Evaluating Alternative Legal Aid Delivery Systems

Hennessey Hayes, Tim Prenzler, Andrew McLean Williams

In 1995–96 the Legal Aid Office (Queensland) ran a pilot project to compare old and new ways of making legal aid available to those who need it.

The authors lecture in criminology and law in the School of Justice Administration, Griffith University, Brisbane

This article reports on recommendations arising from issues of method in the evaluation of different forms of delivery of legal aid. Specifically, the recommendations derive from a pilot project of the Legal Aid Office (Queensland) (LAOQ) in 1995-96 comparing the conventional assignment of cases to a panel of private practitioners with assignment by competitive tendering. The pilot was representative of the trend towards corporatisation of legal aid and provided important lessons both for the comparative advantages of different forms of delivery and for the evaluation of future projects of this type. Some elements of the study did not yield firm results because of unforeseen obstacles. These could be avoided by integrating evaluation protocols into planning from the beginning. The importance of this cannot be underestimated when crucial policy directions affect citizens' access to justice and the expenditure of millions of dollars.

At the time of the LAOQ pilot, Victoria was the only other State experimenting with forms of competitive tendering but this was confined, like the more famous franchising project in Britain, to processing of aid applications.[1] Since these pilots, the situation for legal aid has deteriorated further with the Commonwealth withdrawing funding of State matters and reducing funding of Commonwealth matters by 20%. By international standards, Australia's legal aid system has recently been described as amongst the most poorly funded and restrictive, and the cuts increase pressure on State legal aid services to find savings.[2] One outcome of the funding squeeze has been to raise the previously marginal issue of quality in legal services.[3] Both the Victorian and Queensland pilots have involved difficult issues of measurement of quality, and challenge other jurisdictions to address the systematic assessment of service delivery.[4]

The *Tender of Prescribed Crime Pilot* was conducted by the LAOQ from September 1995 to June 1996 following recommendations by a Public Sector Management Commission report in 1992 and a Criminal Justice Commission report in 1995 emphasising that increased demands and reduced funding meant new efficiencies needed to be found. One option recommended for consideration was competitive tendering. This was envisaged primarily as an alternative to the main panel system (accounting for approximately 65% of expenditure), not to the in-house sector. The evaluation team was engaged near the completion of the pilot. Both the full report and a summary are publicly available.[5] A Tender Evaluation Committee of the LAOQ agreed to a six-part method to assess the outcomes in terms of both efficiency criteria, centred on financial costs, and justice criteria, centred on quality of service and client access:

1. An international literature review on contracting out of government services generally and legal aid services specifically.
2. Interviews with professional stakeholders.
3. Analysis of case outcomes.
4. A survey of client satisfaction.

5. An assessment of comparative costs.
6. A review of LAOQ case management audits.

The last five involved primary data collection, both quantitative and qualitative, and allowed for 'triangulation' to maximise sources of information and arrive at the most reliable and comprehensive conclusions possible. Nonetheless, it must be kept in mind that even with a diverse set of research instruments there are limitations on any empirical approach to such complex issues. This is certainly the case with regard to public funding of criminal defence work. For example, views about quality will vary considerably between clients, practitioners, government and the legal aid broker. Even within the legal profession, peer review of case work has been shown to be highly divergent.[6] With these qualifications in mind, the findings from the Queensland pilot supported the predictions from the literature review:

1. Cost savings in direct payments to private practitioners were offset by increased administrative costs, especially in quality control.
2. It was difficult to make fair comparisons in client outcomes, but the nature of the cases and client background tended to be determinant rather than the source of legal defence.
3. High levels of client satisfaction also appeared unrelated to the source of legal defence.
4. Although outside the terms of reference, it was impossible to ignore the fact that closer attention to economies of scale with in-house services presented a possible major alternative source of cost savings to contracting out.[7] (The suggestions made here on evaluation protocols apply equally to in-house services.)

