Distributing the legal aid dollar - effective, efficient, and quality assured?

John Boersig and Romola Davenport*

This article discusses the ways in which Australian Legal Aid Commissions monitor the quality of legal aid work, and how a national scheme could be remodelled in light of the experiences of other jurisdictions and emerging evidence as to best practice. It argues that peer review is the 'gold standard' of quality control. Legal Aid Commissions must evaluate the existing evidence base, implementing a peer review system that operates in parallel to existing performance and financial audits while minimising costs through targeted audits. In this way the Commissions will fulfil not only their statutory obligation to provide efficient and effective legal services, but also their ethical obligation to promote access to justice through delivering high quality legal services to disadvantaged people.

Introduction

The challenges for Legal Aid Commissions (LACs) in Australia are significant and numerous, including high demand for services, insecure and increasingly austere funding arrangements and growing unrest in the legal profession over stagnant fee rates. In this context, LACs must be able to demonstrate that their services provide value for money and value for clients. Developing comprehensive and reliable quality control mechanisms is an essential part of demonstrating the value of legal aid work.[1]

The quality of legal aid services is also an important access to justice issue. All legal aid services must be of an equivalent quality to the services provided by private practitioners to fee-paying clients. This ensures 'equality of arms' in the courtroom where legal aid clients may be facing self-funded clients, public prosecutors, or government lawyers.

This article discusses the ways in which LACs already monitor the quality of legal aid work, and how a national scheme could be remodelled in light of the experiences of other jurisdictions and emerging evidence as to best practice. International trends, and some experience within Australia, indicate that peer review is the 'gold standard' of quality control. Above all, in developing a model of risk-targeted peer review, LACs must evaluate the existing evidence base and adapt these principles to the Australian context - implementing a system of peer review that operates in parallel to existing performance and financial audits, while minimising the costs through targeted audits.

It is argued that in this way LACs will fulfil not only their statutory obligation to provide efficient and effective legal services, but also their ethical obligation to promote access to justice through delivering high quality legal services to disadvantaged people.

International Perspectives

Quality control and value for money are recurring themes in legal aid research, regardless of the service delivery model that is used. Notably, systemic reviews undertaken in the UK and New Zealand have identified quality issues both in private practices and Public Defenders' offices.

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* John Boersig LLB, BA (Macq), PhD (USyd) is Chief Executive Officer, Legal Aid ACT and Adjunct Professor of Law, University of Canberra. Romola Davenport is a Research Assistant, Legal Aid ACT.

In New Zealand, the Bazley Review[2] found serious quality issues amongst private practitioners performing legal aid work. Lawyers were found to be 'gaming the system' by encouraging a client to delay a plea or change pleas part-way through proceedings in order to maximise legal aid payments.[3] The review found that the 'fee for service' model used by the Legal Services Agency encouraged lawyers to do more and take longer than necessary.[4] In areas with no Public Defenders service, the lack of competition exacerbated this problem.[5] Other quality issues included lawyers failing to appear at court or failing to adequately prepare due to overbooking.[6] The report recommended the use of Public Defenders services in busy courts where high volumes of cases made Public Defenders efficient, as well as using Public Defenders in areas with serious quality issues, so as to spark competition.[7] The findings of this report reinforce the benefits of promoting quality and efficiency through public-private competition. Additionally, the report emphasised the need for government oversight of legal aid services in order to counteract information asymmetry from consumers[8] and potentially unscrupulous practices by lawyers. Following the Bazley review, the New Zealand Ministry of Justice implemented a comprehensive audit process involving peer review of legal aid files.

Similarly, a United Kingdom review of legal aid procurement[9] found that Public Defenders' services generated cost savings and often led to the earlier resolution of criminal matters.[10] However, the report found that there was a risk of quality declining where Public Defender services were overloaded with cases.[11] The report ultimately recommended that legal aid suppliers should be subject to peer review to monitor quality.[12]

Effective legal practice is an essential component of value for money. Significantly, a number of international reviews have uncovered serious cases of ineffective legal practice. For example, the Bazley Review, as noted above, identified widespread evidence of practitioners intentionally prolonging proceedings in order to maximise payments.[13] Similarly, a review of the Scottish Public Defenders' Office found that criminal cases handled by that Office were more likely to be resolved at a plea hearing or at an intermediate hearing, while cases handled by private practitioners were more likely to resolve at or after a final hearing.[14] The evaluators theorised that privately handled cases took longer because private solicitors had an incentive to encourage not

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[2] Dame Margaret Bazley, 'Transforming the Legal Aid System: Final Report and Recommendations' (November 2009) *Legal Aid Review* <https://www.beehive.govt.nz/sites/default/files/Legal%20AidReview.pdf> ('Bazley Report').
[3] Ibid 101 at [330].
[4] Ibid 39.
[5] Ibid.
[6] Ibid 100 at [324]-[326].
[7] Ibid 118.
[8] Ibid 34 at [37].
[9] John Flood, Avis Whyte, and Sylvie Bacquet, 'Report on International Approaches to the Defence of Indigent Persons in Criminal Cases' (for Lord Carter's Review of Legal Aid Procurement, 2005) ('Flood Report').
[10] Ibid 39.
[11] Ibid 62.
[12] Lord Carter's Review of Legal Aid Procurement, *Legal Aid: A Market-Based Approach to Reform* (July 2006) 7.
[13] Above n 15, 79 at [330].
[14] Tamara Goriely, 'Evaluating the Scottish Public Defender Solicitors' Office' (2003) 30 *Journal of Law and Society* 84, 91-92 < https://onlinelibrary-wiley-com.virtual.anu.edu.au/doi/pdf/10.1111/1467-6478.00247 >.

guilty pleas – namely that they would be issued with a legal aid certificate for the client.[15] This theory was largely confirmed by interviews with solicitors.[16]

In England and Wales, research and policy literature indicates that there is significant concern about 'supplier-induced demand.'[17] Lawyers are frequently blamed for ever-increasing legal aid costs, and governments often accuse solicitors of providing unnecessary services in order to increase profits. However, these claims can be difficult to substantiate as litigants usually seem to desire the extra services,[18] and because in England and Wales there are no in-house practices to provide benchmarks for effectiveness and quality.

