

CHRI 2018



REPORT ON PROCEEDINGS

LAUNCH AND CONSULTATION OF
CHRI'S NATIONAL STUDY ON LEGAL AID
FOR PERSONS IN CUSTODY

Hope Behind Bars?



CHRI

Commonwealth Human Rights Initiative
working for the *practical* realisation of human rights in
the Commonwealth

I. Background and Context



The Commonwealth Human Rights Initiative (CHRI) organised the launch and consultation for its National Report on Legal Aid for Persons in Custody – Hope Behind Bars? on 9th September 2018, in New Delhi. The report was launched by Justice (Retd.) A.P. Shah, Former Chief Justice of Delhi High Court, Justice S. Muralidhar, Delhi High Court, Mr. Sanjay Hazarika, International Director CHRI, and Mr. S. S. Rathi, Director, National Legal Aid Services Authority (NALSA).

The event was attended by representatives from legal services authorities, judiciary, prison department, law schools, media and civil society. The launch was followed by a panel discussion on ‘improving quality of legal aid services’ chaired by Justice S. Muralidhar, Delhi High Court. The second half of the day was spent discussing the role of civil society and university based law clinics on strengthening legal aid for persons in custody.

This report documents the key findings of the study, encapsulates the discussions during the consultation and brings together the key recommendations and ways forward that will enable stakeholders, especially legal aid functionaries to ensure effective access to legal aid for persons in custody.

KEY RECOMMENDATIONS FROM THE CONSULTATION:

The consultation drew detailed deliberations from key stakeholders. While this document details the recommendations made by them thematically below, some key recommendations follow:

1. NALSA to develop a Standard Operating Procedure (SOP) for streamlining access to legal aid for persons in custody – at arrest during in production and prisons.
2. Legal Service Institutions and Universities to collaborate to ensure students assist legal aid lawyers in drafting bail applications, applications for furlough, parole, etc. and identify mentally ill inmates. NALSA may develop a protocol for the same.

3. NALSA to prepare duty notes for legal aid providers. This would ensure that they are aware of the roles and responsibilities. The State Legal Services Authority (SLSA) to translate them in regional language(s).
4. Legal Service Institutions to introduce legal aid clinics in police stations keeping in view custodial violence and human rights violations in police custody. NALSA may develop a scheme/protocol to operationalise these clinics.
5. Legal Service Institutions to strengthen engagement with civil society organisations to aid in monitoring and assist their work and improving the accountability and transparency within legal aid services. In this direction, NALSA to develop an SOP for empanelment of civil society organizations.
6. NALSA to develop a 'directory of legal services authorities' and make available it online on its website.

About the Report

The report, published in two volumes, identifies policy and implementation gaps which plague the legal aid system and suggests ways to improve legal aid delivery, particularly for those who are in jail. Based on responses to RTIs received from 29 states and Union Territories over the past year, the report also identifies certain good practices in states which can be replicated across the country.

The report addresses two vital areas of legal aid delivery: early access to legal aid for persons in custody and quality of legal representation. It looks at legal aid delivery at police stations, courts and prisons. The report includes both theme-wise and state-wise analysis of the existing system, and highlights key issues in both policy and implementation of legal aid in India. It also brings together relevant state-wise statistics on prisons, police and courts.

II. Key Findings from the Report

1. **Budget for Legal Aid:** The per capita spending on legal aid in India is just Rs 0.75 (\$0.008 USD). In Australia it is \$23 and in Argentina \$17. One of the most often cited challenges faced legal aid across the globe and in India is the lack of funds.

