charge.281 This pro bono requirement is reiterated in AIBA’s By-Laws.282 AIBA’s By-Laws further state that these cases must be identified by the MoJ.283 The Advocates’ Law states that these cases must be confirmed (or certified) by the MoJ.284 One of the specific objectives of the Legal Aid Regulation is to coordinate the pro bono work of advocates.285

Currently, the pro bono requirement in Afghanistan is best described as an assigned counsel system managed by AIBA. When AIBA faces requests for legal aid, it can assign cases to a licensed attorney up to three times a year free of charge. Often these requests for legal aid services come from the LAD.286 AIBA maintains a pro bono database to manage and track which advocates are assigned these cases.

Under the law, pro bono cases should be certified by the MoJ. Practically, this is a difficult process and no certification mechanism has been established.287 Representatives of the MoJ and ILAB have attempted to examine the delivery of pro bono services, but report resistance to this from AIBA.288 AIBA notes its independent status as an argument for its resistance, but this status was afforded to it under the same law that requires MoJ to certify pro bono delivery.

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281 Advocates’ Law, Article 13(15).
282 AIBA By-Law, Article 43.
283 Ibid.
284 Advocates’ Law, Article 13(15).
285 Legal Aid Regulation, Article 2(4).
286 Fourth Consultation Conference, April 11, 2017.
287 Ibid.
288 ILAB meeting held on January 3, 2017.
The *pro bono* requirement is often held up as an untapped legal aid resource. The total number of *pro bono* cases contracted in 2016 was 1036. This is low considering the number of licensed lawyers (over 3000) who are supposed to be completing three cases per year and the fact that 87 percent of lawyers questioned during the field assessment, claimed they completed the three cases annually (the rest of the respondents failed to provide an answer). Some have suggested that instead of an assignment system, advocates should simply be required to submit evidence of having completed their three *pro bono* cases before their licenses are renewed. However, this would require that advocates proactively identify and contract with indigent criminal defendants. While AIBA has noted that this would be a logistically burdensome and difficult to monitor, it could facilitate a need-based solution easily implemented by the individual judges in need of legal aid providers on their cases.

Advocates on the LAGF roster must complete a *pro bono* case for every LAGF case that they are assigned. Once the *pro bono* case is completed, the advocate may once again seek an LAGF case that pays for services delivered. This means that these advocates must already proactively seek a *pro bono* cases between their first three cases each year. However, it is difficult to determine whether this takes place. For example, in Bamyan AIBA reports only 22 *pro bono* cases for 2016, but 100 LAGF cases.

Several complicating factors suggest the mandatory *pro bono* requirement may not offer a true solution to the scarcity of legal aid providers. First, many AIBA members do not practice law or even use their legal skills in their work. Others are legal experts, professors, etc., but have never represented a case in court, and many practicing private lawyers mostly handle family, civil, or commercial cases. Finally, many defense lawyers work for legal aid authorities such as the LAD, legal aid NGOs, or law clinics. Salaried lawyers already working in legal aid need not complete extra *pro bono* cases, and would be exempted in most jurisdictions.

There is no regulatory guidance on how these various categories of advocates should deal with the *pro bono* requirement. However, the Leadership Counsel of AIBA, which serves as its board of directors, recently ruled that advocates who are assigned a *pro bono* case can refuse the case, if they pay 2,000 AFN (approx. USD 30) to AIBA. These sums go to the core funds of AIBA.

This ruling does build flexibility into the *pro bono* regulatory system and could help to deal with some of the problems listed above with licensed but unqualified advocates. Still, the ruling conflicts with the specific wording of Advocates’ Law and AIBA’s By-Laws. Furthermore, it is unclear that the Leadership Counsel of AIBA can unilaterally make policy. Also, the amount for the fine is low considering that the smallest reimbursement for an LAGF lawyer is 4,000 AFN (petty criminal offense), with the highest amount for a criminal case being 20,000 AFN, if the case is appealed. Finally, any such fine would have to be

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289 LAAR Fieldwork, Question x141
290 ILAB meeting held on January 3, 2017.
291 LAGF Procedure, Article 12(6).
292 Interview with Mustafa Razm Kohestani, member of the leadership board, AIBA, January 17, 2017.
specifically used for legal aid provision for indigent criminal suspects if it is to adhere to, at least, the spirit of the law. Currently, it flows into the general funds of AIBA.

C. Public-Private Partnership: Contracting for Services

As is implied above, Afghanistan’s government may meet its obligation to deliver legal aid services by providing those services directly, or by assignment and cooperation with outside organizations and counsel. In Afghanistan, the right to counsel and legal aid enshrined in Article 31 is derived from Islamic jurisprudence, traditional justice principles, and international human rights law. However, nowhere is there a specific requirement that the government must be the direct provider of legal aid services. Rather, it is common practice that a state may meet its obligations either directly or through assignment or cooperation, with fidelity to basic principles of justice.

Contracting out legal aid services involves allotting government monies for legal aid to private institutional or individual indigent defense providers, which may include AIBA, NGOs, legal clinics, or even a law firm. Typically, the state authority (e.g., a city, ministry of justice, or legal aid board) requests bids or negotiates directly with a service provider to handle an agreed-upon number of cases (or all cases within specified dates), to uphold specific quality assurances in legal aid representation, and to set a price-per-case or other payment structure. Once the contracted entity delivers the legal aid services, it receives payment based on the terms of the contract.

Under the Legal Aid Regulation, the ILAB may enter into cooperative agreements with institutions only; no specific article allows ILAB to contract directly with legal aid providers. The MoJ, on the other hand, is legally capable of entering into contracts with individual advocates and has done so in the past, for example in cooperation with the World Bank using Afghanistan Reconstruction Trust Fund (ARTF) funds to target the in-absentia backlog, discussed infra at 0.

293 Legal Aid Regulation, Article 20(3); Legal Aid Policy 2012, Article 2 (“legal representation may be provided by lawyers employed by the state, and by private lawyers and those employed by NGOs”).
295 UN Global Study, at 41.
296 Legal Aid Regulation, Article 20(3).
297 Articles 25 and 27 are drafted in such a way as to suggest a direct relationship between the board and individual legal aid providers, the most rational reading of these articles is that the performance of the legal aid providers impacts the agreement between ILAB and the institutions that employ the providers. See Legal Aid Regulation, Articles 25 and 27.
298 The World Bank completion report specifically cited the practice and the authority of the MOJ to contract legal services out to individual providers:

MOJ developed a system for subcontracting private lawyers for cases in absentia. The system was piloted under the project preparation grant for the second phase. It is currently used by the UNDP in their legal aid project [LAGF]. Both service delivery arrangements included specific M&E systems which allowed the MoJ to oversee and reimburse [individual] service providers for their services.

The legal aid system’s only significant institutional contract for services took place in 2011. MoJ contracted out legal aid services to ILF-A, an NGO focused on indigent criminal defense, in a pilot project using ARTF resources to commission a set amount of legal aid cases at a uniform per-case cost.\(^\text{299}\) As this was the first contract-for-services for legal aid in Afghanistan, numerous unforeseen matters were determined ad hoc in direct negotiation between MoJ and ILF-A. The procurement process was sole-sourced, using regular World Bank procedures.

However, sole-sourcing of the contracted legal aid services to ILF-A, as well as the amount of money at stake in an increasingly challenged funding context, gave rise to allegations of favoritism and a lack of transparency. Throughout the contract, the legal aid community pressured MoJ to explain why it had sole-sourced the contract.\(^\text{300}\) Eventually, allegations of fraud led to a refusal to pay for services already rendered by ILF-A. ILF-A was placed in financial difficulty and relationships between the MoJ, the World Bank, and other interested parties deteriorated. To resolve the issue, the MoJ initiated two different audits but failed to find pervasive fraud or non-performance under the contract by ILF-A.\(^\text{301}\) Even now, the results of final audit have not been certified, perhaps because certification of unfounded audits would require the MoJ to pay monies owed to ILF-A pursuant to the contract. These funds—sourced through ARTF—are no longer available (although the majority of the judicial reform funds were never disbursed),\(^\text{302}\) presenting a difficult situation for the MoJ and the Ministry of Finance (MoF).

This pilot contract offered key insights and lessons learned for Afghanistan’s legal aid system, including 1) evidence that a well-functioning and independent legal aid board would benefit legal aid coordination; 2) an object lesson in the complex challenge of having the MoJ and the ILAB share responsibility of legal aid delivery without clear guidelines or division of responsibilities; 3) the lack of secretariat support to the ILAB, a currently neglected role delegated to the MoJ (pursuant to the Legal Aid Regulation); and 4) recognition that an institutional contract-for-services scheme in Afghanistan requires fair and transparent selection, contracting, delivery, reporting, and payment procedures (including a dispute resolution mechanism).

\(^\text{299}\) The World Bank’s evaluation of this project noted: “MOJ used services of the International Legal Foundation (ILF) to process about 2800 cases and file 980 appeals…. Cooperation with ILF resulted in the expansion of the system by 206 trained lawyers and 14 trained paralegals working in 12 provincial offices. Legal representation and advice has involved a broad range of cases e.g. murder, terrorism, kidnapping, forgery and counterfeit, narcotics, theft, drinking and intoxication, violence against women, and traffic cases.” Ibod.

\(^\text{300}\) The World Bank acknowledged this issue, and its politicization, in its completion report on this project: “The use of the International Legal Foundation (ILF) - Afghanistan was criticized by local lawyers who believed they could provide the same services for less; however, as they were potential competitors, their claim would need to be subject to scrutiny. An audit found irregularities in the ILF contract, and the Ministry of Justice decided not to continue the contract. The audit questioned 50 out of 2600 cases, but the [World Bank] Task Team Leader believes that this was largely driven by political considerations, and was not an impartial, robust process.” Ibid.

\(^\text{301}\) “The audit questioned 50 out of 2600 cases, but the [World Bank] Task Team Leader believes that this was largely driven by political considerations, and was not an impartial, robust process.” Ibid.

Nevertheless, despite irregular use, practice of contracting out legal aid services is explicitly acknowledged in the policy instruments discussed infra at 0, and public support for legal aid has never translated to an insistence that legal aid services be conducted exclusively by public employees; in fact, Afghanistan’s mixed model of legal aid has incorporated government, private, and NGO lawyers for over a decade. In addition, MoJ policy continues to affirm its commitment to funding a mixed model of legal aid that includes contracts for services to outside parties: “[t]he Government is responsible for funding of legal aid services and should develop a budget and a legal aid fund that can be used to fund the mixed model.”

Coordination

Coordination mechanisms for legal aid traditionally ensure quality, standardization, and consistency in practice. In Afghanistan, which has 34 provinces and varied legal aid providers and legal aid delivery mechanisms, effective coordination of legal aid requires detailed understanding of the context and the gaps between policy and implementation. There are formal and informal coordinating bodies for legal aid in Afghanistan, with varying levels and areas of official authority. Although the MoJ and the ILAB are the official entities charged with coordinating legal aid, actual coordination of legal aid is distributed. AIBA coordinates defense lawyers, including many legal aid providers, and administers the LAGF/the LAGF coordinating committee, which makes decisions about the fledgling assignment model. The Afghanistan Legal Aid and Advocates Network (ALAAN), an informal organization of legal aid service providers, including the LAD and the AIBA, is a professional advocacy and interest group supported by IDLO. These coordination entities do not perform a duplicative role to the ILAB, but have their own strengths and challenges.

A. The Ministry of Justice and ILAB

Pursuant to presidential decree, the LAD was transferred from the Supreme Court to the MOJ in 2007, rendering the MoJ a principal provider of legal aid. With the passing of the Legal Aid Regulation, the MoJ also became one of two principal authorities regulating and coordinating legal aid provision. The LAD is given the duty to monitor all legal aid providers, albeit without explanation on how to use this authority. Article 18(19) of the Legal Aid Regulation gives the LAD sweeping authority to assign any duty it seems fit to any legal aid providers. Practically speaking, these activities never take place. The LAD has no staff dedicated to monitoring service delivery of other legal aid providers. Nor is it practically capable of directly tasking non-LAD advocates, over the objections of the management of other individual and institutional providers.

303 See also, Legal Aid Policy of Afghanistan (2012).
304 Ibid., Article 6.
305 Legal Aid Regulation, Article 3.
306 Presidential Decree 111, Article 3.
307 Legal Aid Regulation, Article 3.
308 Ibid., Article 17(4).
309 Ibid., Article 18(19).
Nevertheless, in theory, a legal aid system fully regulated and coordinated by a justice ministry could function efficiently. However, independence is critical for credible legal aid, particularly since the Afghan courts manage a significant and active docket of political and security cases. Recognizing this, the drafters of the Legal Aid Regulation created a parallel coordination entity, the ILAB.

The ILAB was enacted via the Legal Aid Regulation in 2008 as a sustainable and affordable coordinating body for legal aid in Afghanistan. It is a seven-member stakeholder body consisting of representatives from the Law and Political Science Faculty of Kabul University, the Sharia Faculty of Kabul University, the Ministry of Women’s Affairs (MoWA), AIBA, the Afghan Independent Human Rights Commission (AIHRC), the legal aid NGOs, and the LAD. Each member of the ILAB is appointed, by invitation, for a two-year, renewable term.

Internationally, legal aid boards are a common solution to help organize and coordinate legal aid delivery. If implemented effectively, legal aid boards create independence and transparency, increase efficiency and consistency, improve monitoring and data collection, and enhance quality of services. In Afghanistan, the ILAB is authorized to license NGOs and accredit individual legal aid providers. The ILAB is also tasked with monitoring and evaluating performance, negotiate agreements and provisions on behalf of legal aid, and receive reports from legal aid providers. In addition, the ILAB is charged with organizing programs for the effective coordination of legal aid and suggesting revisions to its convening authority (the Legal Aid Regulation) as necessary, as well as conducting training to develop the capacity of providers.

The statutory language is unclear as to whether either entity (ILAB or the LAD) has primacy in the coordination of legal aid. The language suggests in certain sections that the ILAB is a supervising authority over the LAD, the primary organ of the MoJ that handles legal aid.

310 See examples: Nigeria, China, Indonesia, Bangladesh, etc. The executive agency in charge of justice sector affairs, such as the Ministry of Justice, was most frequently the institution leading such reforms in all regions except Latin America & the Caribbean, and the Middle East & Northern Africa. UN Global Study at 67. 311 Article 7.4 of the 2012 Legal Aid Policy discusses the importance of credible legal aid, stating “Credible legal aid services means that the legal aid system is not perceived to be an organ of the state and is controlled by an independent statutory legal aid body such as the Independent Legal Aid Board whose powers and duties are enshrined in a Legal Aid Regulation.” 312 Kierra Zoellick, Legal Aid Boards, American University Justice Programs Office (February 2017). Available as Annex 3. 313 Legal Aid Regulation, Articles 19-20. 314 Ibid., Article 19. 315 Ibid., Article 21. 316 Kierra Zoellick, Legal Aid Boards, American University Justice Programs Office (February 2017). Available as Annex 3. 317 Ibid. 318 Legal Aid Regulation, Articles 19-20. 319 Legal Aid Regulation, Articles 20. 320 Ibid. 321 Article 3 of the Legal Aid Regulation discusses the organization of legal aid and stipulates that the “Ministry of Justice with cooperation of Independent Board of Legal Aid shall regulate affairs related to legal aid for indigent persons throughout the country.” Legal Aid Regulation, Article 3. 322 Compare Legal Aid Regulation, Article 17(5) (duties and authorities of the LAD include “[r]eporting about related performances and activities to Independent Board of Legal Aid on quarterly basis”), Article 17(7) (duties
However, the idea that the ILAB is an independent check on the MoJ’s coordination and regulation powers is not borne out in practice or design. By design, the LAD is a member of the ILAB and heads its secretariat, which has remained completely inactive.323 The ILAB is also the institution designated to propose amendments to the Legal Aid Regulation.324 Any proposed amendments require approval from the cabinet (council of ministers), where presumably deference is afforded to the opinion of the Minister of Justice.325

Within its capacity, the MoJ is regularly attempting to coordinate and regulate legal aid provision independently from ILAB. For example, MoJ entered an institutional contract for services with ILF-A, discussed supra at C. This assessment is also sponsored by MoJ and funded via contract with the MoJ. In both cases the ILAB, the institution delegated explicit authority to enter agreements and conduct assessments,326 had minimal involvement in the process.

i. ILAB Activity

The Afghan government intended the ILAB to be “a focal point for the international community to help legal aid delivery in Afghanistan.”327 The intention was to provide a vehicle through which “[t]he extensive current and anticipated efforts of the international community to support legal aid systems in Afghanistan … [could] be properly monitored, with priority undertakings and policy matters channeled through a committee that meets regularly and has members with decision making authority.”328 However, in its first two years, the ILAB failed to perform any task whatsoever,329 beyond drafting its own internal procedures.

In 2011, ILAB’s leadership changed, meeting stipends (sitting fees) were instituted through the support of GIZ, and the ILAB became more active, licensing legal aid service providers and proclaiming some policy. Nevertheless, a more active ILAB did not achieve the intended benefit of effective legal aid coordination. ILAB’s first license was issued to the Law Clinic of Herat University, but as discussed supra at iii, the Legal Aid Regulation does not authorize ILAB to license university clinics.330

However, the Legal Aid Regulation does require legal aid providers working for the LAD, the bar, licensed NGOs, and legal clinics to be “accredited” (etebar nameh) by the ILAB,331 but this accreditation process is not explicitly described or defined. This accreditation

and authorities of the MOJ LAD include “[p]erforming other duties assigned by Independent Board of Legal Aid or the Ministry of Justice”), and Article 20(8) (ILAB duties and authorities include “[m]onitoring and evaluating performances and activities of the Legal Aid Department….”) 325 Legal Aid Regulation, Articles 19 and 23.
326 Ibid., Article 20(4).
327 Interview with Prof. Ibrahimi, Member, ILAB, December 13, 2016.
328 Legal Aid Regulation, Article 20.
329 NPP5, at 34.
330 Ibid.
331 Adam Smith International, GIZ Legal Aid Pilot, Legal Aid Board Needs Assessment (December 2010).
332 The primary reason for issuing a license to the Herat University Clinic was so that it could receive funds from the Open Society Foundation. Interview with Abdul Basir Faizi, former Rule of Law Officer of Open Society Afghanistan, April 3, 2017.
333 Legal Aid Regulation, Articles 15(2) and 20(6). See also ILAB Procedure, Article 11(2)(1).
function was presumably included in the Legal Aid Regulation to promote quality representation and to hold providers accountable their pro bono obligations, but it has been criticized as a de facto duplicative licensing scheme for defense lawyers and an erosion of the independence of the AIBA. Thus, in practice, the ILAB ignores its duty to accredit legal aid providers, as well as its self-delegated duty, under Article 11 of the ILAB Procedure, to accredit legal aid assistants and clinical students.

Nor has ILAB’s policymaking effectively addressed ongoing coordination needs in the legal aid system. The ILAB’s policy prescriptions in 2011 included a seven-case limit per month for legal aid providers and an indigency threshold of $300 monthly income. However, the case cap limited institutional providers’ discretion and management under the auspices of quality assurance. No quality measures were taken and the case caps principally functioned to reduce productivity. The indigency threshold of $300 monthly income was based on a discussion among the board members and mandated without independent analysis, evidence-gathering, or investigation. In each case, the limit was neither well-defined nor narrowly tailored to practice needs and, in each case, the limit was criticized as arbitrary and subject to multiple interpretations. The case caps and the income-based indigency threshold were abandoned within three years, with the latter replaced by the current indigency form discussed supra at 0.

Thus, in practice, between issues of budget, capacity, expertise, redundancy, and timing, ILAB’s capacity is exhausted by four of its 12 enumerated responsibilities: 1) licensing of NGO legal aid providers, 2) licensing and accrediting LAD legal aid providers and other authorities providing legal aid, 3) designing an indigency form, and 4) authoring an ILAB procedure pursuant to Article 20(11).

The ILAB has been unable to meet more recent mandates as well, including the directive in Presidential Decree 129 that the ILAB develop recommendations on how to expand legal aid to detainees and prisoners. It also did not meet the expectations of the NPP5 to be central in the monitoring and evaluation of the LAGF, to develop and enhance continuing legal education programming for Afghan lawyers, “to revise the current structure of the Legal Aid Department to make it more effective,” or to develop and enhance non-criminal legal aid.

332 See ILAB Procedure, Articles 6(1) and 18.
333 See supra at 4.7 for a brief discussion of AIBA licensing.
334 Interview with Ruhollah Qarizada, President, AIBA, February 20, 2017; See also ILAB Procedure Article 11(2)(1) and 18.
336 Ibid., at 12-13.
337 Adam Smith International, Legal Aid Board Needs Assessment, 20-25, GIZ Legal Aid Pilot (December 2010).
338 Legal Aid Regulation, Article 20.
339 NPP5 at 34.
340 Ibid., at 34-35.
341 Ibid., at 36.
342 Ibid.
In addition, core functions of effective coordination of legal aid have not yet been commenced by the ILAB, including assisting in the transformation of the LAD, entering into cooperation agreements with legal aid provider entities, proposing amendments to the Legal Aid Regulation, organizing programs for effective administration of legal aid and coordination among legal aid authorities, ensuring timely provision of legal aid, monitoring and evaluating the LAD, adjudicating complaints, and conducting professional seminars and continuing legal education.\(^{343}\) This represents no small task; one of the lessons learned from the two-year, $28 million World Bank-led Afghan Judicial Reform Project that targeted legal aid improvements within a broad umbrella of justice sector capacity-building was that “[m]ore support than was available in this case is needed to build robust M&E systems with baselines, adequate data collection tools, and measurable targets not only for outputs, but for performance outcomes of the sector,”\(^{344}\) although the majority of those funds were never disbursed.\(^{345}\)

\[ ii. \text{ MoJ and ILAB: Coordination Among Conflicts of Interest} \]

ILAB also overlaps the LAD of the MoJ in its coordination role. As a department of the MoJ, the head of the LAD is responsible to the Deputy Minister of Justice for Professional Affairs, and by extension, the Minister of Justice.\(^{346}\) However, the LAD is also responsible to ILAB.\(^{347}\) Among other things, under ILAB Procedure, ILAB gives itself the authority to provide consultation to the MoJ on where LAD offices should be established.\(^{348}\) Since ILAB and the MoJ have joint authority over legal aid,\(^{349}\) the LAD should, in theory, answer equally to both organizations. However, in practice, the budget, structure, and all other important decisions regarding the LAD are determined solely by the MoJ, with no regulatory prescribed or practical role for the ILAB.

As secretariat, the LAD manages files and conducts correspondence for the ILAB, even this meager secretariat support has been provided to the ILAB through capacity replacement programs by donors such as GIZ and JSSP. The LAD has never assigned a full-time staff member from its \textit{tashkeel} to the ILAB, nor has it found a consistent meeting space.\(^{350}\) The Legal Aid Regulation assigns specific duties to the LAD, including as ensuring cooperation with legal aid providers by other justice institutions, collection of legal aid delivery data, and

\(^{343}\) Adam Smith International, \textit{Legal Aid Board Needs Assessment}, 20-25, GIZ Legal Aid Pilot (December 2010).


\(^{347}\) Legal Aid Regulation, Articles 17, 23.

\(^{348}\) Ibid., Article 6(2).

\(^{349}\) Ibid., Article 3.

\(^{350}\) ILAB meeting held on December 13, 2017.
monitoring other legal aid service providers, implying that these duties are part of LAD’s secretariat work for ILAB.

However, conflicts also arise in this context. Since its establishment, Mr. Assadullah Wahdat, the head of LAD, has been a member of the ILAB, an institution intended to monitor the work of the LAD. This creates potential conflicts of interest, as a major part of ILAB’s work may involve criticizing the LAD. This may be one reason for the fact that the LAD has not succeeded in its duties as the secretariat of ILAB.

B. The Afghan Independent Bar Association

AIBA was convened pursuant to the 2007 Advocates’ Law, which was intended to end a tradition of government regulation and oversight of lawyers with the innovation of self-regulation. Consequently, oversight and discipline of defense attorneys in Afghanistan are largely non-governmental functions as the MoJ was not intended to retain residual power to regulate or otherwise control defense attorneys not in its employ.

AIBA has primary responsibility for coordinating individual lawyers and the private defense bar, which includes many legal aid providers. AIBA also plays formal and informal roles in many provinces, including through providing access to laws, statutes, and other resources, and acting as an organizing force for the defense bar. AIBA also plays a role hosting coordination meetings, ethics discussions, and refereeing attorney complaints and problem-solving as part of its routine work in the provinces and in Kabul.

i. LAGF Committee

The LAGF Committee, also discussed supra at B.i, is made up of six members who discuss and make decisions about the LAGF project. Provincial versions of the committee are primarily responsible for assigning advocates to legal aid cases and handling payment and other logistical issues with the assistance of the local AIBA office. The main committee in Kabul also tackles larger policy issues that impact the smooth implementation of LAGF. The LAGF Committee, with the technical help of UNDP, has been successful in meeting the needs of the LAGF project, but it remains a relatively disconnected from the larger coordination of legal aid delivery in Afghanistan.

C. Afghanistan Legal Aid and Advocates Network

ALAAN was established in February 2015, and is a user-driven platform composed of all types of legal aid providers, which facilitates the coordination of information, policy recommendations, and associated activities to elevate the level of practice in the criminal courts. Because it brings together organizations working across the country, its membership

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351 Legal Aid Regulation, Article 17.
352 Advocates’ Law, Article 4.
353 Sarah Han, Legal Aid in Afghanistan, Context, Challenges and the Future, 8, Afghanistan Analysts Network (April 2012).
354 Assessment Team Debrief, December 26-27, 2016
355 Ibid.
is connected to the practice of legal aid nationwide and can offer reliable, experience-based information on necessary actions to be taken. Members can discuss their challenges in a cooperative environment and strategize on how to move forward in a unified fashion.

ALAAN policy sets forth a basic set of requirements for being able to join the network. Member organizations must include legal aid provision as a specific activity in their charter. Applicants must provide their charter, registration certifications (from the MoE or the MoJ), and their ILAB license before being considered for membership. The network holds monthly meetings and failing to attend two meetings in a row is supposed to result in a notice, a third missed meeting results in a warning, and a fourth absence result in revocation of membership.356

With the advent of ALAAN, the legal aid community can experiment with a stakeholder coordination body that is consensus-driven. Would such a body be able to remain open to all legal aid providers, or would it be closed off to newer or nontraditional service providers? Can these stakeholders recognize each other’s strengths and weaknesses and coordinate their activities to match these realities? Can they divide resources based on the needs of the population rather than their organizational interests?

ALAAN has shown some success in creating a unified advocacy body for legal aid service providers. The network met with the Director General of Prisons and Detention Centers, and successfully advocated for greater access for lawyers to detention and prisons to meet with their clients.357 ALAAN also identified and communicated several issues to the judiciary such as the need for more advance notice of trials and hearings, the need for public trials, and greater respect by judges of the role of the defense lawyer in practice. Further, the network has been working on working the AGO and the MoJ on greater access to investigation and case files.358 Finally, with the help of IDLO and The Asia Foundation, ALAAN is developing a comprehensive and multi-level legal aid case management database that, if successfully implemented, would be significant tool for coordination of legal aid services in Afghanistan.

Still, the network has not been able to function as a true coordinating body. Membership in the network can be denied based on past grievances or a determination that the mission of an organization is not focused enough on legal aid.359 Its policy sets out only few rules that are still regularly flaunted by some established members.360 More importantly, when given the opportunity to distribute resources, ALAAN members failed to achieve consensus on even basic parameters despite a context where no sacrifice was required.361 Lastly, the network is

356 Afghanistan Legal Aid and Advocates Network, Policy provided by IDLO on March 20, 2017.
357 ALAAN Conference, Kabul, Afghanistan, March 27, 2017.
359 For example, the Afghan Women’s Network (AWN), which provides legal aid in Nangarhar, was denied membership to ALAAN, because it is itself a network and delivery of legal aid is a secondary mission of the organization.
360 Afghanistan Human Rights Organization (AHRO) is not licensed by ILAB and regularly fails to participate in meetings, but until recently had not received even a notice. ALAAN meeting, April 9, 2017.
361 In November 2016, The Asia Foundation presented ALAAN with the task of distributing 100 legal fellows among themselves. The fellows present a free workforce, yet the ALAAN meeting lasted two hours without any progress, and the ALAAN members requested that the Foundation take on the task itself.
still largely dependent on the financial and capacity support of IDLO without a clear path of transition to self-sustainability.

Still, ALAAN may be an effective vehicle for building leadership capacity within legal aid and for unifying the legal aid community in support of concrete advocacy goals, such as access to case files at the prosecution stage, better case management by the courts, and uniform pleadings. ALAAN’s legal aid map and brochure are attached as Annex 2.
5. SUB-ASSESSMENT OF THE LEGAL AID DEPARTMENT

This section covers how the LAD manages its finances, administration, procurement, human resources, and case information. In many respects, this section stands apart from the rest of the LAAR. This analysis and preliminary recommendations are being presented as a snapshot of the LAD’s current state. Unlike the previous section, there is little discussion of whether the LAD is meeting its regulatory responsibilities or what its role is in the wider legal aid landscape. Whether the specific recommendations discussed in this section will be viable or necessary depends on how the Government of the Islamic Republic of Afghanistan (GIRoA) and donors implement the LAAR. However, the challenges discussed in this section do inform the broader recommendations made as part of the roadmap, infra in Section 7.

Summary of Sub-Assessment

The MoJ assigns many of its administration and finance functions to distinct departments. Therefore, this sub-assessment also need to review the ability of the LAD to coordinate with these departments. This fact, which was exacerbated by limitations on access and responsiveness to documents, budgets, etc., resulted in several contradictory narratives and ambiguity in the information collected during the sub-assessment. Still, there were obvious challenges that need to be addressed by the LAD:

- The LAD has not sought or does not have access to defined financial, human resource, and administration management systems and processes – e.g. documented procedures for budget preparation, budget monitoring, reporting, or human resource management. This results in operational inefficiencies.
- The roles and responsibilities of various functions within the MoJ (including the LAD) and provincial offices are not clearly defined. This is acknowledged by the MoF, who note that there is an “ambiguous role of the provincial governors in the budget preparation and execution process, where in a number of provinces governors are required to sign every invoice, causing considerable delays in the budget process.”
- There is a dire need for process mapping, based on relevant policies and procedures, of all the LAD’s functions, which incorporates appropriate coordination mechanisms with other MoJ departments.
- The LAD has terms of reference (ToRs) that cover the basic duties of each position, but these often fail to clearly communicate the expectations from employees, are not based on process maps or clearly defined and are not accessible via standardized policies and procedures.
- The key element of public financial management, i.e. budgeting, seems to be vertically structured. The LAD central department prepares budget with limited informal input (if any) from provincial offices. The MoF views this as a much wider issue and explains that there is “a centralized approach to budget preparation by

central ministries, where in most cases provincial departments are not involved at all in the budget submission or allotment preparation process.\textsuperscript{363}

- Budget preparation practices undertaken by LAD are ad hoc. The LAD simply responds to a request of the Directorate of Finance and Accounting for budget input by providing a list of equipment it needs for its office in Kabul. Each provincial office does the same with its own Administration and Finance Directorate in the provincial branch of the MoJ.

- Budgets are not prepared by linking annual operating and procurement plans with financial requirements. Nor is it obvious that the LAD (the budget owner) requests or has access to the final budget. The LAD management is not aware of budgetary ceilings at either the central or provincial level.

- LAD management does not review financial progress reports (e.g. actual vs. budget, commitments, liabilities, advances, etc.) on a periodic basis, which should be accessible through the MoJ’s Department of Administration and Finance (DAF), which is using Afghanistan Financial Management Information System (AFMIS).

- The LAD complains that the human and physical infrastructure of the LAD does not commensurate with its workload. The department is currently delivering services through 193 legal aid providers at provincial offices – i.e. less than one legal aid provider per district.

- Legal aid providers do not have appropriate administrative support, which limits their ability to give the necessary attention to their cases.

- LAD managers complain that hiring suitable candidates is hindered by unwanted interference from senior government officials and local strongmen.

- Due to the structure of the human resource system of the GIRoA, the salary structure of legal aid providers (\textit{taskheel} staff) does not reflect market dynamics.

- The LAD has failed to use available case management systems in cooperation with other justice institutions and or to develop or use a legal aid specific database to help track legal aid delivery statistics, and manage monitoring activities and create structured and vigorous supervision systems.

In addition to the above, there are broader issues of leadership, management, depleted human resources, inappropriate interventions and methodologies, and lack of proper planning, which all contribute to meager progress and development. MoF, in its 2014 report \textit{Assessment of M&E Systems in Ministries and Agencies}, states, “The major challenge therefore remains the level of understanding and commitment of ministry/agency senior management to building and maintaining a performance monitoring and evaluation system and to using this in operational management and strategic planning processes, and their ability to establish a technical department with the technical skills and internal power to ensure that all departments and programs comply with the requirements of the institution-wide system.

There is a long path to be followed in the coming years in these areas.” Although the MoF assessment is from 2014, this summary continues to hold true.

Therefore, regarding the LAD, as it functions in the current context, the following recommendations are made:

- Any future capacity building interventions should give strong consideration to leadership and management challenges of the LAD.
- A change management specialist should be engaged to provide guidance during each phase of capacity building process for the LAD. As the LAD support functions are deeply linked with other MoJ departments, this process shall also require significant input from the MoJ’s planning, finance, and administration departments and a specific plan to enhance the LAD’s capacity to utilize these departments.
- The MoJ (including the LAD) should embrace MoF initiatives on provincial budgeting reforms. Efforts should be made to develop a formal mechanism of involving sub-national offices in budgeting process. A detailed budget preparation process should be developed and documented along with standard templates for budgetary data collection. Appropriate training should be provided to all staff including leadership to ensure that they are aware of their responsibilities in relation to the budget development process. A financial management reporting framework should be established that specifies what reports are to be prepared, what they are to contain, and how they are to be used to ensure appropriate oversight and monitoring of program activities.
- A formal and detailed process of allocating human resource to offices should be created based on previously identified criteria. Internal hiring processes should be made more robust and strict conflict of interest rules should be developed, distributed, and implemented. Taking into consideration the limitations of the government’s salary scale, a career pathway linked with financial benefits should be developed to motivate the LAD’s legal aid providers and reduce turnover. The MoJ should set up a working group to find innovative ways to incentivize legal aid providers.
- The LAD must create the capacity to use available case management systems in cooperation with other justice institutions and to develop or use a legal aid specific database to help track legal aid delivery statistics nationwide, manage its monitoring activities, create structured and vigorous supervision systems, and meet its secretarial duties for the ILAB.

**Scope of Sub-Assessment**

As part of the larger legal aid assessment and roadmap, the MoJ requested that the Foundation carry out a preliminary capacity assessment of the LAD. The focus of this sub-assessment was to understand high-level capacity challenges of LAD in the areas of finance,
human resource, administration, and information management that hinder the LAD’s ability to meet its responsibilities.

Specifically, this assessment was to investigate the following key areas:

- **Financial Management**
  - Are there enabling structures in place at the LAD to facilitate adequate planning and monitoring of financial activities?
  - Is there a robust budget preparation process, whereby information is collected from relevant stakeholders in order to produce a budget document that captures the LAD’s planned activities in sufficient detail to provide a meaningful tool for subsequent implementation and monitoring?
  - Does the LAD’s management frequently monitor actual expenditures against the budget and take necessary corrective actions?

- **Administration**
  - Are there enabling structures in place at the LAD to facilitate adequate administrative management activities?

- **Human Resource Management**
  - Is there a consistent pay and grade system in place to motivate employees?
  - Is the hiring process efficient and transparent, and does it fulfill the department’s needs?
  - Is the organizational chart (tashkeel) developed in consultation with relevant stakeholders and does it consider the duties and program objectives of the LAD?

- **Information Management**
  - Is the LAD managing its case information and gathered detailed service provision data?
  - Is this information used to monitor and supervise the professional staff?
  - Is this information used to make greater policy decisions?

Being a government entity many components of MoJ’s functions pertaining to financial management, human resource, procurement, audit, accountability, etc. are performed by other GIRoA entities such as the MoF, the Control and Audit Office, and the Independent Administrative Reforms and Civil Service Commission (IARCSC). This sub-assessment did not examine the functions performed by such entities.

**Methodology for Sub-Assessment**

The sub-assessment was conducted using a participatory self-assessment process that revolved around the scope described above. The assessment involved a total of 20 participants including representatives of LAD, MoJ, and World Bank project staff. The Foundation’s assessment team facilitated the process of self-assessment in which the MoJ representatives engaged in in-depth reflection and discussions to determine the key gaps in the current practices.

This process for this preliminary assessment involved the following steps:
1) Preparation for Assessment
The Foundation’s staff worked with MoJ representatives to complete a number of activities in preparation for the assessment. Key among these activities included: customization and refinement of assessment tool, induction of MoJ management and staff about the assessment approach, and identification and selection of participants for the focus group discussions.

2) Data Collection
Key methods used for data collection during the assessment were focus group discussions, key informant interviews, review of documents, and observation of workplace behavior. Focus group discussions were the main data gathering forum, during which the facilitators administered the assessment and held in-depth discussions about LAD with participants. At the conclusion of each focus group session, key capacity gaps were agreed on by the participants through a consultative process. The information collected from these discussions was triangulated through a review of documents, discussions with key informants and making observations in the organization.

3) Finding Validation
The information generated during data collection phase along with suggested interventions was summarized and presented to LAD/MoJ management. This was followed by a discussion to incorporate any new insights, clarify outstanding issues, and validate the results.

4) Draft Report
The Foundation worked collaboratively with the MoJ to develop a draft report. It was shared with the senior management and discussed on several occasions. Disagreements among MoJ officials and with the assessment team are noted below. Some of the additional information requested to substantiate or resolve disputed points difficult to obtain and caused substantial delays in the analysis. This draft report was reviewed, updated, and amended before being incorporated into the larger assessment in the form of this section.

**Overview of LAD**

The MoJ is divided into 13 departments, plus a Human Rights Unit and the Office of the Minister. For budgetary management, these departments are distributed between four programs: Juvenile Rehabilitation, Legal, Legislative, and Support Services. The LAD, along with the Huquq Department and State Cases Department, make up the Legal Program.

The LAD was established in 1989 and worked in the structure of Supreme Court, with a single office located in Kabul. Beginning in 2008, it was statutorily placed under structure of the MoJ. Subsequently, the department expanded into all 34 provinces of Afghanistan. Thus, the LAD is a principle substantive department of the MoJ. Its key role and responsibilities include:

1) To provide access to legal aid for indigent suspects and accused persons for free.
2) To ensure the rights of indigent suspects and accused while providing legal aid.

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365 Interview with Deputy Minister of Justice, December 27, 2017.
3) To provide reliable legal aid to suspects and accused in a sustainable manner.
4) To organize the free provision of legal aid by advocates.
5) To coordinate the activities of legal aid providers of LAD and accredited NGOs providing legal aid in civil and criminal cases.
6) To monitor and evaluate the provision of legal aid and the performances of legal aid providers.
7) To provide legal aid in every phase of legal proceeding for indigent suspects and accused persons.
8) To ensure the cooperation of relevant legal and justice officials with legal aid providers while performing their duties.
9) If possible, to provide legal aid for indigent women and children in civil cases.
10) To collect exact statistics regarding provided legal aid to indigent suspects and accused persons.
11) To monitor the performance of relevant legal aid providers in every phase of legal proceedings.  

Being a government entity, certain LAD functions pertaining to financial management, procurement, and human resource management, etc. are performed by specialized MoJ departments and external GIRoA entities including MoF, National Procurement Authority (NPA), and Independent Administrative Reform and Civil Service Commission (IARCSC). In addition, the MoJ’s Support Services Program and these external GIRoA entities are primarily responsible to perform fiduciary checks over the LAD’s activities along with execution and record keeping of transactions e.g. procurement processing, payroll processing, accounting, treasury management, etc.

Still, the LAD is responsible to cooperate with the departments in the Support Services Program (such as the DAF and the Human Resource Department) to create plans and initiate its activities – e.g. budget formulation, procurement planning, compiling departmental structure (tashkeel), developing staff training plans, and initiating procurement processes. It has three support staff members that are assigned to assist with coordination of financial and administrative affairs at its central office. Consequently, the LAD should have a significant role in planning and monitoring its own activities with support of other MoJ departments and government entities.

**Financial Management of LAD**

The MoJ’s Department of Administration and Finance (DAF) is broken into four Directorates, including the Directorate of Finance and Accounting, which has 20 employees and is responsible for providing financial management support to the line departments of the MoJ and act as interface with the MoF. The DAF’s responsibilities include allocating budgets for the central and provincial offices, collecting revenue on behalf of the MoJ, depositing revenue to the general account of government revenues, and preparing the annual ordinary and development budgets of the MoJ, (with input from the respective line departments/programs). The central office of the LAD generally relies on the DAF for its financial management at the central level.

The GIRoA’s challenges with budgeting have been acknowledged for some time. The demand from all stakeholders for greater accountability and real results led to a need for enhanced results-based budgeting and monitoring in the Afghan institutions. Accordingly, MoF began a reform process for program-based budgeting whereby each program budget is linked to the services to be delivered. This aimed to shift the focus of budgets from financial inputs to the delivery of defined outputs. Success of this initiative hinges on developing focused strategic plans and linking them with annual operational planning including a budget. At the MoF level, the Budget Integration and Reform Unit (BIRU) is responsible for implementation of program budgeting and providing capacity building function in the wide area of public finance management.

Further, the budget preparation in government ministries was highly centralized. Budget requests were being prepared by central line ministries and submitted to the MoF without appropriately consulting provincial departments. Budget appropriations did not consider

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367 Terms of Reference for Administration Officer and Administration Employee, provided by MoJ.
provincial breakdown of the budget. This resulted in low budget execution rates and limitations in service delivery at the provincial level. To address this issue, the MoF initiated provincial budgeting reform with the objective to move towards a more participatory approach where provincial authorities are involved in planning and budgeting processes, resulting in greater integration of the provincial needs in the national budget. A dedicated Provincial Budget Unit (PBU) at the MoF level has been established to ensure integration of specific provincial needs and requirements in the national budget and address specific capacity development needs at provincial level.

The MoJ’s annual budget is prepared on the basis of directives issued by the DAF through a budget circular. The DAF is responsible for preparing the budget in liaison with line departments including the LAD. As noted above, for budgetary purposes, the LAD falls into the Legal Program along with the Huquq and the State Cases Departments.

The LAD’s involvement in the budget preparation is limited to sending a list of equipment required (in the form of a letter) to the DAF, which is used for compiling the budget for code 25208—Office and Computing Equipment of the Legal Program. The DAF then assigns costs to equipment based on historical information. The remaining elements of budget – i.e. code 21 (Wages and Salaries Expenditure) and code 22 (Use of Goods and Services) – are compiled by the DAF based on historical information and with limited involvement of the LAD.

Once the budget for all departments is compiled at the ministerial level, it is submitted to the MoF for review and presented at the National Assembly. After approval, the budget is incorporated in AFMIS, which is the main budget management software used by the MoF. Subsequent revisions of the budget require approval from the Minister of Justice and the MoF.

Though the assessment team was not provided with the budget documents of MoJ or the LAD, generally ministerial budgets list physical and financial targets for implementation of activities. Physical targets include outcome description and outcome indicators, timelines, activities and targets. Further, they include financial expenditure to be incurred by province.

As noted above, the DAF uses AFMIS for budget monitoring and accounting, which is managed by MoF. The AFMIS is primarily tailored per GIRoA internal requirements whereby pre-defined object codes for recording expenditures incurred are used to record financial transactions. The system has the capacity to monitor budgets, record expenditures, and generate reports by pre-defined object codes and programs.

All GIRoA financial regulations including the Public Finance and Expenditure Management Law (PFEMFL) and the Accounting Manual and Budget Manual are issued by the MoF and are applicable to the MoJ/LAD. These documents are generic and primarily focused on functions/requirements from the MoF’s perspective.

While it is difficult to determine if this is the case for the LAD itself, overall, the MoJ often fails to spend its annual government-allocated development budget. Thus, at least part of the problem is the failure of policy and procedures rather than a lack of funds. Once the full
budget is spent, it will be easier to identify where there is a greater need for increased budgeting.

**Policies and Procedures**

There is no specific finance manual developed to govern the financial management activities performed at the MoJ and the LAD. This results in delays in program activities and causes operational inefficiencies.

During the focus group session with management at the LAD, it was noted that the staff were not fully aware of the expectations from them in when making financial or human resource decisions. During the annual budget formulation, the LAD leadership only submits a list of equipment it requires to the planning department. This list is only for the central office and requires no consultation with the provincial offices. The remaining LAD budget – *i.e.* human resource and other operating costs – is compiled by the DAF based on historical information. Furthermore, during the discussions, the LAD management explained that there is often not enough budget for their equipment and supply costs. However, the DAF responded that the lack of available funds is related more to the lack of accurate identification of budgetary requirements during budget formulation process, which is the responsibility of LAD. The same was emphasized by the Deputy Minister for Administrative Affairs, who insisted that the failure to meet the needs of the LAD are a result of the LAD’s inability to identify and plan for them.

Both in the central office and in the provincial offices, the lack of documented policies and procedures results in limited guidance to staff for effective and efficient management of resources. Further, it means that knowledge and skills with respect to processes are concentrated in a few experienced staff. This is a barrier to the professional staff’s ownership of systems and controls, and limits the ability for international donations to create positive impact. It highlights the fact that the LAD’s first order problem is not availability of funds, but rather the capacity to manage them.

**Budgeting**

Budgeting procedures for planning activities, collecting information, and preparing budgets are not documented by the LAD. LAD staff members are not abreast of current requirements and their responsibilities in relation to the budget development process. This is one of the reasons for deficient budgeting. Furthermore, there are no standard templates for budgetary data collection – *i.e.* information that must be submitted to DAF. While there are understood guidelines for what should be included in the letter submitted to DAF, there is no detailed template such as a spreadsheet, form, or catalogue that would require the LAD to engage in a more rigorous process and allow it to more precisely identify its needs.

As noted above, the current budget preparation practice is ad hoc. The LAD sends a list of equipment required to the DAF annually but provides no official input with regards to human resource and other operational costs. While this input may be futile, since for example
increasing human resources is difficult, it should still include an official and precise exercise that engages the whole department.

It seems that the budget is not prepared by linking operating and procurement plans with financial requirements. This reflects a lack of understanding of program-based budgeting concepts and the LAD’s responsibility therein. The MoF rolled out program-based budgeting reforms several years ago which encourage the budgetary units to prepare program-based “zero-budgets” by defining service delivery (output) targets they plan to achieve with allocated funds, however this has yet to be implemented at the LAD. As with the above, creating a “zero-budget” may be considered futile because of the inherent resource limitations that the GIRoA faces, but even if resources will not be available to fully fund such a budget, this exercise will be beneficial. It will provide the LAD management with a more detailed and complex understanding of the needs, provide better information for future advocacy with senior management, and assist the process of meeting needs through more innovative measures. It should be noted that such an exercise would require real assistance from with the DAF or outside experts to avoid the creation of an unrealistic wish list.

Another issue is that the involvement of provincial and regional LAD offices in the preparation of the budget is not streamlined. The MoF has acknowledged that this is an issue that causes delays in the provincial budget reform implementation and states that there is “Poor communication between central line ministry and provincial departments on any budget related issue; provincial departments lack information on the overall budget structure of the central ministry, programs implemented by the line ministry, budget policies behind it, and/or budget allocation for their province.” In the same report the MoF goes on to note that there is “a centralized approach to budget preparation by central ministries, where in most cases provincial departments are not involved at all in the budget submission or allotment preparation process.” The problem for LAD offices however is not whether the approach is centralized or not. Rather, it is a matter of lack of coordination with the central office, plus a lack of specific budget requests.