These reports, and the reforms that were subsequently implemented, provide important guidance on the kinds of quality issues that Australian legal aid providers should be aware of. The New Zealand review indicates that legal aid providers should be conscious of the risk that private practitioners may over-service to maximise income. Conversely, the UK review suggests that Public Defenders are not a panacea for quality issues, especially when they are overloaded with cases.

The 'Mixed Model' of Legal Aid Service Delivery in Australia

LACs receive the vast majority of their funding (86% in 2017-18)[19] from state and federal governments, and have a statutory obligation to utilise these funds to provide legal services to disadvantaged people as efficiently, effectively, and economically as possible.[20] However, LACs have a broad discretion as to how this objective is achieved.

The Mixed Model

All LACs in Australia use a 'mixed model' of service delivery, meaning that services are provided both through salaried, 'in-house' lawyers, and through private practitioners working at legal aid rates. Private practitioners are remunerated through a fixed scale of fees that varies by case type, while in-house lawyers receive a salary that is determined independently of work volume. Regardless of the means or quantity of their remuneration, all legal aid lawyers are expected to provide high quality services to legal aid clients. Thus, relative accountability and quality are key issues in a mixed model.

Nationally, all LACs follow similar guidelines for the allocation of work between in-house and private lawyers. However, these guidelines produce notably different outcomes between jurisdictions; for example, 67% of grants are assigned to in-house practitioners at Legal Aid ACT, whereas only 23% are allocated to in-house practitioners at Legal Aid Queensland.[21] On one level, these figures reflect the fact that Australia is a large and heterogeneous country, and that there are a multitude of ways in which efficient and effective legal services can be delivered under a mixed model. However, these figures could also reflect the underlying tensions in the mixed model, which manifest differently in each jurisdiction. These undercurrents include complex

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[15] Ibid.
[16] Ibid.
[17] Tamara Goriely, 'The English Approach to Access to Justice' paper presented to a World Bank Workshop, Washington (11 December 2002) 3.
[18] Ibid 4.
[19] National Legal Aid Statistics, *Finance – Income and Expenses* 2017-18 <https://www.nationallegalaid.org/resources/finance/>.
[20] *Legal Aid Act 1977* (ACT) s 10 (1) (a); *Legal Aid Commission Act 1979* (NSW) s 12 (a); *Legal Aid Act 1978* (Vic) s 4 (a); *Legal Aid Queensland Act 1998* (Qld) s 3 (1) (a); *Legal Aid Commission Act 1990* (Tas) s 6 (1) (g); *Legal Aid Act* (NT) s 8 (a); *Legal Services Commission Act 1977* (SA) s 11 (a); *Legal Aid Commission Act 1976* (WA) s 15 (1) (a).
[21] National Legal Aid Statistics, *Practitioner Type 2017-18*, <https://nla.legalaid.nsw.gov.au/nlareports/>.

relationships between LACs and Law Societies, as well as ongoing difficulties in measuring relative quality and efficiency.

From an economic standpoint, and with a view to quality, LACs have been under increased stress in recent years due to funding levels which are stationary or decreasing in real terms.[22] As a result, the fees paid to private practitioners for legal aid work have not increased, in some jurisdictions for over a decade.[23] Many private practitioners have long claimed that it is economically unviable to perform legal aid work,[24] and for many years there have been concerns about 'juniorisation'[25] (a trend towards legal aid work being performed by inexperienced private practitioners). Some private lawyers argue that low rates of remuneration for legal aid work mean that they must either lower their quality standards and deliver a second-rate service, or put in unpaid work on legal aid cases.[26] These issues demonstrate that work allocation decisions cannot be governed only by considerations of relative efficiency and cost – work allocation decisions should also be closely informed by reliable data on quality and effectiveness. Many of these challenges are also recognised in international research. While there are a range of sources indicating that the mixed model facilitates greater efficiency than using either in-house or private lawyers alone,[27] there is also evidence to suggest that relative quality under a mixed model can be highly variable. Quality of work may be influenced by a range of factors including case volumes, means of remuneration[28] and the opportunity cost for private practitioners.[29] Jurisdictions that use the mixed model must therefore consider how to ensure equivalent quality when lawyers experience different labour market incentives.

While it is now orthodoxy (at least in Australia), that legal aid is most efficiently provided through a mix of in-house and private practitioners, questions remain about the relative effectiveness and quality of these services, especially in light of the ever-expanding gap in profitability between private work and legal aid.[30] Law Societies in Australia have traditionally not favoured any kind of external regulation, preferring to regulate the profession with internal measures such as barriers to entry, professional education requirements, and complaint mechanisms. External regulation, even when its scope is strictly limited to legal aid work, can be viewed as an encroachment on the autonomy of the legal profession as a whole. Nonetheless, despite the concerns of Law Societies, the rising tide of public sector accountability is pushing all public agencies, including LACs, towards developing transparent mechanisms of demonstrating efficiency and quality. In light of these trends, it is clear that governments, as the major investor in legal aid services, must be able to impose quality standards on their suppliers and ensure that these standards are met.[31] It remains to be seen whether the successful implementation of quality control in legal aid will raise broader questions about quality control for the legal profession as a whole.

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[22] National Legal Aid, Submission to Attorney-General's Department, *Review of the National Partnership Agreement on Legal Assistance Services 2015-2020* (5 October 2018), 11.
[23] Letter from The Law Society of New South Wales to Legal Aid New South Wales (10 April 2018), 3 <https://www.lawsociety.com.au/sites/default/files/2018-06/Letter%20to%20Legal%20Aid%20NSW%20-%20Legal%20Aid%20NSW%20review%20of%20fees%20-%2010%20April%202018.pdf>.
[24] Don Fleming and Anne Daly, 'Private Practitioners and the Australian Mixed Model: Changes in Labour Markets for Legal Aid 1990-2003' (2004) *Centre for Labour Market Research*, 2.
[25] Ibid 38.
[26] Ibid 3.
[27] Flood Report (n 8) 6 [11]; Bazley Report (n 1) 118.
[28] Michael Roach, 'Does Raising Indigent Defender Pay Rates Improve Defendant Outcomes?' (2017) *Applied Economics Letters* 1025, 1026.
[29] Michael Roach, 'Indigent Defense Counsel, Attorney Quality, and Defendant Outcomes' (2014) *American Law and Economics Review* 577, 615.
[30] National Legal Aid (n 21) 11.
[31] Bazley Report (n 1) 98 [316].

