Legal Aid Services, Quality and Competence: Is Near Enough Good Enough and How Can We Tell What's What?

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Introduction

The history of legal aid in Australia indicates that little emphasis has been given in a structured sense to quality of service issues. This was no doubt caused in part by the notion that issues relating to the quality of service provided by legal practitioners were solely within the domain of the legal profession itself. Until recently, it was apparently assumed that lawyers, as professionals, would provide a quality service, both to legal aid and paying clients. Jan King, Victorian Lay Observer[1] considers that "people did not think more about the issue than that".[2] Weisbrot observes that:

> "The potency of the ideology of the rule of law, which demands the 'independence' of the legal profession from any State control, and the penetration of the State by the legal profession...have ensured a high degree of autonomy for lawyers over their own affairs."[3]

Weisbrot notes a principal justification for self-regulation offered by the legal profession as being:

> "...the 'service ideal', whereby members of the profession are said to practise in a 'tradition of devoted and disinterested service' and that their labour is

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1 The Lay Observer to the Solicitors' Board and Barristers Disciplinary Tribunal is appointed by the Victorian Attorney-General to act as an independent observer of the internal disciplinary processes of both arms of the Victorian legal profession.

2 Personal interview, Jan King, Lay Observer and former LACV Commissioner, 26 October 1994.

3 D Weisbrot, *Australian Lawyers*, Melbourne: Longman Cheshire, 1990, at 192-193.

directed towards general community or cultural benefit rather than self-interest..."[4]

Garth refers to the unwritten contract between the profession and the public which "provides that lawyers will be left alone and given a monopoly in exchange for the promise that a high-quality service can be obtained from anyone with the professional license".[5]

Legal aid clients, those who receive services brokered and often paid for on their behalf by a public authority, have tended to be less likely to raise quality concerns regarding those services than would other legal service users. The charitable nature of much legal aid provision has seen clients accept the service without criticism. This acceptance now appears to be more open to questioning from both the recipients and funders of such services. Legal aid clients are more likely to raise concerns given the increasing likelihood that they will be required to make what is often a quite substantial payment towards the cost of the services they have received.[6] Legal aid authorities have with encouragement from government focussed increasing attention on how to both reduce costs and increase service quality. This article will explore issues related to legal aid quality by looking at one particular change to legal aid service delivery, that is, the offering of legal aid franchises.

Various changes in service delivery methods are currently being considered by legal aid authorities, both in Australia and elsewhere. Reduced costs and the prospect of enhanced service quality are dual benefits which are promoted as available via initiatives such as the granting of legal aid franchises.[7] Franchising involves legal aid authorities conferring additional rights upon service providers who agree to meet additional requirements in relation to service delivery and structure. In effect, franchisees are given preferred supplier status. Victoria Legal Aid (VLA), the new body responsible for legal aid administration in Victoria, is currently evaluating a franchising pilot project undertaken by its predecessor, the Legal Aid Commission of Victoria (LACV). The operation of the LACV's pilot has been watched with interest by other Australian Legal Aid Commissions but has been the subject of surprisingly little scrutiny from the legal profession and academics.[8]

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4 Id, at 196.

5 B Garth, "Rethinking the Legal Profession's Approach to Collective Self-Improvement: Competence and the Consumer Perspective", (1983) *Wisconsin Law Review* 639, at 651.

6 Below, see note 43 and related text.

7 Franchising is the most significant of the changes being proposed. Other changes being mooted include the introduction of greater competitive tendering and restricting the eligibility of lawyers to do legal aid work.

8 For an outline of some of the concerns raised by franchising, see J Giddings, "Franchising: Making a Meal of Legal Aid" (1994) 19(6) *Alternative Law Journal* 270. It is interesting to note that, unlike the Law Society of England and Wales, the Law Institute of Victoria has been very supportive of the introduction of franchising.

The Legal Aid Board of England and Wales (LAB) has shown considerable interest in franchising. In the late 1980s, the LAB began investigating the concept of legal aid franchises and a three year pilot project was conducted in the Birmingham region which started in May 1990.[9] Respected academics were engaged to conduct major research related to the pilot project and several major reports have been produced detailing research results.[10] In August 1994, the LAB entered into more than 1000 franchising contracts with solicitors' offices, advice agencies and law centres.[11] Franchisees must submit to audits of their work on files of legally assisted persons in return for greater powers and preferential payment arrangements. The most important of these additional powers relates to providing franchisees with the ability to grant legal assistance to their own clients in certain circumstances rather than applications for assistance having to be considered by the central administration.

There has been a much more active debate about the merits of franchising in the United Kingdom than has occurred here in Australia. Issues of defining legal service quality and the setting of the required level of quality have been central to this debate. The legal profession and legal reform groups have been vigilant in their examination of these developments and have been wary of the possibility of franchising being linked with other developments such as tendering for exclusive rights to perform legal aid work in certain areas.

The move of the LACV in the early 1990s to begin considering quality issues appears to have been a response to the cost-cutting focus outlined above. There was a sense that the debate needed to be more balanced and that a brake needed to be applied to the prevailing economic rationalist thinking. The recession had seen the LACV 'caught with its pants down', lacking skills in long-term planning and with a Board of Commissioners which found it difficult to think strategically.[12] On one hand, the LACV felt the need to be seen 'doing things' and be receptive to new ideas and innovations, especially given the prospect of defeat of relatively sympathetic Labor governments at both State and Federal levels at elections in October 1992 and March 1993 respectively. On the other hand, the LACV was becoming increasingly concerned not to jeopardise the quality of the services provided to legally assisted persons.

Different approaches are now being taken by the Victorian and Federal governments in relation to legal aid. The Victorian Government has

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[9] A Sherr, R Moorhead & A Paterson, *Lawyers - The Quality Agenda*, Legal Aid Board London: HMSO, 1994, Volume. 1, Chapter 1. This work is hereafter cited as "Sherr et al, *Quality*".