The provincial offices convey their needs to the head of the provincial justice department in similarly generalized narrative requests. These requests are combined with the needs of other departments and submitted to the DAF as a provincial budget. The DAF is responsible for compiling the LAD budget. However, this budget is not shared with the LAD (who should be the budget owner) and the LAD fails to actively request the budget, and may not have the capacity to review/understand the budget. Thus, LAD management is not aware of budgetary ceilings at the central or provincial level. During the year, if there is any expenditure requirement that is over and above approved budgetary ceilings, another long process of budget revision would need to be triggered that results in program delays and/or underspending. Often, the answer is to simply decide to go without the expenditure.

369 Interview with Deputy Minister of Justice, December 27, 2017.
370 Focus Group 1, August 23, 2016.
Thus, many LAD offices continue to lack essential resources. In the LAD office in Bamyan, the assessment team observed attorneys sharing a desk and using it sequentially to complete their work. As one attorney finished and stood up from the desk, the attorney(s) standing by would take a turn at the desk and complete their work in the allotted time.\textsuperscript{371} None of the LAD offices, except Herat, had a conference room or designated meeting space although most NGOs did. In multiple provinces, the assessment team found that in order to copy the case file review in this project, the attorneys were forced to carry the case files to the bazaar and return with copies. In one province, attorneys and supervisors tried to print out cases for over an hour without success. LAD attorneys reported paying out of pocket to make copies of prosecution files and evidence.\textsuperscript{372}

\textit{Financial Reporting}

The DAF has access to AFMIS for generating financial reports, however LAD financial reports (e.g. actual vs. budget, commitments, liabilities, advances, etc.) are not requested by the LAD management for periodic review. As aforementioned, the LAD is part of the Legal Program and its expenses (separate from salaries) are lumped in with the Huquq and State Cases Departments under AFMIS. In addition, in all provinces the LAD shares space with the rest of the MoJ departments, except Herat where the LAD has their own separate office.

While it would be theoretically possible to tease out its budget, the current structure requires a fulltime financial professional to spend a great deal of time and effort to do so – and for little effect. Currently, the LAD does not have an established financial management reporting framework that specifies what reports are to be prepared, what they are to contain, and how they are to be used to ensure appropriate oversight and monitoring of program implementation. The use of IT financial system (AFMIS) is limited to DAF only. Per management, the LAD can apply to MoF to be granted access to AFMIS and to be given its own accounting code – but this would have to come after significant capacity enhancement that would have to include dedicated finance and administration staff.\textsuperscript{373} However, the Deputy Minister for Finance and Administration opposes such a course of action, reasoning that it would be an increase in the bureaucracy of the MoJ and that the problems of the LAD could be better handled with better coordination and capacity from the management of the LAD.\textsuperscript{374}

\textit{Human Resource and Administration Management}

The LAD is operating in 34 provinces and employs 121 legal aid providers under its taskheel. In addition, the under the World Bank project, it has also deployed an additional 72 legal aid providers working in 21 LAD provincial offices.

The MoJ Human Resource Department is responsible for overall human resource management, staff recruitment, processing of payroll, and interaction with the IARCS to

\textsuperscript{372} Ibid.
\textsuperscript{373} Interview with Deputy Minister of Justice, December 27, 2017.
\textsuperscript{374} Ibid.
implement government human resource policies, staff appraisals, etc. It consists of 35 employees working in four directorates: Directorate of Recruitment, Directorate of Personnel Bio, Directorate of Administration Development, and Directorate of Employees’ Liaison. As with the DAF, the LAD’s three support staff members coordinate with the Human Resource Department at the central office in Kabul. In the provinces, the professional staff must deal with the provincial human resource office directly.

The IARCSC has the authority to regulate and process the required regulations for implementation of the provisions of the Civil Servants Law of 2008, including finalizing organizational charts (tashkeels). Further, recruitments of grade 1 and 2 staff are the responsibility of the IARCSC. The recruitment for grades 3 to 6 staff is performed by the MoJ recruitment committee, which also has a representative of the IARCSC.

The Labor Law of 2007 and the Civil Servants Law of 2008 are applicable to the MoJ. The Labor Law was enacted in accordance with the Constitution of Afghanistan to regulate and clarify the responsibilities, rights, allowances, and social welfare of employees. The Civil Servant Law was enacted to strive to employ competent people in civil service administrations and to regulate their relations with administration.

**Policies and Procedures**

Neither the LAD nor the MoJ have developed a human resource and/or administration manual. This results in delays in program activities and causes operational inefficiencies. Although the Labor Law and Civil Servant Law provide overall guidance, these documents are applicable for all government institutions and do not include process level details for effective implementation and understanding by managers and employees.

**Staffing Structure**

Unsurprisingly, during the focus group sessions, there was consensus agreement that there are not enough legal aid providers for the needs across Afghanistan. There is a total of 193 legal aid providers (including GIRoA- and World Bank-employed), as compared to over 2,000 prosecutors. When they are able to travel outside the provincial capitals to represent clients, the legal aid providers spend significant time travelling from provincial offices to districts.

Further, there are few administrative support mechanisms in place. This impairs their ability to effectively utilize their time. Professional staff waste time on administrative tasks such as organizing transportation or spending hours copying files in courts and prosecution offices (see infra 1).

The distribution of these legal aid providers within provinces seems to be ad hoc. Per management, the number of legal aid providers per province depends on population and caseloads of the provinces. For example, four legal aid providers are operating in Balkh due to high caseloads whereas only one legal aid provider is providing services in Nuristan, which has a smaller population and lower caseload. However, there is no formal assessment of populations and caseloads before human resource allocations are made.
The LAD’s full organizational structure was not shared with us to carry more in-depth analysis (including of an analysis of gender percentages). However, the LAD did share its organogram for the central office, which does show that the LAD has three support staff members (one administrative manager and two administrative officers) who are responsible, among other tasks, to coordinate support functions for the LAD’s central office i.e. financial management, human resource management, and administration matters. These positions are for relatively low pay grades (grades 5 and 6 respectively), with even the administrative manager (modir-e edari) requiring no college education.

**Staff Capacity**

Focus group respondents opined that the quality of legal aid providers at the central office, especially those who are more experienced, is satisfactory. However, it is difficult to find suitable candidates for provincial offices, due to security challenges and low salary. They claimed that university graduates who have no work experience are not competent, due to the weak legal education system in Afghanistan. One of the respondents noted that hiring suitable candidates is further complicated by unwanted interference by senior government officials and local strongmen. The Deputy Minister disagreed with this, and expressed his view that the vast majority of hires are done without any serious interference.

Even so, Afghan citizens showed significant trust in government lawyers, notwithstanding their general distrust in government institutions. Despite reporting only 36 percent confidence in government ministries, 64 percent of Afghans stated they would most trust a government lawyer to protect their rights if charged with a crime. However, this may well reflect the understanding of Afghans that government employees prefer to work with each other than outside lawyers.

**Salary and Benefits**

Respondents explained that the salary structure of taskheel staff is based on government rates that do not necessarily reflect market and environmental dynamics. Further, there is significant inconsistency between legal aid providers who work under the World Bank project (30,000 AFN per month) and tashkeel staff (9,500 AFN). However, World Bank representatives noted that these lawyers are project consultants who will lose their jobs at the end of the project. They are not provided any government benefits or job security. This is presented as justification for the significantly higher salary. The LAD management further complained that the World Bank legal aid providers were originally supposed to work in more difficult environments, but that they are currently working in secure areas.

Like other government employees, the salary grading system under the Civil Service Law is applicable to the LAD. The system reflects a hierarchal model, thus the grade set for legal aid

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375 Terms of Reference of positions provided by MoJ.
376 Focus Group 2, September 4, 2016.
378 Ibid., at 10.
lawyers must be lower than provincial supervisors, who must be lower than the head of the departments. With the head of the LAD at grade 1 and the heads of the Support Program Departments at grade 2, LAD supervisors can only be at grade 3, leaving regular lawyers at grade 4. Once the legal aid lawyers are hired at grade 4, they can only increase their pay through a step system, purportedly based on annual performance evaluations. If lawyers move up the step system every year, which is usually the case, they will max out on their salaries by the fifth year of employment. The confines of the Civil Service Law result in an inability rather than an unwillingness for the MoJ management to increase the salaries of the LAD lawyers.380

The LAD legal aid providers complained that they are required to pay their advocates license fee from their own resources, which is an additional burden on their already low salary. Respondents requested that this fee be covered by the MoJ as an incentive. The LAD management instead suggested that AIBA should provide licenses for free to LAD staff. However, it should be noted that AIBA is a resource-poor organization that provides services for its membership using its modest licensing fees, while the MoJ faces mostly bureaucratic obstacles to meeting the request of their staff.

LAD staff lawyers also claimed that those who can find better opportunities leave the LAD on a regular basis. However, Deputy Minister of Justice Mr. Sayed Mohammad Hashimi, rejected the idea that there was a high turnover rate at the LAD. He stated that the benefits and stability afforded to the LAD lawyers causes relatively few to leave their jobs. No formal turnover rates were provided to check on either of these assertions, however when asked about vacancies, the LAD management noted that there were none in the whole department.

Staff Development

Participants explained that the MoJ recently hired a capacity development advisor, who has developed a staff training plan based on a needs analysis. However, when asked about specific plans, the LAD management could not recall any process that they were involved in beyond the development of a proposal for UNDP’s LAGF project.

Roles and Responsibilities

The provincial LAD offices have two lines of reporting. On all support functions (including financial management, administration, logistics, etc.) LAD provincial officers report to the provincial MoJ manager who reports directly to the provincial governor. The approval authority on financial transactions rests with the provincial governor. On legal and substantive matters, LAD provincial officers report to the LAD Manager at the MoJ headquarters in Kabul. This causes a blurred structure where the persons accountable for activities are not the budget holders.

This issue is also acknowledged by the MoF, which states that the “[a]mbiguous role of the provincial governors in the budget preparation and execution process, where in a number of

380 Interview with Deputy Minister of Justice, December 27, 2017.
provinces governors are required to sign every invoice, causes considerable delays in the budget process.\textsuperscript{381}

Similarly, departmental/unit roles and responsibilities in relation to support activities are not defined. As an example, the responsibility of the LAD’s central office to monitor financial performance of provincial offices is vague. While the MoJ’s budget is prepared at the central level (including for the LAD), budget execution is carried at the provincial level without a defined role for the central office in monitoring provincial financial performance.

\textit{Interdepartmental Coordination}

The mechanism for coordination between the LAD and other MoJ line departments is not clear. Management meets with other departments whenever a necessity is recognized, however the process is not formal. There are no periodic meetings with the MoJ Administration and Finance, Human Resource or Planning and Policy Departments to discuss the financial progress, key issues, way forward and to document these discussions. Similarly, due to a lack of coordination between the LAD, the Human Resource Department and the Finance Department, the request for additional staff for the year 2016 was not incorporated in the budget, which resulted in delayed hiring.

Coordination of the LAD central office with provincial staff is also weak. As noted above, limited consultation is carried out with provincial offices while compiling the budget. Furthermore, communication with provincial staff is ad hoc. Provincial staff only submits quarterly operational progress reports (in quantitative form) to the LAD central office. Even this is not done in a uniform fashion, as is addressed below in the information management section. The central office engages with provincial staff only when needed. There is no formal mechanism to hold periodic meetings/conference calls and obtain detailed narrative reports to promote effective communication.

\textit{Information Management}

While this preliminary assessment concentrates on the financial and administrative capacity of the LAD, much of this capacity rests on the ability if the LAD to meet its basic monitoring and information management responsibilities as laid out by the MoJ:

\begin{itemize}
  \item To monitor and evaluate the provision of legal aid and the performances of legal aid providers.
  \item To collect exact statistics regarding provided legal aid to indigent suspects and accused persons.
  \item To monitor the performances of relevant legal aid providers in every phase of legal proceedings.
\end{itemize}

However, the LAD lacks the capacity to gather and organize data for statistical purposes. In Kabul and provincial offices, there are ad hoc registration spreadsheets using Excel or, more often, a basic registration book. These are used to report basic case data to headquarters.

However, this data is not consolidated or analyzed in any fashion. Nor is there a system that ensures the data is internally consistent or external validated through a regular audit. The lack of a legal aid database makes supervision and monitoring very difficult.

In theory, the MoJ does have access to the Case Management System (CMS) developed by the JSSP and funded by the Bureau for International Narcotics and law Enforcement (INL) of the United States Department of State. CMS is managed through a monitoring board made up of the Supreme Court, the AGO, the MoI, the NDS, and the MoJ itself. Access to CMS does provide an opportunity for the LAD to use statistical information for policy making and monitoring.

However, the LAD has yet to take full advantage of this opportunity. Policy presentations and decision-making processes still refer to ad hoc requests from provincial offices or perceptions gathered during office visits rather than arrest and detention statistics. While LAD management admits that they have received some training on how to use CMS, there is still confusion as to how CMS works and what LAD should do with the data it makes available. Also, the utility of CMS for LAD is substantially hindered, because inclusion of defense information is rare. While the police, prosecution, and courts have input access, neither the MoJ nor AIBA can input any information, including the name of the defense attorney or defense contract date. Nor have the MoJ or AIBA been able to create procedures, policies, or agreements with the input capable organizations to make case registration obligatory.

While with greater understanding and use of CMS the LAD could have access to an important statistical tool, because of the structure and capability of CMS, there is still a need for a legal aid specific database for supervision and monitoring purposes.

Policies and Procedures

LAD legal aid providers understand that they are required to register their cases in the LAD office case book. However, even this basic duty is not listed in the terms of reference for the legal aid providers, nor in any other policy or procedure. Beyond the above general duties regarding information management bestowed upon the LAD by the MoJ, there are no written policies or procedures on the types of data that need to be collected, preserved, and presented by the office as a whole or by the legal aid providers individually. While there is some general guidance in the Legal Aid Regulation, the Advocates’ Law, and AIBA’s Code of Conduct, the LAD is still in dire need of information management policies at all levels. Also, as discussed below, there is a need for the LAD to lead an effort to create policies and procedures at the police, prosecution, and courts so defense information is better collected and registered.

Technical Capacity

As noted above, the LAD can only view access the CMS. However, CMS input mechanisms currently do not successfully include defense information in most cases in the system. For defense information to be included, either the LAD should be afforded input access or the input offices (police, prosecution, and courts) should be given specific procedures to follow that makes defense data inclusion a mandatory part of the CMS data entry process. In theory,
the LAD could be given input access only on fields it needs, such as the name of the defense attorney, his/her bar number, and the defense contract date. This would require advocacy within the CMS monitoring board, who could then task JSSP with bringing the necessary changes to allow for such field specific input access.

However, a more holistic solution would be to create a procedural system that collects defense information in all cases, including all legal aid cases (whether LAD or NGO) and all cases represented by private attorneys. This would be possible by working with the CMS monitoring board to create a procedure that would require input offices to refrain from cooperating or confirming a defense contract until the required information (lawyer’s name, bar number, contract number, and contract date) is entered into CMS. Both LAD and AIBA require contracts to be confirmed and signed by an external authority. This is done directly on AIBA contracts (all non-LAD contracts) and by means of a letter in LAD cases. The LAD should follow the lead of AIBA and require confirmation by the case stage authority and a unique number on each of its “contracts.”

Once enacted, either CMS solution would obviate the need for LAD offices to maintain registration books. However, even if the use of CMS becomes more uniform and inclusive of basic defense data, the structure and access afforded to this system make it necessary for the use of an independent legal aid database. Just as current case registration spreadsheets are inadequate, CMS is capable of providing information about a case in the system, but it is not designed as a monitoring and supervision tool for legal aid service providers. An independent and universal legal aid database could serve as a data validation tool for CMS and vice versa. Such a database will assist the LAD and the ILAB in their efforts to monitor, supervise, and coordinate legal aid provision. Once trained on this new system, defense lawyers would be able to use such a system to manage their caseloads and maintain a record of representation.
6. SWOT ANALYSIS

The legal, policy, and operational frameworks already discussed depict a complex legal aid system maintained through a rich assembly of interconnected justice system actors. To comprehensively examine this system, and to set forth a detailed and efficient roadmap, a “SWOT Analysis” is a common method for assessing and evaluating organizational capacity. SWOT is an acronym for Strengths, Weaknesses, Opportunities, and Threats; these factors are assessed separately and iteratively in order to assess, recommend, and develop strategy. In a SWOT analysis, Strengths and Weaknesses are considered internal factors, or existing attributes, i.e., circumstances originating from inside the current legal aid context. These might include, among other things, human resources, physical and financial resources, procedures and processes already in place, and past experience. Opportunities and Threats are considered external factors, or impactful events or circumstances attributed of the environment, i.e., originating outside the currently operating legal aid context. Common external factors include things like funding sources, donor context, the economy, legislation and law, demographics, and security.

Assessing these factors, and their impact, offers a comprehensive analysis of challenges and capacities, but also facilitates a clear assessment and recommendation. There are a variety of ways a SWOT analysis can facilitate landscape analysis, organizational change, or the development of a viable roadmap. Recommendations according to SWOT build on strategies derived from (a) matching strengths to opportunities, (b) converting weaknesses and threats to strengths and opportunities, and (c) building strategy through identifying relations between external and internal factors in the relevant (legal aid) landscape.

In the context of legal aid in Afghanistan, SWOT offers an analytical method to identify key valuable or detrimental practices, viable recommendations, and forward-looking strategy based on core building blocks and effective means to organize and deploy these building blocks in the given landscape. In this analysis, the identified strengths should be used to address perceived threats and opportunities should be used to minimize weaknesses. By matching strengths to opportunities, the capacity for effective innovation is also greatly enhanced.

**Strengths**

For the purposes of this SWOT analysis, strengths are advantageous characteristics of Afghanistan’s legal aid system as it currently exists. It involves a focus on factors internal to the legal aid context that demonstrate excellence or create the conditions for excellence. The strengths of the legal aid system in Afghanistan fall within three major categories: strong priority for meaningful legal aid and legal and policy instruments, increased public legal awareness, and beneficial impact to the Afghan formal justice system generally.

**Afghan Law and Policy Safeguards Legal Aid**

**A. Strong Policy and Legislative Commitment**
As discussed supra at 0, there is a strong commitment to legal aid in the legal and policy instruments of Afghanistan. Both the GIRoA and foreign donor organizations consider the right to counsel and a commitment to meaningful access to legal aid important components of rule of law, access to justice, and stability.

While this is an overall strength, there are important caveats. While these policy documents set the right tone, recognize real, ongoing deficiencies, and reflect the urgency of the need, actual implementation efforts have been complicated by sometimes inapposite standards, regressive or contrary customary practice, misunderstanding, and/or outside processes and procedures imported wholesale without recognition or accommodation to local context. Undeniably huge strides have been made, but often the good intentions of Afghan leaders, policymakers, and international donors are not realized as access to justice priorities are implemented ineffectively or not at all and deliverables fail to materialize.382

B. Ongoing Capacity-Building Efforts

Both clinical programs and post-graduate and graduate fellowships serve to build understanding and capacity to advocate for access to legal aid among future leaders in their fields. Many clinical legal aid students may never go on to become legal aid providers, or may do so for just a short period. In addition, many clinical students will never again have an opportunity in their career to consider the interests and needs of very poor people facing incarceration or death. However, the clinical model also contributes to the health of the legal aid system in general. Developing a broad-based understanding and consensus on the role and importance of legal aid providers is key to sustaining a commitment to defendants’ rights as a core function of the formal justice system. Clinical students, even those who do not become legal aid providers, are well-positioned to act as spokespersons and leaders in the wide variety of academic, government, and private contexts where legal aid policy, funding, and practices are discussed and determined.

In addition, an important investment in developing capacity in the legal aid in Afghanistan, but also in the formal justice system generally, that can enable greater understanding of the importance of legal aid involves various education and fellowship opportunities available to promising Afghan students. Fellowships like the Fulbright, Chevening, and other degree programs, offer an educational foundation for justice work, an opportunity to observe the importance of balanced advocacy in action, and a glimpse at fully-formed justice systems elsewhere. Lawyers and scholars have benefitted tremendously from educational opportunities in outside jurisdictions; many of those who return to Afghanistan after completion become leaders in their fields.

C. Established Frameworks and Controls Exist

Institutional legal aid providers, most of whom have reporting obligations to GIRoA and the international community, have benefitted from a significant investment in training and

382 See Sarah Han, Legal Aid in Afghanistan, Context, Challenges and the Future, Afghanistan Analysts Network (April 2012).
expectations on human resources, financial controls, and transparency. Most institutional providers demonstrated that some key policies and procedures related to transparency and effective organizational management existed and were in use in their organizations.

i. Human Resources and Organizational Management

During the field-based assessment in the provinces, legal and managers and executives affiliated with institutional providers were asked to share the written policies of their offices. Three-quarters of providers were able to share office procedures manuals. 72 percent of institutional providers were able to share written organizational charters, recruitment policies, attorney ethics and professionalism standards, and supervision and management policies. Two-thirds of providers shared human resources policies. Over half of providers were able to share anti-corruption policies, disciplinary policies, best practices materials, training policies, and performance standards. Only ILF-A, DQG, and Medica Afghanistan had and could share their orientation policies.

With respect to organizational management, all institutional providers indicated they employed standardized system for filing and case management. Most institutional providers indicated that all attorneys are required to use a standardized filing system, as well as to record case details and events in a digital database. Only JFAQ indicated that attorneys and staff are required to maintain files in a standardized manner taught in training or orientation. Among legal aid managers, 40 percent indicated that all attorneys and staff must maintain files in a standardized manner taught in training or orientation. 39 percent of supervisors indicated that attorneys were required to use a standardized filing system and record case details and events in a digital database. 19 percent of supervisors indicated that

383 LAAR Fieldwork, Question x74.
384 Ibid.
385 Ibid.
386 Ibid.
387 Ibid.
388 Ibid.
389 Ibid., Question x105.
390 Ibid.
391 Ibid.
392 Ibid., Question x79.
393 Ibid.
attorneys relied on skills they learned in school, during their *staj*, or elsewhere in order to maintain files and case materials.\textsuperscript{394}

Throughout the fieldwork, all institutional legal aid providers reported that executive and management staff were hired pursuant to specific job descriptions,\textsuperscript{395} evaluated at least annually,\textsuperscript{396} and that their work was structured by written supervision and management policies.\textsuperscript{397} Among non-governmental institutional providers, all legal aid executives surveyed reported that there was a Board of Directors in place that hired key staff, approved the annual budget, and regularly conducted a strategic planning process.\textsuperscript{398} In addition, among these institutional providers, executive and management staff shared authority with the Board of Directors in ways determined explicitly by the organizational charter or other written policy.\textsuperscript{399}

Also important, all legal aid executives (institutional providers) in Afghanistan surveyed indicated their organizations had a strategic plan.\textsuperscript{400} In 50 percent of the cases, the strategic plan was developed and endorsed by a Board of Directors; the other half indicated that organizational leadership developed and endorsed the strategic plan.\textsuperscript{401} One-third of the legal aid executive personnel indicated that their strategic plan was updated periodically and that operational personnel had been involved in the development of the strategic plan.\textsuperscript{402}

\textit{ii. Frameworks for Financial Controls}

Effective frameworks for financial controls exist among legal aid providers. Two-thirds of institutional providers required all staff to have checks for conflicts of interest, maintained a procurement process in writing, and conducted some independent review of financial procedures.\textsuperscript{403} 83 percent of institutional providers indicated they conducted annual program and financial audits, employed credentialed financial staff, had dedicated accounting software for financial transactions, required invoicing and approval for all vendor payments and salaries, had a strategic plan, gave individuals limited authority to make financial disbursements (requiring that money pass through multiple people before being disbursed), and required multiple signatures to disburse organizational funds.\textsuperscript{404}

\textsuperscript{394} Ibid.
\textsuperscript{395} Ibid., Question x117a.
\textsuperscript{396} Ibid., Question x117d.
\textsuperscript{397} Ibid., Question x117b.
\textsuperscript{398} Ibid., Question x117c.
\textsuperscript{399} Ibid., Question x117e.
\textsuperscript{400} Ibid., Question x112.
\textsuperscript{401} Ibid., Question x112.
\textsuperscript{402} Ibid.
\textsuperscript{403} Ibid.
\textsuperscript{404} Ibid., Question x119.
Most institutional providers claimed legal compliance as well.405 Institutional legal aid providers annually file taxes and paperwork to maintain legal compliance with the government and 80 percent of providers reported registration with the ILAB.406

**D. Awareness of Quality Control Principles**

Legal aid professionals also demonstrated understanding of quality assurance and common mechanisms to promote minimum standards; 90 percent of legal aid executives and managers stated that they measure quality along various indexes.407 These include case file reviews, client satisfaction assessments, feedback from justice system personnel, case outcomes, reputation, regular supervision, and outside auditors/monitors.408 As is evident, some of these means are superior to others.

When asked about the importance of performance indicators, including trial, pretrial release, defense investigation, defense statements, etc., over 90 percent of legal aid executives and managers stated pretrial was important as a performance indicator.409 In addition, for over 90 percent of respondents, meeting with clients in custody (visiting the jail),410 defense investigation,411 the defense statement,412 counsel’s presence at court appearances,413 and trial414 were “very important” performance indicators. A majority of respondents also indicated that pretrial representation (motions and objections)415 and an organized case file416 were very important performance indicators.

Legal aid managers also indicated they recorded factors relating to quality assurance.417 Overwhelmingly, legal aid executives indicated they tracked how clients came into their organizations.418 83 percent of legal aid providers track clients coming in through referrals from judges, prosecutors, community organizations, or walk-ins.419 Half of all providers tracked referrals from the jails or detention centers or other third-parties. Less than half of providers tracked referrals from the police.420

In addition, three-quarters of institutional providers track case outcome; more than half track case duration, case origin (how they received a client), attorney productivity, and attorney

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405 As a governmental provider, the LAD is exempt from some of these requirements. Including the LAD, 83 percent of institutional providers annually file taxes and paperwork to maintain legal compliance with the government and 67 percent of providers reported registration with the ILAB.
406 Ibid., Question x121.
407 Ibid., Question x72.
408 Ibid., Question x72a.
409 Ibid., Question x73a.
410 Ibid., Question x73b.
411 Ibid., Question x73c.
412 Ibid., Question x73d.
413 Ibid., Question x73e.
414 Ibid., Question x73f.
415 Ibid., Question x73g.
416 Ibid., Question x73h.
417 Ibid., Question x80.
418 Ibid., Question x95. 83 percent of institutional providers tracked client origin.
419 Ibid.
420 Ibid.
outcomes. Less than half of institutional providers tracked variations in case length or cost related to type of case or type of client. Among legal aid executives, two-thirds of organizations indicated they tracked attorney outcomes and case duration. All organizations indicated they tracked case outcomes and 83 percent reported tracking attorney outcomes as well. Only 17 percent of legal aid executives tracked variations in case lengths or costs relating to the type of case or client.

Attorney productivity was often measured by institutional providers as well. Only eight percent of legal aid managers indicated they did not track lawyer productivity at all. Over half of legal aid providers tracked when lawyers opened or closed cases. 39 percent of legal aid managers and executives reported that attorneys were required to maintain time sheets detailing time devoted to any case on a particular day.

In addition, most institutional providers consider specialization and experience to ensure and enhance quality. Of respondents, 70 percent indicated that cases were assigned with reference to particular and/or specialized experiences and skills of the assigned counsel

E. Institutional Structures to Promote Independence Exist

Maintaining independence has been a core goal in the development of the legal aid system in Afghanistan. When legal aid executives were asked how their organizations promote attorney independence and/or best practices to maintain independence for defense attorneys, 83 percent of executives indicated they conducted self-evaluations and/or internal discussions of attorney independence, including whether individual attorneys or the organization as a whole faced improper pressure or influence. Two-thirds of executives indicated they had a written policy on independence, including the appearance of impropriety, and that attorney independence was an orientation topic for new hires.

Even so, while most legal aid providers engage in basic activities to promote and safeguard attorney independence, there is minimal local engagement to promote, reinforce, and reaffirm independence principles throughout the justice system. For example, only one-third of executives stated that their organization’s leadership periodically engaged in discussions with justice sector actors, including the judiciary, AGO, MoI, etc., to ensure independence was protected. Similarly, only one third had specific policies and mechanisms for reporting misconduct, or trained their lawyers on issues relating to attorney independence.

421 Ibid., Question x80.
422 Ibid.
423 Ibid., Question x111.
424 Ibid.
425 Ibid.
426 Ibid., Question x83.
427 Ibid.
428 Ibid.
429 Ibid., Question x41.
430 Ibid., Question x89.
431 Ibid.
432 Ibid.
433 Ibid.
Afghans Understand the Right to Legal Aid

This is not 2004. There is a widespread understanding of legal aid and, to a lesser extent, its benefits throughout Afghanistan. This cognizance – of specific requirements and their individual roles – is well-developed among justice system actors, citizens, government officials, civil society, donors, and others. While the system may remain opaque (which in fairness is a global problem), there is a general understanding of the justice system, the role and the right to counsel, and the obligations of justice system actors to facilitate the access to counsel that extends throughout the Afghan criminal justice system.

A. Widespread Recognition of the Importance of Legal Aid

Recognizing that effective rule of law and meaningful access to justice relies on an effective legal aid mechanism, legal aid policy has developed in ways that mirror and challenge the Afghan formal justice system through broad-based internal and external support. Ongoing internal and external commitment has made legal aid in Afghanistan an important priority and has also allowed different models of legal aid to advance. In addition, the MoJ, civil society, the donor community, and the legal aid community have sought this LAAR and guidance for several years. Authentic cooperation by all parties evinces a level of support that is key for organizational change and improvement.

i. Afghan Citizens

In addition, the Afghan formal justice system and the society at large has a strong understanding of the role and the importance of defense counsel and legal aid providers, as confirmed by the fieldwork. Three-quarters of Afghan citizens correctly identify defense lawyers as professionals who “help people who have been arrested or detained,”434 although many also believed defense counsel manage marriage proposals or work in Parliament due to similarities in the terminology in Dari.435 In addition, one-fifth of Afghans indicated that a defense lawyer has represented them or someone they know in a criminal case, “challeng[ing] the perception that defense services are rare and appear[ing] to support the view advocated by the defense bar and legal aid providers that case management systems are not capturing the extent of defense services being provided.”436

Afghan citizens also affirm their belief in the right to counsel, with 79 percent of Afghans surveyed nationwide indicated that people arrested or accused of a crime should have the right to a defense lawyer irrespective of actual guilt.437 Among those who did not express support for the right to counsel in 2016, nearly half explained their statements by referencing the importance of punishment;438 only three percent believed there was no substantive right to counsel.439 In addition, one-fifth of respondents supported extending the entitlement to free

435 Ibid.
436 Ibid., at 112.
437 Ibid., at 10.
438 Ibid., at 238.
439 Ibid.
legal aid to women and children and, to a lesser extent, elderly and internally displaced persons.\textsuperscript{440}

However, it is important to note that understanding of the role of defense counsel, and the rights to counsel and to legal aid, may exist more broadly among ordinary Afghan citizens than it does among conflict-related detainees, who are typically more indigent, less educated, and more marginalized. The April 2017 UNAMA report on the treatment of conflict-related detainees in Afghan custody notes widespread confusion among detainees as to how to access counsel, as well as no measurable improvement in this over time.\textsuperscript{441} “Even when detainees were informed of their right to a lawyer, many detainees interviewed by UNAMA lacked a clear understanding of the benefits of accessing a defence counsel during the pre-trial stages of the investigation. Many were also unaware of the availability of legal aid lawyers, and had not sought legal assistance, often stating “lawyers are expensive and I have no money to pay them.”\textsuperscript{442} Thus, it is fairly clear that success in public legal awareness programming may not have penetrated some core constituencies needing legal aid.

\begin{figure}
\centering
\includegraphics[width=\textwidth]{chart.png}
\caption{What Does a Defense Lawyer Do?}
\end{figure}

\textit{ii. Formal Justice System}

Within the criminal justice system, the role of defense counsel is understood and easily articulated. Prosecutors, police, legal aid executives, and judges were asked about the importance of having a defense lawyer present in a criminal investigation and trial. Overwhelmingly, they asserted that it was always important for the defendant to have a lawyer. Less than one percent of people stated that defense counsel was usually unnecessary and no respondents indicated that defense counsel were never necessary.

\textsuperscript{440} LAP Fieldwork, Question x16.
\textsuperscript{442} Ibid.
Key justice system organs charged with protecting the right to counsel understand their role in facilitating access to counsel. The fieldwork also confirmed that law enforcement and adjudication entities do not see legal aid as unrelated or ancillary to their work. Overwhelmingly, police, prosecutors, and judges understood that protecting and ensuring the right to counsel is part of their professional responsibilities. All police officers interviewed indicated that the police chain of command or police training materials set forth their duty to provide notice and access to counsel.\(^{443}\) In addition, 100 percent of police claimed they assisted criminal suspects in accessing counsel\(^{444}\) and 93 percent of police stated they were aware of written policies requiring them to notify suspects of their right to counsel at arrest.\(^{445}\)

In addition, 87 percent of police indicated it was both their duty and their practice to provide confidential meeting space for clients and their lawyers to confer.\(^{446}\) Interviews with clients generally confirmed this as 65 percent of clients stated confidentiality of their conversations with their attorneys was respected throughout the court process.\(^{447}\)

Consistently with the police, over 95 percent of prosecutors\(^{448}\) and judges claimed that they assisted criminal suspects and defendants in gaining access to counsel.\(^{449}\) No prosecutors stated that they did not routinely advise suspects of the right to counsel.\(^{450}\) When asked, 60 percent of prosecutors indicated that criminally accused suspects or defendants should access counsel at arrest.\(^{451}\) However, another 12 percent indicated they should access counsel only at trial and four percent indicated in the detection stage (after arrest, before transfer to prosecution).\(^{452}\)

**B. Prosecutors, Police Understand Role in Early Access to Counsel**

In addition, 74 percent of prosecutors claimed that it was their practice to affirmatively instruct the police to provide early access to counsel.\(^{453}\) When asked at which stage of the case they typically notified a criminal suspect or defendant of their right to counsel,\(^{454}\) over

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\(^{443}\) LAAR Fieldwork, Question x133.  
\(^{444}\) Ibid., Question x135.  
\(^{445}\) Ibid., Question x132.  
\(^{446}\) Ibid., Question x134.  
\(^{447}\) Ibid., Question x144e.  
\(^{448}\) Ibid., Question x126.  
\(^{449}\) Ibid., Question x135.  
\(^{450}\) Ibid., Question x124.  
\(^{451}\) Ibid., Question x128.  
\(^{452}\) Ibid.  
\(^{453}\) Ibid., Question x127.  
\(^{454}\) Ibid., Question x124.
half of prosecutors indicated that they informed suspects of the right to counsel at the arrest or detection stage, stating they offered counsel the opportunity to surrender clients to the police or that there were attorneys stationed at the police station to represent suspects as they arrived.\textsuperscript{455} Nearly half of prosecutors claimed they notified legal aid organizations of potential clients in advance of filing the case with the court.\textsuperscript{456} Only two percent of prosecutors suggested they routinely notify clients of their right to counsel at trial.\textsuperscript{457}

In addition, legal aid professionals claim increasing amounts of early access and representation, with 62 percent of legal aid providers stated they typically commence representation in the early stages of a case, \textit{i.e.}, at detection or investigation stages, either in response to a call from the police or prosecutor or by affirmatively checking for clients in the detention centers and police precincts.\textsuperscript{458} However, this varies significantly between providers, with LAD more frequently being assigned in court and NGOs picking up cases at the police station and in the jails and detention center.\textsuperscript{459}

\textbf{C. Widespread Consensus on Best Practices for Legal Aid Representation}

The fieldwork revealed nearly universal agreement to set consensus-based, universal best practices for legal aid representation in Afghanistan. This consensus is important – it allows for common expectations, terms of reference, evaluations, templates and forms, monitoring, training, and supervision, in addition to clear understanding of the legal aid provider’s role. It also offers an opportunity to standardize various practices and activities that support legal aid as well as attorney conduct. A list of these consensus-based best practices is attached as Appendix A.

Currently, there are no national standards that set forth precise, granular criteria for quality representation.\textsuperscript{460} However, there is widespread consensus on the viability of most of what could be termed “best practices” and commonly understood best practices would facilitate coordination as well as substantive representation.\textsuperscript{461} The fieldwork confirmed this paucity of existing guidance; although 60 percent of legal aid providers reviewed documents on best practices before starting their jobs, 20 percent of these were relevant to local practice only, 17 percent were relevant to local and Afghan practice nationally, and 20 percent reviewed documents in writing that referenced international norms and law, in addition to local and national authorities.\textsuperscript{462}

\textsuperscript{455} Ibid.
\textsuperscript{456} Ibid.
\textsuperscript{457} Ibid.
\textsuperscript{458} Ibid., Question x22.
\textsuperscript{459} Assessment Team Debrief, 26 December 2017.
\textsuperscript{460} Work is being done on a new Code of Conduct for AIBA, but it has not been finalized and it is unclear how detailed the code will be.
\textsuperscript{461} LAAR Fieldwork, Question x1.
\textsuperscript{462} Ibid., Question x30.
Legal aid clients also confirmed that presumably “standard practices” were applied inconsistently and arbitrarily. Of the clients who chose to answer, nine percent of clients indicated they never met their lawyer before trial and the same percentage indicated they had spoken with their lawyers only once before trial. Of clients who had spoken with their lawyer two to three times before trial. At the appellate stage, seven percent of clients had never met their appellate lawyer, and 43 percent had met with their lawyer only once or twice. Only 10 percent of clients had met with counsel three or more times.

Thus, a significant opportunity exists to create clear, universal standards of representation, based on agreed best practices and related performance indicators, that can be monitored and evaluated. Developing and implementing a set of best practices and associated performance indicators facilitates clear interventions at multiple levels for quality assurance and performance improvement.

Afghanistan’s Justice System Profits from Robust Legal Aid

A. Increased Legitimacy of the Formal Justice System

Over time, and with the advent of legal aid, the formal justice system is gaining legitimacy among Afghans. The presumption of disuse and disinterest with the formal justice system underlies a widely-cited statistic in Afghanistan, that 80 percent of conflict resolution is handed through traditional justice mechanisms and that these forums disadvantaged women and vulnerable people. However, in 2016, the majority of Afghan citizens stated their belief that the state court system was fair and trusted (62 percent) and that the court system follows the norms of the people (57 percent). Just under half of Afghans also believed that the state courts were effective at delivering justice. Throughout Afghanistan, nearly 80 percent of experts believed that the rights of the case parties were observed in the course of court proceedings.

The fieldwork also investigated the interaction between legal aid in the formal justice sector and the traditional justice mechanisms. Throughout all provinces, 60 percent of justice

463 Ibid., Question x147a.
464 Ibid., Question x147a.
465 Ibid., Question x147b.
466 Ibid.
467 The Asia Foundation, Survey of the Afghan People, 113 (2016).
468 Ibid.
469 In Nangarhar, 100 percent of experts agreed with this. However, the study notes the possibility that this outcome was more perception than reality and that negative answers might have been perceived to create problems for the respondents. HREVO ROL Report, at 76-77.
470 LAAR Fieldwork, Question x12.
sector personnel indicated that the option of accessing a legal aid provider or other advocate reduced use of traditional justice remedies by encouraging people to look at the formal justice system as a credible alternative for conflict resolution. An additional 20 percent of criminal justice system respondents indicated that there was reduced use of traditional mechanisms, because the criminal justice system is considered a fair and accessible forum, particularly for problems faced by traditionally vulnerable groups like women and indigent persons.

A important caveat is that an urban/rural distinction may be relevant to this analysis; urban Afghans were believed to resort to formal justice sector resources more readily while in the rural areas, people tended to integrate the formal and informal justice systems, using the informal system as a preliminary step for the formal justice system. Thus, in evaluating this, it is important to recognize that assessing the rule of law through crime reporting, i.e., people choosing to access the formal justice system, may be imprecise and/or erroneous, as it is greatly impacted by issues of filial piety and family loyalty.

Using the international indicator of “percentage of crime reported to official entities” may be an inexact and inaccurate way to evaluate the rule of law. The culture of resorting to authorities outside the family to resolve civil and criminal conflict is unusual in Afghanistan, as in other traditional societies; resorting to official dispute resolution forums is conflated with blaming and denouncing of local community.

Consistently, only half of crime victims choose to report their crimes to authorities – and even less than half in Herat and Kandahar although these provinces represent the highest level of reporting of crime to the police.

Nevertheless, among all Afghans, half of those who reported a crime in 2016 chose to complain to the Afghan National Police (ANP), as opposed to the local jirga or shura (informal local dispute resolution). Of those who reported using a dispute resolution institution (Huquq Department, state court, or jirga/shura) 37 percent chose to access the state courts. Of those using the state courts, 65 percent reported satisfaction with the

“My attorney tried his best in the primary court, although the judge swore at him and threatened him. But he did all he could.”
“I am highly satisfied with my attorney and he did all he could.”
~legal aid clients

471 Ibid.
472 Ibid.
474 HREVO ROL Report at 18.
475 Ibid.
477 Ibid., at 113.
outcome of the proceedings (another 11 percent were involved in proceedings that were still ongoing). Nevertheless, users of the neighborhood *shuras* or *jirgas* were “more likely than users of other institutions to say that the to say that the [forum] is fair and trusted (83.6 percent), follows the norms of the people (71.7 percent), and is effective at delivering justice (70.7 percent).”

In addition, the perception that the formal justice system is more protective of women’s rights than traditional justice mechanisms is endorsed by women who have actually accessed the justice system; among Afghan citizens, a majority of women who have actually accessed the courts report that they treat men and women equally (in contrast to a minority view held by women who had not accessed the justice system). This comes in the same year that 66 percent of Afghans, a record high, indicated their belief that the country is moving in the wrong direction, a percentage even higher among urban women. Finally, Afghan citizens showed significant trust in their lawyers, including government lawyers, despite general distrust in government institutions. Despite reporting only 36 percent confidence in government ministries, 64 percent of Afghans stated they would most trust a government lawyer to protect their rights if charged with a crime. In some provinces, support for government lawyers was significantly higher; 84 percent of Afghans in Badakhshan indicated trust in government lawyers. Nevertheless, Afghans indicated confidence in and awareness of the different types of legal aid providers operating in Afghanistan, including independent lawyers (58 percent), civil

“The presence of a defense attorney speeds up the trial process. It plays a critical role in ensuring justice and preventing violation of fundamental rights. The presence of counsel also prevents abuse of authority by the judges, prosecutors, or police.”

“Without counsel, the rights of the accused are violated and justice is not served. Gradually, this troubling practice of proceeding without counsel is becoming Afghan custom.”

~ Afghan legal aid experts

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478 Ibid.
479 Ibid.
480 Ibid., at 12.
481 Ibid., at 18.
482 Ibid., at 18-19.
483 Ibid., at 9.
484 Ibid., at 10.
485 Ibid., at 112.
society lawyers (49 percent), and lawyers from international organizations (40 percent).\textsuperscript{486} Clients generally believe their lawyers are honest. Despite evidence of corruption in the system, there appeared to be minimal impact on their belief in the legitimacy of the system; 81 percent of clients stated they did not believe that their legal aid provider was influenced by the government.\textsuperscript{487} Nearly half of the clients surveyed rated their lawyer’s services as “excellent.”\textsuperscript{488} Approximately one-quarter of clients rated their satisfaction with their lawyers as “fair” and another quarter indicated they were poorly satisfied with the services of their attorneys.\textsuperscript{489}

In addition, within the system there was little feeling that defense attorneys faced improper external pressure. The belief that legal aid providers faced pressure to please local politicians (five percent), local strongmen (seven percent) or their ethnic group (six percent) was stronger than the inference of pressure from prosecutors (three percent) which equaled the inference of pressure to appease local \textit{khans}, \textit{maleks}, or \textit{qawm} leadership (three percent).\textsuperscript{490} Finally, it should be noted that institutional legal aid providers are an important advocacy group on human rights and women’s rights.\textsuperscript{491} Legal aid providers are instrumental in bringing attention to human rights violations such as torture and illegal detention. They not only defend the right of clients abandoned by their families and communities and victimized by the justice system, but also bring their narratives to the attention of the government, media, and international agencies.\textsuperscript{492}

\textbf{B. Enhanced Judicial and Systemic Efficiency}

Despite being mandated by law, the role of the legal aid provider is inherently helpful to the efficiency of the criminal justice system. Ideally, legal aid providers function as advocates who develop defenses, present contrary law and policy, and hold the government to its burden of proof. However, legal aid providers also function as crucial interlocutors for the courts and the prosecution: they facilitate access to information for their clients, deliver and explain court and prosecution evidence, reports, and rulings, and should also absorb the costs for printing and copying documents and case files.\textsuperscript{493} Consistent with this, in the fieldwork, 98 percent of prosecutors\textsuperscript{494} and 97 percent of judges\textsuperscript{495} indicated that cases flow more efficiently through the justice system where defendants are represented by counsel.\textsuperscript{496}

\textbf{Weaknesses}

\begin{itemize}
\item \textsuperscript{486} Ibid., at 10.
\item \textsuperscript{487} LAAR Fieldwork, Question x149.
\item \textsuperscript{488} Ibid., Question x169.
\item \textsuperscript{489} Ibid.
\item \textsuperscript{490} Ibid., Question x11.
\item \textsuperscript{491} Interview with Shaharzad Akbar, Country Director, Open Society Afghanistan, December 7, 2017.
\item \textsuperscript{492} Meeting of Detention Working Group, Maldives, November 14, 2016.
\item \textsuperscript{493} Assessment Team Debrief, December 26-27, 2016.
\item \textsuperscript{494} LAAR Fieldwork, Question x129.
\item \textsuperscript{495} Ibid., Question x185.
\item \textsuperscript{496} Ibid., Questions x185, x129.
\end{itemize}
For the purposes of this SWOT analysis, weaknesses are problematic or disadvantageous characteristics of Afghanistan’s legal aid system as it currently exists. Like the strengths analysis, it is principally concerned with factors internal to the legal aid context that act as barriers to effectiveness, i.e., areas for improvement. The weaknesses of the legal aid system in Afghanistan fall within four major categories: despite clear knowledge and understanding, the justice system often ignores legal aid in practice, there are shortages of legal aid in every province, lacking a culture of zealous defense impacts an effective defense in many cases, and service delivery is compromised, sometimes fatally, by lack of coordination.

**Justice System Often Ignores Legal Aid Rules in Practice**

The implementation of practices related to the right to counsel and to legal aid are inadequate in nearly every agency and every role in the justice system. Despite a well-demonstrated and widespread understanding of what a meaningful access to counsel entails, as discussed supra at 0, there is poor execution of these rights in the day-to-day operations of the justice system and only rare examples of actual conduct mirroring the widespread cognizance of the entitlement of a meaningful right to counsel. Some offenders are worse than others; NDS is famous for restricting attorneys’ access to their clients in custody and to evidence in a case. While this may implicate the training programs, for failing to prescribe clear steps from education to implementation, or the resilience of the system itself, in its resistance to change, it remains an entrenched and obstinate challenge for the Afghan justice system.

**A. Actual Notice and Access to Counsel is Systematically Unreliable**

Although the right to counsel is well-understood by criminal justice actors, its implementation does not consistently reflect commitment to the core principles that nearly every justice system actor could articulate on demand. In the fieldwork, one-quarter of clients interviewed had learned about the right to counsel from the judge assigned to their case, i.e., after the detection and investigation phases of their cases. Another quarter learned of their right to counsel from a prosecutor during the investigation phase of their case. Six percent of clients indicated they learned about their right to counsel only from their assigned defense counsel when they met. Notably, despite being surveyed in the same provinces, and in contrast to reports by judges, police and prosecutors, no clients stated that they learned about their right to counsel from the police at the time of their arrest. Only four percent of clients stated they learned about the right to counsel later, at the police station, while already in custody. Another 11 percent already knew they had a right to counsel, although only one percent attributed this prior knowledge to public awareness programming or training. 21 percent of clients had learned of their right to counsel from friends, family, or non-official people they met at the police

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497 Ibid., Question x145.
498 Ibid.
499 Ibid.
500 Ibid.
501 Ibid.
502 Ibid.
station or the detention center. A recent UNAMA report on the treatment of conflict-related detainees confirmed this. “UNAMA observed that access to defence lawyers on arrest and during initial detention by ANP and NDS has not improved … even when they had been informed of their right to legal assistance, the vast majority of detainees had no opportunity to access a defence lawyer until they were brought to court for trial.”