Work Allocation Principles

When designing mechanisms for accountability, it is important that the underlying reasons for using the mixed model are clearly articulated to legal practitioners and the public. All LACs maintain publicly available guidelines for the allocation of legally assisted cases, based on the principles explained below. These guidelines are used by administrative staff within legal aid when determining whether to allocate a case to an in-house lawyer or a private practitioner. The transparency of these guidelines is crucial to the mixed model.

The principles that underpin Work Allocation Guidelines (WAGs) are:

- To ensure adequate geographical coverage of services;
- To avoid conflicts within LACs;
- To capitalise on the expertise of private practitioners;
- To allow for specialisation within legal aid practices;
- To allow for choice of lawyer; and
- To provide price and quality benchmarks.

It is important to note that the mixed model has a significant impact on the overall landscape of legal service provision in Australia. In some cases, the mixed model compensates for market failure – for example, welfare law (as a service provided to clients with little or no capacity to pay and no prospect of windfall gain) is practised almost exclusively by LACs, while private practitioners specialise in areas that are more commercially viable.[32] Additionally, in-house practices aim to model 'best practice' in legal aid work to set a quality benchmark for panel practitioners who only undertake legal aid work sporadically as part of a wider practice.

The mixed model also creates complex dynamics between LACs, who must seek to maximise efficiency, and Law Societies, who are concerned about low rates of remuneration and the volume of work allocated to private lawyers. The very existence of in-house lawyers is often questioned by Law Societies and private lawyers, who resent the competition brought about through the mixed model.

On the whole, it is clear that the argument for both in-house and private practitioners in Australian legal aid is well made out. Significantly, in-house lawyers provide important quality and price benchmarking, particularly for high volume services, while also specialising in areas of law that are generally not profitable for private practitioners. Conversely, private practitioners allow LACs to avoid conflicts, have a comprehensive spread of services (geographically and by law type), and allow for choice of lawyer in some cases. Thus, the challenge for LACs is to develop a sustainable and reliable model of work allocation that ensures a consistent level of quality and value for money whether clients receive legal services in-house or externally.

Current Methods of Quality Control in Australian Legal Aid

All LACs have procedures in place for auditing private practitioners. The main issue with these schemes is that they often do not measure the substantive quality of legal work. Although all LACs have the authority to perform file audits with respect to quality, in practice this power is rarely used. Most audits instead focus on procedural

[32] Victorian Legal Aid, Submission to Productivity Commission, *Inquiry into Access to Justice* (November 2013) 8.

matters such as the quality of file maintenance and compliance with billing procedures. There are several interesting features of audit processes as they currently stand:

Overview of Audit Process

In general, financial and performance audits are carried out by non-legal staff who specialise in managing grants of legal assistance. Audits are mostly carried out on a pass/fail basis, and in some cases practitioners do not receive feedback if they pass the audit.

The majority of staff carrying out audits do not need legal qualifications as they are not judging the quality of the advice given or the adequacy of the service provided in the circumstances (in other words, the quality or effectiveness of the legal work). Non-legal audit staff focus primarily on whether the work that was billed to legal aid was actually undertaken. In order to pass a routine audit, the practitioner must maintain the file so that it demonstrates evidence of key events, including:

- That the lawyer made appropriate and timely contact with the client regarding their case;
- That the lawyer communicated important matters to the client in an appropriate way; and
- That the lawyer actually attended the court events.

Consequently, a practitioner who undertakes the required work but performs the work to an unsatisfactory standard (for example, by giving inaccurate advice) may still pass a routine audit. In this way, routine audits may sometimes fail to protect clients from low quality lawyers. This raises questions about the utility of these audits – in some ways, an audit process that only has a punitive function is a missed opportunity to promote continuous improvement and reward good practices.

The main reason for performing audits in this way is to ensure that practitioners are aware that their work is under scrutiny and to maximise the number of practitioners who can be audited. Historically, LACs have prioritised high-volume audits that promote value for money by detecting fraud and over billing. Substantive reviews of quality are rarely undertaken because of the high cost and low availability of senior lawyers capable of performing such a review.

Most LACs only perform audits on private practitioners (although some do audit their in-house practices as well[33]). While it could be said that in-house lawyers do not need to be audited because they are subject to internal supervision and performance review, this also means that it is more difficult to monitor the relative quality of each practice. In the context of discussions about work allocation and efficiency, relative quality is an important concept. For example, data on relative quality may demonstrate that cost savings attained through changes to work allocation have in fact led to the provision of lower quality services. This information would inform policy decisions about work allocation and government funding of legal services.

In-house legal aid practices have a strong culture of supervision, mentoring and staff development. Practice managers within LACs ensure quality through a range of activities including file audits, pre-trial conferences, in-court observation, judicial feedback, and feedback from in-house mentors. Through these activities, practice

[33] For example: Legal Aid Queensland states that their in-house practice is subject to 'internal processes to confirm compliance' < http://www.legalaid.qld.gov.au/About-us/Policies-and-procedures/Grants-Handbook/Grants-division-compliance-and-audit-program/Grants-division-compliance-and-audit-program >.

managers can ensure that all legal aid lawyers are performing high quality work while also fostering a culture in which lawyers strive to improve their own skills and those of their colleagues. LACs usually have a mix of junior, intermediate, and senior lawyers that facilitates information sharing and development. This enables LACs to implement comprehensive systems of training and mentoring within their legal practices.