[10] See Sherr *et al*, *Quality*, Volumes 1 & 2; A Sherr, R Moorhead & A Paterson, *Transaction Criteria*, 1992; A Sherr, R Moorhead & A Paterson, *Franchising Legal Aid, Final Report*, London: HMSO, September 1992; Legal Aid Board, *Franchising Specification*, July 1992.

[11] Legal Aid Board, *Press Release: Legal Aid Franchising Launched*, 1 August 1994.

[12] Personal interview, Andrew Crockett, former LACV Director, 24 October 1994.

been very focussed on cost reduction, pushing for both reduced average costs per case as well as absolute reductions in government legal aid expenditure. A major reason for this focus has been the demise of the Solicitors Guarantee Fund (SGF) as a legal aid funding source. During the 1980's, the Victorian Government contributed very little direct funding to the LACV. It was generally able to rely on income generated by the Solicitors Guarantee Fund (SGF) to fulfil its obligations. The value of the SGF declined dramatically in the early 1990's, from $17.73 million in the year 1991-1992 to $7.835 million the following year and only $1.611 million in 1993-1994.[13] This lead to the ironic outcome that at a time when the LACV was having to reduce services due to funding difficulties, the State Government was in fact significantly increasing its direct funding of legal aid.

The Federal Government is seeking to increase its influence over legal aid policy, committing itself to increased legal aid spending through *The Justice Statement*[14] released in May 1995. Amongst other expenditure initiatives across the justice system totalling $158 million over 4 years, an additional $24 million will be provided to Legal Aid Commissions for family and civil cases. Ongoing additional funding will only be provided to those Commissions which reassess their service delivery priorities and develop programs that address the Commonwealth's goal in bringing about real reform in the way in which services are delivered. Without this very significant additional funding contribution, legal aid schemes across Australia would obviously be in considerable further difficulty. The price for this additional contribution is likely to be felt in terms of a loss of policy making independence as a result of greater Commonwealth control over the nature and direction of legal aid services with reductions in average costs of legal aid cases being a major focus.

The notion of legal aid franchises had first been discussed in the UK in the late 1980's. It was initially conceived as a mechanism which might enable greater involvement of non-lawyers in handling legal aid work.[15] The LACV was the first Australian legal aid authority to attempt to make use of a similar model, albeit on a 12 month pilot basis and confined to summary criminal cases. Unfortunately, unlike the LAB, the LACV devoted very little attention to the range of preliminary issues relating to the quality of legal services which are raised by this type of change. This failure to establish a firm foundation for the introduction of such an important initiative as franchising will most likely result in major difficulties in the future.

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[13] See Legal Aid Commission of Victoria, *Thirteenth Statutory Report 1991-92*, at 58; Fourteenth Statutory Report 1992-93; at 54; and *Fifteenth Statutory Report 1993-94*, at 42.

[14] Commonwealth Attorney-General, *The Justice Statement*, Canberra: Attorney-General's Department, May 1995.

[15] F Bawdon, "The Birmingham Pilot", (1993) *Legal Action* 7.

These preliminary issues can be viewed as falling into 3 categories: (i) How to define quality and the related term of competence; (ii) Having defined quality, how to effectively measure its elements; (iii) How to monitor the quality of service on an on-going basis. Each of these categories will now be considered in detail.

Defining Quality And Competence

(a) Quality

Sherr, Moorhead and Paterson, the researchers appointed to review the LAB's franchising initiative have observed:

> "The literature on quality and quality management is replete with obscure definitions of quality. At one level quality is an aspirational impossibility: something which is pursued but never achieved, a continual striving for excellence. At the other, quality is simply the compliance with a standard, a 'fitness for purpose' or ability to satisfy the clients' needs."[16]

Harden refers to quality as seeming to have become as much of a public sector buzz-word as efficiency was a few years ago.[17] The idea of quality assurance originated during the 1940's when arms manufacturers and suppliers were pushed to ensure that their products performed in a satisfactory manner.[18] In recent times, attempts have been made to apply quality assurance principles to the delivery of professional services with one of the problems being that:

> "...it is difficult to describe in precise terms what professionals do, or to assess the quality of product in terms of the outcome produced for patients or clients..."[19]

Despite such difficulties, Tull suggests:

> "The consistent though rhetorical use of the term, high quality has served a useful function in the past decade. As programs have aspired to accomplish it, it has provided the impetus for efforts to introduce systems which support the production of good quality legal work, sometimes over the resistance of both staff and managers."[20]

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[16] Id 105.

[17] I Harden, (1992) *The Contracting State*, Buckingham: Open University Press, 1992, at 58.

[18] M Travers, "Measurement and Reality: Quality Assurance and the Work of a firm of Criminal Defence Lawyers in Northern England", (1994) 1 *International Journal of the Legal Profession* 173, at 174.

[19] Id 175.

[20] J Tull, "Assessing Quality and Effectiveness in Legal Services Programs for the Poor", (1994) 1 *International Journal of the Legal Profession* 211, at 213.

Harden considers quality to be a rather vague term and argues it is not a substitute for consumer sovereignty, the notion which underpins private contractual arrangements. The interest shown in legal aid franchising is an example of the powerful push towards the use of contracts for the provision of public services incorporating the view that such contracts will contain provisions, just as they would in a private contractual situation, detailing the level of service quality agreed between the parties. Advocates of such moves fail to recognise that terms relating to quality in private contracts are often of very little value. The predominant use of standard form contracts often leaves purchasers with no real scope to bargain in relation to quality and other matters. Further, traditional remedies for breach of contract can be difficult to obtain, not to mention the expense involved. Garth considers that such "new 'rights' of individual clients realistically cannot be considered enforceable via the ordinary courts."[21]

The lack of a clear definition of 'quality' raises the further dilemma that there is no authoritative yardstick which can be used to determine the accuracy of any measures devised for the purpose of assessing the quality of legal work. "Such measures of quality as exist are contingent on the assessors' (clients or peers) notions of what constitutes quality and these remain largely subjective and unarticulated."[22] This lack of clarity has been exacerbated in the legal aid franchising debate by the varied use of the related notion of competence. While in the UK, competence has been used to refer to particular levels on a continuum of quality (discussed later in this article), literature from the USA appears to refer to competence as a continuum. The franchise researchers for the Legal Aid Board of England and Wales (LAB) moved from referring to a competence continuum in 1990[23] to a quality continuum since 1992.[24]

(b) What Level of Quality?