One-quarter of clients stated they requested a lawyer from the prosecutor. 22 percent of clients stated they requested a lawyer from the judge. 23 percent of clients indicated they never asked for a lawyer. When asked why, one indigent client stated: “I didn't know about the right to a defense attorney; when the lawyer in court told me that I had the right of having a defense attorney, I said I didn't have enough money to hire a defense attorney.”

B. Early Access to Counsel is Erratic in Practice

As discussed supra at B, prosecutors indicated overwhelmingly that they affirmatively instruct the police to provide early access to counsel, as well as ensuring early notification of the right to counsel at the detection or investigation phases of the case. These statements are consistent with requirements in the 2014 CPC.

However, the assessors found that actual access varied greatly by province. In Kabul, reportedly, prosecutors rarely or never facilitated access to counsel, ignoring the CPC and their professional obligations. On the other hand, in other provinces, including Herat and Balkh, a significant percentage of cases involved access to counsel facilitated by prosecutors.

In addition, the police did not fully confirm the prosecutors’ claims of attention to the right to counsel. Only 40 percent of police stated they had ever been instructed by a prosecutor or a judge to provide access to counsel for defendants at early stages (arrest or pre-arrest). Reports from indigent criminally accused suspects or defendants, also differed greatly from the claimed practice of police, prosecutors, and judges—suggesting a meaningful right to counsel is not routinely or systematically achieved; for example, 81 percent of clients interviewed stated they did not have access to defense counsel at arrest. Half of criminal suspects indicated they were not informed of the nature of the charge or accusation.

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503 Ibid.
505 LAAR Fieldwork, Question x146.
506 Ibid.
507 Ibid.
508 Ibid., Question x146i.
509 Ibid., Question x127.
510 Ibid., Question x124.
512 Ibid.
513 Ibid.
514 LAAR Fieldwork, Question x131.
515 Ibid., Question x144a.
immediately upon arrest. Of course, disparity between the police and client accounts of their conduct is not unusual. Police cooperation with defense counsel and prosecutors, and police adherence to access to counsel regulations, are challenges in both developing and developed nations. On the other hand, as the Foundation’s 2016 Survey noted, “[p]rofessionalization of the ANP has become a top priority for the Afghan government and international donors, but progress toward this goal has been slow and uneven.”

Ultimately, it appears that key provisions ensuring the right to counsel was meaningful were not routinely observed. Although the police overwhelmingly stated it was their custom and duty to provide confidential meeting space for attorney-client privileged conversations, 42 percent of clients stated they were unable to meet with their attorneys privately. In addition, over one-third of clients indicated the confidentiality of their conversations with their attorneys was not respected throughout the court process.

Most importantly, few indigent clients stated that they had early access to counsel. Only seven percent of clients had counsel in the police station—and the lawyer was contacted by the police in only one percent of cases and no one found a lawyer “on duty” at the police station when they arrived. Another 29 percent of clients first saw a lawyer at the jail or detention center, and 24 percent had counsel in the prosecutor’s office. Most disturbingly, 16 percent of clients met their lawyer only immediately prior to trial. Another, three percent of clients first saw a lawyer only immediately prior to the appeal in their cases. Note that all of these clients were selected, because they had received services, and interviews were not held with randomly selected detainees or prisoners who may have never received defense services.

Finally, the Afghan context perhaps suggests the lack of early access to counsel is particularly damaging. In 2015-2016, the United Nations found the “highest level of reported

516 Ibid., Question x144b.
517 Ibid., Question x144c.
519 LAAR Fieldwork, Question x134.
520 Ibid., Question x144e.
521 LAAR Fieldwork, Question x160.
522 Ibid.
523 Ibid.
524 Ibid.
torture and ill-treatment in [Afghan National Police] custody documented since UNAMA began its systematic monitoring of conflict-related detainees in 2010. Across Afghanistan, the United Nations found that 45 percent of detainees offered credible claims of torture in police custody. 90 percent of these detainees indicated they were tortured in order to force a confession; most indicated they did, in fact, make statements to the police to stop the torture or ill-treatment.

One benefit of routine presence of defense counsel at arrest and detection is the presence of a witness and an officer of the court in case of misconduct. This is echoed in the recent UN Report on the treatment of conflict-related detainees in Afghan custody:

> Prompt access to defence counsel provides an essential preventive safeguard against torture and ill-treatment, as, in addition to deterring ill-treatment by their physical presence, lawyers can ensure that the legal system can intervene at an early stage to prevent or identify torture, can initiate procedures for identifying and investigating officials who use torture, and can ensure that forced confessions are not used as evidence at trial.

Facilitating or mandating meaningful and early access to legal aid at the arrest/detection stage operates to deter and to expose incidents of ill-treatment and torture promptly.

These practices, and the lack of early access to counsel, understandably damage the legitimacy and public perception of the formal justice system. In one study, one-third of Afghans indicated their belief that the police use torture or abuse their power to force confessions. In addition, this belief that police abused their authority to force confessions was particularly concentrated in Herat, a province with relatively strong presence of legal aid providers. There, 63 percent of respondents believed that police frequently or usually forced confessions from suspects. Notably, all detainees interviewed in Herat by UNAMA in 2015-16 gave credible reports of torture in police custody. Interestingly, a majority of respondents throughout Afghanistan, in the same study, believed that misconduct by the police could be effectively targeted using criminal or administrative complaint proceedings.

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526 Ibid.
527 Ibid.
528 Ibid., at 58.
529 HREVO ROL Report, at 31.
530 Ibid.
531 Ibid.
533 HREVO ROL Report, at 68-70.
Shortages of Legal Aid in Every Province

In Afghanistan, all legal aid service delivery models face challenges in providing legal aid, particularly in remote or insecure districts outside the provincial centers.534 Rule of law, and support for legal aid, involves building stable, credible, and legitimate alternatives for conflict resolution within the formal justice sector – and making those legal alternatives widely available. “Absence of counsel not only engenders rights violations; it also distorts the truth-seeking function, renders less reliable the outcomes of criminal proceedings, and ultimately undermines public trust in the legal system.”535 All institutional legal aid providers in Afghanistan agree that greater access is important in all parts of country.

While it should be noted that women and juveniles and generally well served,536 every single province in Afghanistan maintains ongoing shortages in legal aid providers, including in many provincial centers, which are the areas with the easiest access to counsel. District practice remains a significant weakness in Afghanistan’s access to justice framework and to the development of a credible and legitimate formal justice sector. In many cases, no legal aid providers appear in district courts. In these cases, evidence is adduced, case decisions are made, and rulings are set forth without the benefit of defense counsel. Although appellate review is de novo, it is limited to the evidence adduced and argued in the lower courts. Thus, the lack of advice of counsel, the development of a theory of the case, investigation, defense witnesses, etc., will define these cases during their entire pendency, even after counsel is appointed.

A. Extreme Scarcity of Legal Aid Providers in Districts

Among legal aid executives, half indicated their services were confined to the provincial center, while the other half indicated they provided services in some districts.537 When identifying gaps, 64 percent were attributed to the dearth of practice in the districts,538 and in particular in remote or insecure districts,539 as opposed to specific types of crimes or defendants (e.g., women).540 Most respondents indicated that, in practice, most legal aid providers work in the provincial center and conveniently-located adjacent districts.541 While security certainly plays a significant role for district practice, other issue including transportation, time, distance, and overnight expenses also play an important role.542

534 LAAR Fieldwork, Question x14
536 Site visits by the field assessment team to juvenile rehabilitation centers and women’s detention centers in most provinces showed few unserved criminal defendants.
537 LAAR Fieldwork, Question x93.
538 16 percent of gaps were attributed to practice in ALL districts. LAAR Fieldwork, Question x14
539 Nearly half of identified legal aid gaps involved remote or insecure districts outside the provincial center.
540 LAAR Fieldwork, Question x14
541 Ibid.
Legal aid clients confirmed the scope of this challenge. Nearly two-thirds of clients interviewed indicated their belief that they could only access legal aid in their provinces at the provincial center. Another quarter of those interviewed did not know where legal aid was available in their provinces. Only six percent of clients believed they could access legal aid in a district outside the provincial center.

Various strategies are used to address challenges in delivering criminal legal aid outside the provincial center, including transferring all district cases to the provincial center after arrest and/or investigation in some provinces (cited by 30 percent of respondents), regular travel to some districts (cited by 27 percent of respondents), or the availability of de novo appellate review at the district level (cited by 16 percent of respondents). Even in Kabul, while lawyers travel to secure districts like Paghman and Bagram, cases from insecure districts like Hoka Jabar and Subee are transferred to courts at the provincial center (Kabul city). In other provinces, as well, where judges and prosecutors have believed that their offices are located in an insecure area, the entire court can be transferred to the provincial center, as has happened in both Bamyan and Herat, among others. Only 11 percent of providers indicated they traveled to all districts in their provinces to provide legal aid services, suggesting ongoing opportunities for coordination and maximizing coverage.

Some attempts to increase district coverage have been made, including with the advent of the LAGF, the most recent addition to the mixed model system in Afghanistan. Overall, in 2016, 27 percent of LAGF cases are contracted in the districts (in the first quarter of 2017 29 percent of services were delivered in the districts). In some provinces this has been more successful:

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<tr>
<th>Province</th>
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<td>Daikundi</td>
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<td>21</td>
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<td>Ghor</td>
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<td>Balkh</td>
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<td>Helmand</td>
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<td>Badghis</td>
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<td>Herat</td>
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<tr>
<td>Bamyan</td>
<td>83</td>
<td>17</td>
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<td>Nangarhar</td>
<td>76</td>
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LAAR Fieldwork, Question x154.
Ibid.
LAAR Fieldwork, Question x18.
Ibid.
LAAR Fieldwork, Question x18.
effective than others; in Bamyan, for example, the LAGF was intended to operate exclusively in the districts, but only 16 percent of cases contracted were outside the urban center of the province.\textsuperscript{550} In Balkh, however, 47 percent of LAGF cases were contracted outside the provincial center.\textsuperscript{551} Still, LAD management complains that any cases taken in provincial centers by LAGF are unnecessary, especially in such well served cities like the capital of Balkh, Mazar-e Sharif.\textsuperscript{552}

\textbf{B. Lack of Counsel Harmful Despite De Novo Appellate Review}

Among respondents, 60 percent believed that district court cases that proceeded without defense counsel were illegal and could not be salvaged or that the harm to the defendants survived on appeal. While there are several potential reasons for this, one important reason is that the appellate panel can review \textit{de novo} only the evidence and information adduced below, limiting the review and the presumption of innocence even on \textit{de novo} review.\textsuperscript{553} Only 12 percent of respondents believed that the smaller number of cases in the district courts offered some protection for defendants even without counsel, and only 23 percent believed that district court cases could be adequately defended and reviewed at the appellate level court, which sits at the provincial center.\textsuperscript{554}

\textit{Zealous Representation is Not Customary}

Defense lawyers and legal aid providers have a duty of zealous representation of their clients, set forth in various legal and policy instruments\textsuperscript{555} and implied in the Advocates’ Oath,\textsuperscript{556} as well as structural safeguards of independence, quality, and loyalty. Internationally, this standard is also well-understood as the core value of effective defense representation. Zealous representation has been reduced to a series of concrete tasks and deliverables in most jurisdictions which, together, comprise the role of the defense counsel. These include things like client-centered orientation in practice, independent defense investigation of the allegations, a holistic approach, and internal quality assurance mechanisms, and others.

\textsuperscript{551} Ibid.
\textsuperscript{552} Fourth Consultation Conference, April 11, 2017.
\textsuperscript{553} LAAR Fieldwork, Question x19.
\textsuperscript{554} Ibid.
\textsuperscript{555} See e.g., Advocates’ Law, Articles 10, 13; Legal Aid Regulation, Article 18.
\textsuperscript{556} The Advocates Oath is the oath that must be taken by new defense lawyers who join AIBA. Advocates’ Law, Article 16.
However, in Afghanistan, current practice norms may chill effective advocacy – with or without the knowledge of the legal aid providers involved. Poor implementation of best practices by individual and institutional legal aid providers customarily diminishes representation and advocacy of indigent clients. “It is important not to confuse legal prohibition with cultural predilection. Just because lawyers have not traditionally filed written motions, relied expressly on constitutional or international jurisprudence, or conducted their own investigations on behalf of the defense, does not necessarily mean they may not, cannot, or should not.” While practice norms may be enforced through intersecting norms within the justice system, or have some basis in law, they need not limit the scope of advocacy on behalf of indigent clients.

Moreover, the lack of implementation of certain practices bespeaks, in some respects, a failure to coordinate available resources as effectively as possible. “Meaningful reform must address the mindset of lawyers that prevents them from providing effective representation by not only targeting financial and structural challenges, but looking to change organizational culture itself.” While many of the inadequacies detailed in this section involve matters and inefficiencies outside of the control of legal aid providers, all of them could be at least improved or even resolved through action and coordination inside the legal aid community.

**A. No Culture of Written Pretrial Motions and Objections**

Defense lawyers in Afghanistan do not have a culture of writing pretrial motions and objections. Case file reviews confirmed that this was the case with all types of legal aid providers, in both individual and institutional models. When confronted with this reality, lawyers often complain that formal motions and objections can be counterproductive for their clients. Defense lawyers claim that prosecutors and judges retaliate against such actions and cause greater troubles for their clients. No evidence was presented to substantiate this belief, and just a few years ago simply seeking defense counsel was a reason for prosecutors and sometimes judges to create greater difficulties for accused individuals. This has changed substantially, through greater awareness and advocacy.

Another obvious hindrance to increasing formal pretrial activity, is the increase in workload it represents for defense lawyers, especially legal aid providers. This is partly due to the lack of templates for motions and objections that can be used efficiently. Often use of templates is denigrated as simply copy-paste work. Instead of learning how to use templates correctly, this culture attempts to repress this type of formulaic motions and objections. Of course,


559 Rapping, Jonathan, at 199.

560 Interview with Mustafa Razm Kohestani, Legal Expert and Member of Leadership Counsel of AIBA, April 20, 2017.

lawyers resort to using the same language, but instead of doing so efficiently and appropriately, this has resulted in lower quality written work.\textsuperscript{562}

The lack of written motions and objections reduces the quality of presentation and fails to hold law enforcement and justice institution accountable. This further hinders larger advocacy efforts since without proper documentation, complaints to higher ranking officials are often ignored.\textsuperscript{563}

\textbf{B. Meaningful Defense Investigation is a Rarity}

Today, it is commonly accepted that an adequate defense requires more than reviewing the prosecution’s case for adequacy. This does not diminish the government’s burden of proof. Legal claims and defenses, developed with reference to disputed and undisputed facts, should be corroborated by witnesses or other evidence; investigation is required to flesh out the claims and their proof. And in fact, when qualified investigators are deployed, their work often proves crucial. Their investigations regularly lead to the recovery of video surveillance footage that exonerates clients; the identification of important data … bank records, school sign-in sheets, and cellular phone positioning systems; and the location of witnesses who confirm client alibis, contradict complaining witnesses, and support client claims of developmental disabilities and mental illness …. The earlier an investigator can uncover facts that exculpate a client, the sooner the prosecution can determine that pursuing the case is not the best use of its resources.\textsuperscript{564}

Zealous representation requires investigation of the basis of the factual allegations as an important component of preparing a defense.\textsuperscript{565}

Internationally, use of defense investigation recognizes that the police or prosecution may have ignored, misunderstood, or failed to develop key facts in a given case. The legal aid provider’s role involves conducting an independent investigation in at least some cases to determine whether an alternative theory of the case is possible or likely. “The risk of believing that meaningful representation can be devoid of investigation, legal research, personal client/attorney relations, and pre-trial preparation is enhanced in a system that teaches the lawyer that fidelity to the judge is paramount.”\textsuperscript{566} While legal aid providers are officers of the court, their primary obligation and fidelity is to their clients.\textsuperscript{567}

Thus, defense investigation has become a standard in rule of law development and practice. Broadly speaking, the proper role of the investigator involves (a) preparing for the investigation; (b) canvassing the scene of the alleged crime and interviewing witnesses; (c)

\textsuperscript{562} Interview with Mustafa Razm Kohestani, Legal Expert and Member of Leadership Counsel of AIBA, April 20, 2017.

\textsuperscript{563} Representatives of the Kabul Appellate Court, ALAAN Conference, March 27, 2017.

\textsuperscript{564} See Kolb, D., et al., \textit{Analysis of Time and Resources Necessary for an Effective Defense, Investigator and Social Worker Support at 3} (report submitted to the Appellate Division, NYS Courts by the Legal Aid Society and Davis Polk & Wardell LLP), August 29, 2014.

\textsuperscript{565} UN Global Study, at 42, 43-44, 47.

\textsuperscript{566} Rapping, Jonathan, at 192.

\textsuperscript{567} Advocates’ Law, Articles 10, 13, 16.
analyzing facts learned at the scene and discussing those facts with attorneys; (d) viewing property and physical evidence; and (e) conducting additional investigative work in connection with courtroom advocacy (trial). This necessarily includes related travel and training. Legal aid providers have increasingly seen defense investigation as a core component of an effective defense, even where they are not driving the use of investigation as a component of zealous representation. However, legal aid providers were more likely than private counsel to “conduct investigation to establish doubt about the suspect’s defendant’s guilt even if s/he may be guilty” at higher rates in countries mandating periodic training and/or testing for legal aid providers and at twice the global average “in countries where legal aid providers are obliged to adhere to quality and performance standards.” This suggests that clear quality and performance standards could be transformative in adopting a client-centered culture of zealous indigent defense.

In Afghanistan, while the work of legal aid providers is court-based, no resources or prioritization of investigation exists as a core component of an adequate defense. In the fieldwork, one-fifth of respondents indicated that attorneys had access to investigators for case support. No current delivery mechanism (institutional or individual) is imparting or demanding consistent investigation of legal aid cases. In addition, even where there are resources devoted to investigation, they typically do not result in competent evidence (e.g., because attorneys conduct investigations independently and without an investigator or other witness who could present competent evidence to the court). Legal aid individual and institutional providers in Afghanistan underestimate the importance of investigation to effective and/or zealous representation in all aspect of criminal defense.

These challenges are compounded exponentially in Afghanistan’s special courts, like the CNJC and the JCIP, which adjudicate cases in Kabul from all over Afghanistan. Competently investigating whether a narcotics-sweep mistakenly captured innocent bystanders, for

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568 See Kolb, D., et al., Analysis of Time and Resources Necessary for an Effective Defense, Investigator and Social Worker Support at 15 (report submitted to the Appellate Division, NYS Courts by the Legal Aid Society and Davis Polk & Wardell LLP), August 29, 2014.
569 Ibid., at 16.
570 Ibid.
571 Globally, only 10 percent of countries cited legal aid providers as the primary drivers of defense investigation practices. UN Global Study, at 114.
572 Ibid.
573 LAAR Fieldwork, Question x49.
574 Ibid., Question x64.
example, requires tremendous resources where canvassing for witnesses and corroborating evidence involves hundreds of miles travel through risky terrain.

In the fieldwork, overwhelmingly, private and public legal aid providers indicated that attorneys typically investigate cases personally, if at all, for tasks such as canvassing for witnesses, talking to people involved in the allegations, examining the crime scene, and examining the credibility of the prosecutor’s theory of the case personally.\textsuperscript{575} 18 percent of private counsel stated they did not perform investigations on cases routinely because their work was court-based,\textsuperscript{576} while 17 percent of legal aid executives indicated there is usually very little or no time to conduct additional investigation beyond reviewing the prosecutor’s case file.\textsuperscript{577} No legal aid providers considered investigation to be among the most significant activities conducted in representing their clients.\textsuperscript{578} Nor did any private counsel consider investigation to be among the most significant parts of their representation.\textsuperscript{579}

The case file review corroborated this finding; the average score on investigation after review of the case files was 1.38 out of 5, the lowest average score in any category and revealed poor investigation efforts across all accusation categories, institutional providers, and legal aid individual providers.\textsuperscript{580} Even in cases involving contested allegations of adultery, no attempts were made to secure marriage certificates or affirmations from officiants in other provinces or to speak with people in remote locations who could corroborate the accused’s story.\textsuperscript{581} Nevertheless, 92 percent of managers and executives stated that defense investigation was very important as a performance indicator in individual cases.\textsuperscript{582}

\textbf{C. Client-Centered Orientation Remains Elusive}

Although criminally accused suspects and defendants, \textit{i.e.}, clients, are technically the consumers of the criminal justice system, justice systems often operate in a bureaucratic and routinized manner that feels esoteric and alienating to people unfamiliar with the courts and fearing for their freedoms. A common problem globally, this was also confirmed in the Afghanistan fieldwork. The private bar opined that the least important legal training needs included courtroom advocacy (three percent) and client interaction or relationship-building (seven percent).\textsuperscript{583} In addition, clients’ experience with the justice system, including with counsel and the courts continue to be under-estimated as a measure of quality. While 82 percent of legal aid managers and executives claimed that they assessed client satisfaction or otherwise track client feedback,\textsuperscript{584} only 14 percent of clients confirmed that they completed a client

\textsuperscript{575} LAAR Fieldwork, Question x64: 83 percent of legal aid executives and 77 percent of private attorneys stated attorneys typically investigate cases personally
\textsuperscript{576} Ibid.
\textsuperscript{577} Ibid.
\textsuperscript{578} LAAR Fieldwork, Question x66.
\textsuperscript{579} Ibid.
\textsuperscript{580} LAAR case file review aggregated data.
\textsuperscript{581} LAAR case file review scoring template.
\textsuperscript{582} LAAR Fieldwork, Question x73d.
\textsuperscript{583} LAAR Fieldwork, Question x140.
\textsuperscript{584} LAAR Fieldwork, Question x77.
satisfaction survey instrument or were asked for feedback on their satisfaction with the legal aid services provided.\(^{585}\) Of clients, 66 percent indicated that their legal aid providers did not do client satisfaction surveys or otherwise track client feedback as far as they knew.\(^{586}\)

The fieldwork also looked at the collection of client satisfaction information as a component of quality assurance.\(^{587}\) For example, 18 percent of legal aid managers and executives indicated they did not do client satisfaction surveys or otherwise track client feedback,\(^{588}\) while less than half of legal aid executives and managers indicated that all clients should complete a survey instrument that allows an opportunity to express satisfaction or dissatisfaction with the legal aid services provided.\(^{589}\) One-quarter of providers track and record client feedback volunteered during or after the legal aid service delivery.\(^{590}\) Client reporting differed somewhat, with 66 percent of clients indicated that their legal aid providers did not do client satisfaction surveys or otherwise track client feedback as far as they knew.\(^{591}\) Only 14 percent of clients indicated that they either completed a survey instrument and could express satisfaction or dissatisfaction with the legal aid services provided or that their legal aid providers affirmatively reached out to solicit feedback on their satisfaction with the legal aid services provided.\(^{592}\)

**D. Supervision Remains Untapped Resource for Improving Quality**

Most legal aid institutional providers have supervision locally and also from their headquarters, although sometimes this supervision is nominal at best.\(^{593}\) Some, like Medica Afghanistan, send supervisors to the provinces to ensure local supervision is effective.\(^{594}\) Overall, 50 percent of legal aid providers and managers stated that all attorneys received some supervision on written and oral advocacy.\(^{595}\) In 26 percent of the cases, this applied only to new attorneys.\(^{596}\) Of respondents, 41 percent indicated that supervisors evaluated attorney-client interactions periodically,\(^{597}\) and one-third of respondents indicated supervisors received guidance on effective management techniques and were evaluated with respect to their supervision and management skill.\(^{598}\) Legal aid providers did not fully confirm this level and type of supervision; although the role of the supervisor is well-understood, 17 percent of legal aid providers said they had never had a supervisor observe their performance in court in

\(^{585}\) LAAR Fieldwork, Question x170.
\(^{586}\) Ibid.
\(^{587}\) LAAR Fieldwork, Question x77.
\(^{588}\) Ibid.
\(^{589}\) Ibid.
\(^{590}\) Ibid.
\(^{591}\) LAAR Fieldwork, Question x170.
\(^{592}\) Ibid.
\(^{593}\) Assessment Team Debrief, December 26-27, 2016.
\(^{594}\) Ibid.
\(^{595}\) LAAR Fieldwork, Question x27.
\(^{596}\) Ibid.
\(^{597}\) LAAR Fieldwork, Question x27.
\(^{598}\) Ibid.
the last year and eight percent of respondents said supervisors had never observed their interactions and relationships with their clients.

In the fieldwork, there was also discussion of quality assurance mechanisms for legal aid providers’ court filings, including motions, defense statements, and appeals. Half of respondents indicated that attorneys are required to consult supervisors or team leaders and receive authorization to file a submission to the court and that attorneys engage peers and supervisors on an ad hoc basis to review and comment on their work. Only junior attorneys, 20 percent of the time, are required to consult supervisors or team leaders for authorization to file a submission to the court. This structure suggests an effective means of ensuring minimum standards for court filings. At first glance, the challenge appears to be universalizing this practice, rather than revising it.

When legal aid executives were asked how their organizations balanced workload and efficiency, 83 percent of them indicated that supervisors regularly assess and adjust attorney workloads.

Many of the weaknesses in supervision could be addressed with feedback and/or effective management. Leadership training, i.e., training and supervision of managers, is an opportunity to enhance quality in countless small ways. Institutional providers overwhelmingly claim their managers receive training on effective supervision practices, but this was not fully confirmed by legal aid managers. Supervisors of legal aid providers were asked how often they received training and guidance on effective management and supervision in the prior year; of managers, 30 percent indicated they had not received guidance on leadership or management in the prior year, and 27 percent of supervisors/managers indicated they had received training and guidance on effective management and supervision once or twice in the prior year, with 21 percent of supervisors/managers indicated they had received training and guidance on effective management and
supervision more than twice in the prior year.\textsuperscript{609}

The case file analysis also shows that institutional models provide higher quality services as compared to individual models.\textsuperscript{610} In addition, organizations that specialize in legal aid provide higher quality services than organizations that provide legal aid as part of a broader mission.\textsuperscript{611} This is the case with both scores on defense statements and total case file scores.

It seems clear that supervision practices must be reconciled with supervision goals and expectations for institutional providers. In practice, good supervision sets an important tone; even in offices with high caseloads, attorneys meet with their clients and visit the detention center where supervision sets the tone that these are non-negotiable priorities.\textsuperscript{612} Ultimately, effective supervision requires expanding good supervision practices to additional providers and locations, but also ensuring that supervision, including quality assurance activities like review of defense statements, is conducted by individuals with adequate substantive expertise. A clear delineation of supervision norms, criteria, goals, and metrics would be a beneficial publication of a nationwide coordination mechanism.

\textbf{E. Quality Control Mechanisms Not Implemented Effectively}

A significant challenge in quality assurance is the existence of universally-approved transparency and quality frameworks that primarily fail in implementation, often for structural reasons invisible to a quantitative analysis but easily discovered through qualitative analysis. For example, strong financial controls cannot succeed where mistakes are not openly acknowledged and investigated, as discussed \textit{supra} at C.ii. However, this issue recurs throughout the legal aid system, including in programs and in regulatory language. See \textit{supra} at 0.

Certainly, additional training and supervision opportunities mitigate this issue somewhat: 37 percent of respondents indicated attorneys undergo periodic training on effective writing skills and preparation of defense statements and motions.\textsuperscript{613} One-quarter of orientation of new hires includes specific training and guidance on preparing defense statements and other written advocacy tools.\textsuperscript{614} However, a significant opportunity for routine quality assurance through supervision is regularly squandered for lack of expertise that could be taught or specifically required in the hiring and promotion process.\textsuperscript{615} Nor is the scope of this problem adequately understood: less than half of supervisors or team leaders review, or audit,

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{609} Ibid.
\item \textsuperscript{610} LAAR case file review analysis of average scores among providers.
\item \textsuperscript{611} LAAR case file review analysis of average scores among providers. Assessment Team Debrief, Dec. 26-27, 2016.
\item \textsuperscript{612} Ibid.
\item \textsuperscript{613} LAAR Fieldwork, Question x31.
\item \textsuperscript{614} Ibid.
\item \textsuperscript{615} Assessment Team Debrief, December 26-27, 2016 (many supervisors in legal aid organizations lack prior experience as a defense attorney or substantive expertise that would allow them to build capacity among attorneys they supervise).
\end{enumerate}
\end{footnotesize}
previously filed defense statements, motions, and other written work as a part of attorney evaluation.\textsuperscript{616}

As discussed, supra at C.i, most institutional providers of legal aid have an organizational management framework that is consistent with good management practice and international norms. Thus, two-thirds of institutional providers subjected staff to checks for conflicts of interest, maintained a procurement process in writing, and conducted some independent review of financial procedures.\textsuperscript{617} Of the institutional providers, 83 percent indicated they conducted annual program and financial audits, employed credentialed financial staff, had dedicated accounting software for financial transactions, required invoicing and approval for all vendor payments and salaries, had a strategic plan, gave individuals limited authority to make financial disbursements, and required multiple signatures to disburse organizational funds.\textsuperscript{618} Institutional legal aid providers have clearly benefitted from internal and external training and expectations for financial controls and transparency.

These are excellent signs, as these procedures are comprehensive, but also expensive and time-consuming to develop. However, even ideal financial procedures require constant attention to detail in operation, including ongoing review for error, acknowledgment of mistakes, corrective action, and feedback in order to effectively function. Strong financial controls are not self-executing and the operation of these processes remains significantly challenged in the legal aid context in Afghanistan. “One of the most valuable things that a manager can teach her staff is the ability (no matter how embarrassing) to show fallibility, admit wrongdoing, listen to tough feedback, and persevere through the corrective action toward the next challenge.”\textsuperscript{619} This deficiency was evident in the fieldwork: only one institutional provider indicated it conducted a regular external program review.\textsuperscript{620} No organization acknowledged multiple years of “unfounded” audits, i.e., audit findings without any problems. Only one third of institutional providers stated they periodically conducted an external financial audit.\textsuperscript{621} As with program audits, no provider admitted multiple years of unfounded external financial audits.\textsuperscript{622}

\textbf{F. Rarity of Holistic Services}

For many, involvement in the criminal justice system stems from issues far more important to them than the criminal charges they negotiate. This might include addiction, family problems, social service needs, civil law issues, or other ancillary factors. “The holistic approach recognizes that the specialized expertise of a lawyer represents only the tip of the iceberg of legal services needed when a person is seeking to resolve a legal dispute or problem.”\textsuperscript{623}

\begin{itemize}
\item \textsuperscript{616} LAAR Fieldwork, Question x31
\item \textsuperscript{617} LAAR Fieldwork, Question x119
\item \textsuperscript{618} Ibid.
\item \textsuperscript{620} LAAR Fieldwork, Question x103
\item \textsuperscript{621} LAAR Fieldwork, Question x104
\item \textsuperscript{622} Ibid.
\item \textsuperscript{623} McKay, Leanne, \textit{State-Sponsored Legal Aid Systems}, at 24 INPROL (December 2015) available at \url{http://inprol.org/publications/15233/state-sponsored-legal-aid-schemes}.
\end{itemize}
Without recognizing and/or addressing the root causes, the criminal justice system promotes “revolving door” recidivism and repeated involvement in the justice system by certain individuals.

Holistic representation, typically involving “[s]ocial worker intervention, can decrease recidivism by more effectively addressing a client’s life issues, which may have contributed to his or her criminal behavior. In the domestic violence context, social worker involvement can dramatically improve client outcomes outside of the courtroom.” By viewing the accused client as a whole person and seeking to address behavioral and other reasons for an individual’s presence in the justice system, a holistic approach is an increasingly common means of allocating preventive resources and seizing an important intervention point to promote positive change and avoid incarceration.

Most holistic representation involves staffing social workers, who can assess and address or make referrals for needs outside the criminal case. In holistic practices, social workers provide critical professional services to clients that very often are central to an effective defense. Among other things, social workers identify mental health issues and substance-abuse problems, advocate for alternatives to incarceration, and elicit facts that are critical for mitigation at bail proceedings…and at sentencing. Such efforts can regularly improve case outcomes. When problems and potential solutions are identified early, the results are very often better for … clients and their families.

Holistic representation offers an approach that feels fair to judges, prosecutors, and indigent defendants and avoiding incarceration dramatically cuts the cost of criminal justice for the government.

In Afghanistan, holistic representation is not the norm although many suspects and accused persons would benefit from holistic interventions, i.e., their presence in the justice system involves extenuating circumstances rather than a pure desire to commit crime. Some Afghan organizations do provide holistic representation (including Medica Afghanistan and Women for Afghan Women), but many institutional and individual providers see holistic representation as outside the scope of their work.

Overall, half of legal aid managers indicated that they did not devote specific resources to offering holistic services to clients, i.e., resources or activities for clients whose involvement in the justice system is linked to trauma, abuse, lack of education or employment, disability, poverty, or socioeconomic factors. Only one-fifth of respondents indicated that they make local referrals to civil society organizations or government agencies that may assist their clients and one-fifth indicated that they provide holistic representation, including engaging social workers or counselors as necessary in order to understand the issues a client has that may impact the case, the theory of the defense, or the client’s life more generally. Less than

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624 See Kolb, D., et al., Analysis of Time and Resources Necessary for an Effective Defense, Investigator and Social Worker Support at 32 (report submitted to the Appellate Division, NYS Courts by the Legal Aid Society and Davis Polk & Wardell LLP), August 29, 2014.
625 Ibid., at 2.
626 LAAR Fieldwork, Question x65.
627 Ibid.
10 percent indicated that attorneys received training on identifying the need for social service intervention and assistance. This data suggests a lost opportunity to intervene to prevent recidivism and to fashion more appropriate (and cheaper) solutions than incarceration.

In addition, most legal aid providers lacked access to professional support that could facilitate a holistic approach. Only one third of respondents indicated that attorneys could access social workers for client support. Half of legal aid executives claim to coordinate with other civil society and governmental personnel to provide clients with more holistic services, a claim not confirmed by legal aid providers or supervisors.

**G. Inadequate Practical Education, Orientation, and Continuing Education**

Although not by design, in Afghanistan many lawyers learn primarily on-the-job. In the LAAR fieldwork, 44 percent of respondents indicated that “on-the-job” training and mentoring was the chief method of orientation and training attorneys and legal aid providers in the standards and practice of indigent criminal defense, with 42 percent of respondents citing on-the-job training and mentoring as their chief method of learning best practices, performance standards, and attorney expectations.

As discussed supra at 0, the university education system does not meet the needs of the justice system. Like judges and prosecutors, criminal defense in the Afghan system is designed around an attorney staj which serves as initiation, apprenticeship, and orientation for the profession. However, unlike other arms of the justice system, and discussed supra at 0, the defense attorney staj has yet to be developed in a consistent and meaningful manner.

In addition, there is no replacement for the staj that offers comprehensive training to new lawyers. Less than one-third of legal aid providers stated that new graduates and junior attorneys must participate in structured orientation and training including substantive and skill-based training. Moreover, only nine percent of the time was this a requirement for all new hires irrespective of prior experience.

Of legal aid attorneys, 65 percent indicated that regular training was comprised of affording attorneys access to training programs conducted by AIBA, international organizations, and advocacy organizations. Furthermore, 48 percent indicated attorneys were required to participate in training programs periodically. Less than one-third of organizations indicated that attorneys could access to training on advocacy skills or training on substantive developments in the law several times a year and only 14 percent indicated that attorneys had access to training on substantive developments in the law several times a year.
AIBA also opined on what type of training was most important for legal aid lawyers. One-quarter of respondents indicated training on the Criminal Procedure Code was of primary importance, an answer which recognizes the CPC is fairly new with substantial revisions that are not yet universally practiced. Other training needs identified included defense investigations training (19 percent), criminal legal theory (13 percent), and training on the penal code, writing defense statements, and pretrial written motion practice (10 percent each). With the implementation of a new Penal Code set for the fourth quarter or 2017, more training on that subject will be necessary as well.

H. Evaluation Under-Utilized as Quality Assurance

Regular evaluations of service delivery and the evaluation process are important tools for quality assurance and performance improvement. In addition to providing targeted feedback, they encourage the development of clear expectations (in the form of ToRs or delineated tasks) in advance of the evaluation period and offer a clear standard for excellence to all staff and supervisors. However, the fieldwork showed that less than 50 percent of respondents indicated that routine evaluations of attorneys and managers existed in their legal aid practice. In only 11 percent of the cases were attorneys required to acknowledge the evaluation, its findings, and areas for improvement in writing. Less than five percent of legal aid providers, executives, and managers indicated that their evaluation mechanism included a process to challenge the results of an evaluation in the case of disagreement. In seven percent of the cases, respondents indicated that no structured evaluation process existed. Less than one-third of managers or supervisors were evaluated as to the strength of their management skills.

I. Caseloads Reflect Entrenched Structural Challenges

Although there are caseload caps for legal aid providers in Afghanistan, they are interpreted and implemented differently by different institutional providers. Per ILAB, legal aid providers should maintain approximately seven cases, unless the venue is in dire need of legal aid, in which case providers can take up to 12 cases. This is still a very low number for legal aid experts with experience in the volume practice that traditional public defender work involves. However, institutional efficiencies and institutional structures remain weak or non-existent throughout most of Afghanistan and legal aid provider caseloads also involve significant administrative and non-legal professional responsibilities.

Overall efficiency and quality are compromised by very limited access to administrative and litigation support for most attorneys. Paralegals, social workers, and administrative support

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637 LAAR Fieldwork, Question x140
638 Ibid., Question x140.
639 Interview with Ashraf Rasooli, Senior Adviser to the Minister of Justice, March 28, 2017.
640 LAAR Fieldwork, Questions x34, x78.
641 Ibid.
642 Ibid.
643 Ibid.
644 Ibid.
build efficiency and assist attorneys with time-consuming tasks like filings, investigation and research, checking and informing clients and families of court dates, and visiting clients in detention. In the course of the fieldwork, defense attorneys and legal aid providers were asked about available administrative and logistical support. Nearly half of respondents claimed some access to paralegals and secretaries for administrative support or that attorneys had access to transportation for work on their cases and to travel to/from the office, court, or other relevant locations. However, the assessors observed and discussed the nuances of these answers. Most organizations, with the exception of Medica Afghanistan, did not have dedicated social work or administrative staff. The assessors also observed legal aid organizations using legal fellows, i.e., trainee lawyers funded by outside donors, as paralegal or administrative support. In the past, NGOs had also hired graduates of law or sharia faculties who were licensed attorneys to work as paralegals. Often, after working for one to two years, they could be upgraded to a full attorney position. Some private law firms often use this method as well; it is, in effect, an informal trainee period for attorneys, most of whom have not completed a staj program as discussed supra at 0.

Lack of Coordination Impacts Service Delivery

Afghanistan has a responsibility to provide meaningful legal aid in 34 provinces, each of which has multiple provincial and district courts. A host of coordination needs exist at every level, yet remain unmet, despite the existence of several overlapping coordination entities discussed supra at 0. This need is particularly pronounced because Afghanistan uses a mixed model to deliver legal aid services. Typically, in a mixed model approach, “legal aid service providers may be coordinated by a legal aid board or public defender institution, or may function more independently of each other. The lack of coordination is often a challenge in hybrid systems and requires strong oversight and quality control mechanisms.” No such strong coordination, oversight, and quality control mechanism exists in Afghanistan.

The ILAB was designed as an overarching coordination entity for Afghanistan’s legal aid system. A mixed model, “[w]hen administered effectively… can promote high-quality legal representation and enhanced access to justice for indigent members of society. Good practices show that effective administration requires: an independent body to oversee the work of all lawyers involved in the scheme, … comprehensive monitoring and quality control mechanisms; and systems of accountability for the provision of high-quality legal aid

646 LAAR Fieldwork, Question x49.
647 LAAR Fieldwork, Question x49.
648 Ibid.
650 LAAR Fieldwork, Question x49.
652 Ibid.
653 Ibid.
654 Ibid.
655 Discusses supra at 4.9.
656 UN Global Study, at 51.
services.” However, ILAB has never effectively served these functions and major coordination needs remain unaddressed. However, the expectation that ILAB will function effectively as a coordinating body, despite problematic beginnings and its institutional lack of capacity, has also been a paralyzing influence to necessary coordination within the system.

A. ILAB Licensing Exhausts Its Capacity

Under the NGO Law, legal aid NGOs must be registered and are subject to monitoring of the MoE and the MoJ. Under the Legal Aid Regulation, ILAB is a nominal, redundant licensing authority for legal aid NGOs. As noted above, its self-delegated licensing authority over legal clinics is not implied by Afghan law, nor is it a meaningful quality assurance mechanism. It also claims currently-unused accreditation authority over individual legal aid advocates, despite strong opposition from AIBA.

In practice, ILAB’s focus on licensing exhausts nearly all its capacity, leaving important legal aid coordination undone. Article 20 of the Legal Aid Regulation sets forth various duties and authorities afforded to ILAB. A 2010 Legal Aid Needs Assessment by Adam Smith noted that, despite twelve clear, enumerated items delegated to ILAB, it had not yet acted on two-thirds of its core responsibilities. Seven years later, that assessment stands. Specifically, ILAB has yet to create information and capacity coordination systems such as even a rudimentary case management databases.

Nor has ILAB’s licensing enhanced legal aid capacity in either quantity or quality. Legal aid NGOs licensed by ILAB provide their mandated reports, but face no other monitoring or evaluation. Some organizations, such as the Afghanistan Human Rights Organization (AHRO) refuse on principle to adhere to the regulation and have yet to be licensed by the ILAB, yet they have yet to face any penalty. In fact, AHRO, which is not registered as an NGO with MoE, continues to maintain its registration as an association with the MoJ.

The Legal Aid Regulation may require NGO licensing due to a misunderstanding by its drafters of the definition and utility of licenses and accreditations. Typically, licenses serve as exclusionary mechanisms giving some the permission necessary to engage in a task and disallowing those who are not licensed, often through a strong penalty. Accreditation, on the other hand, is a vetting mechanism that allows for a person or an organization to claim extra prestige, status, or eligibility.

B. ILAB Mis-Adapted from South African Model

The Legal Aid Regulation was originally designed by rule of law and legal aid experts hired by Adam Smith International (ASI) and drafters from the MoJ. The ASI experts were

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658 NGO Law, Articles 4, 23, and 27.
659 Legal Aid Regulation, Article 20.
661 Interview with Prof. David Mason, Buenos Aires, November 17, 2016.
tasked specifically to help implement the recommendations of IDLO’s *Models and Options for Legal Aid Delivery*, which suggested that South Africa’s mixed model system should be emulated in Afghanistan. The experts from ASI attempted to adjust the South African model to the Afghan context with the help of MoJ drafters but, ultimately, several aspects of the final model were disavowed by the ASI experts. One of these decisions was the inclusion of an NGO licensing mechanism for ILAB.

In South Africa, the Legal Aid Board (LAB) has a specific budget that it can use to contract with NGOs. If the LAB determines that a population or locale is better served by contracting with an NGO rather than some other method of legal aid service delivery, it begins a selection process to award a contract to an NGO that can deliver these services. In order for an NGO to be eligible as a candidate in this process and be considered for a contract, it must first be accredited by the LAB. If a legal aid NGO is funded by an independent donor or some other type of fundraising mechanism, it must be registered and adhere to local NGO laws, but there is no requirement that it be accredited by the LAB. The South African LAB has no licensing power at all.

In Afghanistan, it was envisioned that ILAB would also play a role in contracting for services. Although the 2011 agreement between MoJ and ILF-A did not involve ILAB, the Legal Aid Regulation authorizes ILAB to enter cooperative agreements with AIBA, licensed NGOs, law clinics, and other relevant authorities. Cooperative agreements may involve memoranda of understanding or other agreements with varying contractual obligations. While ILAB does not have a budget to contract for legal aid services, nor has it ever used its authority, it does have the latitude to do so under the Legal Aid Regulation.

In the same vein, the Legal Aid Regulation and ILAB procedure cite accreditation letters, licenses, memoranda of agreement, and contracts in ways that are inconsistent with the maximum utility or common use of such tools. Notably, ILAB has the authority and the responsibility to suggest changes to the Legal Aid Regulation. However, instead of seeking to repair and redress legal and policy realities that complicate coordination, ILAB ignores these provisions of the Legal Aid Regulation.

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663 Interview with Prof. David Mason, Buenos Aires, November 17, 2016
664 Interview with Ms. Vidhu Vedalankar, Chief Executive Officer Legal Aid South Africa, Buenos Aires, November 16, 2016.
665 Wilna Lambley, Regional Operations Executive: Gauteng, Legal Aid South Africa at Second Stakeholder Conference for the Assessment of Legal Aid, Open Society Foundations Afghanistan (via videoconference) and December 5, 2016 written follow up responses.
666 Legal Aid Regulation, Article 20(3).
667 Ibid., Article 20(4).
Thus, although adapted from a model used in South Africa, key distinctions between the South African model and the Afghan adaptation have compromised ILAB’s effectiveness significantly.\textsuperscript{668}

In South Africa, the LAB does not license or regulate legal aid providers, NGOs, or clinics. The South African LAB does no licensing beyond accrediting institutions to qualify for grants and cooperative agreements.\textsuperscript{669} Instead, the South African LAB provides an overall coordination function for all types of legal aid providers and manages government provided resources.\textsuperscript{670} It has administrative employees who carry out most tasks necessary to coordinate, fund, and manage legal aid in South Africa, with the board serving as a supervisory entity. Membership on the LAB is by application, not appointment.\textsuperscript{671}

The membership of ILAB is made up of the institutions it is supposed to monitor. If ILAB had a budget, five of the seven members (LAD, AIBA, law and sharia faculties, and NGOs) could have conflicts of interest, as potential grantees in a tight funding context. The representative for NGOs is particularly controversial as this representative is usually selected from a single NGO in an ad hoc process. However, this is also true of the Kabul University law and sharia faculties, since they can hardly represent all clinical programs across Afghanistan. Even without resources to distribute, the conflict of interest remains strong. The LAD, evaluated by and answerable to the board for its service as a secretariat and as a legal aid provider, is also a member of the Board.

In contrast, South Africa’s 14-member, uncompensated LAB is selected from applicants who submit applications and interview and who must possess core necessary skills for the functioning of the board (e.g., auditing/accounting, information technology, legal aid experience, etc.), in addition to administrative employees, an active service judge, and a chief executive. Only one position on the board, the Director General, is reserved for a specific stakeholder or his/her nominee.\textsuperscript{672}

The departures from the South African model have impact. In Afghanistan, the structure of ILAB is disempowering and the members of the board have trouble attending board

\textsuperscript{668} Interview with Prof. David Mason, Buenos Aires, November 17, 2016.
\textsuperscript{669} Wilna Lambley, Regional Operations Executive: Gauteng, Legal Aid South Africa at Second Stakeholder Conference for the Assessment of Legal Aid, Open Society Foundations Afghanistan (via videoconference) and December 5, 2016 written follow up responses.
\textsuperscript{670} Ibid.
\textsuperscript{671} Ibid.
\textsuperscript{672} Ibid.
meetings. Frequently, ILAB lacks a quorum; its most active period was occasioned by donor intervention, including the payment of “sitting fees” to members of ILAB. It is composed of very high-level appointees who primarily manage ongoing paper reviews of NGO and law clinic licenses. Each member of ILAB also has substantial primary responsibilities in their own institutions. As with any other board without an active secretariat, the output of ILAB is minimal. Boards are not typically the primary drafters of rules and regulations, engaged in monitoring and quality control, creating budgets, writing proposals, etc. Typically, boards set goals, shape strategies, review budgets, edit and approve draft regulations, and make decisions based on briefings by a secretariat.