Emerging directions in best practice

Current trends in Australian legal aid indicate a shift towards more intensive, quality-focussed auditing. A number of LACs are moving towards implementing a comprehensive system of peer review of files in order to monitor quality. For example, Victorian Legal Aid (VLA) has developed detailed practice standards for each area of law[34] and has established a Quality Audit Team that periodically reviews files from different areas of law.[35] Practitioners then receive feedback on their compliance with the practice standards, and aggregate results are published on the VLA website.[36] Legal Aid Western Australia (LAWA) has implemented an Audit and Compliance Policy under which LAWA undertakes integrated quality and compliance audits on private practitioners.[37]

More recently in Australia, Legal Aid New South Wales (the largest LAC in Australia, with an annual expenditure of $280 million[38]) commissioned a study comparing the performance of in-house and private practitioners when handling legal aid cases. The study was initiated due to concerns that low fee rates and a system of payment based on 'billable hours' were providing an incentive for private practitioners to maximise the number of hours spent on each case. The results supported this hypothesis. The numbers indicated significant disparities in effectiveness: cases handled by private lawyers were less likely to be dealt with summarily; less likely to be committed for sentence; and more likely to result in a late guilty plea.[39]

These examples provide ample evidence to infer that payment based on stage-of-matter or on billable hours can provide incentives to over-service. It is therefore important for LACs to monitor whether practitioners use dispute resolution processes effectively so as to minimise (a) the length of proceedings and (b) the number of case events (including court events and alternative dispute resolution processes).

In criminal matters, for example, effectiveness could be monitored by reference to proxies such as:

- Stage of guilty plea;
- Use of late guilty pleas;
- Use of summary courts (in matters that can be dealt with either summarily or as indictable offences);

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[34] Victorian Legal Aid, 'Section 29 Panels Conditions' <https://www.legalaid.vic.gov.au/information-for-lawyers/practitioner-panels/panels-conditions >.
[35] Victorian Legal Aid, 'Quality Audits' <https://www.legalaid.vic.gov.au/information-for-lawyers/practitioner-panels/panels-conditions/quality-audits >.
[36] For example: < https://www.legalaid.vic.gov.au/about-us/news/indictable-crimes-first-quality-audit >; < https://www.legalaid.vic.gov.au/about-us/news/child-protections-first-quality-audit-solid-result >.
[37] Legal Aid Western Australia, *Audit and Compliance Policy* (December 2018) < https://www.legalaid.wa.gov.au/sites/default/files/Audit_and_Compliance_Policy.pdf >.
[38] National Legal Aid (n 18).
[39] NSW Bureau of Crime Statistics and Research, *Legal Aid Lawyers More Efficient than Publicly Funded Private Lawyers*, (13 February 2019) < https://www.bocsar.nsw.gov.au/Pages/bocsar_media_releases/2019/mr-Legal-aid.aspx >.

- Early use of plea and/or charge bargaining;
- Number of grant extensions requested and/or granted; and
- Total number of case events.

It is important to note that these measurements would only yield valuable data over a long period of time. A large pool of data is required because there are many different variables (outside a lawyer's control) which may prolong a case or increase the number of case events. These variables may include, for example, variations in judicial practice and the other party's willingness (or unwillingness) to settle.

This policy shift toward higher levels of accountability is being driven by a number of factors, including community expectations and an increasing awareness that poor legal outcomes have high social and economic costs. While these negative externalities may be less obvious than the immediate financial costs of fraud and over-billing, they are nonetheless significant. Low quality work has particularly high costs in legal aid work because grants of aid are only given in the most serious cases where individuals risk significant loss, including loss of liberty, livelihood, housing, or family. If these cases are dealt with ineffectively, vulnerable individuals may be plunged further into a cycle of poverty and disadvantage which will be increasingly difficult to break. Consequently, one of the major concerns for LACs is to control not only for the economic costs of fraudulent billing, but also for the social costs of low quality work.

One of the most significant challenges faced by LACs in pivoting to a more substantive form of review is the increased cost associated with employing senior lawyers (rather than auditors or grants staff) to review files, as well as the increased time required per file. Most LACs will need to control these costs by conducting targeted and efficient quality audits, directed at the most high-risk practitioners. Ideally, targeted quality audits would work alongside an ongoing system of comprehensive procedural audits. In this way, LACs could control the costs of auditing while also protecting against fraudulent billing and low quality work.

LACs could also counteract the increased costs per file by allocating work to firms, rather than individual practitioners. This would increase efficiency by reducing the total number of entities that need to be reviewed. This change could also reduce the likelihood of unsatisfactory work by allocating less work to sole practitioners (who generally present a greater quality risk than firms) and more work to firms. In most jurisdictions, sole practitioners are over-represented in complaint numbers. This is most likely because sole practitioners have more difficulty delivering a high quality service due to a lack of supervision, support, and infrastructure. By shifting to a model that allows firms to receive panel accreditation, LACs could mitigate the risk created by unsupervised sole practitioners while also reducing the costs associated with quality control.

The subsequent sections will discuss what a best practice model of quality control might look like in the Australian context, focussing on the use of peer review and client surveys.

Monitoring the Quality of Legal Services

The measurement of quality in legal services has been the subject of discussion and research for over forty years.[40] A broad range of quality control mechanisms have been developed, and have been trialled with varying success in Australia and abroad. Over time, peer review of legal aid files has come to be recognised as one of the most (if not

[40] Rick J Carlson, 'Measuring the Quality of Legal Services: An Idea Whose Time Has Not Come' Vol 11 No 2 *Law and Society Review* (1976), 287.

the most) effective means of monitoring quality of legal services in comparison to other methods such as self-assessment, direct observation, analysis of complaints, or analysis of court documents.[41] Although it is also one of the most expensive methods of quality control,[42] its effectiveness is so great that it has been adopted in a range of countries including England and Wales, Scotland, New Zealand, the Netherlands, South Africa, Chile, and China.[43] Overall, international trends appear to indicate a convergence towards peer review as the 'gold standard' of quality control.

This section will draw on the early work of Paterson and Sherr,[44] and more recent developments in England, New Zealand, Australia, and the EU, to suggest a model of peer review that is adapted to Australia's jurisdictional conditions (specifically in the context of the mixed model), and that is financially viable to implement. The following sections will explore the proposed model including: the development of practice standards; the selection and training of reviewers; and the selection of review subjects and files. The integral role of an appeal pathway will also be discussed. In setting out how a re-modelled review might look it is also important to take into account the inevitable challenges of implementing comprehensive peer review.