The setting of the level of quality to be required of all service providers will have significant implications for the various parties interested in legal aid. Tull refers to the current usage of the term 'high quality' as involving "...a far higher standard than lawyers are generally held to and may in reality be chimerical".[25] Garth, in what Sherr *et al* describe as a seminal

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[21] B Garth, "Rethinking the Legal Profession's Approach to Collective Self-Improvement: Competence and the Consumer Perspective", (1983) *Wisconsin Law Review* 639, at 677.
[22] Sherr *et al*, *Quality*, at 81.
[23] National Consumer Council, (1990) *Professional Competence in Legal Services*, 5.
[24] A Sherr, R Moorhead & A Paterson, *Franchising Legal Aid, Final Report*, London: HMSO, September 1992, at 34 and also Sherr *et al*, *Quality*, at 19.
[25] Tull, op cit 212.

article[26] expresses concern that a uniformly high setting of the required level of competence will significantly reduce access to services as it assumes that "all practitioners ... are supposed to perform at the level of corporate lawyers with deep pocket clients".[27] The reference to a uniformly high level of competence indicates that Garth is referring to a similar concept to that which Sherr *et al* refer to as quality. This article will refer to competence as one level of quality.

Garth outlines the rise in the USA during the late 1970's and early 1980's of a movement within the legal profession promoting increased uniform competence and draws a parallel with similar developments in the 1920's when concerns of the elite of the organised legal profession:

> "...with the public's perception of the quality of the legal profession and the legal system joined forces with the concerns of rank-and-file practitioners regarding competition to place 'competence' on the agenda for reform."[28]

It has been the guarantee of competence which has justified the continuation of the legal professional monopoly.

> "[If] unrestrained competition is the norm and the professional image suffers too much in the public's perception, there is always the possibility of the *bete noire* of the profession, government regulation."[29]

The issue of whose interests should be paramount when deciding what quality of service should be provided is very difficult to resolve. Self interest in reducing costs makes it inappropriate for government to have control over the setting of quality levels. The legal profession has much to gain from advocating that a high level of quality be provided, so long as funds are available to pay for all the services required. Legal aid clients will seek the highest quality service available although they may be tempered in such calls for better quality by the prospect of having to pay larger contributions towards the legal costs incurred on their behalf. The fragmented nature of the legal aid client population is another matter which would make it difficult for any united client position to be enunciated.[30]

Acceptance of the provision of any service level less than excellence could be viewed as acknowledging that legal aid provides a second rate service. It must, of course, be remembered that the overwhelming majority of users of the legal system do not qualify for legal assistance and yet cannot afford a top-level service of the "corporate clients with deep pockets variety" referred to by Garth.[31] Cost pressures will, to a large extent,

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26 Sherr et al, *Quality*, 6.
27 Garth , op cit 640.
28 Id 653.
29 Id 657.
30 A Paterson & A Sherr, "Quality, Clients and Legal Aid", (1992) 142 *New Law Journal* 783.
31 Garth, op cit 640.

dictate the quality of service such people receive which means that they, too, would not be receiving an 'excellent' service. Only the very wealthy would not find the legal costs of a major piece of litigation economically crippling.

(c) Competence

In the UK, the term competence has been taken to refer to a capacity to perform certain tasks adequately or to a specific standard.[32] The focus is on adequacy rather than higher levels of quality. Such competence is closely linked to actual performance with this link being strengthened by the fact that competence is generally measured by assessing actual performance.[33] Competence can be seen as denoting one point on any given performance ladder but it should also be recognised that its use in conjunction with terms such as 'adequately' indicates that what is competent can vary according to the circumstances surrounding the delivery of the service. Cooper considers that "competence only becomes interesting when the subjective criteria by which it is measured are analysed".[34] The issue of measurement of levels of quality, including competence, principally through the use of transaction criteria, will be considered later in this article.

A range of aspects of legal competence are outlined by Sherr *et al* using various sources. The following is an outline of the major aspects referred to:[35]

(i) Legal knowledge – including knowledge of procedural matters;
(ii) Practical skills – in areas such as negotiation and cross-examination;
(iii) Administrative skills – in practice management generally including staff supervision;
(iv) Motivation – including a commitment to ongoing personal education;
(v) Proficiency in planning and preparation;
(vi) Intellectual, emotional and physical capabilities;
(vii) Self-evaluative skills – particularly the ability to identify matters beyond one's own competence;
(viii) Fact-related skills – particularly in obtaining facts from the client and then in making use of that knowledge;
(ix) Client-related skills – in communicating with clients and involving them in decisions about their case.

The nature of legal aid work may require the use of notions of quality and competence somewhat different to that used for general legal work. Garth observes that:

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32 Sherr et al, *Quality*, at 1.
33 Id 4.
34 J Cooper, "What is Legal Competence?",(1991) 54 *Mod LR* 112, at 113.
35 Sherr *et al*, *Quality*, 6-8.

> "Poverty lawyers must practise a kind of law that emphasizes 'mass delivery' and maximum impact of legal services instead of uniform, high-quality 'mega-lawyering' along corporate lines."[36]

While this analysis may be most applicable to delivery of legal aid services by salaried lawyers with an emphasis on legal aid policy objectives, it is still instructive as to what elements should be incorporated into the definitions of quality and competence to be used for private sector delivery of legal aid services. It may be that a lawyer needs to be capable of providing services at a range of quality levels and assessing what level is appropriate in particular circumstances. Garth suggests that:

> "Lawyers should know how to do premium work, but professional quality might improve and consumers might benefit if lawyers also know how to best standardize procedures, utilize assistants and manage a large caseload."[37]

Legal aid authorities will also need to decide whether or not to use a broad definition of legal competence. If the emphasis in defining competence is on a theoretical capacity to do certain things to an acceptable minimum legal standard,[38] this would involve use of a narrow definition. Such an approach would be unfortunate as it would mean that characteristics which relate more generally to service delivery rather than specifically to legal work, such as communication skills, accessibility, enthusiasm and dedication would only be considered in the context of quality and levels on the quality continuum above that of competence. Ironically, these quality aspects are among the matters upon which legal aid authorities should be focussing in assessing legal aid services as well as being the issues where input from clients would be very useful for assessment purposes.