Some of the above concerns, such as the make-up of ILAB and its NGO licensing power, are rooted in the Legal Aid Regulation. However, issues also stem from a failure to adhere to the Regulation, such as the failure for the LAD to serve as ILAB’s secretariat or ILAB’s self-designation as a law clinic licensing body. The continued existence of ILAB as the central element of legal aid coordination in Afghanistan requires, at a minimum, that the Legal Aid Regulation be amended, clarified, and respected.

Opportunities

For the purposes of this SWOT analysis, opportunities are favorable factors that can be leveraged advantageously. The opportunities analysis looks at external factors and realities or trends in the relevant environment that may be used to improve the legal aid system or its operation. These external factors are often flushed out using the PEST acronym, which indicates an examination of the impact of political, economic, social, and technological factors. The opportunities of the legal aid system in Afghanistan involve broader policy objectives (e.g., gender, anti-corruption, and harmonizing the traditional justice system) that can be addressed in part via robust legal aid, the increased awareness and respect for legal aid by the public and the government officials, and the increased capacity to collect and analyze data in service to larger social goals.

Cross-Cutting Policy Objectives Demand Robust Legal Aid

Legal aid serves important goals specific to the justice system, but it also has a track record and additional capacity to further broader policy goals. Key multilateral policy instruments, like the Self-Reliance Mutual Accountability Framework, discussed supra at 0, accredit the importance of effective rule of law and access to justice to broader objectives of stability,
anti-corruption, and meaningful inclusion of women. While Afghanistan continues to struggle with ongoing problems with corruption, gender equality and inclusion, and the legacy of traditional justice mechanisms, certain data also suggests that these challenges are tempered by clear signs of resiliency, which enhance the legitimacy of the rule of law and the formal justice system. These resiliency data points show how support for legal aid is also support for broader policy priorities.

A. Anti-Corruption Failures Are Not Access to Justice Failures

Afghanistan has struggled famously with corruption, only to remain consistently one of the most corrupt nations on Earth. The legal system remains a particular site of corruption, with the judiciary rated “the most corrupt institution in the country” and international claims that “a dysfunctional police and judiciary is allowing impunity for the corrupt.” Significant anti-corruption efforts stem from a popular belief that corruption “is an impediment not only to economic growth and development, but also to political stability, democracy, and sustainable peace. In fragile and conflict-riddled countries such as Afghanistan, corruption can deeply undermine the effectiveness and legitimacy of nascent government institutions.” Even so, while this “epidemic of graft” may “subvert the rule of law,” considerable efforts and over $100 million in U.S. funding earmarked for anti-corruption in the last seven years have not shown success in mitigating corruption or altering the proclaimed culture of impunity. However, there is a silver lining: the justice system enjoys considerable legitimacy as a site of conflict resolution among Afghans despite the culture of graft.

i. Kommission Kari: Structural Corruption in the Justice System

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677 Ibid.
679 Ibid.
681 Some analysts suggest that the very means of targeting corruption-related activity may be misdirected. “Anti-corruption policy, with respect to police, prosecution, courts, and detention facilities, relies on legal reform and punishment of individual offenders. This approach is hampered by its emphasis on individual aspects, and its wholesale disregard of structural aspects, of corruption. Controlling corruption requires structural change in organizational culture.” This includes reform of recruiting and hiring standards within the criminal justice system, promoting transparent standards and ethics, conducting training (and reviewing existing training programs) to promote organizational change, and ensuring organizational (and ministry) models facilitate the achievement of quality and organizational goals without resorting to illegal or unethical activity, and balancing between police/legal/prosecutorial/judicial authority and political authority. HREVO ROL Report, at 111.
In Afghanistan, a widespread practice of *kommission kari*, or “working on commission,” describes a specific type of structural corruption that thoroughly pervades many governmental institutions.\(^{682}\) It institutionalized a culture of graft, where those seeking government services expect to pay for convenience, efficiency, and for substantive outcomes in their favor. These practices are so routine and so universal that they are not necessarily perceived as corruption. With respect to the justice system, one form of *kommission kari* is the creation of a circuit, or a triangle, between the defense counsel, the prosecutor, and the court, in which the defense counsel canvasses the court and prosecutor to determine the price of their cooperation and gets a piece of the deal he eventually makes on behalf of his client, who may believe this is the proper role of defense counsel.\(^{683}\)

The majority of experts (88 percent) indicated that defense lawyers function to decrease corruption in the criminal justice system. Legal aid gained donor attention in recent years, in part as it became clear that pervasive corruption in the judiciary and among prosecutors could be institutionally addressed through robust legal aid. Although the data is anecdotal, certain institutional providers refused to be complicit in corruption and showed some success in individual cases obtaining just outcomes without participating in the culture of graft. For these providers, refusal to be complicit in corruption is a pillar of their practice. Even so, there is a perception that a majority of defense lawyers, judges and prosecutors, are involved in some variety of this structural corruption.\(^{684}\) The specific circumstances vary endlessly: clients may introduce the issue, and may be dealing with the prosecutor directly at the same time, a lawyer may tell his client the cost to follow a case well and attend all court appearances, the judge may seek a commission from defense counsel for appointing him/her to a case, a judge may tell a client or defense counsel that s/he wants to appoint a “smart” lawyer to this serious case, the defense counsel may broker a deal between the parties and retain a commission, the prosecutor may mention the maximum penalties in seeking payments, the defense counsel may seek expenses like transportation, phone cards, etc. from the client, the judge or his staff may seek phone cards from the defense counsel.\(^{685}\) In some provinces, the assessment team observed LAD employees taking on private civil cases and working on them in their government offices.\(^{686}\) Among some, the provisions in the CPC requiring judges and prosecutors to appoint counsel are used to commence negotiations in *kommission kari*.

The data also suggests *kommission kari* is familiar to Afghans interacting with the justice system. Of Afghans who had been represented or who knew someone who had been represented by a defense attorney, 55 percent indicated that the defense counsel had received compensation from the defendant or his family.\(^{687}\) “The Afghan Ministry of Justice and NGO legal aid providers suggest that most criminal defense is provided through legal aid services, pointing to a lack of private defense lawyers in most areas of Afghanistan. However, [the data] … suggests that a significant proportion of legal aid lawyers may be receiving some

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\(^{682}\) Assessment Team Debrief, December 26-27, 2016  
\(^{683}\) Ibid.  
\(^{684}\) Ibid.  
\(^{685}\) Ibid.  
\(^{686}\) Ibid.  
compensation from their indigent clients in addition to their salaries.\textsuperscript{688} The fieldwork assessment confirmed this.

In the fieldwork, nearly a quarter of clients claimed that they had been asked for some type of fee. Of those, over a third claimed that this was done by defense lawyers or their affiliates.\textsuperscript{689} Several clients attributed their incarcerations or convictions to their inability to meet a request for payment from the police, prosecutor, or the judge, with or without the knowledge of their defense counsel.\textsuperscript{690} For example, one client stated: “I was not able to pay, because I had just $10,000 and attorney said that the judge has asked for $15,000.\textsuperscript{691}

The judiciary has made efforts to target this ongoing issue. A department of the Afghanistan Supreme Court, called the Judicial Surveillance Department, seeks to expose and address corruption within the judiciary, including the incidents discussed above. The Department was convened pursuant to Articles 92-95 of the Law on the Organization, Structure, Duties, and Authorities of the Judiciary explicitly to target bribery and corruption of judges and judicial staff, to identify drivers of corruption, to monitor the productivity and attendance of judges and judicial staff, and to accept public complaints and concerns.\textsuperscript{692} In its ten years of operation, the Judicial Surveillance Department has investigated and made arrests of 526 individuals – 93 of those arrested were judges, 92 were court staff, and 341 of those arrested comprised “other people who have misused the Supreme Court’s name,” which includes attorneys appearing in the courts.\textsuperscript{693}

In addition, this culture of corruption is not limited to legal aid providers, or to the courts. The overwhelming majority of Afghans believe paying a bribe to the police is an effective strategy to avoid detention, despite a much smaller percentage actually having direct experience doing so.\textsuperscript{694} While this belief is fueled by public opinion and the media,\textsuperscript{695} there is certainly clear basis, as well as the very relevant question of whether and how this impacts the legitimacy of a system where the payment of graft is “prevalent and ordinary.”\textsuperscript{696}

In another example, a majority of victims of crime throughout Afghanistan found themselves forced to pay official or nonofficial costs in order to access the criminal courts.\textsuperscript{697} This practice was particularly concentrated in some provinces, like Herat, where 84 percent of crime victims were forced to pay official or non-official fees to the courts.\textsuperscript{698} While these fees were requested from both legal/judicial entities in the courts and administrative staff,\textsuperscript{699} they raise some concerns that the courts offer a forum that is fair primarily when all parties have higher socioeconomic status, that justice can be bought and that it primarily serves the rich

\textsuperscript{688} Ibid.
\textsuperscript{689} LAAR Fieldwork, Question x148
\textsuperscript{690} Ibid.
\textsuperscript{691} Ibid., Question x148I-1 (ln 369)
\textsuperscript{692} Judicial Surveillance Department, Supreme Court Presentation to UNAMA, February 7, 2017.
\textsuperscript{693} Ibid.
\textsuperscript{694} HREVO ROL Report, at 27-30.
\textsuperscript{695} Ibid., at 28.
\textsuperscript{696} Ibid., at 37.
\textsuperscript{697} Ibid., at 36.
\textsuperscript{698} Ibid.
\textsuperscript{699} Ibid., at 37.
and powerful, and that the courts may not be a viable recourse for people who lack financial resources.\textsuperscript{700} 

\textit{ii. Legitimacy of the Justice System Rests on Quality of Services}

As discussed above, the courts and the judiciary were cited in 2016 as the most frequent location where Afghans reportedly directly encountered and dealt with corruption.\textsuperscript{701} Of Afghans experiencing corruption, 60 percent faced it in the courts or the judiciary.\textsuperscript{702} This included being made to pay money, give a gift, or perform a favor.\textsuperscript{703} However, in 2016, the Foundation’s \textit{Survey} found that Afghan citizens’ happiness was positively correlated with their satisfaction with dispute resolution mechanisms, including the courts, despite being negatively associated with their perception of corruption in Afghanistan.\textsuperscript{704} In fact, a majority of Afghans indicated satisfaction with the dispute resolution services in their area.\textsuperscript{705} These factors suggest increasing legitimacy of the justice system despite ongoing corruption within the system; Afghans’ direct experience with corruption did not have a significant relationship with their happiness.\textsuperscript{706}

Increasingly, corruption may not be an adequate indicator for legitimacy and/or confidence in the formal justice system, particularly where certain forms of corruption have become routine and nearly universal. “Varied perceptions of what constitutes a ‘bribe’ impacts how corruption is understood and reported. For example, paying a small gratuity to the police for respectful treatment or to avoid a traffic ticket have become social norms; such payments are not considered bribes. Clearly, where corruption is a social norm, and graft is openly justified, modification of behavior is a serious challenge.”\textsuperscript{707} Consistently with this, the Foundation’s 2016 \textit{Survey} concluded that “while the percentage of Afghans who experience corruption is high, that experience does not appear to affect their confidence in government institutions as a whole … this result says that corruption is so normalized that Afghans do not use it as a measure of their confidence in government institutions.”\textsuperscript{708} This is a trend that has grown in recent years, and a reversal from years prior to 2014, where Afghans who experienced corruption were less likely to report satisfaction with the government.\textsuperscript{709}

Thus, while corruption remains pervasive throughout the system, it does not negatively impact Afghans’ satisfaction with the formal justice system, or its credibility. These “happiness” data points suggest a resiliency toward ongoing, intractable challenges and a sophisticated willingness to distinguish the negative aspects of a culture of graft from a

\textsuperscript{700} Ibid.
\textsuperscript{701} The Asia Foundation, \textit{Survey of the Afghan People}, 9-10 (2016).
\textsuperscript{702} Ibid., at 10.
\textsuperscript{703} Ibid., at 109.
\textsuperscript{704} Ibid., at 30-31.
\textsuperscript{705} Ibid., at 238.
\textsuperscript{706} Ibid., at 30-31.
\textsuperscript{707} HREVO ROL Report, at 30.
\textsuperscript{709} Email to Siavash Rahbari dated March 6, 2017, summarizing findings on particular data inquiries (“If we look at this association over time, we can see it is weaker in 2015 and 2014 ($r = 0.0748$ in 2015 vs $r =0.08$ in 2014) and even this association becomes negative for years 2007-2009 and 2011-2012 which means Afghans who have experienced corruption are less likely to say national government is doing a good job.”)
potentially effective conflict resolution mechanism (the courts), particularly when the formal justice system is working to diminish violence and insecurity.

**B. Legal Aid Providers Uniquely Impact Gender Justice**

The widespread perception that the criminal justice system is patriarchal and incognizant of the needs of women remains an intractable challenge in Afghanistan, and the justice system is no exception.\(^{710}\) By all accounts, the status of women in the justice system, as consumers and as professionals, does not reflect the years of gender mainstreaming and gender equality programming invested in by Afghan civil society, the Afghan government, and the international community. Even workplaces with significant numbers of women still face sexual harassment and coercion.\(^{711}\)

However, “[w]omen’s access to formal justice mechanisms have improved over the period of 15 years. Women work in the justice sector as judges, defense lawyers and attorneys.”\(^{712}\) The National Unity Government (NUG) has also committed to “[i]ncrease women’s participation in government, including the justice and security sectors.”\(^{713}\) While the gender-related challenges in Afghanistan are considerable, it is clear that the inclusion and meaningful participation of women is feasible throughout the justice system.

**i. Gender Disparities Remain, Despite Mainstreaming Efforts**

The gender disparities and the disregard of gendered paradigms was apparent in the fieldwork. Although the assessment team observed women lawyers in most offices, only one province (Herat) appeared to have equal representation of women in the justice sector and only two NGOs (Medica Afghanistan and DQG) had strong representation (and even majorities) of women in all offices visited.\(^{714}\) The LAAR fieldwork confirmed reports that structural barriers to hiring, retention, promotion, and other advancement for women were not well-understood or accepted throughout the legal aid community. Legal aid managers and executives were asked how they addressed concerns that women should have parity in professional development and leadership opportunities.\(^{715}\) Three-quarters of legal aid managers throughout the provinces indicated that this was an unnecessary concern or that they do not make any distinction for gender in their organization.\(^{716}\)

In addition, respondents were asked how their organizations promote a healthy gender balance and what policies and procedures have been enacted to facilitate a meaningful inclusion of women.\(^{717}\) Over half of respondents\(^{718}\) indicated that this was an unnecessary

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\(^{710}\) HREVO ROL Report, at 114.


\(^{712}\) Ibid.


\(^{714}\) Assessment Team Debrief, December 26-27, 2016.

\(^{715}\) LAAR Fieldwork, Questions x8, x118.

\(^{716}\) Ibid.

\(^{717}\) Ibid., Question x46.

\(^{718}\) Notably, 40 percent of potential respondents did not answer this question.
concern, that they were unaware of concerns or related activities, or that their organizations have no policies specific to women.\textsuperscript{719} One analysis recommended actions to address this ongoing disparity, including ensuring the status of women in the justice system, preventing discrimination against women in hiring and promotion, and incorporating topics relating to gender and equality in the training provided to all justice system personnel.\textsuperscript{720}

Nevertheless, a small minority of legal aid offices had taken important steps toward redressing gender disparities. One-third of managers and one-third of executives indicated that management ensures women have proportionate representation in outside training opportunities.\textsuperscript{721} Although the assessment team did not observe gender-specific policies in any office,\textsuperscript{722} six percent of respondents indicated their organizations provide transportation to the office and professional activities or considered and created “workaround” solutions for gender-based limitations that could impact women’s role.\textsuperscript{723} Some offices assign women only in the provincial center, allowing men to handle cases in the districts because security and Afghan culture are more permissive in this arrangement.\textsuperscript{724}

In the same vein, only six percent of supervisors indicated their organizations removed culturally-mandated gender distinctions from necessary criteria for recruitment, retention, and promotion (\textit{e.g.}, travel-based roles may disfavor women, who often cannot travel freely; by the same logic, their experience is likely to be more local and may not include study or conferences abroad or in other provinces) or provided culturally appropriate interventions to address this challenge.\textsuperscript{725} Similarly, six percent of supervisors indicated their organizations explicitly evaluate women for their strengths (as opposed to limitations) in being considered for promotions, another technique shown to impact implicit bias in promotion and hiring,\textsuperscript{726} and 15 percent of legal aid managers and 17% percent of executives indicated that their organizations discuss and offer women leadership skill-building and opportunities as they arise.\textsuperscript{727} Furthermore, 12 percent of legal aid managers and 17 percent of executives indicated that their organizations ensured women attorneys were considered to represent the organization in conferences.\textsuperscript{728}

\textit{ii. Legal Aid Providers as Indigenous Change Agents}

A widely-cited challenge in the Afghan rule of law context, and specifically with respect to gender, is the occasional conflict of cultural norms with international standards. The prosecution of morals crimes offers the paradigmatic example of this issue.\textsuperscript{729} Men and

\textsuperscript{719} Ibid., Question x46.
\textsuperscript{720} HREVO ROL Report, at 114.
\textsuperscript{721} LAAR Fieldwork, Questions x8, x118.
\textsuperscript{722} Assessment Team Debrief, December 26-27, 2016.
\textsuperscript{723} LAAR Fieldwork, Question x46.
\textsuperscript{724} Assessment Team Debrief, December 26-27, 2016.
\textsuperscript{725} LAAR Fieldwork, Questions x8, x118.
\textsuperscript{726} Ibid.
\textsuperscript{727} Ibid.
\textsuperscript{728} Ibid.
women are prosecuted for “running away” (a charge not codified in the Afghan penal code) and “attempted adultery” for conduct that would be considered innocent or with universal sexual rights in Western countries. Adultery charges, i.e., non-marital sexual activity, are common in every province and even rape victims have been charged with adultery when reporting the crime.\footnote{Tchernookova, A., \textit{Portraits of Afghan Women Imprisoned for “Moral Crimes”}, VICE, May 18, 2015, available at \url{https://www.vice.com/en-au/article/portraits-of-afghani-women-imprisoned-for-moral-crime}.}

Legal aid providers are well-positioned to be indigenous, progressive change agents inside their own societies and can be supported in these efforts. They have first-hand access to narratives of loss of liberty, honor, or status as a result of unjust accusations of moral crimes or other culture-based proscriptions. Legal aid providers’ role, and zealous representation for their clients, implicitly involves challenging outdated or unjust social norms. In order to strengthen these indigenous, progressive voices inside the legal system, it is fairly clear that supporting legal aid involves not just supporting the education, training, and hiring of lawyers, but also supporting key principles to an effective defense, including defense investigation and expert and forensic support for developing a defense theory of the case.

The case file review conducted in this assessment supports this analysis. In one case, a woman charged with adultery who claimed she was married in another province was nevertheless subjected to a virginity test to confirm the charges (although no investigation was conducted to corroborate her marriage in the remote province).\footnote{JSSP, \textit{CMS Report: Criminal Type by Kabul and Provinces} (October 2016).} In another case, where a man died while he and his fiancée were overnight visitors, the hosts were charged with adultery and supporting debauchery.\footnote{LAAR case file review scoring template.}

\section*{C. Alternatives to Incarceration and Diverse Approaches to Substantive Justice}

Alternatives to incarceration and diversion have become hallmarks on criminal justice systems globally in recent years. Perhaps ironically, these mechanisms are grounded in traditional restorative and rehabilitative justice principles and have grown in use internationally from a sense of fairness and as mitigation to the high costs of incarceration. The merits of these policies has been recognized internationally, including in the United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems, which notes that “[l]egal aid plays an important role in facilitating diversion and the use of community-based sanctions and measures, including non-custodial measures; promoting greater community involvement in the criminal justice system; reducing the unnecessary use of detention and imprisonment…and ensuring efficient use of State resources.”\footnote{United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems, Paragraph 4, available at \url{https://documents-dds-ny.un.org/doc/UNDOC/LTD/V12/528/23/PDF/V1252823.pdf?OpenElement}.}

While there is a growing respect and acceptance of the formal justice system as a legitimate conflict resolution forum,\footnote{See \textit{supra} at 6.1.3} promoting rule of law through the formal justice system need not involve renouncing or rejecting traditional justice principles in all contexts. In letter and in
spirit, Afghan law imports and incorporates certain principles of informal justice systems. Chapter six of the CPC discusses alternatives to incarceration. In cases involving three years or less of prison, a request for a substituted sentence of community service can be sought. The provision is a direct substitution of a punitive prison sentence with a restorative opportunity to serve the community.

Holistic practice and the use of social workers, discussed supra at F, may be instrumental in building an effective and credible cache of incarceration alternatives capable of complying with and reporting to the court or other authorities.

Social workers can very often provide important assistance in advocating for alternatives to incarceration, by identifying substance-abuse problems, informing the court about the client’s relevant history, and locating possible treatment programs that address the client’s needs. By identifying clients for whom placement in a program is appropriate, Legal Aid not only benefits individual clients, but also decreases the heavy costs borne by the state associated with incarceration.

Practically speaking, alternatives to incarceration offer a cost-effective means of making criminal sentencing rehabilitative and narrowly-tailored to a criminal defendant’s needs. Social service professionals, like social workers, provide the link between the legal needs of the court system and the social service needs of the legal aid client.

This analysis also suggests diverse views—including diverse traditional justice voices—can complicate the conversation about what justice-based interventions look like in important ways. “One prerequisite for rule of law to be effective is balancing the methods of criminal justice with local considerations and customs. Paying no attention to diverse cultural values actually creates distrust in the criminal justice system.” Embracing aspects of cultural pluralism may promote effective rule of law, rather than compromising to the formal justice system. Institutional legal aid providers can be important agents for this type of development as they provide a connection between the community and formal system, and can be trained and organized around specific policy objectives.

Increasing Support for Legal Aid in the Government

Afghanistan’s NUG has shown interest in improving legal aid as a component of broad-based reforms “[t]ackling underlying drivers of corruption, including the illicit economy, and improving governance with a focus on the rule of law and ensuring human rights, especially for women and children,” and “[d]evelop and implement the Justice Sector Reform plan to improve access to justice and rule of law all over the country.” This has extended beyond traditional legal aid providers.

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735 CPC, Chapter 6.
736 CPC, Article 325.
737 HREVO ROL Report, at 114.
739 Ibid.
Appointments by the AGO of former legal aid lawyers and human rights activists reflect an intent to balance adversarial system and leverage the strength of the defense bar. Throughout the provinces, several defense lawyers have been appointed as appellate prosecutors, including in Balkh, Ghor, and Kunduz, in addition to the anti-corruption court. These actions, which specifically promote understanding and communication among the organs of the justice system, create efficiencies as well as opportunities to promote the importance of the defense function and legal aid through interlocutors with first-hand experience in legal aid and defense counsel work. Reportedly, in Balkh province, the willingness of the appellate prosecutor to assist in matters of access to counsel, assessment, and facilitating legal aid services already has provided significant and noticeable developments.

The same is true for the Directorate for Prisons and Detention Centers, which as discussed supra at C, has already shown good faith efforts to increase access for defense lawyers. The MoJ has also been successful to increase the LAD’s tashkeel by 30 staff members, and have shown willingness to bring necessary changes to laws and regulations. All of these changes present a number of opportunities for changes that have been stalled in the past.

For example, promoting early access to meaningful legal aid necessarily involves cooperation by the police, detention facilities, social service agencies, and community organizations. Three-quarters of legal aid providers indicated they received clients via referrals from other organizations and agencies such as from shelters, MoWA, AIHRC, or others. Over half of legal aid providers indicated they received regular calls from the local jails or detention centers on behalf of people in need of counsel, referrals from a prosecutor during the investigation or from a judge once the case was in court, or walk-in request by clients or their families. Additionally, A majority of legal aid providers (64 percent) indicated they engage in community outreach to promote public awareness of their organizations, services, and availability. However, the most effective means of providing early access is through duty lawyers who are stationed at police stations and detention facilities. Less than half of legal aid providers indicated they had attorney(s) stationed at or calling into the police station daily to

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741 Ibid.
742 LAAR Fieldwork, Question x70.
743 Ibid.
check for new arrests in need of counsel.\textsuperscript{744} In the past, this was partly due to lack of access and cooperation by police and detention authorities. The current cooperative climate may present an opportunity to increase the use of duty lawyers.

\textit{Improved Data Collection and Analytical Capacity}

One significant challenge in administering and coordinating legal aid on a large scale involves tracking and measuring characteristics of local practices and attendant needs, productivity, trends, etc. Monitoring and evaluation structures such as case management systems are an invaluable means of improving the quality of legal aid services.\textsuperscript{745} Data-informed decision making has become a basic element of developing better legal aid management.\textsuperscript{746}

Article 17 of the Legal Aid Regulation assigns the duty to collect accurate statistics on legal aid provision to the LAD, notionally as part of its secretariat duties for ILAB.\textsuperscript{747} However, as discussed \textit{supra} at 0, the LAD’s information management and database capacity remains quite low.

However, there has been significant international investment in a national Case Management System (CMS) currently managed by JSSP. Currently in use in 25 provinces, this system is expanding to all 34 provinces in the near future and tracks cases beginning at arrest with the MoI through investigation by the AGO and trial and appeals by the judiciary. This system, when used correctly, can provide the kind of information necessary to engage in true coordination of legal aid services.

In addition, IDLO and The Asia Foundation have been assisting ALAAN to create a specific legal aid database that can be cross referenced with CMS, but provides additional information and supervision tools to institutional legal aid providers. The development of this database, as a combined effort of ALAAN that includes the LAD and AIBA, presents an opportunity for a more universal platform that legal aid coordinators can use to develop informed policies and strategies regarding both the quantity and the quality of service delivery.

\textit{Threats}

For the purposes of this SWOT analysis, \textit{threats} are potentially harmful factors. The threats analysis looks at external factors, realities, or trends that could adversely impact the legal aid system or its operation. As with the opportunities analysis, the external threat factors are often flushed out using the PEST acronym, which indicates an examination of the impact of

\begin{itemize}
\item[Ibid.]
\item[745] UN Global Study at 48.
\item[747] Legal Aid Regulation, Articles 17 and 20.
\end{itemize}
political, economic, social, and technological factors. The threats facing the legal aid system in Afghanistan fall within security, funding, and expectations-based categories.

**Ongoing, Pervasive Security Problems**

The increasing deterioration of security in Afghanistan has a real impact on the formal justice system and the rule of law. Nearly two-thirds of Afghans indicate the areas where they live have been affected by the conflict and its conditions, and two-thirds of those affected by the conflict experienced displacement. The United Nations Assistance Mission in Afghanistan’s (UNAMA) 2016 Report on the Protection of Civilians in Armed Conflict in Afghanistan documented record civilian casualties, adding up to over 11,000 civilian casualties. It also documented record-high injuries and deaths to children, with over 3,500 child casualties, a 24 percent jump since 2015 and the highest number of child casualties ever recorded by UNAMA in a single year.

Courts, judges, and lawyers have been targeted in terror attacks in multiple provinces, including Kabul, for years. In February 2017, an explosion outside the Supreme Court in Kabul killed 20 people and injured many more. In 2016, three attacks on the courts and court personnel throughout Afghanistan in as many weeks resulted in the death of a provincial judge, an attorney general (who was less than an hour into his appointment to the position), and dozens of casualties of other court personnel and bystanders. In the first half of 2015, the Taliban stated it was responsible for 11 separate attacks against legal professionals and court houses in which 28 people were killed and another 86 injured. In 2014, two lawyers in Baghlan province were killed when a car bomb exploded in front of the courthouse there. Even this assessment was impacted by the security situation; after traveling to Kunduz, the assessment team was unable to return to Kabul as planned due to security incidents that made travel unsafe while they were conducting the surveys. Perhaps not surprisingly, this year, a record number of Afghans expressed pessimism, indicating the country was moving in the wrong direction; this pessimism was most concentrated among urban women. The most significant reason given for pessimism among Afghans was insecurity, which was mentioned in nearly half of all responses.

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750 Ibid.
757 Ibid., at 18-19.
758 Ibid., at 22-23.
The specter of insecurity and parallel, unacknowledged power structures hangs over the formal justice system and the courts. While 75 percent of justice system respondents in the fieldwork had not been pressured through physical threats against themselves or their families, the formal justice system is greatly impacted by precautions out of concern for personal security. Witnesses do not come to the courts, lawyers may not visit crime scenes, and entire courts have been moved from insecure districts to provincial centers. In 2016, 70 percent of Afghan citizens reported fear for their personal safety, a percentage even more concentrated among urban Afghans and in the southern part of the country. This fear for personal safety reflects security concerns; it is pervasive despite nominal ordinary crime. Only in Herat and Kandahar did a significant percentage of Afghans report being victims of crime. However, attacks targeted to the formal justice system entities, fears for personal safety linked to the security situation, and general pessimism pose ongoing threats to the appreciation and acceptance of legal aid and the formal justice sector as a meaningful forum for conflict resolution.

**Funding and Sustainability Challenges**

Afghanistan’s government, civil society, and nonprofit, and private sectors are all heavily impacted by outside donor funding. The strong international diplomatic and humanitarian presence in Afghanistan has influenced its economy significantly and the gradual disappearance of donor funding from various contexts has served as a test for the sustainability of various initiatives. Considerable funding for legal aid comes from the international community, either foreign governments or private foundations. Legal aid, however, is a legal and constitutional requirement. It is rarely profitable or independently sustainable, even in highly developed countries.

In addition, while the need remains significant, a financially viable sliding scale market for legal aid services, capable of employing lawyers without further impoverishing indigent clients, could only be established after a great deal of piloting and adjustments. As discussed supra at A, with respect to economic security, “[p]erceptions across multiple indicators show a growing sense that things have grown worse in the past year at levels not seen since 2008.” Nevertheless, almost half of all private lawyers believed at least 40 percent of potential clients could afford a lawyer independently. However, 57 percent of clients surveyed indicated they could not afford to pay for a lawyer at prevailing rates and an additional 26 percent were unsure of their ability to pay.

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759 LAAR Fieldwork, Question x10.
762 HREVO ROL Report, at 15-16.
763 LAAR Fieldwork, Question x120.
766 LAAR Fieldwork, Question x136. 49% of private counsel believed up to 30% of clients could afford to hire a lawyer. And additional 22% of private counsel believed 40-60% of clients could afford to hire a lawyer. 22% also believed that 70-100% of clients could afford to hire counsel.
767 Ibid., Question x152
The Institutionalization Problem

One frequent concern with high-volume, court-specific legal aid practice is the potential misaligning of defense counsel incentives. As repeat players in the system, legal aid providers interact with the same judges, prosecutors, and police far more often than any particular client, and these relationships have professional and personal impact. Traditionally, lawyers are paid by clients directly, and are accountable to their expectations. In the context of legal aid, where lawyers get cases, and where clients access counsel, through the court or the prosecutor, this accountability may be obscured; a widespread issue in indigent criminal defense work arises: the institutionalized, repeat player legal aid provider more closely affiliated with court personnel than his client. Although the lawyer’s duty of loyalty to his client is codified in law, irrespective of financial status, repeat players in the justice system can have professional and financial incentives to please the justice system players.

Concerns that legal aid providers may be principally loyal to justice system personnel (or ineffective in making alternative arguments and representatives before the same personnel) are common in legal aid systems. In Afghanistan, a common practice of facilitating illegal payments to the court or prosecution through counsel, kommission kari or “on commission,” discussed supra at A.i, offers another unusual application of this issue. Courts have faced similar issues and have responded by cycling judges between different provinces to disrupt the establishment of networks.

For legal aid providers, attorney independence is a key aspect of protecting the rights of their clients and performing their duties, including the duty of zealous representation. However, minimal efforts exist, particularly at the provincial level, to ensure this understanding among coordinated organs of the justice system. Only two legal aid executives stated they trained all attorneys periodically on issues relating to attorney independence, that they had specific policies and mechanisms for reporting misconduct, or that their organization’s leadership periodically addresses independence with justice sector actors, including the judiciary, finance ministries, interior ministry, etc.

Logistical Barriers to Case Management

The physical evidence recovered in most cases remains with the police; it may never make it to the file of the prosecutor. The process for legal aid providers, who cannot typically access these materials, to view physical evidence is long and prohibitive and involves petitioning police headquarters. In part, this is because most prosecutors’ offices lack secure facilities to maintain chain of custody of physical evidence.

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769 LAAR Fieldwork, Question x89
771 Ibid.
772 Ibid.
Case file reviews confirmed this issue, noting a lack of meaningful use or challenges to physical evidence, as well as a failure to investigate for important physical evidence at times.\textsuperscript{773} Many legal aid providers acknowledged they did not routinely examine or analyze physical evidence in the prosecutors’ cases, including weapons, ballistics, blood, etc.\textsuperscript{774} In most cases, physical evidence never even makes it into the courtroom.\textsuperscript{775} Thus, defense lawyers rarely challenge physical evidence in most trial. Issues with chain of custody, substantive evidence, collection procedures, and integrity and applicability of the physical evidence are not raised in the vast majority of criminal cases in Afghanistan.\textsuperscript{776} The prosecutor typically packages the information about the physical evidence offered by the police and presents it to the court.\textsuperscript{777} However, this raises substantive justice issues for indigent defendants, who cannot raise challenges to this evidence, and for the system, which may issue convictions despite physical evidence that may not corroborate the claims in the case.

**Conclusions**

In the last fifteen years, Afghanistan has benefitted from a diverse commitment to indigent criminal defense that has allowed many different types of legal aid providers and service delivery mechanisms to flourish. At this point, many of these can be examined within the actual context of Afghan life and the Afghan justice system for viability, and potential for duplication or scaling. The key strengths, weaknesses, opportunities, and threats identified in this analysis show that the Afghan justice system and its criteria for legitimacy are unique; for example, the routine corruption within the justice system does not drive a lack of systemic legitimacy.

At the same time, Afghanistan has shown itself remarkably impervious to copy/paste solutions and the legal aid scheme is no exception. The most effective legal aid systems develop organically, based on a commitment to justice or rule of law but also in a manner that recognizes and implements local priorities with strong advocacy from indigenous civil society leading the process of change. Afghanistan has made great strides, considering that decades (or centuries) of development elsewhere have been accomplished in just fifteen years. However, the most intractable issues (e.g., gender, corruption) may require indigenous voices and change agents to see significant impact and there are voices within the legal aid community who can contribute to this systemic process, both inside the justice system and beyond.

Overall, the fieldwork demonstrated real impact from over ten years of training, mentoring, and promotion of rule of law and access to justice in the formal justice sector. Representatives from each organ of the justice system were, overwhelmingly and accurately, able to articulate the role of defense counsel and the right to counsel and to legal aid.

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\textsuperscript{773} LAAR case file review scoring template.
\textsuperscript{774} LAAR Fieldwork, Question x1_19.
\textsuperscript{775} Assessment Team Debrief, Dec. 26-27, 2016.
\textsuperscript{776} Ibid.
\textsuperscript{777} Ibid.
including early access to counsel. For example, 80 percent of police officers stated there was a positive impact and were able to accurately state a credible basis for the importance of legal aid providers in the early stages of a case, citing benefits to rule of law, systemic legitimacy, rights of the accused, integrity of the process and its players, leveling the playing field, etc.

Within the system itself, there is strong knowledge of institutional roles, the law, and its basis, indicating a major challenge and focus lies not with training, but with effective implementation. Overall, even where effective frameworks for transparency and accountability exist, ineffective implementation frustrated the core intent of the quality assurance structures in place. With respect to supervision, designating supervisors without defense expertise resulted in a pro forma and cursory review of the documents that are submitted to court without the expertise to actually review, edit, or meaningfully supervise or grow lawyers’ skills. Similarly, with financial accountability frameworks, the feedback and acknowledgment of human error required to fix mistakes was consistently lacking.

In addition, there remains unmet need for legal aid in every province as well as important areas for improvement the legal aid system. Justice system players understand their roles, and the requirement under law, but have not committed to legal aid in their everyday practice. Legal aid providers do not maintain a standard of zealous representation or conduct the investigation and the work required for their clients to understand that fairness is possible within the justice system. Even given the ever-present concern for security, structures are in place to offer a meaningful access to counsel and a meaningful defense. As the recommendations below suggest, many strategies grow from these factors and several incremental changes could enhance fundamental fairness for individuals in the justice system, achieve important policy commitments, or add credibility and legitimacy to the justice system.
7. **ROADMAP**

The current legal aid landscape is very different from what it was in 2008 when the Advocate’s Law and the Legal Aid Regulation were authored. Since then, there has been a great deal of development, changes, and lessons learned. All providers have improved in some way and increased their capacity. While a great deal remains to be done, it is important to build on these experiences and preserve the gains that have been made.

The recommendations below intend to 1) assist the system to preserve the gains it has made, 2) adjust the core of the system to be more flexible and responsive to long-term challenges, 3) identify specific immediate challenges and present options for dealing with them.

<table>
<thead>
<tr>
<th>STRENGTHS (S)</th>
<th>STRATEGIES</th>
<th>OPPORTUNITIES (O)</th>
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<tbody>
<tr>
<td>Law &amp; Policy Safeguards Legal Aid (S1)</td>
<td>Amend CPC, Legal Aid Regulation (O2+W1)</td>
<td>Cross-Cutting Policy Objectives (Gender, anti-corruption) Demand Robust Legal Aid (O1)</td>
</tr>
<tr>
<td>Afghans Understand Right to Legal Aid (S2)</td>
<td>ILAB Reform (O2+W3)</td>
<td>Current Support for Legal Aid (O2)</td>
</tr>
<tr>
<td>Afghanistan’s Justice System Profits from Robust Legal Aid (S3)</td>
<td>Coordination (O1, O3 + W3)</td>
<td>Improved Data Capacity (O3)</td>
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<th>STRENGTH/OPPORTUNITY STRATEGIES</th>
<th>STRATEGIES</th>
<th>OPPORTUNITY/WEAKNESS STRATEGIES</th>
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<tbody>
<tr>
<td>Strategic Advocacy (S3+ O1)</td>
<td>Keep Mixed Model (T3+ S1)</td>
<td>Holistic Approach (O1+W2)</td>
</tr>
<tr>
<td>Culture of Zealous Defense (O2 + S1)</td>
<td>Contract legal aid (S1+T1)</td>
<td>Attorney Access (O2+W1)</td>
</tr>
<tr>
<td>Support Institutional Providers + Service Delivery (S3+O1)</td>
<td>Culture of Indigent Defense (T2 + S3)</td>
<td>Amend CPC, Legal Aid Regulation (O2+W1)</td>
</tr>
<tr>
<td>Support LAD (S3+O2)</td>
<td>Develop Indigency Standards (S1+T3)</td>
<td>ILAB Reform (O2+W3)</td>
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<tr>
<td>Adopt ALAAN + CMS databases (S3+O3)</td>
<td>Fix Pro Bono (S3+T2)</td>
<td>Coordination (O1, O3 + W3)</td>
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<td>Best Practices (W2+T3)</td>
<td>Holistic Approach (O1+W2)</td>
</tr>
<tr>
<td>Zealous Representation Not Standard (W2)</td>
<td>District Practice (T1 + W4)</td>
<td>Attorney Access (O2+W1)</td>
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<td>Certificate System (T2+W2)</td>
<td>Amend CPC, Legal Aid Regulation (O2+W1)</td>
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<td>Coordination (W3)</td>
<td>Standardize Forms (W2+T4)</td>
<td>ILAB Reform (O2+W3)</td>
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<td></td>
<td>Clear Impact Indicators (W2+T3)</td>
<td>Coordination (O1, O3 + W3)</td>
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<td></td>
<td>Legal Education + Training (T3+W2)</td>
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Recommendations to GIRoA

As discussed in Section 4, GIRoA’s responsibility to ensure the provision of legal aid is based on its constitutional duty and policy objectives, and it extends to the provision of meaningful, not nominal, legal aid. While GIRoA struggles to ensure quality throughout the justice system, there are several discrete interventions that would promote quality, efficiency, and independence for the legal aid community, while also enhancing the legitimacy and the performance of the justice system overall.

Retain Mixed Model for Legal Aid Service Delivery

The mixed model is the most common state-sponsored legal aid model today in countries where there are large legal aid caseloads. It is a flexible model that can be adapted to suit the specific needs of each country context. When administered effectively, the model can promote high-quality legal representation and enhanced access to justice for indigent members of society.778

Afghanistan should retain its mixed model legal aid delivery system as it offers flexibility and promotes innovation. The MoJ retains responsibility to provide legal aid nationwide and maintains legal aid offices in every province, which donor-driven NGO projects have not been able to sustain. The NGOs play an important role elevating the level of practice, driving efforts for early access to counsel, and promoting visibility of specific groups hit hardest within the justice system, like women and children. In addition, severe and ongoing shortages of legal aid throughout the country suggest that private counsel and members of the defense bar who are willing and able to access remote and insecure districts and provinces remain important to widespread availability of legal aid.

To improve ongoing deficiencies in the legal aid system, retaining the mixed model must be accompanied by various associated efforts:

Good practices show that effective administration requires: an independent body to oversee the work of all lawyers involved in the scheme, transparent and fair hiring procedures for lawyers; flexibility to respond to the needs of the target population; comprehensive monitoring and quality control mechanisms; and systems of accountability for the provision of high-quality legal aid services.779

There are numerous ways that the mixed model system can be enhanced. As described below, there is a need to identify a more precise vertical structure that can serve as the core of the mixed model regulatory framework. Reforms in laws and regulations are suggested throughout this analysis, as well as modifications to the coordination function and the everyday practice of legal aid; retaining the mixed model requires attention to these actions to enhance effectiveness and availability of legal aid.

7.1.1 Retain ILAB


779 Ibid.
As described below, there are a number of amendments that must be made to the legal and regulatory framework to enhance coordination and efficiency. One question that was raised often in consultation conferences was whether the ILAB is a necessary element of the legal aid system. Comparative analysis has shown that it is not. As discussed supra at 0, while a mixed model requires heavy coordination, such coordination could be done by the MoJ itself without the need for an independent body. In fact, considering that roughly two-thirds of the population trust government lawyers to represent them in criminal trials, there might not be as urgent a need for independence.

However, for Afghanistan, an independent body may well serve an important function to create some distance between the executive’s arresting and prosecution duties and its duty to provide defense services. The public’s perception may change quickly depending on circumstances, and in some provinces like Zabul, independence was valued quite highly.

Practically, ILAB’s independence includes a separate bank account and the ability to seek and manage resources from international donor organizations. This and other factors allow it theoretically to be more flexible than the MoJ or LAD to engage in private-public partnerships, set policies, and engage in advocacy campaigns.

However, this recommendation is caveated by a serious need to amend the Legal Aid Regulation and reformulate ILAB. The membership of the board needs to be reexamined and it must have a functioning secretariat. Detailed policies need to be developed to ensure conflict of interest issues are taken into consideration for both the board membership and the secretariat. Without such changes, ILAB is simply a bureaucratic hurdle with the potential to spoil further development.

### 7.1.2 Amend the Legal Aid Regulation to Enhance Coordination

Several aspects of legal aid coordination should be modified, as suggested supra at 0. In its 2013 Five Year Strategy, the MoJ cited its most significant challenges in ensuring access to justice; these included “ambiguity of managerial and legal framework of [the] Legal Aid System” and “non-existence of an effective coordinating system for legal aid to use the available resources and address the minimum requirements.” To bring about the necessary changes to the coordination mechanism, the Legal Aid Regulation will need to be amended.

First, the regulation needs to be much clearer as to the structure of responsibilities, duties, structures and authority of the different entities involved in coordination. Either the ILAB needs to be reformed, or the MoJ should simply take over all coordination tasks without the added complication of the ILAB. As noted above, in consideration of the long term needs of Afghanistan, this assessment recommends reforming ILAB rather than abolishing it.

However, ILAB’s coordinating authority should not simply be assumed or willed through legislative or regulatory fiat. Similar to other claims to legitimate authority, ILAB’s

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781 Ibid.
coordination role must be earned by adding value to the system and having that value recognized. It should develop its authority by first serving as a resource for financial assistance, information, and advocacy, and subsequently, it should use this authority to coordinate resource distribution, set policy and guidelines, and monitor quality.

A. Revise Structure of ILAB

While ILAB has not been able to achieve its core objectives, this is not a reflection on the membership of the board itself, who have all been accomplished and well-respected professionals and academics. Rather the source of the problem lies in the regulation itself and the fact that the LAD could never serve as a true secretariat.

However as discussed, for ILAB to become a true coordinating body, it must be able to fairly and transparently distribute resources and impartially monitor and evaluate the quality and capacity of legal aid providers. This requires that membership of the board change to eliminate any appearance of conflict of interest. Individuals or organizations that expect to request resources from ILAB or be monitored and evaluated by it, should not be members of the board. This would mean that the current structure would need to change to eliminate representatives from the LAD, NGOs, and Kabul’s law and sharia faculties. A decision should be made by AIBA, as to whether it wishes to maintain its coordination role on the board or join the ranks of organizations that will can request resources from the board.

For the board to function as a powerful advocacy body and to be able to coordinate with other stakeholders in the justice and law enforcement sector, it should include membership the Office of the Minister of Justice, a member of the High Counsel of the Supreme Court, the leadership counsel of the AGO, and maybe a representative of the MoI. To maintain its independence, the board should also add unaffiliated experts to its membership. The expertise of these individuals would not necessarily have to be on legal aid, but could touch on broader legal issues, financial oversight, logistics and coordination, or religious and social studies.

There is a worry that these individuals would fail to attend board meetings or be engaged in the decision making of ILAB. While one solution would be to provide sitting fees or other types of monetary incentives, this is strongly discouraged by experts who have studied other legal aid boards. Instead other strategies should be used to avoid this type of disinterest. First, the number of meetings should be reduced from monthly to quarterly and kept short. Second, the regulation should create mechanisms for the selection of specific membership such as the Supreme Court and the AGO. Third, independent experts should be asked to volunteer themselves rather than be appointed, and fourth, tasks should be specifically assigned to elected board members in the ILAB’s procedure.

Another option would be to create a pure stakeholder board made up of all legal aid providers. Such a stakeholder board would serve as a strong source of expertise and automatic coordination capacity. However, with the existence of ALAAN, legal aid providers already have a forum that can coordinate the community on issues that can be resolved.

783 Interview with Prof. David McQuoid Mason, Buenos Aires, November 17, 2016. See also, Kierra Zoellick, Legal Aid Boards, American University Justice Programs Office (February 2017). Available as Annex 3.
through consensus and cooperation. Experience has shown that such a structure is less viable for a body that distributes resources and holds providers accountable.

B. Create and Maintain a Strong ILAB Secretariat

Regardless of the makeup of the membership of the ILAB, the establishment of a strong secretariat is necessary for it to function. All boards are by their nature supervising bodies rather than executive bodies. It is neither prudent nor practical to expect a board made up high ranking officials, academics, or experts to engage in the day-to-day work required to maintain an active institution.

As discussed above, the LAD has failed to dedicate any resources to the secretariat of the board. The MoJ should dedicate a tashkeel that can perform the tasks required of the board. The secretariat will need to have the capacity to create proposals and reports for donor organizations including the government itself. It will also need to have the capacity to be a contracting or grantmaking organization. It should also be able to monitor and evaluate the performance and quality of legal aid providers, develop policies and engage in the minutia of advocacy and liaison work (drafting letters, MOUs, visiting with other ministerial bureaucrats, etc.). Once the MoJ has committed to staffing such a secretariat, it could then become the target of real capacity building efforts.