Development of practice standards

The EU guidelines for developing quality measures suggest that the local Law Society or Bar Association should be closely involved in the development of performance criteria.[45] In the context of the Australian mixed model, it would be appropriate to involve legal aid lawyers, private practitioners who perform legal aid work, and private practitioners who only work for paying clients. This would ensure that the guidelines are developed consultatively, as well as helping to attain 'equality of arms' for legal aid clients by developing quality standards that reflect the standard of service provided to paying clients.

Recent research has demonstrated that the content of the guidelines should aim to ensure quality across three areas: technical competence, client care, and utility.[46]

Technical competence requires a practitioner to have knowledge of the relevant law and procedural requirements, and to provide advice that is accurate in the circumstances.

Client care includes catering to a client's individual needs (for example, by using an interpreter or explaining concepts in simple English), as well as identifying personal circumstances linked to the presenting issue, and providing referrals to relevant non-legal services.

Utility is a combination of technical competence and client care – it involves providing advice that is useful to the client in the circumstances and helps them to move forwards in a meaningful way. The Legal Aid Agency for England and Wales measures utility by the extent to which a lawyer's actions help to 'achieve the client's *reasonable*

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[41] Simonas Nikartas and Agné Limanté, *Tools and Criteria for Measuring Legal Aid Quality: Guidelines for EU Member States* (2018) QUAL-AID, 40 < https://www.jura.uni-frankfurt.de/75941968/QUAL_AID_Evaluation_of_Legal_Aid_Quality.pdf > ('QUAL-AID Report').
[42] Ibid.
[43] Ibid 27.
[44] Avrom Sherr, Richard Moorhead, and Alan Paterson, *Lawyers: The Quality Agenda* (Her Majesty's Stationery Office, 1994).
[45] QUAL-AID Report (n 40) 16.
[46] Legal Services Consumer Panel, *Quality in Legal Services* (November 2010) Legal Services Board < https://www.legalservicesboard.org.uk/about_us/board_meetings/pdf/Paper_(10)82_Quality_in_legal_serv_(Anx%20C).pdf >.

objectives'[47] (recognising that a client's instructions may not always be reasonable or achievable in the circumstances). Therefore, the concept of utility embodies an expectation that legal advice or assistance should have a positive (not neutral or detrimental) impact on the client's position. However, a positive impact will not always align with the client's expectations – for example, a positive result in a matter with no prospects may be for the client to abandon the matter or enter a plea of guilty.

Within each law type, the various quality criteria can be grouped by stage of matter (for example, in a criminal matter: pre-charge; committal; and trial) to measure the quality of work at each stage. The criteria should consider whether the action taken was timely, correct, appropriate (and appropriately communicated), and helpful to the client in the circumstances. Practice standards should also reflect the expectations of the government as a purchaser of legal services – for example, standards should consider how efficiently the work was carried out, the reasonableness of any disbursements or extensions, and the clarity and composition of the file.

Practice standards may also include an explanation of how a given quality standard should be demonstrated within a file. For example, Victorian Legal Aid, in addition to providing practice standards which describe a practitioner's obligations, also provides a list of practice standard *measures* which set out how a practitioner can demonstrate compliance with a particular standard.[48] This ensures that practitioners have a clear understanding of the standard of record-keeping that is required for effective peer review.

Selection and training of reviewers

The process for selecting reviewers should have a range of criteria. Most importantly, reviewers should be experienced practitioners who do not have a conflict of interest with the providers subject to review.

In England and Wales, reviewer positions are publicly advertised according to the area of law in which reviewers are required.[49] Where there is shortage of reviewers in a particular area of law, individuals may be invited to apply for a position.[50]

Reviewers should be experienced legal aid practitioners (for example, in England a reviewer must be a supervisor under a current legal aid contract[51]) who consistently produce high quality work. The screening process may include reviewing a sample of the applicant's work to ensure that it is of a high quality.[52]

The avoidance of conflicts is an essential part of developing a peer review model that is trusted and objective. For the purposes of peer review, a conflict includes any situation in which the peer reviewer may have already formed an opinion about the provider's work or developed any kind of bias for or against the provider.[53] The Legal Aid Agency in England and Wales avoids conflicts in three ways:[54]

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[47] Legal Aid Agency, *Independent Peer Review Process Guidance* (June 2017) 42 < https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/620110/independent-peer-review-process-guidance.pdf >.
[48] Victorian Legal Aid, *Practice Standard Measures* < http://www.legalaid.vic.gov.au/information-for-lawyers/practitioner-panels/panels-conditions >.
[49] Sherr, Moorhead, and Paterson (n 43) 12.
[50] Ibid.
[51] Legal Aid Agency (n 46) 13.
[52] Ibid.
[53] Ibid 23.
[54] Ibid.

- Peer reviewers do not review firms with which they have had previous dealings, including working for, acting against, or where a family member or spouse has previously worked at the firm;
- Peer reviewers do not review firms within their 'geographic area' unless both the reviewer and the firm consent; and
- Firms are given a list of peer reviewers and asked to identify any relevant conflicts.

In the Australian context, this model would have to be adapted to each jurisdiction, noting that the eight LACs vary significantly in size (the largest LAC serves a population of 7.9 million, while the smallest LAC serves a population of just 247,000[55]). Therefore, in more populous jurisdictions, the legal community may be large enough to enable reviewers to audit providers from a different area of the same state. However, smaller LACs may need to recruit reviewers from interstate in order to avoid conflicts.

Reviewers should be trained on pre-reviewed model files, and discrepancies in marking should be discussed and eliminated where possible. Where it is not possible to reduce discrepancies through training and discussion, it may be necessary to remove the candidate from the pool of reviewers.[56] LACs could also consider appointing senior reviewers who can provide benchmarks for appropriate marking and investigate the reasons for any discrepancies.[57]

Selection of review subjects

There are three methods of selecting practitioners for review: random selection; risk-based selection; and a combination of both.[58]

Risk can be conceptualised in several different ways. One of the primary ways in which LACs define risk is through the identification of financial risk. Under this model, high-risk providers are classified as those who undertake a high volume of work, have a high cost per case, or a high total amount of billing. However, risk can also take into account the interests of clients, including the risk that a practitioner poses to clients through failure to comply with ethical and professional standards. Risk to clients is more difficult to quantify but can be identified through measures such as the number of client complaints or the frequency of adverse judicial comment. In New Zealand, the legal aid agency develops a 'risk profile' for each provider based on a combination of financial risk and risk to clients. Some of the factors taken into account include: [59]