(d) The Relationship Between Quality and Cost

The connection between service quality and cost will continue to be very important. If competence is viewed as a particular minimum level of quality to be required of all service providers, this requires that competence levels not be linked to cost considerations. The LAB describes its objectives in promoting franchising as "to provide an accessible and quality assured legal aid service to clients giving improving value for money to the taxpayer".[39] This clearly indicates the LAB's strong emphasis on the

[36] Garth op cit, 669.
[37] Garth, op cit, 685.
[38] Paterson & Sherr, *op. cit.*
[39] Legal Aid Board, *Annual Report 1993-1994*, at 34.

need for cost control at the direction of the government. To allow any specified minimum level of competence to be reduced depending on the type of work or client involved will create significant problems for legal aid because of its unusual nature with the service being paid for by some-one other than the recipient.

LAB Chief Executive, Steve Orchard has described cost as "the most visible quality element in privately-funded legal services".[40] Orchard has asked, "Can clients, whether legally aided or not, ignore the cost involved? Of course not."[41] Although clients cannot ignore cost issues, it is inappropriate for quality levels to be dictated by cost considerations. Legal aid clients should be assured of a quality of service which will not put them at a disadvantage in relation to other legal system users. The LACV's Mission Statement refers to the provision of various services of high quality.

The interest of government is likely to bring strong cost reduction pressures into play. This is particularly so in legal aid systems such as those in Australia which are not demand driven, with LACs required to use mechanisms such as restrictive case eligibility criteria (which can be tightened during any given year if necessary) to ensure that they do not commit to expenditure greater than the annual funding allocation they receive from government. Expectations of government will be high in the area of LACs providing assistance to more people without increases in government funding. In his introductory letter to the LACV's 1993/94 Annual Report, LACV Chairman, Peter Gandolfo, stated that:

> "In the strongest performance for some time, this year we did more with less, using fewer resources to assist more Victorians in understanding and preserving their legal rights."[42]

There is a real danger that this may occur at the expense of the quality of the service. As Moorhead *et al* observed in relation to government cost pressures:

> "Both lawyer and consumer become increasingly powerless to agree upon the quality of service because neither party can arrange for the economic support which would be necessary to achieve that service."[43]

Cost, in the form of the contribution which a legally assisted person will have to pay to the legal aid authority which assists them, is becoming an increasingly important factor to legal aid clients. LACs are continuing moves to maximise their self-generated revenue and contributions from

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[40] S Orchard, "The Board's Agenda", (June 1993) *Legal Action* 7.
[41] Ibid.
[42] Id, 1.
[43] R Moorhead, A Sherr & A Paterson, *Franchising: Assessing the Quality of Legal Aid Lawyers?* (July 1993) paper presented at the conference on Law and Legal Services, Low Wood, England, at 8.

clients form a major part of income of this type. Income for Australian LACs from client contributions and costs recovered more than doubled from 1987-1988 to 1992-1993, from $18.5 million to $40.3 million.[44] The LACV has always led Australian LACs in the amount it receives by way of client contributions. While contributions recovered by the LACV have fallen from their 1991-1992 level of $16.05 million (19.7% of total income), principally as a result of the recession,[45] they still totalled $10.686 million in 1993-1994 and $8.328 million in 1994-1995 (13.8% and 11.2% of total income respectively). Very substantial contributions are regularly required from assisted persons such that the scope for increasing this revenue is limited. Assisted persons are likely to expect a significantly improved service if they are made aware before legal services are provided to them that when their cases finish they will have to repay all or a large part of the money paid out for those services.

(e) The Quality Continuum

In the United Kingdom, Sherr, Moorhead and Paterson have suggested a quality continuum for legal services as follows:[46]

- Excellence
- Competence-Plus
- Threshold Competence
- Inadequate Professional Services
- Non-Performance

A level between threshold competence and competence-plus has been identified as the critical level below which franchised legal aid service quality should not fall. A higher standard was viewed as having the potential to endanger access through pushing up cost. A further suggestion was to introduce more than one type of franchise, conferring greater franchise benefits such as extended decision-making powers and additional preferential financial arrangements on those achieving higher levels of

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[44] Access to Justice Advisory Committee, *Access to Justice: An Action Plan*, Canberra: AGPS, at 233.

[45] Apart from the reduction caused by the general economic downturn, contributions are greater from persons assisted with family law or civil law matters than criminal law cases and it was in the areas of family law and civil law that the impact of guideline tightening was most significant. In 1993-1994, family law accounted for 21% of grants of assistance compared with 70% for criminal law (Legal Aid Commission of Victoria, *Annual Report 1993-1994*, at 12). In the 3 months to 30 September 1994, contributions from family law cases made up 47% of total contributions compared with 13% for criminal law (Legal Aid Commission of Victoria, *Monthly Accounts Report to Commissioners*, 17 October 1994, at 12)

[46] Sherr et al, *Quality*, 19.

work quality.[47] Concern has been expressed by the UK Legal Action Group that the levels of quality which are set will act as ceilings rather than floors. Cost competition pressures could result in legal aid practitioners currently operating above the current acceptable minimum quality level having to reduce their quality in order to retain their legal aid contract.[48]

This quality continuum may be of limited value as it currently comprises only five categories covering the entire spread of legal service delivery. Threshold competence is described as defining "the extreme limits of community tolerance".[49] It is a uni-dimensional, pass/fail assessment of quality which could alternatively be described as minimum competence.[50] The continuum has only one level between threshold competence and the aspirational standard of excellence, namely competence-plus. With so few levels on the continuum, it may well be difficult for it to be used to distinguish meaningfully between substantially different standards of performance.