Findings:

- A. RTI responses point to a 14% under-utilization of funds allocated. The SLSAs utilised Rs 220 crores of the Rs 257 crores allocated to them in 2016-17.
- B. Bihar, Sikkim and Uttarakhand utilised less than half the funds allocated to them. Andhra Pradesh and Uttar Pradesh also underspent by more than a third.
- C. At the other end of the spectrum, Delhi, Gujarat, Punjab, Rajasthan and a few others spent more funds during the year than were allocated to them.
- D. On average, one-sixth of the funds utilised by the states have been on *lok adalats*, legal awareness and legal representation. The biggest chunk of expenditure, and rightly so, was on payments made to lawyers, which accounted for 28% of the total expenditure. Only 3% was spent on training.

2. **Legal Aid at the Police Station:** The constitution of India (Article 22(1)) guarantees the right to a lawyer to an arrestee, so does Section 41 D of CrPC (Code of Criminal Procedure 1978) and Section 12(g) of the Legal Services Authorities Act 1987.

Findings:

- A. There is at present no national scheme which establishes a mechanism to provide legal aid at the police station.
- B. None of states which responded to CHRI's RTIs said they have any scheme to provide legal aid at police station.

Consequently, rights of arrested persons are frequently breached with impunity. It is common place to hear of arrest without sufficient cause, breach of D. K. Basu guidelines, illegal detentions for over 24 hours, intimidation and torture in the early stages of the criminal justice process. Internationally, the UN Legal Aid Principles¹ and the recent UN Model Law have stressed on importance of legal aid lawyers and paralegals at the police station.

¹ UNPGLA (United Nations Principles and Guidelines on Access to Legal Aid in the Criminal Justice System 2012).

3. **Legal Aid Clinics in Jails:** NALSA (Legal Aid Clinic) Regulations 2011 and NALSA Standard Operating Procedures on Representation of Persons in Custody 2016 mandate the setting up of jail legal aid clinics in each prison.

Findings:

- A. There are 1062 legal aid clinics in India. We received information of 659 jails. 92% of these jails had constituted a legal aid clinic. More than 50% of the clinics were constituted between 2015 and 2016.
- B. The responsibility for the functioning of these clinics lies essentially with convict paralegals and jail visiting lawyers. While only three-quarters of the clinics appointed jail visiting lawyers, convict paralegals were appointed in only a third.
- C. Registers are crucial to record, monitor and follow up on requests made by inmates in the clinics. Only 35% of the districts (93 of 251 districts) were maintaining registers in the jail legal aid clinics. Khagaria district in Bihar stood out as it maintained nine registers.

4. **Quality of Legal Aid:** The NALSA (Free and Competent Services) Regulations 2010 regulate the functioning and monitoring of legal aid services.

Findings:

- A. Monitoring Committees are mandated to review the quality of legal aid provided by lawyers. 60% of the districts which responded to the RTI constituted a monitoring committee.
- B. More than half of these were constituted in 2015 and 2016.
- C. Maintaining records and registers and keeping a separate staff to manage these committees are crucial for its working. Only 16% of these committees had staff and 23% maintained registers.

Given the complete lack of infrastructure to monitoring the work of legal aid providers, and no effective mechanism to receive feedback from the client, the quality of legal aid suffers.

5. **Other important findings:**

- A. About 80% of India's 1.32 crore population is eligible for legal aid. This is by far the biggest coverage of legal aid in the world and India has made provisions to ensure that those who cannot afford it, have legal representation.
- B. To be able to manage the demands of legal aid, legal aid bodies are supposed to be adequately staffed and trained. While there are 651 District Legal Aid Authorities in India, we received response on this specific query from 520. Of the 520 DLSAs, only 339 had full-time secretaries. Without a dedicated secretary, legal aid administration would remain insufficient and ineffective.

III. Discussions and Deliberations

1. 'Improving Quality of Legal Aid Services'



Mr. Sanjoy Hazarika, International Director, CHRI, stated at the outset that legal aid is essentially “about the idea of justice meeting the idea of India.” He stated that central focus of legal aid should be on “rights and constitutional justice which is delivered in time”. The national report raises two very crucial questions: How early is ‘early’ access to legal aid and how effective and competent is the legal aid that is being provided. Mr. Hazarika also highlighted the need to start legal aid representation at the stage of police custody/arrest while citing a good practice adopted in Fiji.