- Total amount paid to the provider in the last year;
- Number of files assigned in the last year;
- Cost per file;
- Number of extensions sought;
- Number of case approvals rejected/refused;

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[55] Australian Bureau of Statistics, *Australian Demographic Statistics* (June 2018) <http://www.abs.gov.au/ausstats/abs@.nsf/0/D56C4A3E41586764CA2581A70015893E?Opendocument >.
[56] Legal Aid Agency (n 46) 16.
[57] Legal Services Board (n 45) 18.
[58] QUAL-AID Report (n 40) 32.
[59] New Zealand Ministry of Justice, *Terms of Reference: Quality and Value Audits* (May 2018), 6 < https://www.justice.govt.nz/assets/Documents/Publications/Quality-and-Value-Audit-Terms-of-Reference.pdf >.

- Percentage increase in fees or files over last two years;
- Number of substantiated complaints;
- Adverse judicial comment; and
- Progression to a new provider level or area of law.

Similarly, LAWA performs targeted audits on a percentage of the firms listed as 'top earners' in the LAWA Annual Report.[60] Additionally, LAWA performs 'targeted' audits on firms where serious quality issues or concerns have been raised, as well as randomly auditing a percentage of firms that are not top earners and have not had serious quality concerns raised with regards to their work. This is an example of a mixed risk-based and random selection process that considers financial risk and risk to clients, as well as randomly selecting some other firms.

These approaches are indicative of how a best practice model might be further developed in Australia. In the development of best practice, risk assessment must be foundational; for instance taking into account the potential for small practices to have serious quality issues (noting these small-scale providers may be classed as low-risk under the New Zealand model, but would most likely have to have concerns raised about their practice under the LAWA model). As noted above, sole practitioners may pose a higher risk because they lack the level of support and infrastructure necessary to provide high quality services. Accordingly, a selection method that takes into account this increased risk is necessary. Additionally, a provider's risk profile could include information on client demographics (for example, the percentage of clients that have a disability or come from a culturally diverse background) to ensure that the review process protects the most vulnerable clients from low quality providers.

Risk-based selection is likely to be the most cost-effective method of identifying quality issues. This is because it allows legal aid agencies to focus their limited resources on auditing the practitioners that pose the greatest financial risk to the legal aid agency or the greatest risk to clients' interests. Risk-based selection is particularly important when utilising peer review because it is one of the more expensive form of quality control.

Arguably, quality control should not be based solely on a risk-based selection method as this can create problematic dynamics. For example, in a system where only high-risk providers are audited, providers that receive an audit request may feel that they are being targeted because their work is perceived to be of low quality. This perception can create an incentive to tamper with files or retrospectively alter them in order to manipulate the review process. Such a result would obviously be undesirable as it would detract from the integrity and reliability of the process. Random selection could mitigate this risk. However, while random audits would reduce the risk of file-tampering, they would also reduce efficiency and increase costs because LACs would have to undertake more reviews in order to identify the same number of quality issues.

Accordingly, the third option (a combination of both random and risk-based selection) is likely to be the most appropriate. The LAWA model is a good example of a combined risk-based and random selection approach which encompasses a broad definition of risk (including both financial risk and the risk to clients' interests). Under a partly risk-based and partly random model of selection, practitioners will not know whether they have been randomly selected or whether they have been identified as high-risk, and so have less incentive to tamper with files. Concomitantly, LACs will also be able to direct limited resources towards the practitioners who pose the greatest risk.

[60] Legal Aid Western Australia (n 36) 5.

An integrated high volume/random and risk-based selection model could readily be introduced in Australian LACs using the existing models of financial and performance auditing. Under an integrated system, LACs could continue to undertake relatively high-volume financial auditing on a combined risk-based and random basis. The risk calculation for financial auditing should be based primarily on a consideration of financial risk to LACs. In addition, LACs could peer review a smaller selection of files. The selection criteria for peer review would be based primarily on risk to clients, although some files, including in-house files, should be randomly peer reviewed in order to establish a quality benchmark. Importantly, the system should be fully integrated into a single audit process so that providers do not know whether they are being audited randomly or based on risk, or whether their files will be subject to financial audit or peer review. This system would control the costs and volume of peer review while also ensuring the integrity of the process.

Selection of files for review

The number of files selected should be enough to provide a representative sample of the provider's work, but not so many that the costs of review escalate and only a small number of providers can be reviewed. Determining the files selected for an initial review will usually depend on whether it is an individual lawyer or a firm that is being audited. For example, in New Zealand[61] and Scotland[62] (both jurisdictions in which individual practitioners receive panel accreditation) an initial review covers at least five files per lawyer. Alternatively, in jurisdictions where legal aid work is contracted to firms, an initial review may cover up to 12 files per provider.[63] In Australia, while some LACs can authorise firms to do legal aid work (for example, Queensland's 'preferred supplier' system[64]), other jurisdictions can only authorise individual lawyers. Therefore, the number of files reviewed should vary according to the nature of the provider, in order to balance efficiency with the need for statistically valid review.

The number of files selected for review could also reflect a provider's risk profile. This protocol is used by LAWA.[65] Under LAWA's current audit policy, the number of files reviewed reflects both the size of the provider and its risk profile (for example, a large firm or a firm that is considered high risk will be asked to provide more files for review[66]). However, as set out above, it may not be desirable to put firms or practitioners on notice that they are considered high risk, as this creates an incentive to tamper with files.

Initial reviews can be undertaken remotely (meaning that the provider sends the files to the reviewer, rather than the reviewer attending the provider's office) so as to minimise costs. Reviewers should mark each file according to the established criteria, and then allocate an overall mark to the file (which may or may not be the average of the marks for each criteria). Finally, the reviewer allocates an overall mark to the provider based on all of the files reviewed. Paterson, Moorhead, and Sherr[67] propose that this overall grade should be marked on a 5-point scale in which a mark of 3 indicates competence, equivalent to a practitioner of ordinary skill and ability.[68] A mark of 1 or 2 indicates failure of performance, equivalent to professional negligence.