It must be asked whether use of a floor level between threshold competence and competence plus sets too low a standard. One UK practitioner has written that:

> "If the Legal Aid Board minimum standards remain so low, cynical firms will be able to qualify under the franchising criteria without establishing good supervision."[51]

It will be crucial that legal aid authorities put into practice the stated intention of increasing the standard required as the performance measures are further developed.[52]

The franchising debate has been described as:

> "...an opportunity to define a part of the continuum of quality taking account of the context of legal aid work in defining competence without damaging access."[53]

Concern has been expressed at the danger that:

> "a failure to recognise the crucial importance of the operational context of legal aid (its organisational and economic limitations) will confuse standards which are supposed to be normative, from those which are aspirational in context."[54]

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47 Paterson & Sherr, op cit.

48 'Franchising: A New Agenda', (April 1993) *Legal Action*, at 3.

49 Sherr et al, *Quality*, at 19.

50 National Consumer Council, op cit, at 5.

51 S Harman, "Franchising: The Preliminary Audit Experience", (January 1994) *Legal Action* 9.

52 Sherr et al, *Quality*, 86. The initial standards were set low with a view to enabling practitioners to familiarise themselves with the requirements before compliance rates were then raised.

53 Id, 19.

54 Ibid.

On the other hand, setting the standards too low will mean they are of little value in making sure a satisfactory system is provided.[55]

(f) Legal Aid and the Cutting Edge

It is important that with any introduction of franchising arrangements, continuing recognition is given to the need for legal aid work to be at the cutting edge of the legal system with a view to furthering the interests of its client constituency through use of legal processes. The type-of-case eligibility guidelines used by Australian LACs should be framed so as to encourage private practitioners to seek funding for such cutting edge work. LACs should also gear their salaried practices to the running of such justice-driven cases which have a broader impact than assisting one individual client in relation to an issue where the applicable law is relatively settled. "Many commentators have expressed concern about the narrowness of the areas of law advised upon under legal aid."[56] Moorhead, one of the LAB's franchising researchers, notes that one of the difficulties in legal aid planning:

> "...is how any significant shift towards [greater legal aid coverage of] social welfare legal work can be achieved within a system that is pitched entirely at the working practices of solicitors within private firms."[57]

Such solicitors tend not to adopt a strategic approach to their legal aid work, particularly as they are not actively encouraged to do so.

Unfortunately, several of the current criteria being used by the LAB for determining franchise applications[58] appear to have the effect of discouraging such work. The refusal of franchises on the basis that the rate at which applications for assistance submitted by the franchise applicant are refused, due to insufficient case merit, has the potential to discourage cutting edge type work with service providers becoming reluctant to submit applications which test the boundaries of existing legal entitlements. Further, the consideration of average costs incurred per case may encourage firms to skim cases and focus on those cases which appear most straightforward.

In its 1980 Legal Systems Study, the Legal Services Corporation in the United States of America (LSC) used four performance indicators for assessing its programs: cost; client satisfaction; impact on the poverty

[55] Note that Sherr et al state that "setting the standard too low will undermine the whole scheme", Sherr et al, *Quality*, at 2.

[56] A Blake, "Publicly Funded Legal services in England and Wales: Policy and Administration in the 21st Century", (1990) *Unpublished Paper*, at 10.

[57] R Moorhead, "A Strategy for Justice", (1993) *New LJ*, 211.

[58] Sherr et al, *Quality*, 69.

community; and quality.[59] Garth refers to the LSC as an organisation best:

> "...understood as [being] charged with both 'mass delivery' of legal services along the lines of legal clinics and complex 'impact' litigation akin to the work of the large corporate bar'.

He then suggests that the imposition of a premium performance standard across all of the Corporation's work would mean "in practice many fewer cases could be handled and impact work would be slighted."[60] The work done on strategic cases needs to be of a very high quality, higher than that needed in other cases.

In Australia, Bothmann and Gordon suggested, in the context of a proposal to establish a poverty law practice, that an assessment of the 'legal aid merit' of any given case could be based on the following five factors: (i) the seriousness of the case for the individual; (ii) the degree of injustice present; (iii) the extent of the client's disadvantage if not assisted; (iv) the effect that taking or refusing to take on the case would have on the practice's reputation within its constituent community; and (v) what wider impact might be had in terms of law reform.[61]

Sherr *et al* recognised the need for careful treatment of the cutting edge issue but were unable to provide a mechanism to ensure that firms would not be disadvantaged in their franchise application because of a high refusal rate arising from a cutting edge focus. In large part, the solution must rest with legal aid authorities using guidelines which place sufficient weight on supporting cases involving issues of interest or significance to legal aid clients. The LAB has indicated that it will consider applications for franchises from cutting-edge applicants if they satisfy the management and other quality criteria but that a high refusal rate might prevent the granting of full devolved powers to grant assistance. Other incentives such as favourable financial arrangements could still be offered[62] but such an approach would amount to a missed opportunity to actively encourage this important work.