The secretariat can take many forms, but it is expected that this type of work would require a database officer, a financial officer, two or three quality monitoring officers, and a head administrator or team lead. The database officer would need to be trained on CMS and could serve as the universal administrator for the legal aid case management database. This person would be charged with creating regular and ad hoc quantitative reports and coordinate with the central managers of CMS and other data aggregating offices in the government. A financial or grant management officer is needed to review budgets, contracts, and grants, track and record expenditures, maintain compliance, be responsible for the ILAB bank account, guide audits, and track ILAB expenditures and more generally the expenditures of legal aid providers. The monitoring officers would need to be experience legal professionals who can review and rate case files, motions, objections, and defense statements. They must be able to travel and be given access to detention facilities and prisons to interview clients. Finally, an experienced team lead would be needed to formulate policy documents and maintain active contact with the board members, donor organizations, and other ministries and stakeholders.

C. Decrease Complexity and Create Precise Roles and Duties

The Legal Aid Regulation needs to be revised to establish clear duties, reporting, and authority structures. As part of the process of reconfiguring and rehabilitating ILAB, the MoJ should abandon the dual responsibility paradigm of the Legal Aid Regulation784 and embrace

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784 Legal Aid Regulation, Article 3.
the role of the board as the independent implementing agent on legal aid that the MoJ describes in its Legal Aid Policy.\textsuperscript{785}

The Regulation sets forth an unrealistic relationship between LAD and other individual and institutional providers. For example, LAD is given the duty to monitor all legal aid providers, without explanation of how to use this authority.\textsuperscript{786} Article 18(19) of the Regulation gives LAD sweeping authority to assign any duty it seems fit to any legal aid providers.\textsuperscript{787} Practically speaking, none of this takes place. The LAD has no staff that is dedicated to monitoring the service delivery of other legal aid providers. Nor is it practically capable of directly assigning any task to non-LAD advocates, as the management of other organizations would instantly protest such a request.

Overall, the Regulation is unclear as to whom LAD should be answering, beyond the Minister of Justice, what LAD’s relationship is with ILAB, and how it should be interacting with other providers. These issues can be easily remedied by making discrete amendments to the regulation such as the deletion of Article 18(19), and clarifying the role and relationship of ILAB with LAD and MoJ.

Regulatory and practically, the budget, structure, and all other important decisions regarding LAD are determined solely by the MoJ, with no regulatory prescribed or practical role for ILAB. The regulation should be modified to provide for clear lines of authority and supervision for LAD by either reflecting current practice, or clear vertical structure that explains the relationship between LAD, ILAB, and the MoJ.

It is recommended that over time, the LAD should be clearly placed under the monitoring and supervision responsibility of ILAB and be the ILAB’s primary target for quality evaluation. The MoJ would continue to maintain its legal and constitutional role through the membership of the Office of the Minister of Justice on ILAB and the fact that the secretariat of the board, which will be its executive organ, will be under the MoJ tashkeel.

The regulation further identifies “authorities” that are allowed to deliver legal aid\textsuperscript{788} and gives the police, detention facilities, prosecution and courts the option of contacting any of these authorities to assist in the provision of legal aid.\textsuperscript{789} This is confusing and leads to bureaucratic hurdles and lack of accountability. The regulation should be amended to state that the police, detention centers, prosecutors, and courts must contact the LAD. Obviously, they should not be precluded from contacting other legal aid providers, but contacting the LAD should be a minimum standard practice in line with the CPC.\textsuperscript{790}

\textbf{D. Remove NGO Licensing and Provider Accreditation Requirements}

As noted supra at 0, the Legal Aid Regulation sets out a licensing and accreditation mechanism that is confusing and badly implemented. NGO’s are licensed as per the

\textsuperscript{785} Legal Aid Policy, Introduction.
\textsuperscript{786} Legal Aid Regulation, Article 17(4).
\textsuperscript{787} Ibid., Article 18(19).
\textsuperscript{788} Ibid., Article 15.
\textsuperscript{789} Ibid., Article 5.
\textsuperscript{790} CPC, Article 152.
regulation, clinics are licensed without any authority, and individual legal aid providers are supposed to be accredited, though this does not occur.

Any qualified and licensed lawyer should be able to provide legal aid whether through an institutional (LAD, NGO, clinics) or individual (pro bono, judicare) model, or simply because they decide to do so for personal reasons. The delivery of free legal services should not be tied to a regulatory authorization beyond the professional standards set out by the bar.

Instead of another bureaucratic hurdle via ILAB licensing scheme, the MoJ or ILAB should strengthen their monitoring and quality assurance mechanisms. So far, NGOs’ improvements in transparency, accountability, and professionalism have resulted from higher donor standards for monitoring and evaluation, auditing, and reporting.791 Certainly an effective baseline has been set through donor intervention over the past ten years. If ILAB were to focus more heavily on actual quality assurance, and if an NGO were found to be fraudulent or providing sub-standard services, it could be reported to the MoE, the MoF, or its donors for appropriate action, or the individual advocates can be reported to AIBA for professional misconduct.

If ILAB or another coordination entity sought to manage the legal aid delivered by clinics, it can enter cooperative agreements with law clinics and provide services to the clinics—such as monitoring systems—and, in return, receive reports or data that will assist it in carrying out its duty to coordinate legal aid across Afghanistan. Any complaints about clinics should be communicated to the university or the MoHE, and any misconduct by clinic supervisors should be reported to AIBA for appropriate sanctions.

E. Develop Processes for Contracting, Grant Making, and Other Flexible Financing

One reason to maintain ILAB is its regulatory authority to maintain a bank account and independently finance legal aid programs. As discussed supra at C, contracting legal aid service delivery to NGO and private counsel is contemplated in the law and policy and has been attempted in various pilot projects. Given the scope of the need, both quality and quantity, increasing the amount of legal aid services contracted out seems important and necessary. While ILAB has not engaged in contracting of this sort (it has been largely the MoJ that has experimented with contracting out for legal services), it is empowered to do so under the regulation, as discussed supra at A.ii. The Legal Aid Regulation should be amended to clearly explain how the board can receive funds and spend them. This should include permission and prohibitions on whether ILAB funds can be spent on LAD expenses (such as the cost of AIBA licenses), the work of the secretariat, or trainings by AIBA.

In addition to changes in the Legal Aid Regulation, if an institutional or individual contract for services scheme is implemented as part of Afghanistan’s mixed model it will require fair and transparent selection, contracting, delivery, reporting, and payment procedures (including a dispute resolution mechanism). Such procedures are necessary to avoid major delays in service delivery or injury to service delivery organizations. It should include eligibility guidelines that set out which NGOs can apply and could involve an accreditation system. Just

as with other donors, ILAB should insist that NGOs must be audited, monitored, evaluated, and adhere to a regular reporting schedule. These systems, mechanisms, and guidelines should be clear and precise and be published.

The ILAB must also set out payment schemes and structures with specific deliverables, including supervision guidelines, monitoring and evaluation standards and reporting requirements. This is possible with minimal effort by copying and adjusting standard best practices from analogous government or donor documents.

This also has application with respect to legal clinics. From a coordination standpoint, ILAB should be interested in law clinics only in so far as they can be used as a tool to better deliver legal services to indigent populations. If ILAB were to become an organization that manages substantial funds, it could support legal clinics financially by creating an accreditation and application procedure that is transparent and published as part of its procedures.

The ILAB should order a first draft of these procedures to be created by its secretariat. This draft should be reviewed and approved for public comment. After public comments are incorporated, it should be reviewed and finalized by the MoF, the Minister of Justice, and ILAB membership and published online.

Work with AIBA on Pro Bono Procedure

The pro bono requirement is in serious need of reform and reconsideration. As discussed supra B.ii, while it represents a potentially large pool of legal aid capacity, there are important considerations that must be taken into account. The MoJ should work with AIBA to create a more flexible and realistic system that requires modest administrative resources to manage and can serve multiple purposes. For example, such a system could be used to enhance *staj* or continuing legal education systems or serve to increase access in districts through a weighting policy.

Support LAD Providers

Unlike in many other cultures, many Afghans trust government legal aid providers to defend when they are accused of crimes. This could be because Afghans, even when dissatisfied with government services and pessimistic about the future, may generally trust the authority of the government. It might also reflect the reality that government legal aid providers are more accepted by other actors in the justice system. In addition, the LAD’s funding is more secure than that of independent providers including AIBA and its reach is unmatched. For these
reasons, it is important for the GIRoA and the legal aid community to support the LAD and leverage its strengths.

There are several recommendation and issues discussed supra at 5, that should be considered regardless of other recommendations made in this roadmap. This includes the need for the MoJ to strengthen the administrative and management capacity of the LAD by creating more detailed systems and procedures. The MoJ should also develop a strategy to increase the salaries of legal aid providers by forming a working group with representatives of the MoF with the sole mission to find ways within the law to create greater advancement opportunities for them.

The reformed ILAB should also use its coordination and funding mechanisms to support the LAD providers and take advantage of its strengths. This could include advocating for a system that allows LAD lawyers to travel with judges and prosecutors to districts, creating incentive structures that recognize quality service delivery by LAD providers, and specific training and advocacy efforts based on the expressed needs of LAD providers. It could also include using LAD providers (who have relatively greater access) as duty lawyers in detention centers who can increase early access to counsel.

**Adopt the ALAAN Legal Aid Database and use CMS**

The LAD is already an important member of ALAAN and has participated in the creation of the ALAAN legal aid database. It should continue to participate in its development, seek resources to equip its offices with computers with access to the internet, and train its lawyers and administrators in the use of the database.

The database has been designed to both document the development of cases and to help guide lawyers through minimum practice standards. Unlike other case management databases, it is designed to be used directly by lawyers to assist with accountability, but until the necessary capacity is developed, database administrators may be required to assist in the use of the database.
database. Regardless, the adoption of the database by LAD will be an important step in creating more accountability, better quality, and better resource management.

In addition, as discussed supra at 0, the CMS board should work towards setting up policies that would collect more defense data and provide defense lawyers with necessary data. For example, court administrators should insist that defense lawyers register with CMS, before validating client contracts.

**Amend and Clarify the CPC**

As described supra at 0, the CPC fails to clearly identify the NDS as an organ that is required to provide notice of the right of the accused including the right to a defense counsel, and fails to require that NDS officials take affirmative steps to provide suspects or accused with legal aid or defense services. This should be clarified either through amendment of the code or through a commentary.

Article 290 of the CPC offers another example;792 there, the defendant or defense attorney is mandated to make an objection to misconduct at the detection and investigation stages or else, failing to do so, waive the right to object permanently. However, at this stage of the case, the case is not filed in the court, has not been calendared with a judge, and it is not clear where these objections could be properly raised contemporaneously. This should be clarified in the commentary.

Also, as discussed supra at 0, Article 209 of the CPC continues to result in unacceptably high numbers of in absentia cases in the Afghan criminal justice system and is a major drain on legal aid capacity. The CPC should be amended to allow the courts to toll the statute of limitations, issue a warrant for arrest, and return the case to the prosecution until the defendant can be brought before trial. Yet another avenue would be to seek an advisory opinion from the AGO and the Supreme Court defining and strictly limiting the circumstances in which in absentia cases should proceed.

**Facilitate Attorney Access to Clients and Evidence**

**A. Standardize Calendaring and Notice of Upcoming Court Dates.**

Afghanistan lacks a comprehensive calendaring and notification system that includes attorneys and clients in the scheduling their cases and gives significant notice of imminent court dates. Currently, attorneys are not involved in scheduling cases routinely at all. Attorneys learn that their cases are calendared from a posting in the courthouse, a phone notification by the court, or not at all. This system is not effective for the highest standards of representation, nor does it facilitate increasing attorney caseloads or standards. Ideally, a calendaring system should exist whereby attorneys are included in the scheduling process and

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792 Article 290 provides in pertinent part:

For reasons other than the conditions set forth in paragraph (2) of article 289 of this law, if proceedings related to evidence collection or investigation of misdemeanor and felony crimes are performed in the presence of the accused person or their defense attorneys and they did not object to it, the accused person’s right to defend the nullification of the proceedings shall be dismissed.
either have the ability to influence the court dates selected or else have the maximum amount of notice possible for upcoming court dates.

Attorneys and legal aid providers have complained about the inefficiencies of this system for years. Recently, Judge Hamidi, Head of the Kabul Appellate Court, noted that these complaints lack detailed information and were rarely raised in the proper forum. The suggestion was made that if defense lawyers would name the judges and courts that failed to provide proper notice, appellate court could take corrective action. While it is unclear that this is merely an issue of notice to the appellate court, it does suggest that focused and coordinated advocacy could have been an effective intervention tool here; it may be that many of these types of problems can be resolved through focused and advocacy-linked training.

**B. Universalize Early Access to Counsel**

As discussed supra in Section B, Afghanistan’s legal and policy priorities of early access to counsel are frequently unmet in practice where legal aid providers are unavailable at the arrest and detection stages of a case or police fail to inform suspects of their rights or to provide access to counsel. This also impacts serious issues of abuse, ill-treatment, and torture. “UNAMA observed that detainees were most vulnerable to torture and ill-treatment during the first few days in custody and that the risk of being subjected to such treatment was made greater because they were generally detained incommunicado and denied access to defense lawyers.” Early access to counsel offers important guarantees relating to substantive justice, including non-coercion, defense of due process rights, and important pretrial advocacy and understanding, but also demonstrable protections against physical torture.

Importantly, the torture of suspects and detainees and the resulting forced confessions are unreliable, illegal under Afghan law, and conducted during a period when detainees and suspects are entitled to counsel and to legal aid. Facilitating greater access to legal aid at the detection and arrest stage of a case is also a mechanism to address ongoing, intractable misconduct – including mistreatment of detainees and the creation of unreliable evidence.

**C. Streamline and Increase Access to Detained Clients**

Throughout Afghanistan, attorneys spend significant time coordinating visits to their detained clients. Especially in NDS cases, most defense counsel must devote considerable resources and time to getting into detention facilities and headquarters meet with their clients. Until recently, there have been no standardized or streamlined procedures for attorney access to clients; in some cases, it may take two to three days to get into see the client. These delays have been especially concentrated in Kabul.

This has long been a source of concern for defense counsel and a subject of defense counsel advocacy to the relevant authorities. Recently, in Kabul, attorney access to detained clients

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793 ALAAN Conference, Kabul, Afghanistan, March 27, 2017.
was changed from one day per week to four days per week, a sign that coordinated advocacy by the legal aid community on behalf of their clients can be effective. Maintaining this schedule, as well as ensuring streamlined and expedited access to detention facilities by attorneys (many jurisdictions give licensed attorneys “Attorney Access Cards” to signal per-authorization to enter detention facilities) is equally important.

D. **Standardize Phone Access to Detained Clients**

Even under the best of circumstances, attorneys should not be expected to have all communication with their clients in-person. Facilitating attorney-client trusting relationships entails giving lawyers access to their clients and vice versa. Nationwide, there should be mandated and standardized access to clients via phone in all detention facilities at any time during regular business hours and in emergencies.

E. **Standardize Procedures and Streamline Access to Physical Evidence**

As discussed supra at 0, attorneys routinely lack access to physical evidence in their cases as, typically, the physical evidence is not retained in the file of the *saranwal*. There is generally a long process involved to gain access, which involves negotiating with the police headquarters. This long, prohibitive process is rarely done. However, without access to physical evidence, important potential defense and exculpatory evidence is never investigated.

F. **Subpoena Power for Defense Counsel and Legal Aid Providers**

A major challenge for legal aid providers in Afghanistan is the structural barrier to efficient and effective defense representation which take many forms and diverts attorney resources away from representation of clients. In many jurisdictions, defense counsel has subpoena power, allowing them to request many documents and to compel the presence of witnesses without judicial assistance. Attorney subpoenas have the force of law and may be enforced by the police if not complied with pursuant to the instructions contained therein. In Afghanistan, typically the court or the *saranwal* must compel experts and witnesses to testify and to cooperate. This impedes the development of the defense case and structures defense counsel’s role in a manner that relies on interim permissions from the court to prepare a defense case. Subpoena power enables defense counsel to organize a defense case efficiently and effectively, and it offers an important means of putting key information before the court without the prosecutor acting as gatekeeper.

**Adopt Client/Consumer-Oriented Certificate System**

Currently, Afghanistan does not use a “certificate system,” where the client receives a voucher to “shop” for counsel of his choosing among lawyers accepting legal aid certificates. However, Afghans express significant trust for government legal aid

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796 LAAR Fieldwork, Question x21.
providers, and 81 percent of respondents indicated clients should have choice in their legal aid provider, indicating widespread support for clients’ rights to choose their counsel. Nevertheless, most “choice of counsel” for legal aid clients involves being reassigned away from an attorney with whom a relationship has deteriorated, not affirmative choice of counsel.

Developing a certificate system could align counsel and their clients, in the regular operation of the legal aid system, and offer a systemic intervention that contributes to systemic legitimacy, anticorruption, and a self-regulating process. By aligning counsel with their clients, a certificate system places legal aid vouchers in the hands of clients, rather than the court. In addition, a certificate system is consistent with the Advocates’ Law, which sets forth the defense bar’s position in favor of client choice of counsel. A certificate system might also create a private, competitive market – an effective mechanism in Afghanistan – where clients can steer their own destinies. Developing a certificate system is also an affirmation that the legal aid system will be client-oriented, i.e., focused on promoting the autonomy and agency of its beneficiaries.

**Coordination Among Justice System in Remote and Insecure Districts**

In a legal aid context struggling with unmet need for free counsel in nearly every jurisdiction, many institutional and individual providers question how to deliver the greatest impact, given scarce resources. In the fieldwork, legal aid managers and executives were asked how their organizations balanced competing mandates of providing widespread access to counsel (reach) and maximizing the time their attorneys had for representing clients (efficiency). Nearly half of legal aid providers indicated their organizational balance favored greater reach, seeking to ensure legal aid assistance in as many provinces and districts as possible, security permitting. About 30 percent of providers indicated their organizational balance favored efficiency, encouraging attorneys to spend time in court and with clients, rather than working in provinces with lesser need, or traveling to remote or insecure districts on behalf of a few clients. However, many organizations favoring greater efficiency indicated that, security permitting, they would travel to remote districts.

This is an area that is ripe for a coordination intervention; court takes place in many insecure or remote districts and often prosecutors and judges travel into the districts on a regular basis. In other cases, the courts are moved wholesale to the provincial center. Coordinating the legal aid providers with the judicial and prosecution resources and information (and creating an expectation on all parts that these organs would work together to ensure access to counsel at all court dates) could allow for greater reach and greater efficiency. Moreover, this coordination would be consistent with activities legal aid providers state they want or are

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797 See supra at 7.1.4.
798 Article 2 of the Advocates’ Law provides: “Every person has the right from the time of arrest to appoint an advocate of his/her choice to defend and represent his/her rights.”
799 LAAR Fieldwork, Question x91.
800 Ibid.
801 Ibid.
802 Ibid.
already doing in some respect. Almost half of legal aid managers and supervisors claim they coordinate with other legal aid providers to cover more area and represent more people.\textsuperscript{803} About 12 percent of legal aid managers indicated they coordinate with other providers as a required component of their strategic plan, but no legal aid executives confirmed this claim\textsuperscript{804} and the anonymous comments submitted directly to the assessment team also belied the claim of widespread coordination.\textsuperscript{805}

\textit{Improve Legal Education}

Legal education in Afghanistan remains a bifurcated system that creates inefficiencies and a divided legal landscape. Afghan legal professionals should all be well-versed with the laws, sharia, and practical skills necessary to navigate the complex, rich and still developing legal landscape of Afghanistan. This requires a complete and well-structured university level legal education system, which cannot be replaced by trainings or even the \textit{staj} system.

Without basic skills (basic research writing and analysis), an understanding of doctrine (law and sharia) and practical skills (legal writing, trial advocacy, etc.), students will continue to fail to serve the needs of the justice system. This is particularly the case for defense lawyers, who as discussed \textit{supra} at 0, are not paid to attend a \textit{staj} program, unlike prosecutors and judges. However, even prosecutors and judges would be better served with \textit{staj} programs that can go into greater practical detail and specialization instead of a review of doctrinal law and sharia and basic skills that students have failed to master at the undergraduate level.

While resources are scarce—especially for skills classes (legal writing, trial advocacy, etc.) that require smaller class sizes—greater unity in the curriculum could yield efficiencies that could be redistributed to begin to meet some of these needs. In addition, educational institutions should take advantage of partnerships with legal organizations to provide more clinics, internships, and fellowships.

\textit{Recommendations to Legal Aid Leadership}

While legal aid remains in need of additional resources and outside assistance, there are also significant improvements that legal aid leadership can conduct even without legal reforms, lawmaking, or significant additional resources. Particularly as the donor community shrinks and outside funding becomes more scarce, the need to maximize resources and develop synergies grows. Recognizing this, the recommendations below offer concrete means of promoting quality, independence, efficiency, and justice using interventions that may be implemented through effective leadership, management, coordination, and strategic planning.

\textsuperscript{803} Ibid., Questions x71, x97.  
\textsuperscript{804} Ibid.  
\textsuperscript{805} Assessment Team Debrief, Dec. 26, 2016.
**Adopt Strategic Advocacy Principles**

One significant act legal aid leadership could take, given the resource constraints that will increasingly be placed upon legal aid, is to consider ways to maximize resources, including advocacy resources. Internationally, given an ongoing “imbalance between the number of cases and available resources,” legal aid leaders and policymakers have collaborated to enhance the impact of individual advocacy and direct services.⁸⁰⁶ “Feeling the pressure to get more for less, defenders … deliberated collectively about budget priorities, streamlined their operations, and made internal adjustments to compensate for changes in the policy environment. Far more frequently, defenders began collaborating on issues common to the clients they represented.”⁸⁰⁷ This has been a transformative change among institutional providers internationally in the last twenty years. Recognizing the recurrence of common issues impacting indigent persons facing criminal charges allowed institutional providers to become leaders and policymakers for legal aid needs and to develop means of enhancing the impact and the quality of legal aid.

In addition, as expectations grew that the right to legal aid would be adhered to, and that the right to counsel should be meaningful, providing effective legal aid in large jurisdictions requires coordinated and strategic action, including rendering individual representation into opportunities for broad-based advocacy:

> To advance and safeguard the interests of their clients most effectively, public defender offices will need to seize the opportunity to articulate an institutional vision that extends beyond the crisis at hand. It is of pressing significance that the office determine how it views itself, how it projects itself, and develop strategies in line with that perspective. Even in the midst of battle, if a public defender office grounds its strategic choices in an internally coherent vision of its role in the system, it may ultimately increase its power to defend its clients effectively.⁸⁰⁸

This internally coherent vision has the capacity to not only maximize defender resources, but also to impact and educate the justice system as a whole.

Despite a decade of innumerable trainings, conferences, and interagency meetings, there remains a significant gap between the law and policy guarantees and actual courtroom practice in virtually every province in Afghanistan. While training has been the primary means of capacity development in the last decade, the result appears to be a professional class that has a great deal of awareness but which lacks the ability to implement. Legal aid actors could leverage their resources more effectively—and render trainings more informative and effective—by taking a coordinated and strategic approach to their systemic advocacy. By identifying issues of concern, including laws being misapplied or the non-use of pretrial motions or others, legal aid leadership can offer focused trainings followed by a coordinated advocacy strategy that involves coordinated filings or courtroom advocacy, public speaking

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⁸⁰⁷ Ibid.
⁸⁰⁸ Ibid.
and writing on the topic in the popular media, and the coordinated development of a data set relating to measurable change and substantive gains made through these strategies.

Adopting a strategic advocacy approach allows every training and every filing to become an act of broad-based strategy and facilitates a community of interest and peer assistance. Leveraging routine opportunities, like training, into a targeted event followed by a coordinated, nationwide litigation and advocacy strategy also has the benefit of maximizing available resources toward an important goal of elevating the level of practice in courts throughout the country. Legal aid attorneys become thought leaders for important issues affecting their clients in a coordinated way, as well as advocates on the law and its interpretation. Among other things, it gives legal aid lawyers an opportunity to redefine their role in many courts.

For example, the use of confessions obtained under duress or torture is prohibited by Afghan law. Community-wide training of all legal aid providers on the relevant areas of the CPC and other relevant instruments, as well as linking such training to a set of practice interventions, including developing motion and practice templates in the relevant area, using pretrial motions to suppress, defense investigation to develop the claims, and oral arguments on the law, and interlocutory and post-conviction appeals (1) forces legal aid providers to use the training in context and allows immediate opportunities for supervisors to correct and reinforce the training in context; (2) offers the justice system coordinated and mutually-reinforcing interventions that seek to elevate the level of practice and innovate towards greater quality and fairness; and (3) unifies the legal aid community’s progress toward more effective practice, including by facilitating peer assistance and by promoting efficient and standardized motion templates that allow legal aid providers to build fact and legal arguments in specific cases on a solid legal analysis.

Institute and Implement Universal Best Practices

As discussed supra at C, there is widespread consensus on a series of best practices tested in the LAAR fieldwork. These are appended to this analysis at Appendix I. A set of concrete best practices should be developed using this guidance and reflecting the widespread agreement that these tasks are necessary and appropriate for legal aid providers. These best practices should also be used by coordination entities and institutional providers to develop model terms of reference, organizational and attorney expectations documents, monitoring and evaluation materials, measures of productivity and time management (including time sheets), and routine supervision standards and structure. These practices should also be used to guide and structure clinical education programming so that the messaging is clear and consistent.

Develop Clear Indicators to Measure Individual and Systemic Impact

The importance of effective, measurable indicators cannot be overstated and, with respect to legal aid, should be developed in line with the recommendations and the findings of this assessment. For rule of law in Afghanistan, a series of standard qualitative indicators
achieved has not translated to either stability or effective access to justice. One recent analysis offered structural methods for strengthening rule of law generally in Afghanistan, noting that the rule of law indicators in use were not consistently meaningful in the Afghan context. "Despite more than one decade of rule of law programming, we remain unclear as to which projects are successful or unsuccessful in promoting the rule of law and the key factors impacting the success or failure of these projects." This has been acknowledged in the donor community specifically with respect to justice system reform, albeit after the fact and despite prior lessons learned reporting. The World Bank’s evaluation of its Afghan Judicial Reform Project noted that the:

> monitoring framework did not provide a measure of improved performance of the justice system, other than improvements in specific legal processes. Thus, it is difficult to know if the achievements...resulted in achievement of the broader objectives...However, there were lessons to build on from extensive prior donor support.

The monitoring framework includes many output indicators that are plausibly associated with the objective. However, there is no indicator to measure whether performance of the centralized justice system actually improved, and inadequate indicators on whether citizens had improved access to justice. As discussed above, this makes it difficult to assess whether or not the project's development objectives were achieved.

This was particularly true with respect to legal aid, where many planned interventions and capacity-building exercises lacked either baseline indicators, clear targets, or metrics that reflected on the broader system. Generally in criminal justice data in Afghanistan “statistical record-keeping was ad hoc and inconsistent, as well as frequently unavailable to the public, throughout the criminal justice system and across justice agencies and ministries.” Even standard indicators lacked meaning in many Afghan contexts. Using international indicator of “percentage of crime reported to official entities” seems an inexact and inaccurate way to evaluate the rule of law in the Afghan context. The culture of resorting to authorities outside the family to resolve civil and criminal conflict is unusual in Afghanistan, as in other traditional societies; resorting to official dispute resolution forums is conflated with blaming and denouncing of local community.

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809 HREVO ROL Report at 110, et seq.
810 Ibid.
812 Ibid., at 6.
814 HREVO ROL Report, at 110-11.
815 Ibid., at 18.
The HREVO analysis noted that evaluation criteria and performance standards relied on quantitative criteria that incentivizes efficiency and fails to measure the thoughtfulness or the depth of judicial and legal actors’ roles.\textsuperscript{816} These criteria include metrics like number of judicial decisions issued, number of people arrested, etc.\textsuperscript{817} “This diminishes the performance and priorities of criminal justice entities and personnel; instead of engaging in fact-finding and substantive decision-making, their work devolves to administrative and organizational duties.”\textsuperscript{818} They persuasively argue that redressing this requires, 1) incorporating new metrics that measure and acknowledge misconduct and erroneous decisions or activities by legal, judicial, and police authorities; and 2) ensuring that political pressure on criminal justice system actors facilitates comprehensive decision-making, rather than decisions based on expediency and pressure to conform the statistical realities to certain quantitative metrics.\textsuperscript{819} While some of these analyses may be found in user perception and client satisfaction data, the best practices set forth in the LAAR project at Appendix I also offer a mechanism for evaluating the court’s receptiveness and responses to being engaged at increasingly higher levels and with greater expectations.

\textbf{A. Develop Standardized Practice Templates and Forms}

The use of templates and forms for court submissions and case management is generally frowned upon in Afghanistan, and done clandestinely if at all. Practitioners, managers, and others appear to consider the use of templates and forms as an impermissible shortcut that compromises the integrity of the legal aid provider and the submission. Unfortunately, this belief presents a lost opportunity for standardization, quality assurance, and improved practices.

Outside Afghanistan, in many jurisdictions, attorneys work only from templates, modifying boilerplate language to craft highly effective and individualized motions by focusing on recounting and organizing the facts of a particular case and developing novel legal analyses, rather than re-developing the same arguments on the law which accompany any motion, filing, or defense statement in a particular type of case. Forms and templates presented in a decision tree format also offer useful practice guides that allow less experienced lawyers collect the necessary information early in the case and dispense with simple cases quickly. These efficiencies would greatly enhance the capacity and the effectiveness of defense submissions, also allowing legal aid providers to build on the work of others, rather than generating a defense statement from scratch every single time. Finally, the use of forms and templates aids supervisors and monitoring and evaluation officers who can easily check whether basic actions have been taken in a case.

\textbf{B. Develop Workload Guidelines to Replace Case Caps}

\begin{footnotes}
\footnote{816} Ibid., at 111.
\footnote{817} Ibid.
\footnote{818} Ibid.
\footnote{819} Ibid.
\end{footnotes}
As is discussed above, legal aid provider caseloads may appear low but involve considerable non-legal activity by the legal aid provider in managing the case. On the other hand, maximum thresholds may be arbitrary given the wide variety of cases and environments in Afghanistan. The legal aid community should consider offering guidelines subject to local interpretation and implementation. Guidelines could be implemented with respect to attorney experience, available support, and complexity of cases. Formulas exist in other jurisdictions for developing “weighted caseloads” based on the complexity of the case, the experience of the attorney, and other factors. This approach, once standardized, can be implemented with the use of a database that mitigates the time involved in developing the weighted scores. Most importantly, this is one method of ensuring the case allocation is both fair and adequate to the need.

Build Culture of Zealous Defense

As discussed supra at 0, zealous representation—although a core defense value—is not the norm. Developing expectations that legal aid providers will adhere to a zealous defense of their clients involves modifying the culture of many offices which may have drifted from a client-centered orientation. “Scholars of organizational development have long understood the importance of culture to both understanding and changing organizations…While reform efforts have largely focused on restructuring and funding through the legislative process, successful transformation can only be achieved once we understand the culture of indigent defense that exists, and learn strategies to effectuate a change in that culture.” In the assessment process, it was possible to determine various aspects of the culture of indigent defense.

The literature suggests that, in seeking organizational change, the attention to culture is a priority. The hasty and careless attitude frequently associated with indigent defense work grows from the normalization of practices associated with a lack of preparation. A culture of zealous representation cannot exist without the assistance of investigators or paralegals, the means to conduct legal research and a focus on client communication. It is a “sign of irresponsibility and dereliction to one’s client” where an office culture encourages a willingness to try cases in “the absence of staff meetings, formal training opportunities, and an office environment that encourages communication and brainstorming.” The recommendation of building a defense-oriented culture involves looking to provide resources and interventions that maintain attorneys’ loyalty and commitment to their clients while also offering the capacity to effectively represent them in court.

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822 Ibid.
823 Ibid.
A. Develop Investigation Guidelines

As discussed supra at B, zealous representation is rare in the Afghanistan legal aid community. However, investigation is a critical element of an effective defense. Developing guidelines and performance indicators for investigation in legal aid cases can facilitate the proper allocation of time, resources, and staffing. Investigation can be time consuming and costly, particularly where it is done haphazardly. Recognizing this, some jurisdictions maintain a ratio of one investigator to every four to six attorneys.\textsuperscript{824} Without doubt, context based analysis is necessary to set effective investigation parameters (for example, cases from the Counter-Narcotics Justice Center come from all over Afghanistan and require more resources to investigate than local cases of assault or theft that are confined to a single province or district). However, certain widely used performance indicators may be appropriate to the legal aid context in Afghanistan.\textsuperscript{825} These may include:

(i) Case preparation and review of case files
(ii) Visiting the crime scene
   a. Mapping the alleged crime scene;
   b. Driving or walking around relevant areas to determine the plausibility of a version of events;
   c. Taking photographs of the scene;
   d. Finding and obtaining video surveillance footage;
   e. Canvassing the scene for potential witnesses;
   f. Interviewing relevant witnesses.
(iii) Processing photographs, diagrams, maps, and video surveillance footage for use as competent evidence in a case;
(iv) Locating and evaluating property and physical evidence
(v) Development and refining of strategy and theory of the case with assigned attorney
(vi) On-the-spot investigation during trial
(vii) In-court testimony
(viii) Travel to remote jurisdictions to examine theory of the case
(ix) Service of subpoenas
(x) Undergo training and continuing education

Trainee lawyers and paralegals may be useful in promoting investigation as a priority and finding qualified people to investigate and work up cases. As discussed supra at 0, there is a severe shortage of professional support for legal aid providers. Nor do most lawyers have the benefit of the \textit{staj} in advance of commencing their practice. In many places, trainee lawyers act in an apprenticeship role and learn the practice while developing skills and providing

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\textsuperscript{824} This includes many American jurisdictions. See Kolb, D., et al., \textit{Analysis of Time and Resources Necessary for an Effective Defense, Investigator and Social Worker Support} at 8-10 (report submitted to the Appellate Division, NYS Courts by the Legal Aid Society and Davis Polk & Wardell LLP), August 29, 2014.

\textsuperscript{825} This list was generated in response to an assessment and roadmap for legal aid in New York City, New York, USA. See Kolb, D., et al., \textit{Analysis of Time and Resources Necessary for an Effective Defense, Investigator and Social Worker Support} at 17-28 (report submitted to the Appellate Division, NYS Courts by the Legal Aid Society and Davis Polk & Wardell LLP), August 29, 2014.
basic and administrative support. In other jurisdictions, young lawyers and paralegals can investigate cases and bring competent evidence to the court. Adopting these ideas, in a structured manner, might fill an important gap while also ensuring some training and familiarity before commencing an indigent defense practice. In addition, it offers a change for the lawyer to adopt the “culture of indigent defense” associated with zealous representation.

**B. Legal Aid Providers Should Develop a Theory of the Case in Every Case**

Some legal aid lawyers believe that developing a cohesive theory of the case is the single most important thing a defense counsel can do. Legal aid providers should develop a theory of the case that can be explored, built upon and modified in the course of the case and its investigation. The theory of the case is more than just identifying the chosen defense(s), e.g., misidentification. Instead, the case theory is a shorthand way of offering a counter-narrative to the court that credibly incorporates key facts of the case organized in manner that absolves clients of guilt. An effective theory of the case reframes the case to recharacterize both good and bad facts to counter the prosecution’s claim, without ever shifting the burden of proof from the government. While some defense attorneys do this naturally, a comprehensive theory of the case facilitates every aspect of zealous representation, including organizing the facts of the case effectively. A solid defense theory is the strategic bedrock of effective defense representation.

**C. Develop Use of Demonstrative Evidence in Court**

Many innovations and policy recommendations have centered on improving legal aid in the courts. However, there are also some practice innovations that can serve to elevate the level of practice in courts, including educating the judge while defending a client. Among these is the use of demonstrative evidence, either the actual evidence in the case or charts, pictures, infographics, or other visual aids to express the defense theory of the case. Visual aids, in addition to being helpful to the memory, can also be a powerful way to introduce or set forth a theory of the case.

**D. Develop Indicators to Promote and Reward Holistic Representation**

As discussed supra at F, the rarity of holistic approach in criminal legal aid does a disservice to indigent defendants, but also to the Afghan government. “The emergence of the holistic approach reflects recent international developments in the areas of ‘access to justice’ and ‘legal empowerment.’ … Access to justice is not only about improving the ability of an individual to seek legal remedies to violations of his or her rights through the formal courts.…” Holistic representation acknowledges that a criminal case may not be only or the most pressing matter facing indigent criminal suspects and accused persons. By addressing the client as a whole person, there is a better chance of diminishing recidivism,

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converting a negative contact with the justice system into an opportunity for growth and change, and enhancing the agency of people who find themselves within the justice system.

Holistic representation also enhances criminal defense representation. The use of social workers and social service professionals in close teamwork with the defense counsel can improve case outcomes and enhance a legal aid provider’s ability to defend a case.

Social workers are often critically important to an effective defense. When a Legal Aid client has been arrested, and is incarcerated, the involvement of a social worker can materially increase the likelihood that the client will benefit from an … improved sentence. Interviews conducted by an experienced social worker with the client and with other individuals, such as the client’s family members, treatment providers, friends, and colleagues, can yield factual information that is crucial for mitigation arguments. 827

From a fairness perspective and from a fiscal perspective, adopting a holistic approach to criminal defense, and resourcing it properly, makes sense.

However, it should be noted that the holistic approach does not mean that every organization must have the capacity to meet all the needs of its clients internally. In fact, in Afghanistan it does appear that organizations that are more focused are much more successful than generalized organizations that provide a host of services in-house. The NGOs that provide legal aid services as part of a host of services for their clients scored lowest in the case file review. Therefore, it may be wisest to maintain specialization and instead build better referral systems and coordination mechanisms, and encourage the development of practice habits that use referral as part of the regular service delivery.

E. Develop Specific Strategies Related to Common Case Types and Fact Patterns

While this recommendation touches on the ideas of the institutional provider agenda-setting for the legal system discussed supra at A and strategic advocacy discussed above at 0, it specifically looks to pool the knowledge and resources of similar cases and developing effective defense strategies that could be repeatedly. To that end, key types of cases and fact patterns that emerge most commonly should receive enhanced attention, consideration, and training. Of respondents, 24 percent indicated the majority of cases they worked on were assault or violence,828 17 percent reported theft/robbery and 13 percent reported morals crimes as the majority of their focus.829 Furthermore, 18 percent of respondents indicated security cases,830 while eight percent indicated corruption cases and seven percent indicated narcotics cases.831 Among clients, 31 percent had cases involving assault or violence, and 20 percent of the cases involved security.832 Cases involving narcotics were at 10 percent, and

827 See Kolb, D., et al., Analysis of Time and Resources Necessary for an Effective Defense, Investigator and Social Worker Support at 32 (report submitted to the Appellate Division, NYS Courts by the Legal Aid Society and Davis Polk & Wardell LLP), August 29, 2014.
828 LAAR Fieldwork, Question x60.
829 Ibid.
830 Ibid.
831 Ibid.
832 Ibid., Question x171.
cases involving theft and robbery were at eight percent.\textsuperscript{833} This is not unexpected, but coordination of legal aid should recognize this fact and use it as guidance for setting standards of attorney excellence or competence.

\textit{Develop Indigency Standards}

Although inclusive, the indigency standards remain somewhat arbitrary and subjective. The form sets forth various categories and income levels. However, other criteria are relevant to the determination of whether an individual can afford to retain counsel. The indigency form should include dependents, property ownership, monthly expenditures, assets, debts, and other information that could add accuracy to indigency determinations. Some efforts should be undertaken to rationalize and universalize the process for assessing indigency in order to assure legal aid resources are deployed most effectively.

\textit{Standardized Record-Keeping and Data Maintenance}

Most major legal aid institutions are part of the process of creating the ALAAN legal aid database. Once it is created and piloted, they should begin adopting the database and train their lawyers and administrative staff on its use. In addition, legal aid providers should record and maintain data on every case in a manner that can be anonymized, if necessary, and shared with the legal aid community, the justice community, and/or the donor community. In the fieldwork, judges, prosecutors, and others were asked how they defined a case.\textsuperscript{834} The most frequent response, using a unique case number or identifier, was selected 40 percent of the time.\textsuperscript{835} The defendant name was the defining principle 29 percent of the time.\textsuperscript{836} Ensuring key common fields (e.g., case number, identification number, etc.) exist allows for the development of a databank that can facilitate sophisticated data analytics on quality, effectiveness, and costs over time.

\textit{Recommendations to the Donor Community}

Support for the legal aid sector and the defense bar are necessary and important to effective rule of law, stability, and access to justice. As discussed \textit{supra} at 0, the availability of defense counsel and legal aid adds to legitimacy of the formal justice system and a strong majority of Afghans have come to believe that defense lawyers are necessary irrespective of the guilt or innocence of the suspect or accused.

Beyond protecting the rights of individuals facing prosecution in a flawed system, legal aid providers can also bring systematic improvements. While legal reforms to ensure laws are more just and training of law enforcement and justice actors to understand new laws and procedures are very important, defense lawyers improve the justice system on a day-to-day basis in testing the truth, justice, and fidelity to law of the claims against their clients. By

\textsuperscript{833} Ibid.
\textsuperscript{834} Ibid., Question x123.
\textsuperscript{835} Ibid.
\textsuperscript{836} Ibid.
constantly challenging law enforcement and justice actors to follow the law and improve their practices, defense counsel and legal aid providers can shape and elevate the level of practice of all justice system personnel in individual courts as a systemic intervention. Thus, the adversarial process that has been adopted by the Afghan justice system gives defense lawyers an incredible opportunity for daily engagement and active participation in forming the justice system.

Supporting the capacity of defense lawyers to promote systemic change as well as provide direct services to individual clients requires balance. Donor organizations must ensure their interventions do not add to the complexity of the legal aid landscape while also maintaining room for experimentation. They must prioritize goals to ensure interventions are not overly complicated or require implementing partners to lose focus for the sake of financial support. While service delivery, capacity building, and sustainability are not mutually exclusive goals, it is a rare intervention that can address these priorities equally well on a wide scale, and attempting to do so is often a sign of a lack of coordination among donors.

The recommendations above are addressed to donors as much as to their primary audience, since donors provide a great deal of support to both the government and NGOs. These short recommendations to donors tie together much of the above analysis and recommendations, in language focused at the donor community.

**Support Institutional Service Delivery**

Legal aid delivery by institutional service providers continues to be necessary to protect the rights of indigent suspects and accused across Afghanistan. Institutional service models provide higher quality service than individual models such as the pro bono and the LAGF models. The highest quality service is provided by non-governmental institutional providers who concentrate on criminal legal defense, such as ILF-A and DQG. Such institutions should be supported until the regulatory mechanism is better able to find and distribute resources.

Institutional legal aid providers have improved dramatically on management, compliance, and transparency in the last five years. They have become an integral part of the civil society of Afghanistan and important partners in human rights and women’s rights advocacy, and they can present alternative narratives from the field that are otherwise difficult to gather. Their independence and flexibility provide ample opportunity for piloting interventions and delivering services to individuals who may not trust government representation and are in the greatest need for criminal defense services, such as those accused of national security or moral crimes.

If there is to be a mixed model for Afghanistan, these institutions must continue to be supported and encouraged to experiment with sustainability models. They must be allowed to be open about their flaws and failures to help them improve administrative accountability and enhance quality of service, without the fear of losing support.

**Support the ILAB Secretariat and Modification to the ILAB**
The current structure of the ILAB is too dysfunctional to benefit from any additional assistance. Without designated staff, any support to the ILAB’s secretariat is capacity-replacement rather than capacity-building. However, if the GIRoA changes the structure of the ILAB and commits to hiring a designated secretariat, donors should assist the development of capacity.

Donors should assist the secretariat to develop monitoring and evaluation tools such as a database and case auditing mechanisms and manuals and training on how to use these tools professionally. Also, detailed policies need to be developed for organizational evaluation (accreditation), use of finances, reporting, and the relationship of the board with the secretariat and the MoJ. A detailed, multi-layered authorization system must be developed to allow the secretariat to contract for services, while being monitored by the ILAB.

Once the ILAB has been reformed, established a functioning secretariat, and identified specific policy goals, donors should consider providing pilot funds for the ILAB to distribute for legal aid services. Initial amounts should remain modest to test the ability of the ILAB to create requests for proposals, evaluate organizations and proposals, and monitor activities.

**Increase Coordination**

Currently, the Rule of Law Board of Donors organized by UNAMA meets monthly to coordinate donor action and to discuss rule of law issues. Legal aid donors should organize a working group under the auspices of the Board of Donors that meets on a monthly or quarterly basis to discuss legal aid issues and liaise with ALAAN, the ILAB, and the MoJ.

Donors should consider linking projects through small cooperation efforts to enhance holistic service delivery. Rather than requesting that implementers provide a large number of services in-house or to deal with a several larger policy goals within one project, donors should link their partners with organizations (including those supported by other donors) that already provide specialized high quality services (such as social and psychological services) or that have experience working on specific policy and advocacy efforts (such as transparency and anti-corruption).

**Support Legal Education and Advocacy Oriented Training**

Conceptually, training offers a donor intervention that is easy to plan, deliver, monitor, and evaluate. However, countless hours of training in the past fifteen years have not delivered stability, capacity, transparency, or fairness in the operation of the justice system in Afghanistan. While training has been the primary means of capacity development in the last decade, the result appears to be a professional class that has a great deal of awareness but which lacks the ability to implement.

Training and continuing legal education are, undeniably, important elements of developing the capacity of lawyers. However, legal professionals also need proficiency in integrating and implementing training in their everyday practice; this includes proficiencies in legal reasoning, critical thinking, legal research and writing skills. Notably, these skills are difficult to teach in short training courses; they must be learned as part of a structured university
education and honed through clinical experience, internships, continuing legal education, apprenticeships, and structured feedback. Donors should question the long-term impact of professional education modalities that defer professional skill-building to staj programs (see supra at 0) or ad hoc, short-term training available only after lawyers graduate from university.

In addition, enhancing the impact of training requires immediate mechanisms to use and develop the skills learned, such as the strategic advocacy discussed supra at 0. Situating training within a unified, comprehensive strategic advocacy plan allows the topics trained to be implemented, supervised, and improved immediately in a coordinated fashion. It also allows the training topics to impact the practice and understanding of the justice system as a whole.
APPENDIX I: BEST PRACTICES

As discussed throughout this report, and confirmed in the fieldwork, tremendous consensus exists as to the viability and importance of specific practices to the provision of high quality legal aid services. This report recommends, infra at Section Error! Reference source not found., the adoption of universal best practices for all legal aid providers, working in both institutional and individual provider models in Afghanistan. This recommendation is based, in part, on questions in the fieldwork on specific acts associated with zealous representation, as set forth here in Table 1.

The recommendation to adopt a set of best practices is, of course, aspirational in part. Some practices may be rigorously applied, monitored, and enforced immediately, while others should be adopted gradually, with support for the higher expectations they imply. However, adopting a set of best practices signals a commitment to quality legal aid from grassroots to grassstop. In addition, the widespread consensus on best practices (including by prosecutors and judges) has the capacity to standardize and structure job descriptions, terms of reference, evaluations, and monitoring for legal aid organizations, managers, the donor community, and the Afghan government – in effect, enhancing quality administratively as well as substantively.

Adoption of best practices also facilitates communication and notice of important priorities to the justice system, offers clear and measurable areas for impact investment, and standardized practices within a mixed model containing different types of leadership, supervision, and centralization, among other things.