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[61] New Zealand Ministry of Justice (n 58) 9.
[62] Alan Paterson and Avrom Sherr, 'The Emergence of Peer Review in the Legal Profession' (2007) (paper presented to the 2007 ILAG Conference in Antwerp) < http://www.internationallegalaidgroup.org/index.php/papers-publications/category/17-conference-papers >.
[63] Legal Aid Agency (n 46) 6.
[64] <http://www.legalaid.qld.gov.au/For-lawyers/Become-a-legal-aid-service-provider >.
[65] Legal Aid Western Australia (n 36) 8.
[66] Ibid.
[67] Sherr, Moorhead, and Paterson (n 43).
[68] Paterson and Sherr (n 61) 8.

A mark of 4 or 5 indicates work above minimum competence or of an excellent calibre. Most importantly, the reviewer should provide reasons for the final mark. This is important for two reasons: firstly, so that all firms, even excellent firms, can improve their performance based on the feedback provided; and secondly so that practitioners who receive fail grades have grounds on which to contest the mark if necessary. The Scottish model also suggests that 25% of files marked in the initial review should be double marked.[69] Additionally, under some models, a firm must reimburse the legal aid agency for the costs of the review where the firm fails the initial review.[70]

Appeals

An appeal process is essential to ensure balance and uniformity. In the interests of fairness and transparency, providers should have rights of review and reconsideration. This should occur at three stages: firstly, at the stage of a draft report; secondly, at the stage of a final report; and finally, at the stage of applying sanctions.

The audit process in New Zealand[71] requires the auditor to forward a draft report to the provider, and then allows the provider to make comments on the draft. The auditor then reviews the comments prior to writing the final report. Once the final report is published, the provider may be required to formally respond to any issues raised. Through this two-step process, a provider can respond to any issues that result due to miscommunication or other error at an early stage, and avoid having these findings permanently recorded. This provides some measure of procedural fairness and protection for firms' reputations.

In England and Wales, [72] a final finding of 'incompetence' can be appealed through the 'representations' process. This is appropriate where the issues were not resolved at the draft report stage and result in a fail grade. Under this process, a provider who receives an overall grade below 'competence' can make representations as to why they should have received a higher mark. These representations are then considered by the initial reviewer and either a senior reviewer or an additional ordinary reviewer. The initial mark may be confirmed or revised, or a new review may be ordered. Where the reviewers do not agree, the disagreement will normally be resolved in the provider's favour.[73] A second review will be scheduled immediately (in the case of providers who receive the lowest possible mark), or after six months (for providers who fall just below the ordinary standard of competence).[74]

Victorian Legal Aid also provides firms with rights of reconsideration and review with respect to certain sanctions.[75] This additional appeal mechanism promotes fairness by ensuring that the response to the review is proportional to any negative finding.

By combining all these models, providers would have three important rights: the right to comment on the draft report; the right to appeal a finding of incompetence through 'representations'; and the right to seek review of certain sanctions. These rights promote fairness and transparency and ensure that providers are not unfairly sanctioned. This in turn will enhance the perceived legitimacy of the process.

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[69] Ibid 6.
[70] Legal Aid Agency (n 46) 31 [6.38].
[71] New Zealand Ministry of Justice, *Audit and Monitoring: Operational Policy* (May 2018) 5 < https://www.justice.govt.nz/assets/Documents/Publications/Audit-and-monitoring-policy2.pdf >.
[72] Legal Aid Agency (n 46) 29.
[73] Ibid 30.
[74] Ibid.
[75] Victorian Legal Aid, *Section 29A Panels Conditions: Quality Audit Terms and Conditions (Schedule 3)* < https://www.legalaid.vic.gov.au/information-for-lawyers/practitioner-panels/panels-conditions > note that not all sanctions can be appealed – Schedule 6 of the Panels Conditions contains a full list of sanctions that can be appealed.

Improving the Quality of Legal Services

Just as providers are expected to improve the quality of their services over time, peer reviewers should also aim to improve the quality, accuracy, and consistency of their reviews over time. Under the Scottish model, this is achieved through debrief and feedback sessions in which reviewers can discuss variations in results and the reasons they might have occurred.[76] Paterson and Sherr observed that, under this model, the percentage deviation from the average declined over time, indicating more consistent marking practices.[77] A similar model of continuous review and improvement is already used in various forms in some Australian jurisdictions. This system should be adopted as part of all quality control processes, so that the profession can have confidence in the integrity and consistency of the peer review system.

By implementing a comprehensive system of quality control, LACs should be able to raise the overall quality of services and ensure that legal aid clients are not disadvantaged by their lack of means. The results of peer review processes should be used to remove underperforming practitioners from legal aid panels and direct more matters to practitioners who have a record of providing high quality services. Under the current system, LACs struggle to remove underperforming practitioners and reward high quality work for a number of reasons.

Removal of underperforming practitioners

Law Societies govern the admission and ongoing eligibility of legal practitioners. However, the standard of malpractice required for the revocation of a practising certificate is generally high, and LACs may want to remove practitioners from panels for lesser transgressions which nevertheless endanger the LAC's financial security or the wellbeing of clients.

In the absence of a peer review system, there are few reliable, evidence-based methods of removing panel practitioners for low-quality work. In general, it is easy for practitioners to be appointed to panels, but it is difficult for LACs to remove them. This is partly because Law Societies have advocated heavily for all legal practitioners to be allowed to perform legal aid work, regardless of their ability.

A high volume, random system of financial and performance audits can facilitate the removal of underperforming lawyers notwithstanding that these types of audits generally only seek to satisfy a list of procedural criteria. However, most providers who fail a routine audit will do so on procedural grounds such as non-compliance with an audit request, non-compliance with billing procedures, or failure to maintain the file to an appropriate standard. Failure of a routine audit on the basis of low quality work is a rarity.

Aside from routine audits, LACs can gather data on quality through complaints from judges, practitioners, or clients. However, judges and other practitioners will usually be reluctant to formally record a complaint against another lawyer, so these comments tend to be unhelpful in initiating a formal process of removal. Client complaints are rare and often rely on limited and subjective evidence.[78] A decision to remove a practitioner based on a complaint is therefore more likely to be appealed, and the appeal more likely to succeed, than a decision based on a comprehensive, objective peer review of a practitioner's files.