The capability of LACs to promote public interest testcase litigation, both through their own salaried services and through assignment of such cases to private practitioners, should be extended where this is possible. Poverty lawyers in the USA, particularly in the salaried sector funded by

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59 Id, 8.
60 Garth, op cit, 680.
61 S Bothmann & R Gordon, *Practising Poverty Law*, Melbourne: Fitzroy Legal Service, 1979, at 107.
62 Sherr et al, *Quality*, 74.

the LSC, have been very active in pursuing public interest[63] litigation in a range of poverty law areas.[64] Menkel-Meadow refers to the development since the late 1960's of an expertise amongst legal service attorneys in a new subject called poverty law which included substantive areas (welfare law, as complex as a taxation specialisation) and procedural law (many of the legal services attorneys became the most sophisticated federal and constitutional litigators).[65]

In these cutting edge legal aid areas in particular it may well be that increased use of lawyers specialising in such cases will result in more effective use of legal aid funds, albeit that the fees paid per case will be higher than they might otherwise have been. Goriely notes:

> "To the specialist, legal work is not simply a matter of identifying the facts and applying the law. It is about developing new strategies to further the interests of the client...Instead of applying the notionally 'correct' answer, it goes one step better.'[66]

Franchising arrangements, with their likely downward pressure on costs may create difficulties because of the possibility that:

> "...specialist civil legal aid lawyers who perform at competence plus and rely on cross-subsidisation to balance their books may in future settle for providing only a threshold competence level of service once this has been articulated, because that is all that they have to do and all they are being paid to do."[67]

While it is beyond dispute that lawyers who on average charge unusually high total fees in legal aid cases should be subject to close monitoring, it is important to acknowledge that organisations incurring higher costs may be doing different types of work within any given field of legal aid casework. "Organisations which specialise in particular types of work may attract more heavyweight cases which thus incur higher costs."[68] The provision of a quality service to clients involved in difficult and complex cases or whose circumstances are such that their cases will involve

63 This rather vague term needs to be used with care. For examples of the entry of conservative groups into publicly funded testcase litigation, see C Menkel-Meadow, "Legal Aid in the United States: The Professionalisation and Politicisation of Legal Services in the 1980's", (1984) 22 *Osgoode Hall LJ* 64. Abel also refers to the concept of public interest law being capable of being appropriated by conservative public interest law firms trying to hide their partisanship beneath a disguised neutrality, R Abel, "Law Without Politics: Legal Aid Under Advanced Capitalism", (1985) 32 *UCLALR* 474, at 599.

64 See, for example, A Houseman, "Poverty Law Developments and Options for the 1990's', (1990) *Clearinghouse Review* 2.

65 Menkel-Meadow, op cit, 45.

66 T Goriely, "Debating the Quality of Legal Services: Differing Models of the Good Lawyer", (1994) 1 *Int J of the Legal Profession* 159, at 162.

67 Paterson & Sherr, "Quality, Clients and Legal Aid", (1992) 142 *New LJ* 783, at 784.

68 Sherr et al, *Quality*, 66.

more preparation time (non-English speakers and prisoners for example) should be encouraged by LACs.

The quality continuum will assist with the assessment of legal aid services provided that the level of service to be required is set at an appropriate level. While the need to ensure that access to services is not unduly hindered by setting the level too high, it is equally important not to set the level too low. Further, the quality floor which is set must not be viewed as variable on cost grounds. As with many groups, it may be difficult to generalise usefully regarding the performance of legal aid service deliverers and establish a quality floor upon which to develop higher levels of required service. As Garth has observed:

> "It may be possible to find a line that can accommodate the competing concerns of accessibility, client autonomy and competence. What we shall see, however, is that such a line can be drawn only if competence is defined in a very flexible or even minimalist manner."[69]

Measuring Quality and Competence

The difficulties involved in defining quality are matched by difficulties in relation to its measurement. Paterson states, "[i]f quality is hard to define, measuring it is even harder."[70] To be effective, the means of quality measurement must also enable distinctions to be made between performance at different points on the quality continuum. It may be that measuring actual quality will ultimately prove to be impossible or too cumbersome or expensive. If this is the case, it will be necessary to establish a set of quality proxies which are easier and less expensive to use but which still accurately measure quality.

The use of proxy measures may also be problematic. Quality assessment of this nature relies on measurement of items which have been statistically established as accurate proxies of quality. Harden refers to Goodhart's Law whereby those who are required to comply with standards in the provision of a service adapt their behaviour to satisfy the proxy rather than seeking to satisfy the broader aim of assuring quality.

> "[A]ny previously observed relationship between one variable and another disappears if one of the variables is targeted with a view to achieving a desired outcome for the other."[71]

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[69] Garth, op cit, 665.

[70] A Paterson, "The Renegotiation of Professionalism", (1994) 1 *Int J of the Legal Profession* 131, at 132. Hereafter cited as Paterson, Professionalism.

[71] I Harden, *The Contracting State*, Buckingham: Open University Press, 1992, at 65.

A comparison has been made with criticisms levelled at police station custody records: "What will happen is that practitioners will adjust procedures. Reality becomes what is on paper rather than what actually happens."[72]

The LAB has devoted very substantial resources to the task of developing methods to measure the quality of legal aid services. The LAB is continuing to move cautiously yet steadily towards introducing the use of transaction criteria as a means for assessing the work performed by franchisees. Transaction criteria are "highly detailed descriptions of the key constituents of legal process in green form[73] work".[74] Legal aid client files are audited by trained LAB staff (who are not practising lawyers) and the level of compliance with the transaction criteria as revealed by the contents of the file is then used as measure of quality. The transaction criteria model has significance across the legal services market and is capable of having a much broader application than being confined to legal aid cases.

To date, very little work has been done in Australia to develop transaction criteria or other legal quality assessment measures. Under the LACV's franchising pilot scheme, franchisees had only to meet very general and undemanding practice management standards, and as a consequence the pilot will provide only very limited insight into the quality of service provided. Further, the LACV conducted no pre-pilot auditing such that there is no way in which a comparison can be made regarding the level of quality of service being provided before and during the pilot. This will make it impossible to ascertain what changes in quality have resulted from the use of franchises. A range of mechanisms could be used to measure quality of legal aid services, the most interesting recent development in this area being that of using transaction criteria.

(a) Different Types of Measures

One of the difficulties in measuring the standard of legal work is that such work has been viewed as sufficiently complex to mean that "only fully qualified lawyers are capable of assessing the complexities of a legal case and devising a system for such assessment".[75] The LAB considers:

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[72] R Smith, "Transaction Criteria: The Face of the Future", (February 1993) *Legal Action* 9, at 11.

[73] The Green Form Scheme, established in 1973, enables advice to be given by a solicitor on any matter of English law to people who satisfy a simple income and expenditure test.