Table 1: Best Practice Questions + Data

<table>
<thead>
<tr>
<th>Question x1: Do you have time to do / should legal aid providers do the following activities, if necessary, during the provision of legal aid services?</th>
<th>respondents agree (%)</th>
<th>legal aid community agrees (%)</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. Interview clients within 3 days of being assigned to the case to determine relevant facts and allegations</td>
<td>88%</td>
<td>98%</td>
</tr>
<tr>
<td>2. Interview clients to identify and develop mitigation information</td>
<td>86%</td>
<td>94%</td>
</tr>
<tr>
<td>3. Meet with clients in custody</td>
<td>92%</td>
<td>98%</td>
</tr>
<tr>
<td>4. Meet with clients not in custody</td>
<td>81%</td>
<td>95%</td>
</tr>
<tr>
<td>5. Inform clients of their legal rights at first meeting</td>
<td>88%</td>
<td>98%</td>
</tr>
<tr>
<td>6. Build attorney-client relationship to instill trust + confidence</td>
<td>88%</td>
<td>99%</td>
</tr>
<tr>
<td>7. Keep clients informed of case developments, including updates, and respond to all client communication</td>
<td>89%</td>
<td>99%</td>
</tr>
<tr>
<td>8. Engage clients in meaningful discussion about all case decisions</td>
<td>85%</td>
<td>99%</td>
</tr>
<tr>
<td>9. Conference with the saranwal about pretrial detention, case issues and potential outcomes</td>
<td>76%</td>
<td>93%</td>
</tr>
<tr>
<td>10. Submit pretrial release motions to the prosecution and court</td>
<td>74%</td>
<td>93%</td>
</tr>
<tr>
<td>11. Submit pretrial evidence exclusion motions to the saranwal and court</td>
<td>81%</td>
<td>96%</td>
</tr>
<tr>
<td>12. Zealously advocate during pretrial hearings such as bail, detention, and evidentiary hearings</td>
<td>85%</td>
<td>95%</td>
</tr>
<tr>
<td>13. Explain court pretrial judgments to clients and advise client of options</td>
<td>80%</td>
<td>92%</td>
</tr>
</tbody>
</table>
Using a protocol deemed effective for wide scale criminal legal aid assessments\textsuperscript{837} and, as discussed \textit{infra} at 0, the fieldwork developed best practices by determining on whether providers felt they had adequate time to complete certain activities as a routine course of their representation of clients, or whether they believed the proposed activities were not part of their job. Overwhelmingly, providers accredited the importance of the thirty-six proposed core activities, suggested they either had the time or should make the time for these activities, and denied that these activities were not part of their job. Notably, legal aid providers’ acclaim of exceeded the average of all respondents’ agreement with each suggested activity, suggesting a keen interest in providing high-quality legal services.

The fieldwork, conducted among 400 justice sector professionals and clients, revealed a strong interest in achieving and maintaining practices consistent with the culture of zealous representation recommended in this report. As is clear from Table 1, \textit{infra}, the legal aid community nearly universally accredited the importance of meeting with clients promptly upon assignment, of building the attorney-client relationship, and of keeping clients informed and involved in meaningful case decision-making. The ninety-nine percent agreement with these activities reflects agreement by the legal aid community that these activities are conducted in the routine course of their work and that they are considered a part of the legal aid providers’ duties and responsibilities.

\begin{table}[h]
\centering
\begin{tabular}{|l|c|c|}
\hline
\textbf{Question x1:} Do you have time to do / should legal aid providers do the following activities, if necessary, during the provision of legal aid services? & respondents agree (%) & legal aid community agrees (%) \\
\hline
15. Collaborate with social service professionals to identify mental health, education, substance abuse, or other client needs that may impact the pending case & 73\% & 94\% \\
16. Request separate counsel for defendants who may have a conflict of interest & 76\% & 95\% \\
17. Prepare for court appearances and hearings, including gathering information from clients, witnesses, experts, police, and saranwal & 88\% & 99\% \\
18. Review all evidence and arguments in the saranwal’s case file & 88\% & 97\% \\
19. Examine all physical evidence (guns, knives, blood, etc.) in the saranwal’s case & 65\% & 84\% \\
20. Review and respond to all motions filed by the saranwal & 88\% & 97\% \\
21. Visit and document the crime scene & 66\% & 87\% \\
22. Identify and obtain necessary third party records (business records, etc.) & 85\% & 97\% \\
23. Identify and hire experts & 68\% & 87\% \\
24. Identify, interview, and investigate witnesses & 78\% & 96\% \\
25. Develop defense theory of the case & 78\% & 97\% \\
26. Prepare exhibits and documents to use at trial & 86\% & 97\% \\
27. Prepare witnesses examinations and arrange for witnesses to appear at trial & 80\% & 96\% \\
\hline
\end{tabular}
\caption{Best Practice Questions + Data, cont’d}
\end{table}

In addition, the fieldwork showed the primacy of courtroom advocacy in how the legal aid community construes its own role. Ninety-nine percent of the legal aid community affirmed the importance of advance preparation for court appearances and hearings, including conducting defense investigation, preparing clients to testify or speak before the court, appearing on every single court date, and zealously advocating at trial.

However, the fieldwork also highlighted ongoing challenges in customs and common practice norms in Afghanistan. For example, as discussed *infra* at Section 7.1.8. *Error! Reference source not found.*, defense counsel routinely cannot access physical evidence used in a case before or during trial. At times, the prosecutor may also lack access to this evidence. In practice, defense counsel and legal aid providers develop defenses and represent clients with severe limitations in any prosecution relying on the recovery of weapons, contraband, or other probative items at a crime scene or elsewhere. These practices, common in Afghanistan but unusual or is favored elsewhere, were accredited by respondents in the fieldwork, who scored the duty “examine all physical evidence (guns, knives, blood, etc.) in the saranwal’s case” among the lowest among all categories proposed as best practices, with only 65% of all respondents agreeing this was an important part of the legal aid provider’s role.

In addition, key practices associated with zealous defense and discussed throughout this report, but uncommon in Afghanistan (including investigation, *infra* at Section 6.2.3.B, visiting the crime scene, developing holistic practices, *infra* at Section 6.2.3. *Error! Reference source not found.*, and others) were also judged less important by respondents in the fieldwork, consistently receiving less than eighty percent approval by all respondents surveyed. Similarly, important priorities, like maintaining legal expertise and conducting legal research, conferencing with the prosecutor and pretrial motion practice, and expert discovery similarly were judged important by less than eighty percent of all respondents. The dismissal of these practices, in the absence of concrete experience with them, suggests these important practices cannot be adopted as best practices without an educational training campaign, including sensitizing key stakeholders as to the importance of these practices to the delivery of high-quality legal aid services.

### Table 3: Best Practice Questions + Data, cont’d

<table>
<thead>
<tr>
<th>Question x1: Do you have time to do / should legal aid providers do the following activities, if necessary, during the provision of legal aid services?</th>
<th>respondents agree (%)</th>
<th>legal aid community agrees (%)</th>
</tr>
</thead>
<tbody>
<tr>
<td>28. Prepare defense statement</td>
<td>94%</td>
<td>99%</td>
</tr>
<tr>
<td>29. Ensure that the defense statement is well reasoned, complete, and substantial.</td>
<td>92%</td>
<td>99%</td>
</tr>
<tr>
<td>30. Develop organizational policies and priorities</td>
<td>58%</td>
<td>84%</td>
</tr>
<tr>
<td>31. Discuss cases with colleagues and junior counsel</td>
<td>63%</td>
<td>92%</td>
</tr>
<tr>
<td>32. Conduct legal research and remain current on the law</td>
<td>70%</td>
<td>97%</td>
</tr>
<tr>
<td>33. Participate in public outreach programs</td>
<td>69%</td>
<td>97%</td>
</tr>
<tr>
<td>34. Participate in continuing legal education and training</td>
<td>66%</td>
<td>91%</td>
</tr>
</tbody>
</table>
Implementing some or all of the practices set forth in Table 1 allows for important priorities of independence, quality, efficiency, and standardization to be promoted universally and consistently in the justice system, including among justice system actors who impact legal aid. Translating the broad consensus on the practices identified in Table 1 to a series of best practices to be used throughout the legal aid system in Afghanistan allows for (1) the development of performance indicators, (2) effective supervision, (3) effective monitoring and evaluation by managers and by donors, (4) consistently advertised and applied terms of reference and job descriptions for key legal aid roles, (5) identification of core areas of need, including for additional resources or staffing, (6) clarity of roles and responsibilities for legal aid providers, supervisors, and executives, (7) objective metrics that can be used to measure quality or to establish the merits where legal aid providers finding themselves in conflict with judges, prosecutors, or police. These best practices can also be a tool to educate the legal aid community, the police, prosecutors, judges, experts, and others as to the appropriate standards, practices, and growth involved in developing a culture of zealous representation.
ANNEX 1

Throughout the LAAR process, Open Society Foundation in cooperation with the Emerging Leaders Consulting Services (ELCS) held several consultation conferences. The reports of these conferences collectively make up Annex 1.
Report of the 2nd Stakeholder’s Consultation Conference First National Stakeholder Consultation Conference

A Report Submitted to Open Society Afghanistan

By Emerging Leaders Consulting Services

1/22/2017
Introduction

ELCS is commissioned by Open Society Afghanistan to undertake organization of five national stakeholders’ consultation sessions to assess different aspects of the Legal Aid System in Afghanistan. The process involves participation of different institutions working in legal aid system including, development partners, UN agencies, international organizations, civil society organizations and academic institutions. The first of the series of consultation sessions was organized in Kabul. It was a two-day session conducted on 31st May and 1st June. The theme of the first consultation session was “Development of Criteria for the Assessment”. More than 50 participants representing different institutions attended the first consultation session (annex 1).

Specific objectives of the first consultation session

- To develop criteria for the assessment process
- To build consensus among stakeholders on the set of criteria developed during the conference
- Develop a question bank that would be used later by the assessment team to prepare questionnaire and different interview guides

Methodology

In order to accommodate the views from the very diverse group of participants and to build consensus among them, the team used a participatory approach to organize the conference. As evident from the theme, the conference program was fairly heavy in terms of workload and content. ELCS team collaborated with OSA and Asia Foundation teams to agree on the structure of the conference. The teams agreed that there will be limited number of presentation and more group work and discussions so as to allow for collection of maximum inputs from conference participants. The aim was to use the two days to the maximum extent possible in order to be able to cover this large topic. The conference was a combination of short presentations on specific topics followed by group work (Annex 2).

Proceedings of the Conference

The conference started with introductory remarks by the General Director Legal Aid Directorate Ministry of Justice, Mr. Assadullah Wahdat and Country Representative of The Asia Foundation. Addressing the conference, Head of the Afghanistan Legal Aid Board, Mr. Wahdat said that demand for lawyers was on the increase, but the number of lawyers was limited, especially at the district level. He stressed on the need for
expanding legal aid into districts and underlined that NGOs shall come under the umbrella of Legal Aid Board.

Mr. Wahdat added that as per the law, defense lawyers are required to work on three cases a year, but unfortunately, due to lack of coordination with the bar association, this is not actually happening. He said that there were 3000 lawyers in Afghanistan, and if each lawyer would work on 3 cases in year, a total of 9000 cases will be addressed and that will be a big achievement for the Bar Association.

After completion of the conference protocol, the facilitators briefly introduced the conference theme and the expected outcome of the conference. Facilitators presented introductory presentation on different assessment domains for the legal aid system including:

- Independence
- Accessibility
- Organizational health
- Organization resources
- Quality and
- Efficiency

After the introduction of topics, participants were divided in five groups (annex 3). For maximum input and collecting diverse views, the facilitators assigned participants in groups in a manner that each member represented a different organization. For instance, the Ministry of Justice’s representatives were asked to divide in different groups rather sticking in one group. Furthermore, it was suggested that the group composition remains the same during the two days’ conference so they can build on their work while working on different themes during the conference.

However, there was slight change in group structure given addition of new members on the second day. The discussion in the working groups focused on proposing and drafting assessment questions on specific criteria that were presented by conference facilitators. The facilitators provided the groups with a series of general guiding questions for each topic to help steer and focus the discussions. The facilitators also assured that discussions stayed focused and everyone got a chance to speak. At the end, each working group had the chance to present the conclusion of their work to all participants.

**Summary of Discussion Points**
a. Independence

To give an overview of the theme, the facilitator briefly introduced the topic including the topic domains (table1). The presentation began with the description of independence in the context of legal aid system. After the presentation, participants were divided into five working groups. Facilitators requested the group to work collectively to come up with list of criteria for assessing independence of legal aid.
Table 1, assessment domains for independence

**Assessment Domain**

<table>
<thead>
<tr>
<th>Themes</th>
<th>Sub-themes</th>
</tr>
</thead>
<tbody>
<tr>
<td>Political Independence</td>
<td></td>
</tr>
<tr>
<td>Financial Independence</td>
<td>• funding</td>
</tr>
<tr>
<td></td>
<td>• How lawyers are paid?</td>
</tr>
<tr>
<td>Oversight/Evaluation</td>
<td></td>
</tr>
<tr>
<td>Selection (how lawyers are selected?)</td>
<td>• Conflict of interests</td>
</tr>
</tbody>
</table>

Working in five groups, participants prepared some questions for assessing independence. After completion of the group work, participants presented a summary of their work to the larger group so to get inputs from other groups (figure 1).

*Figure 1, presentation of group work to the large group*
From the presentation of different groups, it seemed that all the groups had an agreement on the independence of Legal Aid Board and legal aid providers. They suggested that the legal aid board shall not be influenced by any other political branch such as executive, judiciary or legislation and shall be independent in exercising its functions. It shall have a separate budget. Another area where the groups had convergence was regarding the insufficient salaries of the legal aid providers and suggested that at least their salaries shall be at the level provided by World Bank to the legal aid providers. One group suggested that Human Rights Commission of Afghanistan shall be given a role to conduct oversight of the legal aid providers.

Moreover, there was also discussion surrounding the independence of legal aid providers. Participants were of the view that inadequate salaries and threats were undermining the independence of the legal aid provider. It was also suggested that an oath shall be prescribed in the relevant laws for legal aid providers and shall be obliged to declare that they have no affiliation with political party and no connectedness with the judge and prosecutor. A summary of the work of five groups is presented in annex 4 to the report.

b. Accessibility

In an effort to allow participants get a good understanding of the accessibility to legal aid system, one of the facilitators gave a presentation on accessibility in the context of legal aid system including its domains (table 2). The presentation began with the explanation of Article 31(2) of Constitution of Afghanistan regarding accessibility in the context of legal aid. In criminal cases, the state shall appoint an advocate for a destitute. Subsequent to the presentation, the facilitator requested the participants to assemble in their groups and come up with a list of criteria/questions to assess accessibility.

Table 2, assessment domains for accessibility

Assessment Domain: Accessibility

<table>
<thead>
<tr>
<th>Themes</th>
<th>Sub-themes</th>
</tr>
</thead>
<tbody>
<tr>
<td>Eligibility</td>
<td>• Financial</td>
</tr>
<tr>
<td></td>
<td>• Types of cases</td>
</tr>
</tbody>
</table>

838 “In criminal cases, the state shall appoint an advocate for a destitute.”
- Gender
- Age
- Unjustified bias

<table>
<thead>
<tr>
<th>Geographical distribution</th>
<th>Quantity of legal aid providers in the provinces (big cities versus small cities)</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Legal Aid Department vs. NGOs availability</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>And how clients are retained</th>
<th>How initial contact is made?</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>At what stage of trial (during arrest, interrogation, investigation, trial)</td>
</tr>
<tr>
<td></td>
<td>Who facilitate the contact between legal aid and client</td>
</tr>
</tbody>
</table>

The group work on accessibility lasted for one hour. Working in groups (figure 1), participants from different institutions proposed an exhaustive list of questions for assessing accessibility to legal aid systems. Stakeholders posed a few similar questions regarding accessibility. Considering the questions proposed by the groups, there was a lot of consensus on clarification of the indigent person. According to group one, vulnerable, internally displaced people, and disabled should be added to the list of indigents; while, group three emphasized that while defining indigent, the income, expenditure, members of family, and assets of a person should be considered.

All groups raised the issue of eligibility of women in both civil and criminal cases; however, group three took the side of men and asked why some legal aid providers do not represent men and would it be fair to provide legal aid in civil cases only for women? The group also suggested that the AIBA defense lawyers should be encouraged to provide legal aid in insecure areas. Most groups have similar questions on the quantity of legal aid providers in provinces, and the presence of LAD, AIBA, and NGOs.

During the group work, a question was raised in Group One on whether clients are satisfied with legal aid delivered by LAD or NGOs and accessibility to which of these two models is easy? Group two raised the question of the lack of courses regarding legal aid assistance in the Law and Sharia faculties’ curriculums; while other groups did not raise such an issue. Group four posed the question of access to the legal aid providers in the pre-trial stage. The result of the work of five groups is attached as annex 5 to the conference report.
Another domain of the legal aid system was organization health and resources. Due to time constrain and in order to allow participants discuss the topic in more detail in their groups, organization health and resources were combined in one presentation. The facilitator introduced the topic including its domains through a brief interactive presentation (table 3). Subsequent to the completion of presentation, participants were asked to join their groups and work with their peers to discuss organization health and resources in the context of legal aid. Similar to other group exercises, participants were required to generate an exhaustive list of questions that would be used later to assess organization health and resources.

During the group work, the prosecutor Ahmad Bashardost the Attorney General Office (AGO) representative expressed his gratitude to The Asia Foundation for conducting such Consultation Conference and counted it vital and significant in development of justice sector. The representative considered legal aid providers as lights for of judicial process and emphasized on their important roles. He added that facts and realities should be considered for finding a permanent solution for legal aid system. He asked for conducting an assessment to find needs, requirements, difficulties and challenges and then the approaches should be taken to address these issues. At the end, he added that AGO is decisive to cooperate with Afghanistan Legal Aid Assessment Project.
thoroughly. The summary of group work on organization health and resources is presented as annex 6.

*Table 3 assessment domains for Organization Health and Resources*

<table>
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<tr>
<th>Assessment Domain</th>
<th>Themes</th>
<th>Sub-themes</th>
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</thead>
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<td>Leadership</td>
<td>Management/Governance</td>
<td>• Boards</td>
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<tr>
<td></td>
<td></td>
<td>• Strategies</td>
</tr>
<tr>
<td></td>
<td></td>
<td>• Written Policies</td>
</tr>
<tr>
<td>Financial Health</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Legal Status</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Structure and System</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Communicate</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Measure</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Financial Health</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Legal Status</td>
<td></td>
<td></td>
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<tr>
<td>Physical Resources</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Human Resources</td>
<td></td>
<td></td>
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<tr>
<td>Information Resources</td>
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<td>• Laws</td>
</tr>
<tr>
<td></td>
<td></td>
<td>• Regulations</td>
</tr>
<tr>
<td></td>
<td></td>
<td>• Cases</td>
</tr>
<tr>
<td>Financial Resources</td>
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**Quality and Efficiency**
Like many other key elements of the legal aid system, quality and efficiency was also studied during the conference. To begin with, one of the facilitators gave an overview of the theme including their domains. The facilitator introduced the topic by describing different aspects of quality and efficiency in the context of legal system (table 4).

Table 4 assessment of domains of quality and efficiency

Assessment Domain: Quality and Efficiency

<table>
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<th>Sub-themes</th>
</tr>
</thead>
<tbody>
<tr>
<td>Client responsiveness/relationship</td>
<td>• First contact, Extent of contact</td>
</tr>
<tr>
<td></td>
<td>• Extent of services</td>
</tr>
<tr>
<td>Practice manuals/Organizational Standards</td>
<td>• Adherence to practice standards</td>
</tr>
<tr>
<td>Training opportunities/Ongoing trainings</td>
<td>• Requirement by organization</td>
</tr>
<tr>
<td></td>
<td>• Requirement by Bar Association</td>
</tr>
<tr>
<td>Supervision/Guidance</td>
<td>• Quality assurance</td>
</tr>
<tr>
<td>Professionalism/Ethics</td>
<td>• Conflict of interest</td>
</tr>
<tr>
<td></td>
<td>• Confidentiality</td>
</tr>
<tr>
<td></td>
<td>• Non-discrimination</td>
</tr>
<tr>
<td>Cost per case</td>
<td></td>
</tr>
<tr>
<td>Time</td>
<td></td>
</tr>
<tr>
<td>Work load</td>
<td></td>
</tr>
</tbody>
</table>

After introduction of the topic, participants assembled in their groups to work on the set of questions and criteria for assessing quality and efficiency. Participants worked in five groups to discuss the topic and generate a list of questions. Looking at the questions proposed by groups, most of them have similar questions on retaining lawyers, standards of recruitment, training opportunities/requirements for lawyers, supervision, and work load. However, there are some questions that only raised by one group. For instance, group five raised the issue of strategic plan on coordination among legal aid
providers to avoid duplication and group one talked on assignment of legal aid provider based on their expertise.

During the discussions, Attorney General Office representative voiced his concern stating that quantity of legal aid providers directly affect the quality and efficiently. He went on to say that considering the increasing number of crimes in the society, the number of legal aid providers recruited by Ministry of Justice and other legal aid organizations are insufficient to address the needs. He added that putting more work on legal aid providers definitely lowers the quality of services. Therefore, allocation of lawyers should be based on population and types of crimes in each province.

Furthermore, while presenting the group work, a group member representing Ministry of Justice stated that some of the legal aid organizations have policies which are contradicting the MoJ’s policies. For instance, he mentioned, that some organizations provide legal aid for specific purposes which is against broader definition of serving justice. The list of questions from the work of five groups is presented as annex 7.
Event Evaluation

In an effort to get insight about participants regarding different aspects of the first national stakeholder consultation conference, ELCS team conducted a post event evaluation. For this purpose, a post evaluation form (annex 8) was distributed to participants. ELCS team requested participants to assess technical and logistics of the conference by using the form. A summary of the assessment results is presented as follows:

As evident from the assessment results, participants have expressed satisfaction the way conference was organized. While the overall satisfaction rate was 78%, there are still areas that need improvement. As per recommendations from participants, more time need to be allocated for the sessions including the group works and Q and A sessions. In addition, participants have suggested including more women in the future conferences to ensure a true representation of their voice on this important national venture. They have also suggested inviting individuals from other institutions including:

- Ministry of Women Affairs (MoWA)
- National Security Department (NSD) the CAPS project
- Academic Members of Law, Sharia Faculties of Ministry of Higher Education (MoHE)
- Representatives from Judicial Affairs (High Court SUPREME COURT)
- Ministry of Interior (Police)
- Ministry of Haj and Islamic Affairs
Conclusion

It was the first consultation session of the series of five stakeholder conferences. More than 50 individuals representing different institutions participated in the conference. Based on the feedback from participants, the conference was conducted successfully; however, there are lessons learned that could be used to improve delivery of future conferences. There was some ambiguity during the first day of the conference regarding the expected outcome of the conference; however, during subsequent sessions including organization of discussions and Q and A sessions greatly helped to clarify the objectives and expected outcome of the conference. It is worth noting that given group dynamics and that each individual represented a different institution, participants had a chance to discuss different aspects during the group works.
### Annex I: List of conference participants

<table>
<thead>
<tr>
<th>Organization</th>
<th>Name</th>
<th>Position</th>
<th>Email</th>
<th>Phone</th>
</tr>
</thead>
<tbody>
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<tr>
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<td><a href="mailto:qawi.afzali@aid.org.af">qawi.afzali@aid.org.af</a></td>
<td>0700203429</td>
</tr>
<tr>
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<td><a href="mailto:qanoon_ghushtonky@yahoo.com">qanoon_ghushtonky@yahoo.com</a></td>
<td>0799759232</td>
</tr>
<tr>
<td>ILF-A</td>
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<td>0700611316</td>
</tr>
<tr>
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<td>Nicole</td>
<td></td>
<td><a href="mailto:n.taylor@theilf.org">n.taylor@theilf.org</a></td>
<td></td>
</tr>
<tr>
<td>JSSP</td>
<td>Muhammad Akbar</td>
<td>Team Leader- MOJ</td>
<td><a href="mailto:Muhammad.Akbar@pae.com">Muhammad.Akbar@pae.com</a></td>
<td>0785876451</td>
</tr>
<tr>
<td>Medica</td>
<td>Humaira Rasuli</td>
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<td><a href="mailto:humaira.rasuli@medica-afghanistan.org">humaira.rasuli@medica-afghanistan.org</a></td>
<td>0797333070</td>
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<tr>
<td>Medica</td>
<td>Farzana Amin</td>
<td>Advocacy Officer</td>
<td></td>
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<tr>
<td>Organization</td>
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<tr>
<td>UNAMA</td>
<td>Ashraf Parwa</td>
<td>Senior Human Rights Assistant</td>
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<tr>
<td>UNDP</td>
<td>Najaf Rajai</td>
<td>Legal Aid Officer</td>
<td><a href="mailto:najaf.rajai@undp.org">najaf.rajai@undp.org</a></td>
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<tr>
<td>UNDP</td>
<td>Vicent Museke</td>
<td>Project Management Specialist</td>
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<tr>
<td>ELCS</td>
<td>Dr. Ahmed Javed Rahmanzai</td>
<td>CEO &amp; President</td>
<td></td>
<td></td>
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<tr>
<td>ELCS</td>
<td>Abdullah Dastageer Popalzai</td>
<td>Consultant</td>
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<tr>
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<td>Ghazi Hashimi</td>
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<td>ELCS</td>
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<tr>
<td>Ministry of Justice</td>
<td>Sayed Mohammad Hashimi</td>
<td>Admin &amp; Finance Deputy</td>
<td></td>
<td>700274676</td>
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<tr>
<td>Ministry of Justice</td>
<td>Asadullah Wahdat</td>
<td>General Director of Legal Aid</td>
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<tr>
<td>Ministry of Justice</td>
<td>Shaheed Arya</td>
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<tr>
<td>HAWCA</td>
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<td>Kabul Sharia</td>
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<tr>
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<td>Aziza Adalatkha</td>
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<td>-</td>
<td>0700248020</td>
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<tr>
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<td>Officer</td>
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<tr>
<td>The Asia Foundation</td>
<td>Abdullah Ahmadzai</td>
<td></td>
<td>The Asia Foundation</td>
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</tr>
<tr>
<td>The Asia Foundation</td>
<td>Mohammad Idrees Ilham</td>
<td></td>
<td>The Asia Foundation</td>
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<tr>
<td>The Asia Foundation</td>
<td>Siavash Rahbari</td>
<td></td>
<td>The Asia Foundation</td>
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<tr>
<td>The Asia Foundation</td>
<td>Sayed Ashraf Muzafari</td>
<td></td>
<td>The Asia Foundation</td>
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</tr>
</tbody>
</table>
# Annex 2 Conference Agenda

Assessment of Afghanistan’s Legal Aid System

First Stakeholder Consultation

DRAFT Agenda

<table>
<thead>
<tr>
<th>Time</th>
<th>Topic</th>
<th>Presenter</th>
</tr>
</thead>
<tbody>
<tr>
<td>9:30-9:40</td>
<td>Recitation from the Holy Quran</td>
<td>قارئ صاحب</td>
</tr>
<tr>
<td>9:40-10:00</td>
<td>Welcome</td>
<td>Asadullah Wahdat, General Director of Legal Aid, MoJ.</td>
</tr>
<tr>
<td>10:00-10:20</td>
<td>Welcome</td>
<td>Abdullah Ahmadzai, Country Representative, The Asia Foundation</td>
</tr>
<tr>
<td>10:20-10:40</td>
<td>Project Introduction: Project Objectives and Parameters and timeline</td>
<td>Siavash Rahbari, Rule of Law Specialist The Asia Foundation</td>
</tr>
<tr>
<td>10:40-11:00</td>
<td>What Will Be Discussed During This Stakeholder Conference: Overview</td>
<td>Professor Ghazi Hashimi</td>
</tr>
<tr>
<td>11:00-11:15</td>
<td>Tea Break</td>
<td>وقفة جاي</td>
</tr>
<tr>
<td>Time</td>
<td>Topic</td>
<td>Presenter</td>
</tr>
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<td>--------------------------------------------</td>
<td>---------------------------------------------------</td>
</tr>
<tr>
<td>11:15-12:30</td>
<td>Independence</td>
<td>Hashmat Khalil Nadirpor</td>
</tr>
<tr>
<td></td>
<td>Breakout sessions; each group selects and</td>
<td></td>
</tr>
<tr>
<td></td>
<td>presents top 5 responses</td>
<td></td>
</tr>
<tr>
<td>12:30-1:30</td>
<td>Lunch and Prayers</td>
<td></td>
</tr>
<tr>
<td>1:30-3:15</td>
<td>Accessibility</td>
<td>Professor Ghazi Hashimi</td>
</tr>
<tr>
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</tr>
<tr>
<td>3:15-3:45</td>
<td>Wrap up Day One</td>
<td></td>
</tr>
</tbody>
</table>

**Day Two June 1, 2016 – ١ جون روز دوم – ٢٠١٦**

<table>
<thead>
<tr>
<th>Time</th>
<th>Topic</th>
<th>Presenter</th>
</tr>
</thead>
<tbody>
<tr>
<td>840-8:50</td>
<td>Welcome</td>
<td>عبده الله دستگير پولزی</td>
</tr>
<tr>
<td>8:50-9:00</td>
<td>Brief Review of Yesterday’s discussions</td>
<td>استاد غازی هاشمی</td>
</tr>
<tr>
<td>9:00-10:20</td>
<td>Efficiency and Quality</td>
<td>Lutfullah Saadat and Hashmat Khalil Nadirpor</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>10:30-12:00</td>
<td>Organizational Health and Resources</td>
<td>Abdullah Dastageer Popalzai</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>12:00-12:40</td>
<td>Lunch</td>
<td>Survey Team, The Asia Foundation</td>
</tr>
<tr>
<td>12:40-1:40</td>
<td>Public Perceptions</td>
<td>تیم سروی دفتر ایشیا</td>
</tr>
</tbody>
</table>

وقت جه/Tea Break
<table>
<thead>
<tr>
<th>1:40-2:40</th>
<th>Wrap Up Panel and Next Steps with Questions from Audience</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>ختم کنفرانس قدمه های بعدی، سوال و جواب</td>
</tr>
<tr>
<td></td>
<td>سیاوش رهبری</td>
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<tr>
<td></td>
<td>MoJ</td>
</tr>
<tr>
<td></td>
<td>وزارت عدالت</td>
</tr>
<tr>
<td></td>
<td>تسهیل کننده دفتر ایل سی ایس</td>
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<tr>
<td></td>
<td>Moderator: ELCS</td>
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</tbody>
</table>
**Annex 3 Composition of different groups**

**Group 1**

<table>
<thead>
<tr>
<th>SN</th>
<th>Name</th>
<th>Organization</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>Assadullah Wahdat</td>
<td>MOJ/LAD</td>
</tr>
<tr>
<td>2</td>
<td>Mohammad Akbar</td>
<td>JSSP</td>
</tr>
<tr>
<td>3</td>
<td>Shabir Ahmed Kamawal</td>
<td>ILF-A</td>
</tr>
<tr>
<td>4</td>
<td>Ali Reza Rohani</td>
<td>AIHRC</td>
</tr>
<tr>
<td>5</td>
<td>Mohammad Khalid Noorzad</td>
<td>USIP</td>
</tr>
<tr>
<td>6</td>
<td>Sayed Rashid Ahmad Bashardost</td>
<td>Attorney General</td>
</tr>
<tr>
<td>7</td>
<td>Humaira Rasuli</td>
<td>Medica</td>
</tr>
<tr>
<td>8</td>
<td>Najaf Rajaee</td>
<td>UNDP</td>
</tr>
<tr>
<td>9</td>
<td>Taj Mohammad</td>
<td>MOJ(^{839})</td>
</tr>
<tr>
<td>10</td>
<td>Enayatullah</td>
<td>MOJ</td>
</tr>
<tr>
<td>11</td>
<td>Mohammad Asif</td>
<td>MOJ</td>
</tr>
</tbody>
</table>

**Group 2**

<table>
<thead>
<tr>
<th>SN</th>
<th>Name</th>
<th>Organization</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>Mufti Mohammad Wali Hanif</td>
<td>MOJ</td>
</tr>
<tr>
<td>2</td>
<td>Ghulam Sakhi</td>
<td>MOJ</td>
</tr>
<tr>
<td>3</td>
<td>Abdul Qawi Afzali</td>
<td>AID</td>
</tr>
<tr>
<td>4</td>
<td>Farkhunda Karimi</td>
<td>GIZ</td>
</tr>
<tr>
<td>5</td>
<td>Rahmatullah Zeeraki</td>
<td>GIZ</td>
</tr>
</tbody>
</table>

\(^{839}\) The green highlighted areas in different groups is an indication that additional people joined the groups on the 2\(^{nd}\) day of the conference.
<table>
<thead>
<tr>
<th></th>
<th>Name</th>
<th>Organization</th>
</tr>
</thead>
<tbody>
<tr>
<td>6</td>
<td>Abdul Hai Farid</td>
<td>AIBA</td>
</tr>
<tr>
<td>7</td>
<td>Noor Aqa Shoaib</td>
<td>AIBA</td>
</tr>
<tr>
<td>8</td>
<td>Mohammad Shaheed Aria</td>
<td>MOJ</td>
</tr>
<tr>
<td>9</td>
<td>Mohammad Asif Nazari</td>
<td>MOJ</td>
</tr>
<tr>
<td>10</td>
<td>Freshta Karim</td>
<td>DQG</td>
</tr>
</tbody>
</table>

**Group 3**

<table>
<thead>
<tr>
<th>SN</th>
<th>Name</th>
<th>Organization</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>Bilal</td>
<td>Not found in the list</td>
</tr>
<tr>
<td>2</td>
<td>Farzana Amin</td>
<td>Medica</td>
</tr>
<tr>
<td>3</td>
<td>Mir Abdul Maroof Zakir</td>
<td>Attorney General Office</td>
</tr>
<tr>
<td>4</td>
<td>Ezatullah Joya</td>
<td>MOJ</td>
</tr>
<tr>
<td>5</td>
<td>Mariam Zalmai</td>
<td>Not found in the list</td>
</tr>
<tr>
<td>6</td>
<td>Noor Aga Shoaib</td>
<td>AIB</td>
</tr>
<tr>
<td>7</td>
<td>Taj Mohammad</td>
<td>MOJ</td>
</tr>
</tbody>
</table>
### Group 4

<table>
<thead>
<tr>
<th>SN</th>
<th>Name</th>
<th>Organization</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>Abdul Basir</td>
<td>Not present</td>
</tr>
<tr>
<td>2</td>
<td>Humayoon Hamid</td>
<td>AIB</td>
</tr>
<tr>
<td>3</td>
<td>Ahadullah Azimi</td>
<td>ILFA</td>
</tr>
<tr>
<td>4</td>
<td>Afzal Rahim</td>
<td>Present /Not in the list</td>
</tr>
<tr>
<td>5</td>
<td>Ashraf Parwa</td>
<td>UNAMA</td>
</tr>
<tr>
<td>6</td>
<td>Sayed Jawad Sajjadi</td>
<td>MOJ</td>
</tr>
<tr>
<td>7</td>
<td>Yaqoob Ali Mosawi</td>
<td>MOJ</td>
</tr>
</tbody>
</table>

### Group 5 International Participants

<table>
<thead>
<tr>
<th>SN</th>
<th>Name</th>
<th>Organization</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>Nicole Tylor</td>
<td>ILF-A</td>
</tr>
<tr>
<td>2</td>
<td>Vincent Museke</td>
<td>UNDP</td>
</tr>
<tr>
<td></td>
<td>Dominique Day</td>
<td>The Asia Foundation</td>
</tr>
</tbody>
</table>
### Annex 4 compiled list of questions from the five groups on Independence

<table>
<thead>
<tr>
<th>SN</th>
<th>Questions</th>
<th>Respondents</th>
<th>Proposed Data Collection Method</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>Whether the Legal Aid Board has institutional independence, i.e. Having political independence and administrative autonomy?</td>
<td>General Directorate of Legal Aid of Ministry of Justice, Independent Legal Aid Board, NGOs providing legal aid services, Afghanistan Independent Bar Association and legal aid providers.</td>
<td>Interview, observation, questionnaire, and consultation sessions</td>
</tr>
<tr>
<td>2</td>
<td>Whether the Legal Aid Board has financial autonomy?</td>
<td></td>
<td></td>
</tr>
<tr>
<td>3</td>
<td>Whether the Legal Aid Board is provided with political, security, administrative and financial support in order to carry out its functions?</td>
<td></td>
<td></td>
</tr>
<tr>
<td>4</td>
<td>Is the Legal Aid Board independent in its oversight activities?</td>
<td></td>
<td></td>
</tr>
<tr>
<td>5</td>
<td>Are there any physical resources for oversight and whether tools for oversight have been established?</td>
<td></td>
<td></td>
</tr>
<tr>
<td>6</td>
<td>Do the legal aid providers have expert knowledge of the judicial system?</td>
<td></td>
<td></td>
</tr>
<tr>
<td>7</td>
<td>Is attendance of professional course for lawyers and acquisition of other practical skills is compulsory for issuance of license?</td>
<td></td>
<td></td>
</tr>
<tr>
<td>8</td>
<td>Whether the credentials/qualification documents of lawyers are evaluated? And If evaluated who evaluates them? 1- by Legal Aid Board, 2- Afghanistan Independent Bar Association, 3- Judiciary, 4- Attorney General Office</td>
<td></td>
<td></td>
</tr>
<tr>
<td>9</td>
<td>Whether hiring or dismissal of legal aid providers takes place independently or under the pressure from political, judicial authorities?</td>
<td></td>
<td></td>
</tr>
<tr>
<td>10</td>
<td>Whether legal aid providers consider political, ethnic, and partisan ground during the performance of their duties?</td>
<td></td>
<td></td>
</tr>
<tr>
<td>11</td>
<td>Whether there exists absolute immunity for legal aid providers for the actions within their power?</td>
<td></td>
<td></td>
</tr>
<tr>
<td>12</td>
<td>How the organization is managed?</td>
<td></td>
<td></td>
</tr>
<tr>
<td>13</td>
<td>How is the relationship between the donor and the hiring organizations? Whether it is professional or based on personal links?</td>
<td></td>
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</tr>
<tr>
<td>14</td>
<td>How the case is handed over and legal issue is selected?</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>
15  Whether effective oversight is carried out with regard to legal aid providers?

16  Whether the salaries of the legal aid providers are sufficient?

17  Whether legal aid providers have ever been threatened?

**Annex 5 compiled list of questions from the five groups on Accessibility**

<table>
<thead>
<tr>
<th>SN</th>
<th>Questions</th>
<th>Respondents</th>
<th>Proposed Data Collection Method</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>Who is indigent person and how can we distinguish they deserve legal aid assistance?</td>
<td>Police, law enforcement entities, judiciary, Afghanistan Independent Bar Association, Legal Aid Department, Legal Aid Providers, clients, and public.</td>
<td>Interview, observation, questionnaire, and focus group.</td>
</tr>
<tr>
<td>2</td>
<td>How many indigent had accessed to the legal aid assistance so far?</td>
<td></td>
<td></td>
</tr>
<tr>
<td>3</td>
<td>Do other people receive legal aid assistance other than indigent person? For example, women, children, vulnerable, internally displaced people and disables.</td>
<td></td>
<td></td>
</tr>
<tr>
<td>4</td>
<td>Does everyone have access to legal aid assistance? How the cost legal aid should be paid?</td>
<td></td>
<td></td>
</tr>
<tr>
<td>5</td>
<td>Whether clients were satisfied with governmental legal aid or NGOs?</td>
<td></td>
<td></td>
</tr>
<tr>
<td>6</td>
<td>What kind of legal aid had been accessible to the indigent person? Governmental or NGOs? Please specify</td>
<td></td>
<td></td>
</tr>
<tr>
<td>7</td>
<td>Whether the defense counsel who provide legal aid has enough experience or not?</td>
<td></td>
<td></td>
</tr>
<tr>
<td>8</td>
<td>How many defense lawyers provide legal aid in Kabul and other provinces?</td>
<td></td>
<td></td>
</tr>
<tr>
<td>9</td>
<td>Is there appropriate balance between legal aid assistance provided by AIBA and LAD?</td>
<td></td>
<td></td>
</tr>
<tr>
<td>10</td>
<td>Is there any coordination among AIBA, LAD, and other legal aid provider?</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>
11 Is the policy written down?

12 Are there any charges you will not represent?

13 How was it decided to open an office in this location? What factors were assessed?

14 How many people go unrepresented? During what time period? What stage?

15 Do you track how client come to you?

16 While providing legal aid, is that right to separate cases?

17 Why some legal aid providers does not provide defense counsel for men?

18 Why some legal aid providers does not provide legal aid in rural areas?

19 At what country there is proportionality between population and legal aid?

20 Providing legal aid assistance in three cases by AIBA defense counsel is enough or not?

21 How AIBA defense counsels can be encouraged to provide legal aid in insecure areas?

22 Why some legal aid providers does not provide defense counsel for men?

23 Why some legal aid providers does not provide legal aid in rural areas?

24 At what country there is proportionality between population and legal aid?

25 Providing legal aid assistance in three cases by AIBA defense counsel is enough or not?

26 How AIBA defense counsels can be encouraged to provide legal aid in insecure areas?

27 What should be done to expand the activities of AIBA and LAD?
Do legal aid providers have sufficient knowledge and ability to represent a client?

In what type of cases indigent and vulnerable people such as women and children take benefit of legal aid?

Are there enough legal aid providers and defense lawyers in provinces?
### Annex 6 compiled list of questions from the five groups on Organizational Health and Resources

<table>
<thead>
<tr>
<th>SN</th>
<th>Questions</th>
<th>Respondents</th>
<th>Proposed Data Collection Method</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>Does the organization have articulated goals, objectives, and activities?</td>
<td>General Directorate of Legal Aid of Ministry of Justice, Independent Legal Aid Board, NGOs providing legal aid services, Afghanistan Independent Bar Association and legal aid providers.</td>
<td>Interview, observation, questionnaire, and consultation sessions</td>
</tr>
<tr>
<td>2</td>
<td>Does the organization analyze the risks?</td>
<td></td>
<td></td>
</tr>
<tr>
<td>3</td>
<td>Has the organization developed a strategic plan?</td>
<td></td>
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<tr>
<td>4</td>
<td>Does the organization have a plan for sustainability?</td>
<td></td>
<td></td>
</tr>
<tr>
<td>5</td>
<td>Does the organization have Office Written Manual, Anti-Corruption Policy, HR Policy, Disciplinary Policy, Financial Policy, Training Policy, Whistle-Blower Policy, Standard of Representation, Lawyers, Managers?</td>
<td></td>
<td></td>
</tr>
<tr>
<td>6</td>
<td>Does organizational structure of the organization set up to achieve objectives, qualities, efficiency, coordination, advocacy, sustainability, transparency?</td>
<td></td>
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<tr>
<td>7</td>
<td>Does the organization developed budget?</td>
<td></td>
<td></td>
</tr>
<tr>
<td>8</td>
<td>Does the organization have funding? Plan for sustainable funding?</td>
<td></td>
<td></td>
</tr>
<tr>
<td>9</td>
<td>Does the organization have number of lawyers? How accessible are they?</td>
<td></td>
<td></td>
</tr>
<tr>
<td>10</td>
<td>Does the organization have number of laws (continuously updated), manuals? Accessible by whom?</td>
<td></td>
<td></td>
</tr>
<tr>
<td>11</td>
<td>Does the organization have developed strategic relationship/partnership?</td>
<td></td>
<td></td>
</tr>
<tr>
<td>12</td>
<td>How is the leadership of the organization?</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>- Is there a specific Job description for management system?</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>- How is the observance of chain of commands (the hierarchy) in the organization?</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>
13 Does the organization structure have leadership board or not?
   - How the member leadership board was chosen?
   - How is the policy of management and leadership in the organization?
   - Does it have long-term and short-term strategies or not?
   - Does it sufficient financial resources or not?
   - How do monitoring and evaluation regarding implementation of strategy take place in the organization and how often?

14 What is the legal basis of your organization foundation and services?
   - Where (geographical territories) does the organization work?
   - What is the communication method between the organization and the interested or relevant organizations?
   - Is the organization accountable for its activities or not?

15 Does the organization have adequate working equipment to provide services or not?

16 Does the organization have enough manpower (work force) to run the service or not?

17 Do the legal aid providers have access to sources of information such as (books, laws, regulations, decrees, bills, etc.)?

18 Does your organization have sufficient financial resources to provide services?

19 How does subject matter authority or territorial matter authority specified in leadership board?

20 Does a wholesome atmosphere dominate in the organization?

21 Is there a transparent recruitment process for recruiting key officials?
22. Were policy and strategy of the organization introduced to all employees and did they have any role in their drafting?

23. Are there implementable policies in the organization?

24. Are there simple and precise procedures while providing legal aid?

25. Which structure works better? Centralized or decentralized.

26. Does structure of the organization change according to the statute?

27. Does current structure address the needs?

28. Is there a clear and explicit system of information exchange among different units?

29. Does the organization have enough number of legal aid providers in comparison of the population and statistics of crimes?

30. Are the available resources used effectively and is there any system to evaluate such purpose.

31. Is there any monitoring mechanism to monitor the organization, legal aid providers and defense lawyer?

32. How the members of leadership board were choses? Elective or appointed?

33. How the organizations consider gender balance?

34. Who runs the organization?

35. Does any political party involve in the organization or not?

36. Is the organization dependent or independent?

37. Are there any criteria for selection of board of leadership?

38. Does the organization have board of directors or not?
Does the organization have board of trustees or not?

Does the organization have statute or not?

Does the organization statute give decision-making discretion to the board of directors or executive?

Does the Organization have specific and effective policies for implementing projects or not?
## Annex 7 compiled list of questions from the five groups on Quality and Efficiency

<table>
<thead>
<tr>
<th>SN</th>
<th>Questions</th>
<th>Respondents</th>
<th>Proposed Data Collection Method</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>Does your organization have any standards or procedures for providing legal aid services?</td>
<td>Police departments, Prosecution offices, Courts, Detention centers, Human rights offices, Women affairs offices, Legal aid department, Legal aid board, Legal aid organizations, Afghanistan bar association, Legal aid providers, and Clients</td>
<td>Interview, observation, questionnaire, and consultation sessions.</td>
</tr>
<tr>
<td>2</td>
<td>How is the relationship retained between defense lawyer (legal aid provider) and the client? Is this in agreement with defense lawyers’ code of conduct and other relevant principles?</td>
<td></td>
<td></td>
</tr>
<tr>
<td>3</td>
<td>Are clients and detention centers aware of free legal aid providers? How do clients find you?</td>
<td></td>
<td></td>
</tr>
<tr>
<td>4</td>
<td>Are legal aid providers accessible? If so, at what stage?</td>
<td></td>
<td></td>
</tr>
<tr>
<td>5</td>
<td>Are the legal aid regulation and relevant guidelines good enough to meet the current needs?</td>
<td></td>
<td></td>
</tr>
<tr>
<td>6</td>
<td>What is the recruitment policy? (application process, qualification, experience)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>7</td>
<td>Is there an orientation and training program for new lawyers? What is your overall training structure?</td>
<td></td>
<td></td>
</tr>
<tr>
<td>8</td>
<td>Are there standards of performance? What are they based on? (law, international best practices)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>9</td>
<td>What is your supervision and mentoring structure?</td>
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<td>How are lawyers monitored or evaluated? Always? Twice a year? What are the criteria?</td>
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<td>Is there any complaint system in place? If yes, is client aware of this system?</td>
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<td>Are you measuring quality? How? How are indicators of performance developed? What are collecting measurements of quality?</td>
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<td>13</td>
<td>In order to provide quality legal aid, do you have any professional mentors for your legal aid providers?</td>
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14 Do you have any form or procedure to find about conflict of interest in your cases? (evaluation forms, personal dossier)

15 Are cases assigned to legal aid providers based on specialty of the legal aid provider?

16 How do you evaluate professionalism and ethics of your legal aid providers?

17 To what extent the current legal aid system is efficient in terms of serving the justice, peoples’ access to justice and fair trial?

18 Have you determined the budget you need to achieve objectives?

19 Have you determined cost per case? How often is it reevaluated?

20 Is there a written policy on caseload? How was policy developed?

21 How do balance between work load and efficiency?

22 Path of a case with organization? One lawyer until the end?

23 How long does it take for lawyer to properly prepare for disposal/close of a case? Has this assessment been done? What factors considered?