Justice A.P. Shah, former Chief Justice, Delhi High Court, when launching the report, highlighted that still “many prisoners are unaware of the status of cases as well as their basic human rights”. He stated that “access to justice is the most basic human right” and emphasised on the need of competent legal aid lawyers providing effective legal representation.

Dr. Srikrishna Deva Rao hailed CHRI’s efforts in putting together the national report. He highlighted the significance of understanding the distinction between two very distinct phases of the criminal justice system - police and prison (judicial) custody and an evidentiary lack of legal aid in the former. He pointed out the need to emphasise upon rights at first production; a right that has been highlighted time and again by several justice delivery mechanisms across the world.

Justice Muralidhar focused on the challenges surrounding litigants’ perceptions of lawyers and the lamentable state of quality legal aid and legal aid lawyers across India. The standards in quality of legal aid services being different across the country causes to discrepancies to creep in. He acknowledged that as majority of the accused are from an economically weaker section of society who cannot afford quality and effective legal representation, it becomes very critical for relevant authorities to appoint lawyers with sufficient experience.

Mr. S.S. Rathi, Director of National Legal Services Authority (NALSA), informed the audience about new developments in legal aid. He appreciated the recommendations made in CHRI’s report and urged to have greater collaborations with CHRI and other civil society organisations.

Stressed upon Article 22 of the Indian Constitution which guarantees legal representation (of the litigant’s choice) at the time of first production in court but in reality, this choice is curtailed by social stratification and limitations. The need for legal aid at initial stages for a litigant is at the highest and not doing so renders the hearing an ineffective ritual. He emphasised on the need for legal aid lawyers to be human rights’ defenders. Commenting on their trainings and orientations, he laid emphasis upon it to be undertaken from a human rights’ perspective and not just substantive and procedural laws. Drawing on the directions in *D. K. Basu*, understanding the scope of ‘places of custody’ and how custody is not just limited to police custody but includes other departments and custodial institutions that may have powers of arrest. He also stated that the scope of penal custodial institutions must include *nari niketans*, beggars’ homes, etc. He also reminded that a litigant’s right to legal representation at the stage of recording confession has been recognized in *Mohd. Ajmal Amir Kasab’s* decision.

2. Role of Civil Society and University based Law Clinics

The objective of this session was to find ways and methods by which civil society could help legal services authorities for furthering the vision on creating access to legal services. The challenges surrounding ease of



access to legal services authorities (at various levels) by civil society organizations, nature of documents, study and research how civil society can assist legal aid services was discussed. The session also explored if and how civil society organizations can help set up legal aid clinics in prisons and/or police stations and other such places. Other relevant aspects discussed included challenges encountered by civil society organisations in gaining access to the prison machinery and providing assistance towards legal aid for persons in custody and setting standards and parameters.

The 1980 committee on the implementation of legal aid schemes took important steps in institutionalising legal aid clinics. It mandated that all law colleges should set up legal services clinic and Emphasised upon the need to build a network of law schools- National law schools, Central and State university departments, private colleges and local colleges, to be able to contribute to the system of legal aid at all levels. Even though the NALSA (Free and Competent Legal Services) Regulations 2010, lays down the structure of the legal aid clinics and their role along with part IV of the Bar Council Rules which provides for the mandate to establish Legal Aid Clinics, it would need the will of the Universities to implement the ideas. Reworking and reimagining curriculum to bring into the fold the idea of assisting legal services delivery is needed. It was further noted that social work students have not been sufficiently involved in legal aid work. It was felt that collaborations between law colleges/ universities and social work colleges will lead to better outcomes.