The main recommendation was that the LAOQ consider a modified form of contracting out through a 'preferred supplier' model which allowed for the following: price competition but with less narrow and short-term contractual arrangements, quality accreditation and auditing, more stability, and retention of a greater degree of solicitor of choice.

A number of aspects of the approach to the pilot impressed the evaluation team. Although some scepticism was expressed by LAOQ management and staff, the large majority interviewed were open minded about the pilot and prepared to withhold judgment until the findings came in. The LAOQ had also been engaged for some years in regular surveys of client satisfaction comparing in-house and panel services (with results showing equal satisfaction). The questionnaire provided an excellent base for the client satisfaction survey for the pilot. Like client surveys, the introduction of auditing was extremely important given the threat to quality implied in competition. This was the major allegation made against tendering by the profession. Also of significance was the engagement of an independent evaluation team consisting of a lawyer (Maclean Williams), a statistician (Hayes) and a person with qualitative research skills (Prenzler). These were highly commendable steps for an organisation naturally dominated by legal practitioners untrained in evaluation and quantitative methods but with a noticeable commitment to protecting the legal rights of clients.

The remainder of this article reviews the main problems encountered by the evaluation team which limited the certainty of the findings and ensuing recommendations. These problems have been experienced before in somewhat similar studies mainly in the United States.[8] A literature search using computerised indexes to sources is always the best way to begin drafting policy discussion papers and evaluation plans in order to learn from others' experiences. A comprehensive list of questions needs to be drawn up and research instruments developed to avoid the problem of unobtainable data when vital questions arise during or subsequent to the pilot. Attention to the issues outlined here will be of significant benefit in putting policy for delivery of legal aid on a more firm scientific footing.

Interviews with professional stakeholders

Forty-three interviews were conducted using a semi-structured format based on the interviewee's relationship to the tender project. Interviews were conducted in Brisbane and two regional centres. This aspect of the evaluation was the least problematic and is included to underline the value of consultation. Questions were designed to obtain expert opinions on issues of quality and costs. Interviews were conducted with the 10 successful tender firms; six unsuccessful firms selected randomly from the 23 firms in this category; two firms who withdrew their tenders; two District Court judges; two representatives of the Queensland Law Society; and 21 staff from the LAOQ. The Bar Association was approached but chose to reaffirm its earlier written submission to the LAOQ totally opposing tendering as a threat to the quality of legal defence.

Interviews with successful tender firms were valuable in pointing to the attraction of certainty of work (in blocks of 25 or 50 cases), guaranteed cash flow, high turnover and administrative savings. Some welcomed audits as a useful prompt for them to develop more rigorous standards and explicit procedures. The above meant most firms felt cost reductions could be achieved without sacrificing quality. The main pitfall lay in complex cases going to trial with potential blowouts in costs. This finding led to a recommendation that a preferred supplier model separate funding of simple pleas of guilty on a competitive basis from more complex matters for which practitioners could apply for costs on a scale system.

Interviews with unsuccessful firms were valuable in identifying areas where more detailed tender specifications could assist tenderers to more accurately assess their costs and submit competitive bids, and in affirming the problem of predicting the costs of complex matters. A problem was also identified with clients approaching a non-tender firm and then being assigned to a tender firm. This created problems of continuity of legal representation which could be addressed through a more flexible and inclusive preferred supplier model. This model might also contribute to the survival of smaller firms, and maintenance of a diversity and geographical spread of suppliers. Interviews with in-house staff prompted the preferred supplier idea and reinforced concern over continuity of representation. The majority of staff were also supportive of substantial outsourcing to maintain a beneficial competitive tension between in-house and private suppliers. The judges argued that continuity of representation contributed to more efficient and just outcomes especially if tendering allowed for the inclusion of committal appearances — an eventual recommendation of the report. The most disappointing response came from the professional associations who based their strident opposition to tendering on anecdotal and speculative grounds about a decline in standards and destruction of small firms without citing empirical studies.