24 Extent of coordination with other providers? Strategic plan for this? Avoid duplication? (working in coordination may free up time to handle)

25 Do you have a case system in place? (number of cases, number of legal aid providers, time spent with client)
### Event Evaluation Form

For better improvement of the program in future, we welcome your valuable feedback (comments/suggestions/recommendations)

#### Lessons Learned

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#### Name/Designation/organization (Optional) (Optional)

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<td>آیا صندوق درسی / محل کنفرانس بطور مناسب و موثر ترتیب و تنظیم گردیده بود؟</td>
<td>Seating arrangement was appropriate</td>
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Do you think that the participants/organizations invited for conference were good enough or you recommend addition or removal of any specific individual / organization?

Please indicate the positive points of this conference

Please indicate the weak points of this conference and let us know your recommendation for improvement (If possible)

If you have any other opinion/ comment / suggestion, please write down here

Many thanks
Report of the 2nd Stakeholder’s Consultation Conference

Presentation of Comparative Legal Aid Models

Kabul Afghanistan
1/22/2017
Introduction

Emerging Leaders Consulting Services (ELCS) is working with Open Society Afghanistan (OSA) and The Asia Foundation to undertake the organization of five stakeholder consultation sessions in Kabul. These consultations will feed into a larger, national assessment commissioned by the Afghan Ministry of Justice of Afghanistan’s legal aid system (the “Assessment”) and carried out by The Asia Foundation. OSA is hosting the consultations for the benefit of the Ministry of Justice, and is financing them through its own foundation funds. The overall goal of the consultations is for the views, needs, and concerns of those active in or affected by Afghanistan’s legal aid system to be understood and reflected in the Assessment.

Purpose of the 2nd Stakeholder Consultation Session

This two days’ consultation session was organized to review the various legal aid models used in Afghanistan and selected countries including South Africa and the Ukraine. The agenda for the conference is attached as annex 1 to the report.

Participants

Participants for the 2nd stakeholder consultation conference will include, representatives from the MOJ including the Legal Aid Directorate, Afghanistan Bar Association, Legal Aid Providers, International organizations offering legal aid services in different locations in Afghanistan, donors supporting legal aid and UN agencies. A detailed list of participants for the conference is attached as annex 2 to the conference report.

Expected Outcomes

1. Present a framework for analyzing legal aid system
2. Apply that framework to the legal aid system in Afghanistan
3. Learn from different jurisdictions’ experiences in reforming their legal aid systems, including why they made certain choices, and what challenges remain.
4. Provide inputs that would inform reform efforts in the legal aid system in Afghanistan
Proceedings of the Conference

Day One (November 22, 2016)

Welcome Remarks by Mr. Sayed Ashraf Muzafari, The Asia Foundation

On behalf of The Asia Foundation, Mr. Muzafari welcomed attendees to the second consultation conference, and thanked Ministry of Justice and provincial legal aid departments for their thorough inputs and cooperation with The Asia Foundation’s survey team who went out to provinces to collect assessment data. He added that a part of the assessment has been completed and The Asia Foundation is working to get assessment done. Mr. Muzafari stated that the current two-day conference is about comparative legal aid models which will help Afghan legal aid stakeholders determine what model is a better option for Afghanistan. At the end, he thanked those who organized the conference.

Mr. Shaheed Arya, Legal Aid Manager, Ministry of Justice

The message from Ministry of Justice was delivered by Mr. Shaheed Arya legal aid manager of Legal Aid Department. He noted that in accordance with the article 31 of Constitution of Afghanistan, Advocate law, Legal Aid Regulation and other international documents MOJ is obliged to provide legal aid services and make legal aid accessible to indigents. He further stated that the general policy of the State stipulates mixed legal aid system in which NGOs, Legal Aid Department and the Independent Bar Association provide legal aid, said. He also mentioned that the achievements of aforementioned legal aid providers are tangible. Mr. Arya stated that the conference is held to consider an acceptable legal aid model to be used after assessment is carried out by World Bank. Mr. Arya said, one of the goals of MOJ was the assessment of legal aid system and the approach of way that is acceptable for all legal aid providers. He noted that there should be integrity and coordination between legal aid providers; hence, we should take the advantage of South Africa and Ukraine legal aid models and amend our legal aid system. Mr. Arya also thanked Asia Foundation and Open Society for conducting the conference.

Presentation on the Legal Aid Assessment and Roadmap

Mr. Ali Shah Hasanzada Project Manager from The Asia Foundation delivered his presentation on the progress of legal aid assessment. He noted that considering the essential topics that were discussed in the first stakeholder conference such as eligibility, quality, independence, efficiency, budget and the like, The Asia foundation developed its questionnaires. He stated that survey was took place in following provinces (Herat, Kandahar, Badakhshan, Kunduz, Nangarhar, Laghman, Balkh, Samangan, Bamyian, Uruzgan, Paktia, Helmand, Daikondi, and Kabul) of Afghanistan. In each province, legal aid providers, private lawyers, judges, prosecutors, police, experts and clients were interviewed. He further stated that The Asia Foundation is analyzing the legal aid framework. Mr. Hasanzada also added that the foundation assessed the administrative capacity needs of the Legal Aid Department.
A Framework for Understanding Legal Aid Systems

A presentation was given by ELCS legal consultants (Mr. Nadirpor and Mr. Popalzai) to introduce participants with a framework through which they can analyze legal aid systems. This framework is called legal aid building blocks. The presenters described these building blocks as legal aid providers, legal aid delivery mechanisms and legal aid coordination body.

Mr. Nadirpor stated that legal aid providers are the people who actually provide the legal aid services to client and are categorized as private counsel, NGOs, government, duty counsel, legal clinics and paralegal. He emphasized that most legal aid systems use a combination of legal providers because it makes the legal aid systems flexible. For instance, due to geography or legal expertise (women and children cases) some providers might be in better position than others.

Mr. Nadirpor moved on to delivery mechanism and described it basically as the way legal aid provider is paid: salaried, case by case, or pro bono. He stated that the mechanism which uses salaried lawyers is called public defender offices which include NGOs, government legal aid departments, legal clinics, duty counsel and paralegals. Mr. Nadipor counted some of the benefits of public defender offices as easy prediction of budget, the ability to outsource delivery of legal aid to NGOs or legal clinics, having more specialized legal aid providers, and offering a built-in supervision while the drawbacks were noted as having high caseloads and limited choice of lawyers for clients.

Mr. Nadirpor described the second delivery mechanism as Judicare in which legal aid lawyers are paid case by case. He noted that these lawyers can be paid on a flat fee or hourly bases. Mr. Nadirpor also added that there are two kinds of judicare mechanism: assigned counsel and certificate counsel. He stated that in the first mechanism, counsels are appointed by judicial organs or law enforcement agency from a roaster while in the second mechanism clients can choose their lawyers from the roaster and a certificate is given to client which the lawyer can seek the payment.

Mr. Nadirpor stated the benefits of judicare mechanism as lawyers having more control over their own caseloads, cost efficient in remote areas where setting the public defender office would be too expensive, and giving client choice and incentive for lawyers to be well-regarded in certificate counsel mechanism. He also noted the drawbacks of judicare as being hard to predict the budget, lawyers’ financial interest in preventing clients to change their lawyers, having no built-in supervision, and lack of expert lawyers in specific cases. He furthermore stated that the drawbacks specific to assigned counsel as possibility of appointing body motivation in finishing the case other than the client’s best interest and corruption.

Mr. Nadirpor described pro bono as a mechanism in which lawyers or law students provide legal aid for free. He furthered that pro bono is completely voluntary and can be recommended as a professional practice or required by law. Mr. Nadirpor counted the benefits of pro bono mechanism as being cost effective and lawyers having control on which cases they take on.
However, he described the drawbacks as being difficult to enforce and inability in addressing access to legal aid on national scale.

Mr. Nadirpor stated that most legal aid systems use a combination of above delivery mechanisms because it allows the system to be flexible.

On legal aid coordination body, Mr. Popalzai described Coordination Mechanism in Legal Aid System and focused on the important role that coordination plays. He explained that a coordination mechanism brings the other building blocks (legal aid providers and delivery mechanisms) together into a system and its set up and powers are defined by law and regulation.

Mr. Popalzai described the purposes of the coordination mechanism as connecting legal aid clients with legal aid providers using existing delivery mechanisms, playing a central role in connecting clients to legal aid providers, serving the interests of legal aid clients in accordance with any existing laws, coordinating with government, donors, and legal aid providers to ensure a rational distribution of resources and added that the key tasks of a coordination mechanism vary from system to system.

Mr. Popalzai provided details on some functions of an effective coordination mechanism and furthered that a strong legal aid system may have more than one provider or delivery mechanism but always there should be just one coordination mechanism.

Mr. Popalzai explicated coordination mechanism forms as Statutory Body, Government Department and Bar Association. He described Statutory Body as an administrative body that law or regulation establishes it to carry out the coordination function and the law/regulation specifies the extent of its powers and authorities. He further explained that a statutory body is not necessarily independent and actual independence depends on the details in the law/regulation (how much control is legally left with the government, for example, in appointment the body’s governing members, determining its own budget, etc.), and the culture of the legal aid system and the institutional strength of the statutory body.

Mr. Popalzai explained Government Coordination Mechanism as a department that typically exists within the Ministry of Justice. He added while talking about Government Coordination Mechanism, a question always about independency of legal aid as an institution rises since the government is supposed to control legal aid providers and legal aid department. He replied that independence coordination mechanism with the government can be overcome through norms/culture of independence within the department, respect for the department by the governing ministry and transparent budgeting procedures and a dedicated budget line.
In regards of Bar Association as coordination mechanism, Mr. Popalzai said that it is not a common arrangement because the primary purpose of a bar association is to govern the legal profession, including professional discipline and one of the primary purposes of a legal aid coordination mechanism is to serve the interests of legal aid clients which means there is always question of conflict of interest between the primary purpose of bar association and legal aid coordination mechanism.

At the end, Mr. Popalzai asked the attendees “What if there is no coordinating body?” and furthered that to build a strong legal aid system, coordination body is a vital requirement and without coordination body, it is impossible for a legal aid system to perform properly and effectively.

Presentation on the Ukraine’s Legal Aid System

Vitaliey Baev, Development Director of the Ukrainian Legal Aid foundation, delivered his presentation on Ukraine’s legal aid system. Mr. Baev described the legal basis for provision of legal aid in criminal cases in Ukraine as a statutory right under the 2011 Law of Ukraine on Free Legal Aid. He stated that according to this law, legal aid is provided for any detained person, anyone in custody in criminal matter, persons under administrative detention, cases of mandatory defense, any person charged with an offence with possibility of prison, defendants lacking financial resources, where necessary in the interests of justices and other additional vulnerable groups.

On legal aid coordination mechanism, Mr. Baev noted that responsibilities of coordination are divided among several government bodies such as Cabinet of Ministers, Ministry of Justice, and Coordination Center for Legal Aid Provision (CCLAP), and Regional Free Secondary Legal Aid Centers (RFSLACs). He described that adopting required regulations and terms of contract for all legal aid lawyers are responsibility of Cabinet of Ministers while Ministry of Justice does the general management of the whole system, establishes RFSLACs, and submits draft laws/regulations to Cabinet of Ministers. Mr. Baev added that CCLAP does the day to day management of the whole legal aid system, drafts policies on legal aid, advises Ministry of Justice on establishing RFSLACs, and manages the national register of legal aid lawyers. He mentioned that there are 25 Regional Centers across the country with around 14 to 15 office staff in each center. Mr. Baev stated that Regional Centers manages contracts with local lawyers, arranges payments, insures the quality, and collects basic information on the volume and types of cases that legal aid is provided for.

Mr. Baev described Ukrainian legal aid delivery mechanism as Judicare model in which Regional Centers assign individual lawyers who are on the registry on a case by case basis. He added that these lawyers are private lawyers who may also take private cases and may decline cases the Regional Centers assign to them. Mr. Baev stated that legal aid lawyers are paid in two ways: payment for action and payment for results. He described payment for action as paying on hour basis and payment for results as paying for completion of a phase in trial such as conducting a motion or a hearing that results in a decision of the court.
Mr. Baev stated that legal aid providers in Ukraine are private lawyers who already licensed by National Bar Association and are on national registry. However, he mentioned that Ukraine has also started working with paralegals in civil cases and there are NGOs that provide legal aid in administrative and civil cases as well.

**Presentation on Legal Aid Model in South Africa**

Ms. Wilna Lambley, the Regional Operations Executive for Gauteng Province at Legal Aid South Africa, delivered her presentation on Legal Aid in South Africa. She noted that the Legal Aid South Africa (LASA) provides and coordinates provision of legal aid services in criminal and civil matters. Ms. Lambley stated that NGOs and universities cooperate with LASA through contracts. She further stated that LASA consists of a 16-member board, an 11-member executive, and 6 regional executives which is 100% funded by the government. Ms. Lambley noted that demand for legal aid services had increased dramatically under the country’s new constitution; since 1990, the Legal Aid Board provide services using three models: 1) public defender offices, 2) the law clinics, and 3) branch offices that administered Judicare.

Ms. Lambley noted that the Legal Aid board was established under Legal Aid Act of 1969 and the board started its work in 1971 with an initial budget of R50 000. She stated that at first legal aid services was offered through the Judicare model for the first 20 years. Notably, she added, the budget for legal aid increased to R 225 million in 1998/99. Ms. Lambley also mentioned that the demand for legal aid services increased dramatically under the country’s new constitution. She pointed to a problem which occurred at the end of 1999 when all legal practitioners refused to represent legal Aid Board clients in Kimberley. Therefore, Ms. Lambley noted that instead the Legal Aid Board sent its own lawyers to Kimberley; so, the first Justice Centre (JC) came into being.

Ms. Lambley explained that right now there are 64 justice centers (Public Defender Offices) across the country which is authorized to hire legal aid lawyers directly. She mentioned that LASA uses different legal aid providers. She added that the Public Defender Office is the main model in which the government salaried defense lawyers, NGOs lawyers who are contracted by LASA, and legal clinics’ defense lawyers who are also contracted by LASA provide legal aid. Ms. Lambley stated that in addition to public defenders, South Africa uses Judicare model mostly in cases of conflict of interest. She noted that in less than 5% cases, Judicare model was used last year. Ms. Lambley stated that LASA contract with law firms to provide legal aid in small towns at a rate that is agreed. She added that LASA guarantee the law firms a certain number of cases.

**Presentation on Legal Aid Models in Afghanistan**

Mr. Ghazi Hashimi Legal Consultant of ELCS delivered his presentation on applying the legal aid framework to Afghanistan. He stated that in accordance with Article 31 of the Afghan Constitution the state is obliged to provide legal aid in criminal cases for indigent citizens. Hence, the Legal Aid Department (LAD) was established in 2008 to provide legal aid services.
He emphasized on three essential components of Legal Aid models as follows: legal aid providers, delivery mechanisms, and coordination mechanisms.

Mr. Hashimi said that in accordance with articles 14 and 15 of the legal aid regulation entities such as Legal Aid Department, NGOs, Legal Clinics, and Afghanistan Independent Bar Association provide legal aid. Mr. Hashimi further noted that the public defender’s office is the main legal aid model that is used in Afghanistan and paid lawyers of Legal Aid Department provide the services in 34 provinces. However, he mentioned that in practice, the World Bank for several years has provided some financial support to the LAD to hire defense lawyers to provide legal aid for indigent persons. He added that LAD decides which lawyer takes what case; so, client choice to select lawyer is limited. In addition, Mr. Hashimi noted that a lot of paid defense lawyers of NGOs also provide legal aid in some provinces. Similarly, he stated that NGOs decide which lawyer takes what case; so, client has limited choice to select lawyer.

Mr. Hashimi stated that the concept of legal clinic is new for educational institutions in Afghanistan; however, right now many universities have established legal clinics—none of them represent clients. He further mentioned that Law students work in the clinics under supervision of defense lawyers and they only provide some basic advice to the clients.

In addition, Mr. Hashimi noted that Judicare is another model through which legal aid services have been provided to the clients in the criminal and civil cases. He stated that the World Bank in the past attempted to pay private lawyers on a case by case basis to handle backlogs of cases; however, this project did not last or expand. Mr. Hashimi stated that the UNDP/AIBA legal aid grant facility is loosely based on an assigned counsel model, where the private lawyers provide legal aid for indigents and essentially the defense lawyers are paid case by case.

Mr. Hashimi has brought an example of Pro bono model in his presentation. He explained that in accordance with the Advocates Law, private lawyers are obliged to provide legal aid in three cases for indigents every year. He stated that AIBA decides which lawyer takes what case; however, in some rare cases Clients have the choice to select lawyer.

Mr. Hashimi described that the Independent Legal Aid Board (ILAB) is charged with coordinating the activities of legal aid providers. He mentioned that the administration was established in accordance with the Legal Aid Regulation in December 2008. Mr. Hashimi added that ILAB has 7 members from the following institutions: The Law Faculty, Sharia School, Ministry of Women’s Affairs, Independence Human Rights Commission, AIBA, NGOs, and the Director of the LAD. Because of budgetary issues, staff, and accommodation problems, he noted, ILAB does not function as a good coordinating body.

Day Two (November 23, 2016)

Presentation on New York City Criminal Justice System Map

Ms. Dominque Day, Consultant for The Asia Foundation delivered a presentation on New York City’s criminal justice system based on data, analytics and qualitative analysis. She pointed out
on the status of prisoners in New York City whom received legal aid services based on a report released on July 31, 2015. Ms. Day affirmed NGOs roles as public defenders in providing legal aid services in comparison with the rest of the providing mechanism, specifically that of private lawyers appointed by court. She stated that government of New York used to provide legal services in the past but due to legal aid providers’ independency, the local government contracted NGOs. She added that based on the report, from total cases assigned for legal aid providers, 83% were defended by public defenders, 4% by private lawyers, 3% lawyers appointed by courts and 11 % by different or unknown entities.

Ms. Day explained that through $ 500 million contract for a period of five years, public defenders (NGOs) did 83% of the services while by the same or a little bit less than the amount court appointed lawyers did 3 % of the services.

**Group Work on Legal Aid Building Blocks**

The group discussion aimed at a structured exchange of knowledge, ideas, and perception among participants about coordination, delivery mechanism, and legal aid provides in Afghanistan. The objective of the group work was to produce a range of options or solutions addressing the below questions, to generate a pile of ideas by examining issues in greater depth, and to reach an agreement on how to improve legal aid system in Afghanistan.

In this session participants were divided into three groups. Groups were consisting of representatives from different organizations. Each group was moderated by ELCS consultants and was asked to answer the following questions:

- What are the main challenges to building a robust/strong coordination mechanism in Afghanistan?
- What are the benefits and drawbacks of each of the three distribution mechanisms in Afghanistan?
- What are the strengths and weaknesses of each of the existing legal aid providers in Afghanistan?

After thorough discussion, the groups made the following statements:

**Summary of Group One**

On challenges in coordination, Mr. Barikzai, Legal Aid Director of Kandahar, stated that the decisions of the ILAB sometimes are not practical; for instance, legal aid providers should report hourly which is not practical in provinces. However, he added that this might be practical for NGO lawyers as they have more resources than government lawyers. Mr. Barikzai also mentioned that ILAB enjoys a very weak executive power which sometimes reduces to only giving licenses.

Meanwhile, Mr. Lal Gul Lal, Executive Director of AHRO, raised the issue of capacity building, noting that ILAB has not built the capacity of legal aid provider institutions and has
not provided guidelines for them. Furthermore, he commented on legal aid coordination stating that there is no interest among stakeholders for developing a coordination mechanism and emphasized that stakeholders should take necessary steps to strengthen legal aid coordination. Mr. Barikzai echoed Mr. Lal in coordination and capacity building issues. Mr. Lal also added that legal aid regulation is controversial to other laws; for instance, legal aid regulation requires providing legal aid in civil cases as well. Moreover, Mr. Lal stated that there is no database for case management and NGOs’ databases are not linked with each other which sometime result in registration of clients with many lawyers. However, Mr. Mohammad Taqi, Legal Aid Director of Nangarhar, responded to this concern stating that there is a database developed by JSSP but if there is any problem in computers there is only one engineer in all Afghanistan that can fix it which takes a lot of time. On this issue, Mr. Barikzai added that all databases are linked.

On distribution mechanisms, Mr. Barakzai stated that salaried lawyers are more active, have specific budget and address, regular reporting and supervision and cover more areas. His position on judicare lawyers was that they are efficient and can reach rural areas; nonetheless, Mr. Taqi questioned the quality of judicare lawyers stating that there are defense statements by these private lawyers which are only one page. Besides, he added that case by case payments are expensive and sometimes cause corruption.

Mr. Lal agreed with Mr. Barikzai on salaried lawyers stating that salaried lawyers are better while he mentioned that judicare lawyers have management and supervision problems. Mr. Lal also noted that there is possibility of corruption in legal services provided by pro bono lawyers and there is no built-in supervision to monitor the work of pro bono lawyers. In addition, he questioned the AIBA policy that requires lawyers to practice in places where they are registered which will result in an uncompetitive atmosphere and raises the issue of quality.

Ms. Betsy Walters, ILF Program Officer, stated that salaried lawyers are of high quality with less corruption. However, she noted that the work of judicare lawyers need to be coordinated and closely supervised while pro bono services should be avoided due to quality concerns. Ms. Walters stated that Afghanistan need to use public defenders and in the meantime contract NGOs.

On legal aid providers, Mr. Barikzai stated that the strengths of public defenders are sustainability, being free of charge, and covering criminal, civil cases in all over Afghanistan while the weaknesses are lack of equipment, insufficient salary, heavy caseloads, and transportation problems in provinces. He added that NGO lawyers are better but they are temporary and when NGOs stop their activities cases are left unrepresented. Mr. Barikzai’s position on pro bono services was that they are of no quality; in fact, he added that no private lawyer carries out a case for free.

Mr. Lal argued that one of the weaknesses of public defenders is not having a code of conduct while Mr. Barikzai refused this statement by saying that legal aid providers’ conduct is stipulated in legal aid regulation and advocate law. Mr. Lal added that possibility of corruption
is another weakness of public defenders as they may compromise with police, prosecutors and judges. He, however, agreed on NGO lawyers with Mr. Barikzai affirming that NGO lawyers provide better services but sustainability is an issue.

Ms. Walters emphasized on existence of code of conduct for government lawyers and elaborated that office policies are clearer than regulations; in the meantime policies can be changed more easily than regulations or laws. She also underlined the independence of NGOs and their initiatives in providing legal aid services and suggested that government should partly fund and/or contract NGOs, considering their capacity, to solve the issue of sustainability. Ms. Walters added that NGOs can bring money from outside if the government funds a part. However, Mr. Barikzai argued that instead of contracting with NGOs, it is better to recruit legal aid providers.

Summary of Group Two:

On coordination challenges, Mr. Abdul Wasay Helaman Legal Advisor for IDLO and Mr. Hares Akhtarzada Head of Herat Legal Aid Directorate stated that although the Independent Legal Aid Board (ILAB) exists as a coordination body in Afghanistan, it plays a symbolic role since it is not a budgetary unit and lack of resources disables the Board to well implement its duties and responsibilities. In agreement with rest of the group, they added that lack of coordination between the ILAB and the other stakeholders in distribution and verification of cases and lack of coordination between the ILAB and legal aid donors are the challenges toward building a strong coordination mechanism in Afghanistan.

On distribution mechanism and legal aid providers, the group unanimously agreed that Public Defender is efficient since it is permanent, cost effective, accessible and credible. However, Mr. Helaman suggested that balance between the salaries and privileges of a private defense lawyer and a legal aid provider should be taken into consideration in order to motivate legal aid providers to serve well and efficiently and the group endorsed his suggestion.

Mr. Ahadullah Azimi, Legal Aid Provider for ILF-A and in charge of Capacity Building Programs in AIBA, and Mr. Helaman expressed their concerns regarding Judicare mechanism in Afghanistan because it needs a strong monitoring system to monitor its accountability and transparency that currently Afghan legal aid system lacks. They added that Judicare budget planning is not an easy task as well. The group agreed on their statement. Mr. Sayed Basheer, Legal Aid Provider for the Balkh Legal Aid Directorate, and Mr. Akhtarzada noted that if monitored by head of provincial legal aid directorate, Judicare can work only in those remote districts and areas where the government cannot provide legal aid services.

The group stated that Pro Bono mechanism is good if efficiently managed which is a bit tough for the time being. All members of the group stated that the AIBA Regulation which makes it compulsory for all defense lawyers to defend three cases for free on annual basis can be a good
example for Pro Bono mechanism in Afghanistan. However, they added that this mechanism is new in Afghanistan; therefore, it is neither supported by the public nor by the AIBA since it is believed that defending cases for free would not work effectively in current situation. Except Mr. Azimi the other members of the group blamed AIBA for its unwillingness to enforce its regulation properly in this regard.

Mr. Akhtarzada affirmed establishment of legal clinics in Afghanistan and counted them very useful in providing free legal consultancy for the indigents and an opportunity for paralegals to practice law. The group agreed with Mr. Akhtarzada but added that except Herat’s legal clinic, the rest have not noticeably been active.

Although the group unanimously was pro NGOs’ roles and count them very useful in enhancing current justice system but expressed their concerns regarding lack of transparency, accountability and responsiveness in their performances and implementation of agreements they sign with the government. Mr. Akhtarzada and Mr. Sayed Basheer insisted on expansion of NGOs’ activities in the districts and remote areas where access to government legal aid is difficult and/or challenging. They added, since NGOs pay more for their legal aid providers, they can persuade them to provide legal aid in districts and remote areas.

Mr. Sayed Basheer complained about some of the NGOs’ unprofessional performances and added that he has witnessed that some legal aid providers made only one page defense letter for their clients; the rest of group members also had such an experience. All group members somewhat expressed their satisfaction about the performances of the legal aid providers salaried by the World Bank.

Summary of Group Three:

Regarding the coordination challenges, Mr. Sayed Ahshraf Muzafari from The Asia Foundation noted that the ILAB does not function as a good coordination body because it does not have a specific administrative manual and strategic plan to coordinate legal aid providers. He further stated that necessary attention should be paid in the selection of the board members because the Board is an executive body; therefore, this duty should be taken by experienced young generation. In addition, Mr. Zakir Husain from MOJ stated that ILAB does not have a database for legal aid cases and does not provide the educational programs in all provinces equally.

Mr. Ahmad Khalid Azizi, Legal Advisor for JSSP, also confirmed the perception of Muzafari. He further stated that the Board does not function very well because board rarely holds its periodical meetings unless donors financially support it. He also said that the Board does not have a long term strategic plan. Mr. Azizi stated that the 2016 plan was the same as the 2014 and even they have not edited the plan. He added that although the Legal Aid Regulation needs to be amended; the board has not taken any practical step yet. Mr. Azizi further stated that Legal Aid providers do not share legal aid services report with the ILAB and this could be a problem in the coordination mechanism. He mentioned that for a better coordination
mechanism the Board should have a specific budget and strategic plan and hold weekly meetings. Mr. Azizi noted that Board members should be appointed from professional people and be paid.

Mr. Shaheed Arya, Legal Aid Manager, stated that Legal Aid Regulation should be amended because the regulation does not solve the problems we are practically facing with. He added that legal aid should be provided not only by MOJ but also by other providers as well.

Mr. Zuhair Ehsani, Bamyan Legal Aid Director, stated that the ILAB does not function very well in practice. He illustrated that we sent a letter to the board to provide us specific guidance on indigence eligibility, but we did not receive any respond even after years. Mr. Ehsani further stated that members of ILAB have not taken necessary steps for the betterment of legal aid. He added that more authority and administrative staff should be given to the ILAB to fulfil its job.

In order to have a powerful Legal Aid Board, Mr. Arya noted that board members should be hired through a competitive process. He also mentioned that in accordance with the Legal Aid Regulation defense lawyers who provide legal aid should get their licenses from ILAB, but in practice ILAB does not provide licenses. Mr. Arya added that defense lawyers who even work with the LAD have to renew their licenses and pay fee to ILAB.

On distribution mechanism and legal aid providers, Mr. Ehsani noted that we prefer Public Defender Offices model over Judicare because Judicare model results in widespread corruption; he gave the example of LAGF project. Mr. Ehsani said that in Bamyan province members of LAD receive fewer cases because courts and prosecution offices refer cases to the LAGF private lawyers who have relationship with the judges and prosecutors and receive their percentage. He further stated that public defenders, especially in LAD, also have their own problems such as having insufficient budget and low salary and inability to cover remote areas.

Mr. Azizi stated that both public defender and judicare models have their advantages and disadvantages. He said that a good model should provide quality legal aid services. Mr. Azizi added that the big problem in the public defender model is low salary and most of defense lawyers who work with LAD leave their jobs when they find a good payment in other organizations.

Mr. Wahdat also noted that low salary is a problem in the LAD. He said that defense lawyers receive less than $200 per month which is not enough for them. Mr. Wahdat further stated that there is also lack of cooperation and coordination between legal aid providers and the ILAB failed to fill this gap.

Mr. Wahdat noted that NGOs provide legal aid services as long as they get funds, when they run out of fund, services stop. He also mentioned that in the past more NGOs were providing legal aid but right now just some of them provide legal aid. Mr. Wahdat stated that Judicare model encourages corruption due to lack of coordination with and accountability to MOJ. He noted that cases are not equally distributed between the defense lawyers, for instance, a defense
lawyer earned 700000 AFS through LGAF project in about a year while another did not receive any case. Mr. Wahdat stated that this is due to lack of supervision; therefore, state should take strong steps for a great coordination mechanism.

Summary of Q and A Session with International Experts Regarding Current Challenges in Legal Aid

In this session participants asked some questions from Ms. Lambley of South Africa and Mr. Baev of Ukraine. The international experts answered the questions as following:

Q1: How does the nomination process work in South Africa Legal Aid Board?

Ans: Ms. Lambley responded that the Board consists of the following 14 voting members, appointed by the Minister of Justice. These members are (a) a judge in active service of a court, nominated by the Chief Justice of South Africa after consultation with the Board; (b) eight members who have, as a whole, the following skills and who are appointed by the Minister after the Board invited nominations from all interested parties: (i) business management; (ii) information technology; (iii) the provision of legal services, including experience as a practicing attorney or advocate; (iv) corporate governance; (v) accounting or auditing; (vi) community-based knowledge relevant to legal aid; (vii) legal education and training; (viii) civil and criminal proceedings and the functioning of the courts and tribunals in general; and (ix) knowledge in public interest law. (c) The chief executive officer; (d) Three employees appointed by the Board for the management of Legal Aid South Africa, and who are responsible for the management, including the financial management, of Legal Aid South Africa and who are actively involved in developing and implementing Legal Aid South Africa’s strategy nominated by the Board; and (e) The Director-General: Justice and Constitutional Development, or his or her nominee.

Q2: What are the criteria for the board members to be selected and for how many years are they selected in the South African Legal Aid Model?

Ans: Ms. Lambley responded that a director must, (a) be a fit and proper person; (b) be a South African citizen; (c) not be an un-rehabilitated insolvent; (d) not be a person declared to be of unsound mind by a court of the Republic; and (e) not be a person who has been convicted in a court of first instance. She went on to describe the last condition as (i) of an offence and sentenced to more than 12 months’ imprisonment without the option of a fine; or (ii) of an offence, which involves any element of dishonesty, either in the Republic, or outside the Republic if the conduct constituting the offence would have been an offence in the Republic, other than a conviction for an offence committed prior to 27 April 1994 associated with political objectives; or (iii) of an offence under the Companies Act, 2008 (Act No. 7 of 2008), the Insolvency Act, 1936 (Act No. 24 of 1936), the Close Corporations Act, 1984 (Act No. 69 of 1984), the Competition Act, 1998 (Act No. 89 of 1998), the Financial Intelligence Act, 2001 (Act No. 38 of 2001), the Financial Markets Act, 2012 (Act No. 19 of 2012), or Chapter 2 of the Prevention and Combating of Corrupt Activities Act, 2004 (Act No. 12 of 2004).
Ms. Lamble also added that Board members hold office for a term of not less than three years and not more than five years, as determined by the Minister, in writing, at the time of his or her appointment and may be reappointed for one additional term only.

On whether Government or NGOs services are efficient in your legal aid system, Ms. Lambley answered that Legal Aid South Africa is Government funded and the biggest provider of legal aid services in South Africa and is very efficient. She added that Legal Aid South Africa works very closely with all NGO’s, but due to the history and circumstances, NGO’s today in South Africa play more of a specialization role and does not provide legal aid on the scale that Legal Aid South Africa does. She described that specialization are in areas such as class actions, legislation affecting the rights of vulnerable groups, etc. She also noted that Legal Aid SA have co-operation agreements with a number of NGO’s to ensure delivery of our mandate.

On the same question Mr. Baev responded that criteria of efficiency need to be defined. He stated that NGOs are complementary parts of the free legal aid system, each part has its own resources of financial provision for operation and self-governed and each of them has its own clients. He added that integration of these parts can avoid overlap of its work and makes the system stronger.

Q3: What are the criteria for a person to be eligible to receive legal aid service?

Ans: Ms. Lambley responded that Legal Aid South Africa receives its mandate from The Constitution of RSA (Act 108 of 1996) in which it is determined that “everyone who is detained, including every sentenced prisoner, has the right to have a legal practitioner assigned to the detained person by the state and at state expense, if substantial injustice would otherwise result, and to be informed of this right promptly; …”; “every accused person has the right to a fair trial, which includes the right – to have a legal practitioner assigned to the accused person by the state and at state expense, if substantial injustice would otherwise result, and be informed of this right promptly; …”; and “every child has the right, to have a legal practitioner assigned to the child by the state, and at state expense, in civil proceedings affecting the child, if substantial injustice would otherwise result…”. She mentioned that the constitutional test therefore is that a person is entitled to legal representation by the state and at state’s expense if substantial injustice would otherwise result. Ms. Lambley also noted that in order to determine the above, the following process is followed in criminal matters and civil matters:

Criminal matters

- A simple means test is performed and the means of the accused only is taken into account. Means is assessed in the form of income (such as wages, income from sources such as rentals, annuities, pensions, etc.) as well as assets, such as property and vehicles, etc. A persons earning plus minus less than R6000.00 per month (approx. $400) and have property with a value of less than R300 000.00 ($ 20 000) will qualify for legal aid.
o Should a person exceed the means test, the executive have a discretion to apply the Constitutional means test, in other words look at the nature, gravity, length, etc. of the matter and approve legal aid. Legal Aid South Africa can, also, in some instances order a contribution from the accused person where the means test have been exceeded but the accused cannot afford private legal representation.

Civil matters

o The means test as above applied, however the means of the household income are taken into account if the party applying for legal aid has access to the household income; and
o The merits of the matter are assessed. If there are no reasonable prospects of success, legal aid is refused (These are in matters such as evictions, damage claims, etc.)

o Children in civil matters are automatically entitled to legal aid if substantial injustice would prevail if they are not legally represented.

On the same question, Mr. Bave of Ukraine responded that criteria for receiving free legal aid in criminal cases are (a) belonging to certain category of people for instance, persons detained in criminal proceedings, persons in respect of whom administrative detention or administrative arrest was applied, persons in whose cases under the provisions of Criminal Procedure Code of Ukraine the participation of the defense lawyer is obligatory, persons in respect of whom measure of restrain in the form of placing in custody was awarded, etc. and (b) level of income which include persons with the average total income below the amount of their family living wage.

Q4: Can Law Firms get legal clinic license to provide services for profit under the clinic?
Ans: Ms. Lambley of South Africa answered that law firms do not get a license to be a legal clinic. She, however, added that they can accredit with Legal Aid South Africa to provide Judicare services on a case by case basis (approximately 5% of our work is outsourced legal firms). Ms. Lambley stated that Legal Aid SA also has 5 agency agreements with law firms – these are in rural areas where Legal Aid SA does not have a footprint at a specific court and contracts with one firm to do all the legal aid work at that court.

On the same question, Mr. Baev responded that legal clinic is a part of universities in Ukraine; they usually provide primarily legal aid in form of legal consultations to people as the part of practical preparation of the future legal professionals. He added that the Bar has its own procedure and require 6-month internship together with passing qualification exam from the person who wants to be a lawyer. Mr. Baev furthered that each lawyer is obliged to have certain amount of qualification upgrade annually in order not to be disbarred. He noted that law Firms are usually not connected so tightly with legal clinics.
Q5: There are 54 million populations in South Africa and 160000 are in the prisons and why number of the prisoners is high? Why 6.7% is foreigners?

Ans: Ms. Lambley answered that crime in South Africa is very high and there is pressure on police to make arrests. She stated that unfortunately, in South Africa, an arrest can be affected immediately after a complaint was laid or when the police witness a crime in progress. This, Ms. Lambley added, results in lengthy detentions for “further investigations” and a number of people are detained without bail or with a bail amount that is unaffordable; therefore, resulting a very high number of awaiting trial detainees. She also noted that part of the problem is that a large majority of people live in informal settlements are unemployed and thus difficult to trace.

Ms. Lambley went on to say that there are various initiatives to address the problems and Legal Aid South Africa also focuses on challenging these matters on a case by case basis in court. She added that various pieces of legislation force the presiding officer to ensure that there are no undue delays and to investigate reasons for detention after 24 months. She stated that all stakeholder structures (Judiciary, prosecution, legal aid, etc.) also have to account for all matters older than 234 months on a quarterly basis.

Ms. Lambley mentioned that the public opinion is still very much in favor of detaining accused persons and politically the police and the prosecution resists releasing awaiting trial detainees. She added that there is still a lot of work to be done to address the problems.

Ms. Lambley also stated that South Africa is viewed by foreigners from neighboring countries as a possible economic prospect and a number of illegal immigrants flood to South Africa daily. She added that the people are mostly from poverty ridden countries such as Zimbabwe, Malawi and Mozambique or countries where there are conflicts such as DRC. She furthered that it is an unfortunate fact that a number of foreigners turn to crime when they are unable to find employment or sustain themselves.

Q6: Whether the legal aid systems allow providing services for in absentia cases?

Ans: Ms. Lambley answered that it is highly unlikely that a matter will be heard in absentia in South Africa. She added that the Constitution actually provides that an accused person has the right to be present at his/her trial. She, furthermore, stated that if a person actually refuses to partake on the proceedings, the State can bring an application to proceed in absentia. She went on to say that in this instance, if the accused is a legal aid client, and he instructs our attorney to proceed, the legal aid will appear for the client.

On the same question, Mr. Baev responded that legal aid is provided in absentia proceedings by request of the investigator or prosecutor or investigative judge, or by a decision of a court.

Q7: How do the systems in Ukraine and South Africa use NGOs, how they establish that relationship?
Ans: Ms. Lambley responded that the relationships with NGO’s have evolved over the past couple of years since South Africa became a democratic society. She stated that initially, NGO have provided most services but, in view of the fact that NGOs are somewhat dependent on donor funding, their role changed. Ms. Lambley added that NGOs today specialize in certain areas of law or in specific communities. She mentioned that Lawyers for Human Rights, for instance, specializes in class actions whereas a number of NGOs will specifically work with the rights of children, or abused women, etc.

On the same question, Mr. Baev, answered that State legal aid centers and NGOs (legal aid providers) have signed agreements on cooperation. He added that within the structure of local centers there is a position of integrator (a person who should, among other function, establish and support links between state funded legal aid system and NGOs). Mr. Baev additionally added that relations between government and no-government parts of the free legal aid system touches exchange of expertise and mutual referrals of the clients, and mostly developed for civil and administrative cases.

Q8: What factors does the legal aid system assess in deciding when and why to use NGOs?

Ans: Ms. Lambley responded that Legal Aid South Africa view all NGOS’s as stakeholders and have forged relationships with NGO’s at all levels. She noted that the relationships have different content, depending on the nature and work of the NGO, for instance, Lawyers for Human rights may develop a class action case and the request Legal Aid South Africa for funding (we have a budget available) or to work with our Impact Litigation attorney on the matter. She gave another example that the Centre for Child Law may be contracted by Legal Aid South Africa to provide training to our lawyers on child law. Ms. Lambley added that Legal Aid South Africa also develops a referral system with NGO’s where clients are referred to Legal Aid South Africa from the NGO or vice versa in appropriate matters.

On the same question, Mr. Baev answered that if the client is not eligible for free legal aid system at the expense of the state then such a client preferably to be referred to the NGO.

Q9: How does the leadership of the coordination work in Ukraine?

Ans: Mr. Daev responded that that responsibility of coordination is divided among several government bodies such as Cabinet of Ministers, Ministry of Justice, Coordination Center for Legal Aid Provision (CCLAP), and Regional Free Secondary Legal Aid Centers (RFSLACs). He described that adopting required regulations and terms of contract for all legal aid lawyers are responsibility of Cabinet of Ministers while Ministry of Justice does the general management of the whole system, establishes RFSLACs, and submits draft laws/regulations to Cabinet of Ministers. Mr. Baev added that CCLAP does the day to day management of the whole legal aid system, drafts policies on legal aid, advises Ministry of Justice on establishing RFSLACs, and manages the national register of legal aid lawyers. Mr. Baev stated that Regional Centers manages contracts with local lawyers, arranges payments, insures the quality, and collects basic information on the volume and types of cases that legal aid is provided for.
Summary of discussion points from the group work on Current Legal Aid Challenges in Afghanistan

In this session participants were divided into three groups. Groups were consisting of representatives from different organizations. Each group was moderated by ELCS consultants and was asked to answer the following questions:

- Can the ILAB serve a useful role now? What practical steps ILAB should take to function very well?
- What role should NGOs play?
- How to have a fair distribution of legal aid in all provinces? Can we adopt any new delivery mechanism to this end?
- Do the current AIBA policies work well in terms of providing free legal aid by private lawyers?

After thorough discussion, the groups made the following statements:

Summary of Group One:

On ILAB role, Mr. Barikzai, Legal Aid Director of Kandahar, stated that ILAB doesn’t play a useful role. He added that ILAB is only an advisory board and doesn’t have executive power while it should be an independent body with its own budget. Mr. Lal, Executive Director of AHRO, echoed Mr. Barikzai’s statement saying that ILAB should be independent with its own budget and should do capacity building and coordination for legal aid providers.

On NGOs role, Mr. Barikzai stated that NGOs should work at all provinces, cover all cases (not only women and children), and coordinate their activities with government legal aid departments. Mr. Taqi, Nangarhar Legal Aid Director, added that NGOs should cover places where the government is not present. Mr. Lal agreed with them and complemented that contracts should be given to professional lawyers.

Ms. Walters, ILF Program Officer, stated that strength of NGOs is that they are more efficient and prefers quality over quantity. However, she noted that sustainability is an issue for NGOs but that can be solved if NGOs are funded partly by government for long terms. Mr. Lal added that government, in its national budget, should allocate budget for NGOs to provide legal aid. However, Mr. Barikzai preferred recruiting legal aid providers by government instead of funding NGOs.

On providing pro bono legal aid, Mr. Barikzai stated that the current AIBA policies on providing pro bono legal aid by private lawyers have not been successful. He added that private lawyers do not take complex cases for free and there is a weak supervision to enforce AIBA pro bono legal aid provision policies. Mr. Lal noted that almost half of licensed lawyers do not practice.
Group Two Conclusions:

On ILAB role, all the seven members of the group considered the role of ILAB very important as a coordination body for the national and international legal aid entities but noted that ILAB has not been able to fulfill its duties properly since its establishment.

Abdul Wasay Helaman, Legal Advisor for IDLO, stated that all the members of the ILAB are unpaid employees and they are working voluntarily; therefore, they do not count themselves responsible and accountable and this caused lots of deficiencies in their performances. The group suggested that ILAB must become a budgetary unit and the government should allocate enough budgets to make the ILAB play its role which is efficient and useful coordination.

Ahadullah Azimi, Legal Aid Provider for ILF-A and in charge of Capacity Building Programs at AIBA and Mr. Helaman noted that the ILAB lacks enough personnel and suggested that ILAB should have a secretary to follow its decisions. All members of the group suggested that unless the ILAB becomes a budgetary unit and this be added in Legal Aid Regulation, the ILAB will not achieve the aforementioned goals. Sayed Baseer, Legal Aid Provider for Balkh Legal Aid Directorate, suggested the ILAB should hold meetings with different legal aid providers on quarterly basis and with its members at least twice a year and furthered that the ILAB should have at least one representative in each province.

Regarding NGO roles, the group stated that there should be transparency in implementation of the agreements/contracts signed between the NGOs and the LAD and the ILAB should oversee, monitor and evaluate the NGOs’ performance. Mr. Akhtarzada and Mr. Sayed Basheer insisted on expansion of NGOs’ activities in the districts and remote areas where access to legal aid is difficult and/or challenging. They added, since NGOs pay more for their legal aid providers, they can persuade them to provide legal aid in the districts and remote areas.

On distribution mechanism, the group agreed with all the delivery mechanisms (Public Defender, Judicare, and Pro Bono) and stated that the Legal Aid Department and NGOs are the examples of public defenders and they are providing legal aid services in the capital and major cities. Mr. Azimi and Mr. Helaman noted that although the LAD and NGOs claim that they cover most part of the country, it is not realistic. He added that security issues and low salary are the major obstacles which put shadow on fair distribution of legal aid in all provinces, districts and remote areas.

Mr. Sayed Basheer and Mr. Azimi shared their concerns about unfair distribution of the services that LAGF is providing in provinces. They stated that favoritism, nepotism, and connections in giving the cases for the lawyers have caused corruption and low quality of services. Mr. Sayed Basheer provided details that a legal aid provider who has connections with a justice sector’s influential staff can get more cases than the one who does not have connection. He added that since lawyers are paid per case and everyone wants to get more cases, regardless of their capabilities, load of cases has resulted in low quality and unfair services.
On current pro bono legal aid, except Mr. Azimi who is in charge of Capacity Building Program in AIBA, the rest of group members expressed their concerns about the AIBA policies in terms of providing free legal aid by private lawyers. They stated that recently the AIBA has put a rule which stipulates that if a private lawyer does not defend three cases for free on annual basis, he/she shall be fined with 2000 AFS for each case. The group noted that how can AIBA compare right of indigents with 2000 AFS and they furthered that there has not been a tangible outcome from the AIBA policies. Mr. Azimi didn’t show reaction to these allegations.

Group Three Conclusions:

Mr. Muzafari noted that because of fixed salary in the public defender’s model, defense lawyers do not work on a case as much as required. He stated that in Afghanistan NGOs are able to design their budget and make their plans, so they function better than LAD. Mr. Muzafari added that LAD does not have the authority to propose their budget. He also noted that unlike judicare there is no opportunity of competition in the public defender’s model; so, we can learn from the South African model to amend our public defender model. Mr. Muzafari also stated that judicare is a good model, but it might not function for long term because it relies on donor founds. He noted that the problem with the AIBA is the lack of management system.

Mr. Ehsani stated that it would be good if we use mixed model of legal aid in Afghanistan. He said that while providing legal aid these three factors should be considered: population, geography, and security. Mr. Ehsani added that in big cities such as Mazar, Herat and Kabul LAD and NGOs shall provide legal aid services; however, in the insecure provinces and rural areas the judicare model shall be used under the supervision of MOJ or LAD.

Mr. Wahdat stated that right now the LAD branches exist in all provinces of Afghanistan while NGOs only work in some provinces. He also mentioned that specific budget shall be given to LAD to assign defense lawyers for representation of the clients in rural areas. Mr. Wahdat noted that security is the biggest problem to provide legal aid services in all provinces and rural areas. He said that AIBA does not report their legal aid activities to LAD arguing that the entity is independent. Mr. Wahdat noted this situation might facilitate corruption because defense lawyers may receive specific fee for cases but they pretend that they provide legal aid service. He further stated that the Judicare model has benefits and drawbacks in the context of Afghanistan. Mr. Wahdat counted the drawbacks of judicare system as lack of coordination, unfair distribution of cases among private lawyers, and lack of reporting to LAD while he stated the benefits of judicare as being accessible in rural areas, speedy and quality legal aid services, and easily accessible to clients in all stages of trial. He emphasized that in order to have a good legal aid model a powerful coordination and supervision system is required.