Dr. Srikrishna Deva Rao, Vice Chancellor, NLU Odisha, an expert in the field of clinical legal education urged to “extensively use para-legal volunteers in the legal system as a link between the community and courts”. In order to spread awareness, he recommended that “schools and colleges need to have systems in place to familiarise them about the role of police”. He also highlighted the importance of legal representation immediately after arrest and pointed out the necessity of legal aid at different stages including, at the point of arrest, during first production, and during remand orders passed by magistrates.

Mr. Sunil Chauhan, NALSA divided persons in custody into three categories – pretrial, undertrials and convicts, with very different needs for each category. Legal aid for each category may not offer students possibilities/ avenues, but there are a range of things the students can contribute to :

1. Research to find out the range of punishments and incarceration periods in the prison and to bring out the unmet legal needs of the prisoners.
2. Strengthen front offices in Legal Services Institutions and the newly established 700 digitised Legal Aid clinics.
3. Lok Adalats and plea bargaining: To increase the use of Lok Adalats for compoundable offences by educating inmates and litigants about the same.
4. Identify instances of prisoners eligible for statutory bail (s.436A) and identify inmates unable to furnish bail bonds and/or comply with bail conditions.
5. Students can look into/help drafting bail applications, applications for furlough, parole, etc. and identifying mentally ill inmates.
6. An area of intervention for students would also be in other detention institutions such as juvenile homes, observation homes, detention centers, etc.
7. Identifying instances where the bread earner/both parents are in judicial custody, and offer help in rehabilitation, assistance, etc.
8. Law clinics / legal aid clinics in law schools can help with training para-legal volunteers.



IV. Recommendations and the Way Forward



The following points emerged as the key recommendations and next steps for taking forward the discussion held on 9 September 2018:

A. Improving Quality of Legal Aid:

1. Introduce a Standard Operating Procedure (SOP) for streamlining access to legal aid for persons in custody – at arrest, production and prisons in order for the effective implementation of all three schemes viz. NALSA (Free and Competent Legal Services) Regulations 2010, NALSA Legal Services Clinic Regulations, 2011 and NALSA Model Scheme for Legal Aid Counsel at Magistrate Court and the existing SOP on Representation of Persons in Custody 2016.
2. Prepare duty notes for legal aid providers. This would ensure that they are aware of their roles and responsibilities.
3. Encourage senior lawyers of the bar to extend their services to legal aid clinics. A system may be explored where a senior and junior lawyer take up legal aid case as a team so that the client is not at a disadvantage.
4. Incentivise legal aid lawyers by providing adequate remuneration to ensure better quality lawyers in the panel. Compare fees paid at various stages among different states in order to reduce huge variations in payment scales. There is a need to experiment with various combinations and models of fee structures for panel lawyers.
5. Devise a mechanism whereby NALSA can provide/ suggest list of organisations which can collaborate with local SLSA/DLSA/TLSCs. Minimum criteria and standards could be set which must be satisfied by concerned organisation to be enlisted.
6. Available legal awareness materials to be translated in the form of posters, pamphlets, street plays, poems etc in local languages for wider dissemination.
7. Strengthen paralegal services through the combined efforts of law schools, civil society and legal support groups.
8. Utilise the legal aid budget on legal aid services, and not merely on administrative expenses such as payment of salaries, office maintenance, etc.

9. Strengthen access to legal aid services by improving infrastructure, human resource management, training and feedback, and utilising technology to improve access.
10. Consider removal of the 'three-year experience' bar for empanelment on the legal aid panel. This would pave the way for inclusion of public spirited and interest fresh law graduates.
11. Emphasise upon legal aid lawyers to not restrict their roles to just legal representation but realise their role as human rights defenders.

B. Improving Access in Police Stations:

1. Introduce legal aid clinics in police stations, keeping in view custodial violence and human rights violations in police custody. Serious efforts must be made towards increasing and ensuring representation in the first 24 hours after arrest. Immediately visit a police station (at the time of an individual's arrest) with a lawyer, paralegal or law student.
2. Understand and address custodial trauma (including that in police stations): trauma is of high intensity, not open to public scrutiny, particularly in case of police custody. There is a serious need for monitoring, scrutiny and proactive human rights intervention in this area.