[74] Sherr et al, *Quality*, 106.

[75] Id, 2. See also Garth op cit, where he refers to Lasch's description of professionalisation as representing the consensus of the competent which arose by reducing the layman to incompetence.

> "It is not, at present, possible to measure objectively key decisions for the lawyer which might be based, for example, on the lawyer's view of the strength of the client's case, opinion of the client's likely demeanour in the witness box and ability to react to cross-examination or the ability of the lawyer on the opposing side."[76]

The following potential means of assessment of the standard of legal work have been suggested by Sherr *et al*:[77]

Input Measures: These measures "endeavour to gauge competency from qualifications eg. type of degree, bar examination scores, attendance at continuing legal education courses or from the practitioners' status in the legal community".[78] Legal directories which score legal firms based on peer assessment have been described as tending to measure social relationships rather than performance.[79] Abel observes that "academic education does not prepare (law school graduates) for legal aid work, most have no other experience, and often there is little or no training on the job".[80] Much of the attraction of input measures "stems from the fact that they are easily quantifiable".[81] Cost and amount of time spent handling each case are also case specific input measures. Input measures have been described as "probably weak indicators of quality".[82] They may be most effective in the context of "certification as a specialist where this is the result of a rigorous certification process."[83]

Structural Measures: These indirect measures focus on the resources and structures available to those working in an organisation, from library and reference material to staff supervision and training to client complaints. While it might be possible for a legal aid authority to use such measures to promote the type of environment and culture of support needed to encourage quality legal aid work, their value is limited by the fact that they relate to matters which "only facilitate competence in its other aspects, they do not ensure it".[84]

Process Measures: These look directly at what lawyers actually do on legal aid files. They focus more directly on performance and:

> "...can be applied to the complete range of lawyering, including fact gathering, legal analysis strategy formation and execution, follow through, client

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[76] Legal Aid Board, (1993) *Franchising Specification*, at 42-43.
[77] Sherr et al, *Quality*, op cit, Chapter 2.
[78] Id, 7.
[79] National Consumer Council, (1990) *Professional Competence in Legal Services: What is it and How Do You Measure It?*, at 9.
[80] R Abel, "Legal Aid Under Advanced Capitalism", (1985) 32 *UCLALR* 474, at 580.
[81] Paterson, *Professionalism*, 132.
[82] R Moorhead, A Sherr, and A Paterson, (1993) *Franchising: Assessing the Quality of Legal Aid Lawyers?*, paper presented at the Conference on Law and Legal Services, Low Wood, England, July 1993, at 9.
[83] Paterson, *Professionalism*, 132.
[84] Sherr et al, *Quality*, 7.

handling, interviewing, counselling, negotiation, mediation, litigation and practice management."[85]

They have therefore been viewed as providing a better assessment of quality than input and structural measures. They can also be applied to all aspects of lawyering from counselling to litigation. While some process matters, such as delay and substantive legal errors, can be measured easily,[86] many others such as interviewing, counselling and legal strategy formation are difficult to assess. The transaction criteria adopted by the LAB are process measures.

Outcome Measures: These look at the tangible results of a lawyer's work and as such, may provide a better approximation of real quality.[87] While outcome measures may be an obvious method of assessing legal service quality, "they are among the hardest to implement".[88] Given the difficulties in ensuring that account is taken of all external variables which may affect the outcome of a case, a great deal of preparatory work is needed before measures which accurately evaluate quality can be implemented.

Sherr et al are of the view that in the area of measuring competence and quality of legal services:

> "...it is clear again that there are no easy answers. Competence is such a multifaceted concept that any successful attempt to measure it will need to combine a multiplicity of outcome, process and structural measures."[89]

(b) Transaction Criteria

The development and use of transaction criteria is the most contentious part of the franchising scheme in that it involves a genuine attempt to assess matters which have previously been viewed both as within the exclusive domain of professional regulation and too intangible for precise measurement. To date, there have been no moves in Australia to develop detailed legal aid transaction criteria although this issue will have to be further considered if the VLA proceeds to introduce franchising. It will be important for the VLA to undertake significant planning in this area if franchising is to do more than reduce legal aid case costs.

Transaction criteria are sets of detailed outlines of small elements of legal aid work. A transaction is defined in this context as "a small section

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[85] Paterson, *Professionalism*, 132.
[86] Abel, op cit, 584.
[87] Sherr et al, *Quality*, 9.
[88] Paterson, *Professionalism*, 132.
[89] Sherr et al, *Quality*, 11.

of work on a particular category of case divided up into observable elements".[90] The criteria have been designed to be less expensive and cumbersome to use than other available measures of quality. The criteria form the basis for a checklist style audit process where trained auditors check whether the various elements of the service have been covered. The auditors need not be lawyers with Sherr et al holding the opinion that the level of legal understanding necessary to utilise the transaction criteria is that of a law graduate or the equivalent.[91] If the service provider's omission rate (the frequency with which they fail to record items of relevant information) is assessed as too high, this is used as the basis for a finding that the services provided are not of a satisfactory nature. The ability of legal aid authorities to obtain information from an assisted person's file without confidentiality problems arising[92] is central to file based auditing of legal work using transaction criteria.

In the UK, the Law Society officials involved in the negotiations over implementation of the LAB's franchising proposal took a cautious approach to the transaction criteria. Their view was that the criteria which had been developed were adequate to carry out the job of assessing competence provided that as a system it was possible to measure competence this way.[93] This could be viewed as an attempt to participate in, and thereby influence, the process without lending it any legitimacy. The criteria have been criticised for only assessing particular aspects of competence, for standardising and making routine legal practice and for encouraging service providers to place undue emphasis on file maintenance (or even cheat) rather than concentrate on delivering a good service.[94]

Through the monitoring of omission rates, the use of transaction criteria can provide an assessment continuum which, with further development, may have the further benefit of providing a method by which practitioners can measure improvement or deterioration in their service delivery. This would be a very positive outcome capable of improving legal aid services. The LAB's researchers have stressed the importance of using a system which is supportive of practitioners and open to scrutiny.