Conclusion

The second stakeholders’ conferences aimed to explore legal aid models and mechanisms for the government of Afghanistan to fulfil its constitutional obligations to provide free legal aid
in criminal as well as civil cases. It attempted to identify the needs, challenges and the way forward towards reforming the current coordination and distribution mechanisms that would facilitate the smooth functioning of legal aid. To this end, the participants shared their ideas on what steps should be taken by relevant institutions to ensure the establishment of a feasible, sustainable, and accessible legal aid mechanism that is supported by proper resources required for its smooth functionality.

In the conference, the building blocks of three different legal aid systems (Afghanistan, South Africa, and Ukraine) were discussed. Considering these systems, the strength and weaknesses of Afghanistan legal aid model were identified as detailed in group discussion sections. Despite having some advantages, the Afghanistan legal aid model faces with some challenges such as weak coordination mechanism, lack of cooperation among legal aid providers and weak supervision mechanism which reflects the capacity of Independent Legal Aid Board. The conference helped the participants to understand and take advantages of the legal aid systems of South Africa and Ukraine and use their strength points in the Afghan legal aid system.

Throughout the conference there were consensus among participants to promote and amend legal aid system and the participants noted that the South Africa and Ukraine legal aids could serve as helpful models. Participants preferred both Public Defender Offices and Judicare models for Afghanistan; however, they suggested that efficiency of each model should properly be evaluated in the context of Afghanistan and should meet the needs of those who are eligible to receive legal aid and guarantee the quality and outreach. For instance, public defender offices are more useful in big cities while judicare is efficient in rural areas since it will cost less than establishing a public defender office. Moreover, it was concluded that deficiencies of each model should be identified and addressed. For example, lack of a strong supervision is a big hurdle toward successful implementation of judicare model which may compromise quality and cause corruption. Likewise, low salary, burden of caseloads in public defender office may also compromise quality of the legal aid services.

Participants of the conference discussed Pro Bono Model and reached to the conclusion that pro bono mechanism has not yet been successful in Afghanistan due to failure in implementing this policy by the institution that make it compulsory on private lawyers. This failure could arise from the institution’s unwillingness or inability which was discussed in the group work section in above. However, the participants were optimistic about efficiency of pro bono mechanism in the long run if AIBA seriously implements its policies and puts in place procedures that assure quality and transparency.

Participants also discussed the current status of Independent Legal Aid Board (ILAB) as legal aid coordinating body and had their observations on bringing reforms to this institution. One of the observations was that the ILAB needs to be financially independent and have a specific budget to carry its tasks effectively. In this regard, the conference asked that government must allocate specific budget for legal aid system. Additionally, it was suggested that professional and experienced people should be appointed through competitive process as members of the ILAB to maximize the productivity of legal aid namely coordination, capacity building, and
monitoring throughout the country. This cannot be done unless the Legal Aid Regulation is not amended. Moreover, it was discussed that ILAB should take necessary steps to link all legal aid providers’ databases and take central role in sharing legal aid information among all stakeholders. On the contrary, all stakeholders also need to cooperate with the ILAB and do their fair share.

Furthermore, participants discussed the role of NGOs in providing legal aid in Afghanistan. One of the main concerns about NGOs was their sustainability. However, participants suggested that sustainability issue could be solved if government contracts NGOs and gives funds for them to deliver legal aid services in specific areas such as remote areas or in specific matters e.g. women and juvenile. As having a comprehensive system of legal aid can be expensive and few governments in the world can fund such a system on their own it was also added that NGOs’ are important because they can raise funds from many different resources other than government.

Annex 1: Conference Agenda

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<td>8:30-9:00</td>
<td>Registration</td>
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<td>9:00 – 9:05</td>
<td>Recitation of Holy Quran</td>
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<td>9:05 – 9:15</td>
<td>Welcome Note by Asia Foundation</td>
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<td>9:15 – 9:25</td>
<td>Opening Remarks</td>
<td>Mr. Wahdat, Ministry of Justice</td>
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<td>9:25 – 9:40</td>
<td>Explanation of Where We Are in the</td>
<td>Mr. Ali Shah Hasanzada from Asia</td>
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<td>Assessment Process</td>
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<td>9:40- 10:15</td>
<td>Presentation: A Framework for Understanding Legal Aid Systems – Part 1</td>
<td>Mr. Hashmat Nadirpor</td>
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<td>10:15 – 10:30</td>
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<td>10:30- 11:00</td>
<td>Presentation: A Framework for Understanding Legal Aid Systems – Part 2</td>
<td>Mr. Abdullah Popalzai</td>
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<td>11:00-12:00</td>
<td>Presentation: Applying the Legal Aid Framework to Afghanistan</td>
<td>Mr. Ghazimi Hashimi</td>
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<td>Lunch &amp; Prayer</td>
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<td>1:00-2:15</td>
<td>Presentation: Legal Aid in Ukraine</td>
<td>Mr. Vitaliy Baev, Development Director of Ukrainian Legal Aid Foundation</td>
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<td>2:15-2:30</td>
<td>Tea Break</td>
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<tr>
<td>2:30-3:30</td>
<td>Presentation: Legal Aid in South Africa</td>
<td>Ms. Wilna Lambley, Regional Operations Executive of Gauteng Province, Legal Aid South Africa</td>
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Day Two: Wednesday 23rd November
روز دوم چهار شنبه ۲۳ نوامبر

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9:30 – 9:40 Recap of the Day One

9:40 - 11:00 Group Discussion and Presentation

1) What are the main challenges to building a robust/strong coordination mechanism in Afghanistan?

2) What are the benefits and drawbacks of each of the three distribution mechanisms in Afghanistan?

3) What are the strengths and weaknesses of each of the existing legal aid providers in Afghanistan?

11:00-11:15 Tea break

11:15-12:30 Discussion with International Experts re: Current Challenges in Legal Aid

12:30-1:30 Lunch & Prayer

1:30-2:45 Group Discussion and Presentations: Current Challenges in Afghanistan

- Groups discuss where they see the critical challenges, and propose
possible solutions, and then present their findings

بحث گروهی روزی چالش های راه های حل و ارائه نتایج بحث

2:45-3:00 Tea break وقفه چای

3:00-3:30 Discussion of Next Steps in the National Assessment Process

بحث روزی قدمه های بعدی در پروسه بررسی ملی

Mr. Siavash Rahbari, The Asia Foundation

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Annex 2: List of Attendees

<table>
<thead>
<tr>
<th>S.N</th>
<th>Name</th>
<th>Title</th>
<th>Organization</th>
<th>Contact No.</th>
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<th>Day 2</th>
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<tr>
<td>1</td>
<td>Asadullah Wahdat</td>
<td>General Director Legal Aid</td>
<td>MOJ</td>
<td>799249719</td>
<td>NO</td>
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<td>Shaheed Arya</td>
<td>Legal Aid Manager</td>
<td>MOJ</td>
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<td>Zakir Hussain</td>
<td>Spokesperson</td>
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<td>Shafiq Nabilizada</td>
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<td>Haris Akhtarzada</td>
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<td>Rahmatullah Zeeraki</td>
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<td>Romal Ayar</td>
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<td>Ahmad Farhad</td>
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<td>Yameenullah Yameen</td>
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<td>S. Ashraf</td>
<td>Legal Aid Officer</td>
<td>Asia Foundation</td>
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<td>25</td>
<td>Siavash Rahbari</td>
<td>Rule of Law Specialist</td>
<td>Asia Foundation</td>
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<td>26</td>
<td>Dominique</td>
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<td>27</td>
<td>Ahmed Javed Rahmanzai</td>
<td>President</td>
<td>ELCS</td>
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<td>28</td>
<td>Abdullah Popalzai</td>
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<td>ELCS</td>
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<td>Ghazi Hashimi</td>
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<td>Hashmat Khalil Nadirpor</td>
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<td>31</td>
<td>Dr. Mohammad Haidar</td>
<td>Event Coordinator</td>
<td>ELCS</td>
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<td>32</td>
<td>Mohammad Zaman Khadimi</td>
<td>Note Taker</td>
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**Annex 3: Groups Participants**

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<tr>
<td>1</td>
<td>Group One</td>
<td>Mohammad Taqi</td>
<td>Director Legal Aid Nangarhar</td>
<td>MOJ</td>
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<td>Obaidullah Barakzai</td>
<td>Director Legal Aid Kandahar</td>
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<td>Lal Gul Lal</td>
<td>Executive Director</td>
<td>AHRO</td>
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<tr>
<td>4</td>
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<td>Ms. Betsy Walters,</td>
<td>Program Officer</td>
<td>ILF-NY</td>
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<td>Dominique Day</td>
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<td>Group Two</td>
<td>Abdul Wasy Hilaman</td>
<td>Legal Aid Expert</td>
<td>IDLO</td>
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<td>Haris Akhtarzada</td>
<td>Director Legal Aid Herat</td>
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<td>Shafiq Nabizada</td>
<td>Legal Education Officer</td>
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# REPORT OF THE 2ND STAKEHOLDER’S CONSULTATION CONFERENCE

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<td>Ahadullah Azimi</td>
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<td>Asadullah Wahdat</td>
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Introduction

The fourth Stakeholder’s Consultation Conference was jointly organized by Open Society Afghanistan and Emerging Leaders Consulting Services. The conference was part of the series of five consultation sessions to engage stakeholders from different organization involved in legal aid in Afghanistan. The consultation sessions will feed into a larger, national assessment commissioned by the Afghan Ministry of Justice of Afghanistan’s legal aid system (the “Assessment”) and carried out by The Asia Foundation. OSA is hosting the consultations for the benefit of the Ministry of Justice, and is financing them through its own foundation funds. The overall goal of the consultations is for the views, needs, and concerns of those active in or affected by Afghanistan’s legal aid system to be understood and reflected in the Assessment.

Purpose of the 4th Stakeholder’s Consultation Conference

The main purpose of the fourth stakeholders’ consultation conference was to present and discuss the preliminary findings of the assessed led by The Asia Foundation and Ministry of Justice.

Participants

Participants for the fourth stakeholder’s consultation conference included, representatives from the MOJ including advisor to the HE the Minister of Justice, representative from the Legal Aid Directorate, Afghanistan Independent Bar Association, Independent Legal Aid Board, Legal Aid Providers, International organizations offering legal aid services in different locations in Afghanistan, donors supporting legal aid and UN agencies. A detailed list of participants for the conference is attached as annex 2 to the conference report.

Expected Outcomes

5. Appraise different aspects of the assessment including, methodology
6. Present and discuss assessment findings
7. Provide inputs to further enrich the assessment findings
8. Incorporate inputs from different stakeholders in the final assessment report
Welcome Remarks by Mr. Ashraf Rasooli, advisor to HE Minister of Justice

On behalf of Ministry of Justice, Mr. Rasooli delivered the opening remarks. Mr. Rasooli expressed his gratitude to Asia Foundation, Open Society and ELCS for the assessment of legal aid system. Appreciating the value the assessment will add to the reform efforts undertaken by MOJ, Mr. Rasooli encouraged the legal aid community to review the findings and use them to support reform efforts at different levels of the system. Mr. Rasooli urged participants to use the conference as a good platform to review and discuss findings of the assessment which will be presented in today’s conference. He further encouraged dialogue and agreement of different stakeholders regarding the findings so to accelerate the work and reform agenda of the MOJ. During this talk, Mr. Rasooli highlighted some of the issues that impede delivery of quality legal aid services in the country.

- Afghanistan is rich in terms of laws, but there is issue with enforcement of the law. The legal aid system is not an exception to this
- Inadequate number of trained and professional attorneys and defense lawyers affect delivery of legal aid to the people of Afghanistan
- Some of the legal aid providers lack essential skills to cater legal aid to accused people
- Lack of coordination and cooperation among law enforcement agencies greatly affect delivery of quality legal to needy people
- People do not have equitable access to legal aid services in the country
- The legal aid workers are not having access to accused person. Mostly, the police will block the attorneys for interaction with accused person.
- There is lack of awareness among general public regarding their right to free legal aid
- The current structure of legal aid board is not responsive to the needs of the country
- There is ambiguity in the roles and responsibilities of members of the legal aid board.

Presentation of summary findings from the three conferences

Dr. Javed Rahmanzai, President of Emerging Leaders Consulting Services presented an overview of the key findings from the past three conferences to the conference participants. In his presentation, Dr. Rahamanzai highlighted title of each conference including objectives and key outcomes. While presenting information on the 1st conference, Dr. Rahmanzai indicated that the focus of first consultation session was to determine domains of the assessment, development of criteria for the assessment including development of question bank. He brief participants about the outcome of conference which was selection of domains for the assessment, development of criteria for the assessment and establishment of a question bank that can be used later by The Asia Foundation team to prepare interview guides and questionnaires.

For the 2nd consultation conference, Dr. Rahmanzai presented an overview of the conference which was presentation of comparative legal aid models from two countries including Ukraine.
and South Africa and Afghanistan. Dr. Rahmanzai summarized the outcome of conference as follows:

- There is a universal framework through which any legal aid system can be analyzed. The framework is also called the building blocks
- There is no best model in the world: the best model is the one that draws on a country’s existing strengths and addresses its weaknesses
- Flexibility is necessary: Strong legal aid systems have built in flexibility that reflect the country’s relative strengths and weaknesses
- Benefits and drawbacks: all legal aid systems have with benefits and drawbacks; compromise will always be part of any reform process
- All systems have on going challenges

Presenting information on the third meeting of the stakeholders’ Dr. Rahmanzai reported that during the third meeting which was organized by UNAMA, major donors participated in the meeting. During the meeting, an overview of the legal aid system for Afghanistan was presented to the donor community. Dr. Rahmanzai summarized the key outcomes of the meeting as follows:

- Participants uniformly agreed that the current structure of ILAB is difficult to support
- The purpose of reform efforts undertaken by MOJ and supported by development partners and international organizations is not to create a new system. It is to support and strengthen the existing system through review and amendment of several aspects of the legal aid system including the laws governing legal aid system in Afghanistan.
- There is a need for policy document that ensures pro bono requirements result in real assistance

To conclude the session, Dr. Rahmanzai indicated that the three initial consultation sessions served as platforms to gather insight from different stakeholders regarding different aspects of the legal aid system. He further added that the views and expert opinions shared by legal expert will be incorporated in the overall assessment findings so to create a roadmap to guide future direction of legal aid system in the country.

Presentation of Preliminary Findings of the assessment

Mr. Siavash Rahbari legal expert from The Asia Foundation delivered a presentation on the preliminary findings of the assessment. In his presentation, Mr. Siavash provided an overview of the assessment including background information regarding World Bank and MOJ’s intent to assess the situation of legal aid system since 2011 to draw a roadmap for the future. Asia Foundation and Open Society Afghanistan expressed interest to provide technical support in this regard. Describing the assessment process, Mr. Siavash presented an overview of the steps involved in the assessment process including the followings:

- Review and assessment of legal framework
• Needs assessment of legal aid directorate with particular focus on management and leadership
• Conducting SWOT analysis of legal aid environment in the country
• Preparation of a roadmap and recommendations to guide future courses of action

Prior presenting further insight into the assessment, Mr. Siavash discussed the shared the objectives of the assessment as follows:

• An understanding of the legal aid environment in Afghanistan
• Presentation of list of recommendations
  o Building on the success of past of decade
  o Establish a clear and realistic roadmap for the future
  o Development of the model
  o Encourage and absorption of funds to support the system

Providing information regarding the process for the assessment, Mr. Siavash indicated that the process involved review of international literature regarding legal aid in other countries, literature review regarding legal aid in Afghanistan and organization of five stakeholder’s consultation sessions co-organized by Emerging Leaders Consulting Services and Open Society Afghanistan. The consultation session helped to determine domains for the assessment including criteria to be used for the assessment.

Regarding assessment activities, Mr. Siavash reported that besides comprehensive review of the literature, the assessment involved collection of primary data from 8 provinces (Figure 1) including organization of focus group discussions with members of the legal aid directorate.

Figure 1 study provinces

Mr. Siavash further added that the findings were supplemented by stakeholder’s consultation sessions that involved study of different legal aid models from other countries. In addition, Mr.
Siavash reported that the assessment team participated in international conferences on legal aid to get a deeper insight regarding legal modalities in other countries. The idea was to collate information from different sources including review of legal aid framework, consultation sessions with stakeholders, report from the field, donor conferences, review and update of assessment data and finally presentation of findings in this conference to seek insight from different stakeholders to further enrich the assessment findings.

During the presentation, Mr. Siavash also highlighted some of the challenges that the assessment team faced while collecting information regarding legal aid assessment. Some of the challenges included:

- Security
- Lack of data and organized information
- Unfortunately lack of cooperation and negative competition among legal aid community in the country
- Complex nature of the legal aid system

Mr. Siavash also presented information regarding some of the assumptions that exist among legal aid community including the followings:

- Provision of legal aid is associated with problems and challenges in every context, particularly in Afghanistan
- There are many different models to provide legal aid
- Every institution and individual strives to learn new things to grow and develop
- Everybody is willing to help in this regard

Below are some of the highlights of the key findings from the assessment. The findings are grouped in four categories including:

- Provision
- Capacity building
- Coordination
- Funding

**Delivery Mechanism of legal aid services: Mix Model**

Providing details regarding the mechanism of delivery of legal aid services, Mr. Siavash indicated that there are different institutions and individuals involved in delivery of legal services. Some of the institutions that are involved in delivery of legal include (Figure 2):

- Legal Aid directorate
- Legal aid clinics
- Legal aid provided by NGOs
- Other NGOs involved in delivery of legal aid
- Services provided by contract providers

Besides institution, Mr. Siavash presented the list of individuals (Figure 3) involved in delivery of legal aid services in the country as follows:
- Legal aid provided through LAGF
- Free Legal aid provided by AIBA and
- Legal aid provided by contract legal aid providers

In his concluding remarks regarding delivery mechanism for legal aid, Mr. Siavash reported that Afghanistan’s legal aid system is a mix model that involves institutions, individuals and legal aid provided through pro bono.

Figure 2 Provision of legal by institutions

In addition to delivery mechanism for the legal aid services, Mr. Siavash presented the findings of SWOT analysis process. Mr. Siavash summarized the findings of SWOT as follows:
Strengths

- Afghan laws, policies that safeguard legal aid
- Afghans understand the right to legal aid
- Afghanistan’s Justice System Profits from Robust Legal Aid

Weaknesses

- System wide
- Legal aid guidelines ignored in practice
- Little Zealous Representation
- Significant Coordination Needs
- Legal Aid shortage in every province

Opportunity

- Cross-cutting Policy objectives demand robust legal aid system
- Legal experts increasingly a resource + referrals
- Data collection and analytical capacity system wide

Threats

- Pervasive security problems
- Repeat player problem
- Funding + sustainability
- Logical barriers to case management

Regulatory framework for legal aid

Providing insight on the regulatory framework, Mr. Siavash presented an overview of the legal aid regulation, the structure and role of ILAB, the role, duties and structure of legal aid department and finally the role of Afghanistan independent bar association. Presenting an overview of the regulatory framework governing legal aid in Afghanistan, Mr. Siavash said that the structure presents a complex model involving different line of communications and chain (figure 4).
Mr. Siavash also presented the role and functions of different entities involved in legal aid system in the country. Presenting information regarding the role of ILAB, Mr. Siavash indicated that in principle ILAB as mandated by the law should partner with MOJ to coordinate the legal aid, however in reality, this is not happening and there is no mechanism in place. There MOJ is not coordinating with the Board on matters related to legal aid. A good example is the current assessment. Adding further details on the subject matter, Mr. Siavash highlighted that the legal aid department should serve as secretariat to ILAB. But, results show that there is no staff and or resources or equipment and space allocated for ILAB to operate. In terms of reporting and accountability, LAD is required to report to ILAB and be accountable to the Board, but this has not been translated into practice.

In terms of structure the Board comprises of seven different stakeholders including (i) head of ILAB, (ii) law and Sharia faculty of Kabul University, (iii) Afghanistan independent bar association, (iv) NGO. This indicates that LAD functions in multiple roles including, member of the Board, its secretariat and at the same time be supervisee to the Board. The Board is also to supposed to monitor legal aid delivery by AIBA, NGOs, and LAW clinics.

On the licensing and accreditation, Mr. Siavash reported that the assessment findings show that ILAB is reluctant and perfunctory NGO licensing body. ILAB as per the findings is an illegitimate and perfunctory law clinic licensing body. While ILAB is regulatorily mandated to
perform this function, due to objections from AIBA, ILAB doesn’t provide accreditation to individual legal aid providers. In terms of monitoring and supervision, NGOs provide regular reports to ILAB. Members of ILAB use funds from donor agencies to travel to provinces to observe and oversee legal aid situation in different provinces.

With regards to financial support to the ILAB, the institution generates funds through collection of license fee, while some support was provided by different donor agencies in the past including, World Bank, GIZ and JSSP.

**The Legal Aid Department (LAD):**

Mandated by the law, the LAD at MOJ is dedicated to delivering legal aid services across 34 provinces. The institution has allocated budget for the current tashkeel or human resources. However, LAD the budget cannot account for the administration and other expenses. LAD has been receiving financial support from some of the donors namely, World Bank and JSSP since it was transferred to MOJ back in 2008. Despite this support, LAD is falling short with regards to supervision and monitoring of legal aid delivery by different individuals and institutions administration and responsiveness. Most importantly, LAD lacks independence and may engage in issues with potential conflict of interest.

**Proposed Options**

Based on the findings of the assessment, Mr. Siavash presented information regarding reform options for the legal aid system in the country.

1. A substantial reform of the ILAB that would involve the followings:
   - Charge membership
   - Real secretariat by LAD
   - Dispense with licensing
   - Create accreditation system
   - Allow accredited organizations to apply for grants
   - Provide data and real coordination

2. Disband ILAB and concentrate on LAD
   a. Create necessary administrative and financial capacity for LAD to seek its own independent budget code
   b. Create a separate account for the LAD so it can seek donor funds to grant to NGOs, legal aid clinics and AIBA members
   c. Lacks independence and adds internal bureaucracy opposed by MOJ administration

3. AIBA
   a. AIBA already plays a vital role in maintaining quality
   b. Should it also help coordinate legal aid or delivery legal aid
   c. There is a conflict of interest between the interests of its membership and of indigent persons in need of help

**Question and Answer Session**
After presentation of preliminary findings of the legal aid assessment, a Q and A session was organized. The session was moderated by Mr. Siavash, Mr. Rahmani and Dr. Rahmanzai. Participants were asked to share their views with regards to the findings of the assessment.

**A summary of the discussion points during the Q & A session is summarized below:**

The Q and A session commenced with remarks from Rohullah Qarizada from AIBA. Appreciating the work of Asia Foundation, Open Society Afghanistan and Emerging Leaders Consulting Services, Mr. Qarizada request if some additional insight can be provided regarding the ILAB. Mr. Qarizada specifically wanted information on the followings:

- More insight on how ILAB should look like in terms of structure?
  - What should be the structure of the Board?
  - Based on the findings of the assessment, what activities should be performed by ILAB?

In response, Mr. Siavash reported that the current structure of the Boar is not responsive to the needs of legal aid system. Particular functions of the Board are performed by LAD. It would be good to expand the membership of the Board to include representatives from Ministry of Justice, Human Rights Commission, Supreme Court and Attorney General’s office. The idea is which institution provides the best coordination platform for legal aid. Most importantly, the goal is to create a strong secretariat that undertakes operational activities of the Board.

Mr. Shaheed Arya from MOJ asked if the assessment had inputs from beneficiaries of LAGF project. He wanted insight on the followings:

- Satisfaction level of beneficiaries from the provision of legal aid through NGOs and LAGF pilot project
- Type of forms and templates to be used in the legal aid

In response to another question regarding the implementation of LAGF project, Mr. Siavash reported that the assessment was undertaken in different provinces including the LAGF project areas. Many people were interviewed to get during views regarding provision of legal aid. From the views presented by respondents, it seems that people expressed dissatisfaction from the provision of legal services by LAD and LAGF. The idea of LAGF was to find an alternative to ILAB to provide legal aid services. The purpose is to ensure the systems are responsive to the needs of people for legal aid and improves access to legal aid and attorneys at the subnational levels. Our expectation should be to have the Board expand the level of professional legal aid services by hiring contract attorneys so they can increase people’s access to legal aid services at the provincial and subnational levels.

Regarding the forms and templates, Mr. Siavash briefed participants that the purpose of these forms and templates has been created in consensus with other stakeholders. The purpose was to facilitate the process of question and answer for defense lawyers. The forms will not only have questions related to the case being presented, but also help the attorneys collect comprehensive information regarding the case. The forms will create a clear map and guide defense lawyers to defend the case more effectively in the court.
In response to the discussion, Mr. Rasooli advisor to the Minister of Justice indicated that MOJ and ILAB are committed to bring necessary changes to the structure of the Board by hiring new members to the Board. Mr. Rasooli further added that the senior leadership at MOJ and the Board are serious about these changes to take place. Mr. Rasooli stressed on the enforcement power of the Board and recommended strengthening the role of the secretariat to provide strong support to streamline Board’s’ operations. Meanwhile, Mr. Rasooli shared some concerns from the leadership at MOJ regarding donors support to different institutions using different mechanisms. Mr. Rasooli said this challenges the MOJ to determine whom to approach for what and how to collaborate with all these many institutions. Mr. Rasooli conferred the view that in order to improve coordination and collaboration between different stakeholders engaged in legal aid, it is important that MOJ, donor agencies, NGOs all work together to establish such mechanism that brings everybody together for maximum impact. The other challenge Mr. Rasooli reported that affect the Board’s capacity is shortage of funds and budget that limits the Board’s ability to provide support and guidance to many organization providing legal aid in the country.

Mr. Askarzada indicated that there is legal aid regulation; however, there is issue with coordination and supervision of legal aid services. He pointed out to some of the following issues that affect delivery of legal aid system in the country.

- Having accurate and reliable statistics in the MOJ
- Findings gaps in the system of legal aid and provision of legal aid
- Absence of accountability framework including reporting system
- Establishment of the M and E system including defining the roles and responsibilities and the reporting line
- Development of a registry that is responsive to the legal aid system

Mr. Askarzada further added that as per the law, members of the Board are mandated to oversee and observe activities of organizations and individuals providing legal aid in the country. Members had to travel to oversee and observe activities of legal aid providers. He suggested that in the future this activity could be transferred to the secretariat of the Board so to ensure the Board engages in strategic activities.

On the cooperation, Mr. Askarzada indicated that unfortunately the cooperation between the Board and individuals and entities engaged in legal aid system is weak. The process has become fault finding instead of creating a supportive environment. In addition, issues with governance and lack of reporting system has resulted in deficiencies in the performance of the Board. Taking these issues into consideration, Mr. Askarzada suggested creation of a database that includes data collected through assessments and reports provided by different institutions. MOJ should serve as focal point for challenging donor funds to legal aid board and other institutions involved in the delivery of legal aid services. It was suggested that to improve functionality of the Board, there is need for increase the number of members besides increasing the capacity of members to deliver quality work.

Presenting the situation of legal aid from the provinces, the legal aid director from one of the provinces indicated that the situation in provinces is dire. There are not enough legal aid
providers at the provincial levels. Performance deficiency among legal aid providers is a cause for concern. To address these shortcomings, there is need for allocation more resources to provinces. LAGF was intended to increase access to legal aid services at the provincial level.

Mr. Rasooly presented his views regarding the issues raised by different institutions. He indicated that the current structure of the Board is not responsive to the needs of entire country. ILAB cannot afford to send legal aid support to all provinces. Budget limitations and resource allocation from the MOF doesn’t allow for expanding and increasing membership of the ILAB. MOJ has lately recruited 30 legal aid providers in the country. The mix model of legal aid is an approved model. The challenge however is operational level issues including insecurity, budget shortcomings and issues surrounding coordination of legal aid.

Providing his views, Mr. Qarizada from AIBA said that the one of the reason Afghanistan choose a mix model of legal aid system was that the government was not able to provide legal aid services at national and subnational levels due in part to system and structural issues. He supports the idea of establishing a database that allows for collection of information regarding provision of legal aid services in different areas of the country. Mr. Qarizada further added that this would also ensure an exercise of the governance of the system to improve accountability and reporting.

**Moderated Panel Discussion**

A moderated panel discussion was held in the afternoon to discuss issues raised during the Q and A session and determine future courses of action. The panel members include the followings:

- Mr. Ashraf Rasoli (Panel Moderator)
- Mr. Qawi Afzali
- Mr. Rohullah Qarizada (AIBA)
- Mr. Siavash Rahbari (The Asia Foundation)
- Mr. Qasim Rahmani (OSA)
- Mr. Shaheed Arya (LAD)
- Mr. Nabi Waqar (NGO)

**Member regrets:** Ms. Fereshta Karimi (ILAB)

Opening the Panel discussion Mr. Rasooly voiced his strong support for the Mix Model legal aid system for Afghanistan. Mr. Rasooly urged members to discuss and suggest reform efforts on other aspects of the legal aid system. He indicated that the leadership at MOJ and other partners has agreed that the it is in the best interest of the country to have a mix model legal aid system. He further added that in order to the legal aid system to thrive, there is need for strong collaboration and coordination among different stakeholders involved in legal aid system in the country. To further this goal, Mr. Rasooly indicated that activities of different institutions needs to be regulated so to maximize the outcome of their activities. Mr. Rasooly also called on the donor agencies to coordinate their activities with the Board so to create synergy and allow for maximum impact. He further urged stakeholders to coordinate their activities with Board and MOJ so to improve use of scant resources. Mr. Rasooly also
recommended improving oversight and monitoring of activities and services of legal aid providers at national and subnational levels. Mr. Rasooli also indicated support for the capacity building of the legal aid providers at different fronts so to increase responsiveness of the system. He expressed his great support for the reform efforts proposed by the system including modification of the structure of the board and establishment of a secretariat for the Board to undertake administrative and to some extend operational activities of the Board. After his introductory remarks, Mr. Rasooli opened the floor for discussion.

Representative from LAD Balkh indicated that the licenses should be the authority of the Board since other organizations issuing license to legal aid providers cannot determine the eligibility of individuals and organization to provide legal aid services.

In response, Mr. Rasooli indicated that there are several license-issuing authorities in the country. NGOs often get their license from MoEC. AIBA issues license to legal aid providers, so there is some level of scrutiny before an institution get license to operate as legal aid provider.

Mr. Qawi Afzali from AID added that the Board’s activities are more or less symbolic in nature. The current organization structure limits the Board’s ability to exercise power in controlling activities of legal aid providers in the country. Board should engage in strategic level activities including drafting policies and strategies while the NGOs and other legal aid providers should serve as implementing partners to the Board providing legal aid service to the people.

On the structure of legal aid board, Mr. Kamawal proposed inclusion of representatives from Police, Attorney General’s office, Supreme Court and Institutions working in Human Rights Issues. He also suggested that someone from Faculty of Sharia and or Law Faculty should be included in the Board.

Mr. Rahmani shared his views by providing insight about the structure of the Board. Mr. Rahmani indicated that while it is good to have representation from different institutions in the Board, too much diversity in the membership may create issue during decision making as it will be difficult for members to reach consensus on a particular matter. There will be opposing ideas. He further added that, besides other criteria for selection of members in the Board, professionalism should be an important factor in selection of members to the Board. Those selected for the Board should have expertise in legal aid system and be member to the Board only. Currently, most of the members are engaged in multiple positions that limit their ability to participate in Board activities.

Mr. Rasooly indicated that quite often the prosecutors don’t value the work of attorneys and defense lawyers. The Board has only been an observant in this case. He further added that the court often undermines the work of attorneys, which needs attention. Board can take lead on this.

The LAD from Bamyan indicated that the board should work independently with full authority to exercise its constitutional power. The biggest challenge according to him is the current structure of the board. He indicated that in the provinces, there is not a good representation of the board. There is less cooperation among prosecutors and attorneys at subnational level. The
LAGF project doesn’t have executive power to resolve issues emerging from the lack of cooperation between defense lawyers and prosecutors.

Mr. Rasooli indicated that establishment of a database and reporting system will resolve some of the issues highlighted by the participants of the conference. In addition, Mr. Rasooli reiterated that establishment of a strong and well-functioning board will help improve legal aid system in the country.

Mr. Siavash reported that the Board should govern the system by preparing policies and strategies to bring discipline in the system. There is need for improving reporting and availability of data and evidence to support the system. In addition, he suggested strong coordination and collaboration among different organizations involved in the legal aid system in the country.

The LAD from Bamyan suggested that in order for the Board to function well and be responsive to the needs of the system, there should be an equitable expansion of the Board activities and functions across the country. He further added that distribution of legal aid providers should be done equitably to ensure people from different provinces can access timely legal aid services across the country. People across the country should know their rights and obligations against the law including the right to access to legal aid and legal aid provider when needed.

The LAD from Herat said that currently there is no differentiation between legal aid providers and prosecutors as far is power is concerned. While some institutions work to increase people awareness, people are often not aware of legal aid providers including agencies involved in delivery of legal aid. Therefore, there needs to be a strong and single source to deliver legal aid to the people in the country. In addition, he added that the Board doesn’t see the need to cooperate with the government. In the legal aid regulation, three cases are to be verified by the government, however there is almost seven years that the Board has not shared its view point on this particular case to either approve and or disapprove the three case scenarios.

Concluding the panel discussion, Mr. Rasooli urged the members to focus on some of the critical issues that affect delivery and quality of legal aid services to the people. He suggested that the focus of this assessment and the consultation organized to supplement the findings were meant to provide constructive insight to the future of legal aid in the country. The MOJ leadership is committed to use some of the findings from the assessment and consultations organized during past several months to determine the future of legal aid in the country. He further added that the role of bilateral donors in supporting the reform efforts undertaken by the MOJ cannot be undermined. They play an important role in improving the status of legal aid in the country. Mr. Rasooly stated that in order for us to embark on this new journey, there is strong coordination and cooperation among different stakeholders involved in the legal aid system.

Mr. Rasooli indicated that the law has given this authority to the Board to cater legal aid to the people of Afghanistan. In his concluding remarks, Mr. Rasooli urged members to support the reform efforts undertaken by the MOJ and its partner institutions. He further added that the purpose of reform should be to learn lessons from the past and use the findings of the assessment to further strengthen the legal aid system in the country. The findings should only
be used to inform reform efforts not to be used to blame an individual and or an institution. Meanwhile, Mr. Rasooli reiterated that the legal aid delivery system in Afghanistan will remain a mix model. However, the leadership at the MOJ is committed to work with partner institution to improve governance, service delivery, financing and accountability in the legal aid system. He further added that in order for the reform efforts to be effective, there is need for improving cooperation and coordination among different stakeholders involved in the legal aid system.

**Conclusion**

The Conference which was the fourth from the series of five consultation sessions provided a god platform for different stakeholders to share their views regarding the findings of the assessment. There was good representation of different stakeholder groups in the conference. Most of the views expressed by participants were on the structure of the ILAB including coordination among legal aid providers. While there was agreement among all stakeholders that the legal aid model will remain a mix-model involving government, donors, NGOs and private legal aid practitioners, majority of the stakeholders voted for a reform in the structure of the ILAB, they stressed on the importance of delineating the role of different stakeholders involved in the legal aid system. In addition, participants recommended strong coordination and collaboration between different stakeholders to maximize the outcome of legal aid services.
Annex 1: Conference Agenda

Assessment of Legal Aid System

Fourth Stakeholder’s Consultation Conference

**Agenda**

**Tuesday 11th April 2017**

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<tr>
<th>Time</th>
<th>Topic</th>
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<td>9:00- 9:30</td>
<td>Registration</td>
<td>Fakhria/Aazin</td>
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<td>9:30 – 9:45</td>
<td>Recitation of Holy Quran</td>
<td>ELCS</td>
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<td>9:45 – 10:00</td>
<td>Opening Remarks</td>
<td>Mr. Ashraf Rasouly</td>
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<td>10: – 10:20</td>
<td>Tea break</td>
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<td>10:20- 10:40</td>
<td>A quick overview of the Three conferences</td>
<td>Daftar Jawaidy/Qasim Rahman</td>
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<td>10:40-11:40</td>
<td>Presentation of Assessment Results</td>
<td>Siavash Rahbari Legal Aid Expert</td>
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<td>11:40-12:10</td>
<td>Q and A (Guided Discussion)</td>
<td>Siavash/Javed/Qasim</td>
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<td>12:10-1:10</td>
<td>Lunch &amp; Prayer</td>
<td>All Participants</td>
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<td>1:20-2:30</td>
<td>Moderated Panel</td>
<td>7 Panel Members(^{840}) including a moderator</td>
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<td>Tea Break</td>
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<td>2:45-3:15</td>
<td>Q and A Session</td>
<td>Siavash/Javed/Qasim</td>
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Panel members

1. Mr. Ashraf Rasuli MOJ (Moderator)
2. GD Legal Aid Directorate Mr. Assadullah Wahdat
3. Donor (Mr. Qasim Rahmani)
4. Ms. Freshta Karimy from ILAB
5. From the AIBA Mr. Rohullah Qarizada
6. Siavash Rahbari from The Asia Foundation
7. Independent Legal Aid Expert (Mr. Qawi Afzali)
8. NGO: Mr. Nabi Waqar

\(^{840}\) Donor agency (1), AIBA (1), NGOs (1), Government (1), ILAB (1), Independent Expert (1)
ANNEX 2

IDLO, in coordination with ALAAN members, provided the LAAR team with a map of the legal aid offices of its membership. This map was updated in December 2016.
## ALAAN Network Contact Information

### Ministry of Justice (MOJ)

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### Afghanistan Independent Bar Association (AIBA)

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### Afghanistan Independent Defenders (AID)

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### Humanitarian Assistance for Women and Children of Afghanistan (HAWCA)

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### Afghanistan Human Rights Organization (AHRO)

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ANNEX 3

Following a Request by The Asia Foundation, the Justice Programs Office at American University in Washington D.C. prepared a paper on legal aid boards. This paper is attached here as Annex 3.
I. Introduction

The United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems guarantee the right to legal assistance “where the interests of justice so require.”1 States have many options when deciding how to organize and coordinate their legal aid provision. A common solution is a creation of a legal aid board, a centralized body specifically designed to coordinate legal aid across the entire country. If done correctly, these boards can ensure that people who cannot afford legal advice are able to receive it. Successful legal aid boards also operate independently from government, which helps safeguard the rights of people for whom the government is the opposing party. States have found that legal aid boards have several benefits if done effectively. These benefits include (1) an emphasis on independence and transparency; (2) increased efficiency and consistency; (3) improved monitoring and data collection; and (5) the potential for higher-quality services.2

A state that wants to set up a legal aid board must decide how it will be established; what tasks it will perform and what policies it will set; who will be on it; and what protections will be put in place to ensure its independence.

II. Establishing a Legal Aid Board

Most commonly, the legislature creates the legal aid board via statute, often as a component of a more overarching Legal Aid Act. Statutes vary in their specificity. Some, such as Ireland’s Civil Legal Aid Act,3 merely dictate that the body exist and does not enumerate the legal aid board’s specific tasks. Others, such as Bangladesh’s Legal Aid Services Act4 or Sierra Leone’s Legal Aid Act,5 lay out what precisely the board should be doing. In Bangladesh, for instance, the board is required to: (1) set criteria to determine whether a person is eligible to receive legal aid; (2) create legal aid schemes; (3) “carry out educational and research programs for the purpose of providing legal aid;” (4) create a campaign to increase public awareness of the availability of and right to legal aid; (5) hear appeals on denied applications; (6) oversee District Committees, which actually

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provide the legal aid; (7) create informational materials and trainings; and (8) “to do anything necessary for carrying out the aforesaid functions and duties.”

III. Board Membership

Composition

States also must determine who is going to be on the legal aid board, who will nominate or appoint those individuals, and how many people will be on the board. Often the same statute that establishes the legal aid board also outlines its membership. Legal aid boards tend to contain anywhere from five to nineteen members pulled from a wide variety of stakeholders in the legal aid system, including judges, attorneys, non-governmental organizations, and others. In some cases, this does not include a government official in order to aid in the board’s real and perceived independence. Some states’ statutes, such as that of Bangladesh, outline the exact breakdown of its nineteen members, which includes, among others, secretaries of various ministries, members of parliament, the Attorney General, the Chairman of the National Women Organization, and representatives of non-governmental organizations. Others, such as those of Sierra Leone and Ghana, lay out what organization members must represent. South Africa’s statute only lists the sector in which board members must work.

Choosing Members

States have several options when deciding who will be on the board, with the Ministry of Justice having more or less power over the board depending on the system. In some states, such as Ireland, the Ministry picks the entire board. However, in others the Ministry of Justice has little to no say in who is on the board. In that case, often stakeholders will nominate their own representatives.

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Most states fall somewhere in the middle. Regardless of the process a state chooses, boards tend to work better if the process and criteria for choosing them is consistent and transparent. Board members, once chosen, usually serve for a set term, often somewhere around two to five years, and can be removed only in very limited circumstances.

IV. The Role of the Legal Aid Board

In broad terms, the job of a legal aid board is to run the legal aid system on a more macro level. This mainly amounts to oversight and coordination of legal aid services, which often includes tasks like creating and implementing policy, managing and submitting budgets, collecting and analyzing data, monitoring and evaluation, and creating consistency throughout the country.\textsuperscript{16}

All of that being said, the tasks of these boards (and even whether a board exists at all) varies widely from state to state. For instance, though many boards have the responsibility of determining eligibility criteria, some state have given that task to the courts.\textsuperscript{17} Others place many policy decisions in the hands of the Ministry of Justice or its equivalent.\textsuperscript{18} In some states, the legal aid board is also active in the provision of services.

Policy

In many states, the legal aid board sets much of the policy related to legal aid provision. These policies may include things like quality standards; provider schemes; eligibility criteria (i.e., criteria to determine who may receive legal aid); application and appeals processes; and data collection. By having a centralized body set policy for the entire country, it is easier for the state to work towards the goal that all individuals, regardless of where they live, can access legal aid services. Standardized policy also simplifies monitoring and evaluation.

Provider Schemes

States may use many different types of legal aid schemes and/or providers, and usually the legal aid board decides which scheme (or schemes) to use and then sets them up. The legal aid board decides whether the state will provide legal aid via public defender offices, paralegals, non-governmental organizations, or some other provider. It will decide whether to pay on yearly contract, a case-by-case basis, or another timetable. Finally, the legal aid board will often actually execute these agreements with providers. For instance, in South Africa, the legal aid board signs cooperative agreements with groups such as non-governmental organizations or universities to

\textsuperscript{16} United Nations Development Programme. (2012). “International Study of Primary Legal Aid Systems with the Focus on the Counties of Central and Eastern Europe and CIS.”

\textsuperscript{17} United Nations Development Programme. (2012). “International Study of Primary Legal Aid Systems with the Focus on the Counties of Central and Eastern Europe and CIS.”

\textsuperscript{18} United Nations Development Programme. (2012). “International Study of Primary Legal Aid Systems with the Focus on the Counties of Central and Eastern Europe and CIS.”
“directly benefit the poor through the delivery of legal services.”  

19 In the Netherlands, the legal aid board is tasked with “enter[ing] into agreements with third parties.”  

Eligibility Criteria

The legal aid board in many states also set eligibility criteria. Generally, these criteria come down to two things: means (can a possible recipient afford to retain private counsel) and merit (defined broadly as “if the interests of justice require”). In practice, legal aid boards must also consider the often-limited resources available to legal aid providers. Regardless of what the eligibility criteria will be, the legal aid board should be “lawfully established, non-arbitrary, transparent and well-publicized.” They also should be objective and non-discriminatory. In some states, the legal aid board sets the eligibility criteria but then local providers or offices apply them. In this case, the legal aid board tends to hear appeals of eligibility determinations. In other states, like Sierra Leone, legal aid board both sets the criteria and makes the original eligibility determination on individual possible recipients. In still other states, such as Bangladesh, the Ministry of Justice determines the eligibility criteria and the legal aid board applies them. Regardless of the division of responsibility here, the legal aid board should ensure that applicants receive a timely response to their request.

Monitoring and Evaluation

Because of its centralized nature, legal aid boards are well positioned to collect and analyze data from the providers. Legal aid boards are able to collect data on: (1) who is applying for aid; (2) how many applications are being submitted; (3) whose applications are being approved; (4) how many applications are being approved; (5) providers’ caseload; (6) the outcome of their cases; and (7) how much time and money is being spent on legal aid. Legal aid boards can then use these data to evaluate their system. They can ensure that the correct clients are receiving aid, for instance. Based on the trends of these data, a legal aid board can also determine whether they are doing enough to educate their citizens on the right to an attorney and the availability of legal aid services.

Legal aid boards also have a responsibility to oversee providers. This means that the legal aid board needs to have a way to address complaints from clients as well as to mete out disciplinary

22 McKay, L. (2015), "State-Sponsored Legal Aid Schemes."
actions when appropriate. For instance, in the Netherlands, the legal aid board has the ability to remove someone from their list of legal aid attorneys if said attorney is not meeting expectations. Private attorneys that will be providing legal aid must register with the legal aid board, and they are audited every three years by specially trained auditors.

One of the more significant tasks of a legal aid board is to ensure consistency for all people in the state, regardless of where they are. The legal aid board can make sure that local systems are providing service in line with national legislation.

V. Independence and Accountability

Those receiving legal aid often by definition are at odds with the government. Therefore, any body (such as a legal aid board) overseeing legal aid must be independent of the government, both in reality and in perception. This independence is usually codified in the original statute. States can take several steps to ensure it – for instance, the membership of the legal aid board can have a major impact on its independence. A legal aid board is more likely to be independent if its members are not beholden to the Ministry of Justice or other government actors. A fixed term for members enhances the legal aid board’s independence as well, as the members are not under threat of being removed for making an unpopular decision. Once members have been chosen, legal aid boards can also establish their independence by ensuring that the government is unable to interfere in its work; the government should not have say over which individuals receive legal aid nor how a legal aid provider works a particular case. In Ireland, this particular protection is in the statute itself: “Nothing in this act shall be construed as enabling the Minister to exercise any power or control in relation to any particular case with which the Board is or may be concerned.” Another way states ensure independence of the legal aid board is to have its funding be a separate line item listed in the budget, rather than having funds come directly out of the Ministry of Justice’s budget, since the MOJ could then arbitrarily restrict the legal aid board’s resources.

Justice (or whatever ministry houses the legal aid board) should not interfere in the work of the legal aid board.\footnote{Paterson, Alan (2013) Establishing an independent legal aid authority in Hong Kong: lessons from overseas jurisdictions. Working paper, available at \url{http://strathprints.strath.ac.uk/45134/1/Final_Hong_Kong_country_Report_PatersonA.pdf}, at p. 8}

However, legal aid boards and by extension legal aid providers still need to be held accountable. Many states require that the legal aid board submit an annual report directly to the legislature (though they often will send an advanced courtesy copy to the Ministry of Justice). The legislature then has the power to enact legislation to effect change if the legal aid system is not up to par.\footnote{Paterson, A. (2013). Establishing an Independent Legal Aid Authority in Hong Kong: Lessons from Overseas Jurisdictions.}

VI. Conclusion

Many states have found that legal aid boards are a helpful way to organize their legal aid provision. They provide a way to coordinate and provide consistency in services throughout the country. They create a barrier between the government and the legal aid providers to help prevent government interference in cases adverse to its interests. They centralize data collection and by extension monitoring and evaluation. Overall, as an oversight body the legal aid board has the potential to make provision of services more efficient, more consistent, and of higher quality. However, in order for the legal aid board to reach that potential, states should carefully consider issues like: who is on the board, including how many people and how they will be chosen; what their tasks will be, what their authority will be, and how they will conduct their work; how they will collect data; how they will monitor and evaluate the system as a whole as well as individual providers; and how the board will maintain its independence while still being accountable.