C. Improving Access in Prisons:

1. Push for the digitization process for all jail legal aid clinics in the country. It would include the CCTNS networking system (Police), e-prisons portal, Prison Management System and Court Information System (e-courts).
2. Understand the prisoner profile and litigants queries to find innovative solutions to counter unnecessary detention. Emphasise upon quality legal representation at the time of first production.
3. Provide support to legal aid / jail visiting lawyers / private lawyers visiting their clients where prisons are located outside cities or in remote places.
4. Train prison officials to sensitise them to change their attitude towards civil society. Create information and knowledge regarding the power, functioning and duties of civil society for prison officials.
5. Educate prisoners to play an active role in their own trial to the extent permissible. Legal aid education for prisoners should become mandatory.

D. Role of Law Colleges:

1. Need for large scale legal literacy and legal awareness: partnerships among academia, judiciary, legal aid authorities and lawyers. Civil society and academic institutions to come together to establish legal aid clinics.
2. Assist the lawyer in clerical and drafting work (help from law students and paralegals). This could save significant time and ensure other work does not suffer. Follow up on legal aid cases can be handled by law students and civil society.

E. Role of Civil Society:

1. Strengthen engagement with civil society organisations to aid in monitoring and to assist NALSA/SLSAs in improving the accountability and transparency within legal aid services.
2. NALSA to develop an SOP for empanelment of civil society organization interested in working with legal aid authorities at the taluka, district, state and national level
3. Utilise flexible provisions for broadening the composition of legal aid services to ensure greater involvement of civil society.
4. Make efforts to engage media persons (reporters and journalists) for reporting on legal awareness.

F. Other Recommendations:

1. A 'directory of legal services authorities' should be developed and made available online on the NALSA website for anyone to access with ease.

HOPE BEHIND BARS? LAUNCH AND CONSULTATION ON IMPROVING LEGAL AID FOR PERSONS IN CUSTODY

9th September 2018

Amaltas, India Habitat Centre, New Delhi

AGENDA

TIME	SESSION	SPEAKER/ PARTICIPANTS
10:00 AM	REGISTRATION	
10:30 – 11:20 AM	<p>Opening Remarks</p> <p>Launch of CHRI's National Report on Legal Aid: Hope Behind Bars?</p> <p>Presentation on the Report</p>	<p>Mr. Sanjoy Hazarika, International Director, CHRI</p> <p>Justice A. P. Shah, Former Chief Justice, Delhi High Court</p> <p>By the author, Mr. Raja Bagga, Programme Officer, Prison Reforms Programme (PRP), CHRI</p>
11:20 – 11:40 AM	TEA	
11:40 AM – 12:30 PM	<p>Panel Discussion:</p> <p>Improving Quality of Legal Representation</p>	<p>Chair: Justice Dr. S. Muralidhar, Delhi High Court</p> <p>Panelists: Mr. Alok Agarwal, Member Secretary, NALSA; Dr. Srikrishna Deva Rao, Vice-Chancellor, NLU Odisha; and Mr. Sanjoy Hazarika</p>
12:30 - 1:45 PM	<p>Open House Discussion:</p> <p>Role of Students in Improving Legal Aid Delivery for Persons in Custody</p>	<p>Moderator: Ms. Maja Daruwala, Senior Advisor, CHRI</p> <p>Key participants: Mr. S.S. Rathi, Director, NALSA; Representatives of SLSAs; Mr. B.D. Sharma (ex ADG and IG) Correctional Services, WB; and Representatives from the Civil Society</p> <p>CHRI: Ms. Madhurima Dhanuka, Programme Coordinator, PRP, CHRI and Mr. Raja Bagga</p>
1:45 – 2:30 PM	LUNCH	
2:30 – 3:45 PM	<p>Open House Discussion:</p> <p>Role of Students in Improving Legal Aid Delivery for Persons in Custody</p>	<p>Moderator: Ms. Madhurima Dhanuka</p> <p>Key participants: Mr. Sunil Chauhan, Project Officer, NALSA; Representatives of SLSAs and Representatives of university-based clinics</p> <p>CHRI: Ms. Amrita Paul, Programme Officer (PRP) and Mr. Raja Bagga</p>
3:45 - 4:15 PM	<p>Way Forward:</p> <p>Converting Thoughts into Actions</p>	<p>Ms. Maja Daruwala; Dr. Srikrishna Deva Rao; Mr. Alok Agarwal; Ms. Madhurima Dhanuka</p>
4:15 – 4:25 PM	Closing Remarks	Mr. Sanjoy Hazarika