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[76] Legal Aid Western Australia (n 36) 12.
[77] Ibid 13.
[78] QUAL-AID Report (n 40) 41.

As has been argued above, the clearest way of remedying the limitations of high volume, random auditing is to implement a system of peer review. This would strengthen the current system by providing better quality evidence to justify removal of underperforming practitioners.

Selective distribution of work to high quality lawyers

Secondly, many LACs are limited in their ability to selectively distribute work to high quality lawyers. In general, Law Societies take the view that all practitioners should have the right to perform legal aid work, with no more stringent quality controls than those that apply generally. As a result of this view, some LACs even have provisions in their Legal Aid Acts which provide that work should be distributed 'equitably' amongst all panel practitioners.[79] This creates issues where LACs are aware that certain practitioners provide lower quality services, but are nevertheless obliged to distribute work to these practitioners.

Moreover, these provisions are inconsistent with the principles of public sector accountability and the government's rights as a purchaser of legal services. In addition, the idea that all practitioners should be allowed to undertake legal aid work fails to take into account the vulnerability of legal aid clients and the fact that they may require a higher standard of care than other clients.

In this situation, evidence gathered from peer review, in conjunction with changes to legislation and policy, could be used to provide more work to high quality lawyers who will provide greater value to the government and to clients. Once a peer review system is established it could also be used as a screening tool to restrict entry onto panels.

Supplementary review methods

One potential limitation of peer review is that reviewers rely on clients to self-identify as having special needs such as disability or mental health issues. However, there is evidence to suggest that rates of self-identification for these conditions are very low.[80] A lack of reliable information on client needs could limit the effectiveness of peer review in terms of evaluating the quality of client care.

One solution for this issue may be to supplement peer review with client surveys, in order to gather first-hand data on how effectively legal aid lawyers communicate with vulnerable clients. While clients cannot be expected to provide feedback on the quality of legal work itself, they can provide important feedback on the way in which the lawyer interacted with them and was responsive to their needs.

In analysing the results of client surveys, LACs should bear in mind that survey results can be distorted by low rates of client uptake and clients' dissatisfaction with the results of their case. Reliability can be increased by using client surveys as one of a range of quality control methods.

Efficiency and cost control

One of the major challenges for Australian LACs will be the cost associated with peer reviewing large panels of practitioners. Historically, most legal aid panels were

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[79] *Legal Aid Act 1977* (ACT) s 31B (3).

[80] For example: Bower et al, 'Fetal alcohol spectrum disorder and youth justice: a prevalence study among young people sentenced to detention in Western Australia' (2018) *BMJ Open* < https://bmjopen.bmj.com/content/bmjopen/8/2/e019605.full.pdf >; Emily Baker, 'ACT Government unsure how many prisoners have disability' (2 June 2018) *Canberra Times* < https://www.canberratimes.com.au/national/act/act-government-unsure-how-many-prisoners-have-disability-20180525-p4zhks.html >.

established in consultation with Law Societies, who advocated for inclusive, not exclusive models. Therefore, low thresholds for panel accreditation were set and panels quickly became very large and difficult to monitor. In implementing a system of peer review, LACs will have to develop solutions to control the costs associated with auditing so many practitioners. One important measures to lower the costs of review would be to alter the makeup of panels to include firms.

Placing firms on panels could decrease costs and increase efficiency and quality. Costs would decrease because there would be fewer providers on the panel and therefore a smaller number of entities to be audited. Efficiency would be increased because some responsibility for quality assurance would be devolved to firm managers, who would have to ensure that all their solicitors are competent, at the risk of losing the firm's accreditation. Overall quality could potentially be improved because firms on average have fewer quality issues than sole practitioners, due to increased support and oversight. In light of these benefits, some LACs, including Queensland, Victoria, and Western Australia have already altered their procedures to place firms on panels. Other jurisdictions may wish to consider this measure in the interests of developing an efficient system for quality control.

Conclusion

The Australian mixed model of legal aid service delivery presents particular challenges for quality control: large panels of lawyers, high volumes of work, and complex relationships with Law Societies around the administration of professional standards. Against this background the article has argued for the implementation of a risk-based process of auditing and peer review of all legal aid work. A targeted, transparent and comprehensive national approach to auditing is supported by research and experience in a range of jurisdictions. The growing evidence-base from within Australia and overseas suggests that a legal aid system will provide better outcomes for clients, whether delivered by in-house lawyers or private legal practitioners, by utilising comprehensive auditing processes that drill down on quality issues. In this context, the LAC legal practices have an opportunity to provide the benchmark standard for service delivery, given the controls available to an in-house practice and the depth of experience in auditing.

Importantly, in concluding that an integrated auditing system would be best practice, it is recognised that the assessment of quality assurance in legal aid services requires a risk management process encompassing both work performance and financial accountability. This re-modelled approach could build on the strengths of Australia's existing audit processes. In terms of the accountabilities necessary for real quality control this article has demonstrated that a range of strategies utilising risk assessment are proven to identify and target underperformance: peer review by experienced legal and financial practitioners must be moved into the centre of risk assessment. Random high volume auditing should occur alongside risk-targeted peer reviews by experience legal and financial practitioners.

Furthermore, the longstanding complementary methods of quality control - client survey/complaints and supervision/mentoring - should remain part of an integrated system of auditing. Importantly, this article also acknowledges that in order to reduce the costs of quality control high volume random auditing by paralegal staff and stage of matter payment should continue; the movement of placing firms rather than individual lawyers on panels should also be encouraged.

Quality assurance will be promoted through transparency and accountability. There are strong professional and financial imperatives for re-modelling current auditing processes with more comprehensive quality control measures. LACs must not be deterred by the inevitable high costs of peer review – instead, they seek to create

efficiency within a system of peer review. A comprehensive approach should pay dividends in reducing the economic and social costs of inefficient and low quality legal aid work. Indeed, the implementation of risk-targeted peer review will necessarily also have implications for the functioning of the wider legal aid system in Australia. Overall, higher quality services provide value for money to the government as the major investor in legal aid, as well as improving access to justice and 'equality of arms' for legal aid clients.

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