Case outcomes

Sentence input forms were used to compare case outcomes between tender and non-tender firms. Statistically significant differences between pleas, convictions and sentences do not prove better or worse representation on either side but would require investigation. In any event, there were no significant differences in case dispositions when controlling for the type of offence. There were 769 input forms lodged at the time of analysis (out of 1148). Of these, 57% were non-tendered cases and 43% were tendered cases. However, many of the forms contained major omissions, especially in charge and sentence information, and gender and age. This severely qualified the reliability of the results. Sentence input forms provide crucial information to legal aid services about their client profile and the outcomes of cases. The problem of non-completion of forms by practitioners pointed to another area where restricting the panel through a preferred supplier model could also be advantageous. One requirement for preferred supplier status could be an electronic forms lodgement facility. Forms would be rejected unless all sections were fully completed with specified terminology. Secure internet connections would also make for efficiencies in communication and sharing of information. It could, for example, allow preferred suppliers to access a common case law database.

Client survey

A telephone questionnaire was developed to compare client satisfaction between tender and non-tender firms.[9] Practitioners had expressed suspicion about the value of surveys given client ignorance of the law. The literature on legal aid delivery systems also registers doubts about the capacity of clients to make informed judgments about legal representation. At the same time, the consensus appears to be that 'consumer input must be given a significant role in the process of evaluating the performance of legal aid service providers'.[10] As Goriely has pointed out, from the perspective of participative client-centred legal work — as opposed to more traditional authoritative legal work — how a client feels is an important indicator of quality of service, given the law's complex and alien processes.[11] This was particularly important in the context of the pilot because of concerns tendering might encourage practitioners to 'churn through' legal aid clients.

Demographic data were sought including reasons for seeking legal aid and expectations about the nature of legal aid services. This was followed by a Likert-style format seeking responses to a variety of pragmatic statements about how solicitors treated their clients in terms of elements of good communication and customer service such as listening, checking understanding, and being accessible. The final section asked specific questions about whether clients made the plea they wanted to make, and if they were satisfied with the defence at trial and pleas in mitigation. Again, these questions were asked to identify any possible effects of pressure to shortcut legal defence by unduly pressuring clients to plead guilty or by making a rudimentary defence.

The outcome of the survey was the most disappointing aspect of the evaluation. The plan was to contact 50 tender firm clients and 50 non-tender firm clients randomly selected from the client lists. This should have provided sufficient quantity for statistical analysis. The extremely poor response subsequently necessitated concerted efforts to contact every client who received services between September 1995 and June 1996, thereby foregoing random selection. Clients in jail were given the questionnaire by correctional officers. Despite concerted efforts by a zealous research assistant, only 72 clients responded (43% non-tender and 57% tender). The source of the problem was client mobility and delay in making contact. A good deal of consultation went into production of the questionnaire and the survey was conducted three months after completion of the pilot. By then, the large majority of clients had moved on without a contact address or phone number, and did not have a listed number. There were in fact very few refusals, almost all clients contacted, including those in prison, agreed to complete the survey.

Analysis of the questionnaires obtained showed no significant differences in satisfaction between the two groups. However, it was a case of not finding any differences rather than demonstrating agreement. The poor response rate also precluded meaningful results regarding client expectations of legal aid services; effects on satisfaction of demographics such as gender, ethnicity and number of dependents; or more specific information about how clients pleaded and how they wanted to plead, or why some thought they did not receive a fair trial or adequate representation. A better response rate and more meaningful data would have been obtained had clients been contacted immediately after their cases were completed.

Financial costings

Financial data comparing costs for tender and non-tender cases were supplied by the LAOQ. There were several complicating factors which made comparisons extremely tenuous. Administrative costs were estimated separately by the central office and by different regional offices and varied significantly. The cost of quality audits for tender firms needed to be included but in one sense this was unfair given there were no audits of panel firms. The average price for successful bidders ($1084 per case) was well below that for unsuccessful firms ($1415) but there were several successful firms, and one in particular, which were much more expensive than the majority. Selection of these firms arguably had a distorting effect. One of the more expensive firms was the only remaining contender in a major regional centre after the other firms withdrew in protest over the pilot. There were also outstanding repayments from unexpended up-front disbursements.