CHRI PROGRAMMES

CHRI believes that the Commonwealth and its member countries must be held to high standards and functional mechanisms for accountability and participation. This is essential if human rights, genuine democracy and development are to become a reality in people's lives. CHRI furthers this belief through strategic initiatives and advocacy on human rights, access to justice and access to information. It does so through research, publications, workshops, information dissemination and advocacy. It has three principal programmes:

1. Access to Justice

Police Reforms: In too many countries the police are seen as an oppressive instrument of state rather than as protectors of citizens' rights, leading to widespread rights violations and denial of justice. CHRI promotes systemic reform so that the police act as upholders of the rule of law rather than as instruments of the current regime. In India, CHRI's programme aims at mobilising public support for police reform. In South Asia, CHRI works to strengthen civil society engagement on police reforms. In East Africa and Ghana, CHRI is examining police accountability issues and political interference.

Prison Reforms: CHRI's work is focused on increasing transparency of a traditionally closed system and exposing malpractices. A major area is focused on highlighting failures of the legal system that result in terrible overcrowding and unconscionably long pre-trial detention and prison overstay, and engaging in interventions to ease this. Another area of concentration is aimed at reviving the prison oversight systems that have completely failed. We believe that attention to these areas will bring improvements to the administration of prisons as well as have a knock-on effect on the administration of justice overall.

2. Access to Information

CHRI is acknowledged as one of the main organisations working to promote Access to Information across the Commonwealth. It encourages countries to pass and implement effective Right to Information laws. It routinely assists in the development of legislation and has been particularly successful in promoting Right to Information laws and practices in India, Sri Lanka, Afghanistan, Bangladesh and Ghana. In the latter CHRI is the Secretariat for the RTI civil society coalition. CHRI regularly critiques new legislation and intervenes to bring best practices into governments and civil society knowledge both at a time when laws are being drafted and when they are first being implemented. Its experience of working in hostile environments as well as culturally varied jurisdictions allows CHRI to bring valuable insights into countries seeking to evolve and implement new laws on right to information. In Ghana, for instance it has been promoting knowledge about the value of Access to Information which is guaranteed by law while at the same time pushing for introduction of an effective and progressive law.

3. International Advocacy and Programming

CHRI monitors commonwealth member states' compliance with human rights obligations and advocates around human rights exigencies where such obligations are breached. CHRI strategically engages with regional and international bodies including the Commonwealth Ministerial Action Group, the UN and the African Commission for Human and People's Rights. Ongoing strategic initiatives include: advocating for and monitoring the Commonwealth's reform; reviewing Commonwealth countries' human rights promises at the UN Human Rights Council, the Universal Periodic Review; advocating for the protection of human rights defenders and civil society space; and monitoring the performance of National Human Rights Institutions in the Commonwealth while advocating for their strengthening.

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Hope Behind Bars?

STATUS REPORT ON LEGAL AID FOR PERSONS IN CUSTODY



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Commonwealth Human Rights Initiative
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Commonwealth Human Rights Initiative
working for the practical realisation of human rights in
the Commonwealth

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