Based on the figures supplied it was calculated the tender group cost more than the non-tender (panel) group by approximately $8 per case. However, in light of the intervening variables, a series of alternative costings was produced partially controlling for these. The results suggested possible savings from tendering in a second round with clearer guidelines and streamlined administration. An important lesson from this experience was the importance of a detailed formula for estimating administrative costs so more reliable comparisons could be made. It was estimated administrative costs for tender cases were 73% higher than those for the panel, but it was difficult to separate start-up costs for the pilot from what might be routine costs in future rounds. Rationales for accepting abnormally high tenders could also be more explicit and more cautious. A longer time frame for evaluation would have allowed for inclusion of repayments from disbursements.

Quality audits

Quality audits provoked a great deal of criticism by practitioners, both private and in-house. They were seen as a superficial 'tick-and-flick' exercise which could not properly assess the qualitative nature of legal representation. Nonetheless, they were supported in principle by the evaluation team with reference to the British concept of 'transaction criteria'.[12] Audit forms elementise essential components of case management, such as instructions, investigations and advice. They cannot be presumed to penetrate all the nuances of client–solicitor interaction or quality of advocacy, but they allow a watch on the procedural minimum necessary for fair legal representation.

LAOQ administrative staff conducted audits on 65% of the 471 cases sent to tender firms. Auditors visited solicitors' offices and assessed all files against the checklist of 22 items. Unfortunately, reportage of results was cryptic. Four of the nine tender firms were said to have fully complied with the criteria. Non-compliance was not described in quantitative terms, but there were some findings regarding failure 'to obtain clients' signed instructions, failing to send an initial or final letter to the client, failing to obtain criminal histories or prepare personal statements'. These results provided some justification for the diagnostic use of audits. Unfortunately, as noted, panel firms were not audited. This was because the panel system did not allow for auditing. The additional cost would also have been a problem. However, in the future, auditing of a random sample of files and more detailed analysis of results might allow for more productive use of this tool.

Conclusion

This paper has given an indication of the controversy surrounding competitive tendering in outsourcing of legal aid. It was said that cost-cutting would significantly reduce service standards and drive small dedicated firms out of business, and there was considerable criticism of the introduction of auditing of files. In many cases the LAOQ was criticised unfairly in its role as 'the messenger' of government austerity. At times, emotions ran high, and there was an unfortunate and unjustified deterioration in the relationship between the LAOQ and the private profession as a result of the pilot. This context adds weight to the case for careful scientific evaluation of different forms of legal aid delivery to determine the best system on more objective grounds. Of course, the main rationale for sound evaluation rests with the grave responsibility to spend tax payers' money as efficiently as possible while maintaining the best protection of the legal rights of the poor.

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COURT IN THE WEB

Reintegrative shaming experiments

If you were interested in the item in last issue's *DownUnderAllOver* about reintegrative shaming, the RISE Working Papers, a series of reports on research in progress on the Reintegrative Shaming Experiments (RISE) for Restorative Community Policing, is available on the Australian Institute of Criminology's website at:
<http://www.aic.gov.au/links/rise/index.html>

The same website includes a draft paper, 'Restorative Justice: assessing an immodest theory and a pessimistic theory' by John Braithwaite, a member of the team conducting the RISE project in Canberra. Found at:
<http://www.aic.gov.au/links/braithwaite/index.html>

Apology Australia

The web site for Apology Australia can be reached at:
<http://www.apology.west.nrt.au/>

The Womens Convention

The Womens Convention website carries the article by Marian Sawer 'Engendering Constitutional Debate' published in the April isue of the *Alt.LJ* along with other information. It can be found through the 'papers of interest' link on the front page of the site:
<http://www.womensconv.dynamite.com.au>

National Women's Justice Coalition web site

<http://www.ozemail.com.au/~nwjc>

Law for you

A new web site of accessible legal information is available at
<http://www.law4u.com.au>