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[90] Sherr et al, *Quality*, 23.

[91] Sherr et al, *Quality*, 101.

[92] General Term of Assistance 3 on the LACV's Application For Legal Assistance requires an applicant for assistance to authorise the lawyer who will act for them to give to the LACV any information necessary for it to perform its function under the Legal Aid Commission Act.

[93] Sherr et al, *Quality*, 53.

[94] A Paterson, *Quality Assurance and Measuring Professional Competence: Are We Trying to Square the Circle?*, paper presented at the Conference on Law and Legal Services, Low Wood, England, July 1993.

(c) Development of the Criteria

As with other aspects of its franchising experiment, the LAB held extensive consultations, not only with the Law Society but also with groups seen as representative of others with an interest in legal aid including the National Consumer Council and the Law Centres Federation.[95] The LAB moved steadily but cautiously in this area, pressing on with development of more and more detailed criteria both before and during the conduct of the Birmingham Franchising Pilot. At the same time the LAB sought to allay Law Society concerns by indicating that initially the granting of franchises would be based principally on management criteria which focus on the existence of a range of workplace systems and procedures to deal with issues from identification of conflict of interest to recording of key case dates. Ultimately, more than four years elapsed between the beginning of development of the criteria and the granting of the first franchises in August 1994.

The current position between the LAB and the Law Society might best be described as involving an uneasy truce. The LAB wants to make (and has made) progress with, and will be under government pressure to continue, its efforts to bring down costs. At the same time, the LAB is aware of the importance of avoiding active resistance to its initiatives from the legal profession. The LAB's cautious approach is likely to result ultimately in the adoption of a transaction criteria based quality measurement system although the Law Society may be able to extract significant concessions with the knowledge that the LAB will be most concerned to ensure that it obtains some tangible result from the substantial resources devoted to development of the system.

It is arguable that the LAB was too quick to move to amend particular draft transaction criteria where initial results from the Birmingham Pilot indicated that there was a high rate of non-compliance. All such criteria were reviewed and, where appropriate, redrafted. If it was felt that the particular criteria reflected a level of quality above that reflected in the other criteria, it was removed. Other criteria for which large omission rates were recorded were only retained if they were viewed as essential.[96]

The researchers stated that this approach:

> "...was intended to produce a reasonable compromise between what solicitors do and what informed commentators believe that they should do. Provided that the two sets of norms are not too far apart, the approach works. Existing standards can be nudged up: the worst can be brought up to the

[95] Legal Aid Board, *Franchising Specification*, 1. Other groups consulted included the Legal Aid Practitioners' Group, the Advice Services Alliance, the Federation of Independent Advice Centres and the National Association of Citizens Advice Bureaux.

[96] Sherr et al, *Quality*, 44.

standard of the median, and the median may be slightly improved. On the other hand, the approach cannot cope with a serious gulf between the two positions."[97]

Perhaps the test should have involved consideration of whether the element in question would require coverage in delivery of a reasonable legal aid service. The current failure of many providers to deal with a particular matter such that high omission rates were recorded should not have been viewed as necessarily conclusive. Further, the retention of such elements might have been useful in distinguishing different levels of quality further along the quality continuum.

(d) Use of Omission Rates

Rates of failure to comply with transaction criteria (omission rates) will only be a valuable measure of the quality of legal work so long as the criteria are relevant and provide an accurate proxy of quality. The setting of acceptable omission rates will be important to the effectiveness of any such system. The LAB has sought to take a user-friendly approach with the initial standard being set at a comparatively low level. Organisations will be expected to improve and their standard of compliance increase as all concerned gain familiarity with the criteria and they are further refined.[98] Presently, the LAB has set minimum transaction criteria compliance rates at 65%. The Law Society's ongoing concerns about the possible introduction of exclusive franchising and competitive tendering are clear from the following July 1994 amendment to the Franchising Specification: "Once confirmed, the transaction criteria compliance rates will be increased only to assure the required level of quality and not to restrict arbitrarily the number of franchised organisations."[99]

Setting required compliance rates at such low levels raises concerns about the quality of existing services. The results from the Birmingham Pilot indicated that even with required compliance rates at the low level of 65%, one in five lawyers work still gave cause for concern.[100] The researchers do not appear to have been concerned by these findings although no explanation was provided as to why they took this view. Presumably, the novel and untested nature of this method of performance measurement was a significant factor. However, reservations would have to be expressed if compliance rates could not be increased significantly soon after all concerned become more accustomed to the criteria.

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97 Goriely, op cit, 168.
98 Sherr et al, *Quality*, 2.
99 Legal Aid Board, (July 1994) *Franchising Specification Amendments*, 12.
100 Sherr et al, *Quality*, 87.

(e) The Value of Peer Review

As part of their research from the Birmingham Pilot, Sherr *et al* considered the validity of assessing a practitioner's work by way of a review conducted by other lawyers. Interestingly, while a transaction criteria compliance rate of 65% was said to indicate threshold competence, there were some cases with compliance rates of more than 70% which were nevertheless felt by the peer reviewers to be below threshold competence[101] (which may itself involve a level of service significantly below that which should be provided to legal aid clients).

While legal professional bodies consider that review of the quality of legal work is best conducted by fellow legal professionals, there are a range of problems with using peer review for evaluation purposes. One such problem is the expense involved. There are also:

> "...other factors such as reputation, or the peer's willingness to handle a case in a way which suits both lawyers, or which conforms to a highly subjective assessment of what constitutes quality work [which] come into play."[102]

Sherr *et al* found peer review to be less reliable than an assessment based on transaction criteria. There were notable levels of disagreement in the assessment of personal injury files although results on family/ matrimonial files were more consistent. In ranking files on a five point scale,[103] there was an average range of disagreement between peer reviewers of 1.61 and 0.96 marks on personal injury and family law files respectively.[104] The peer reviewers demonstrated a distinct level of disagreement on some files with assessments on one file ranging from threshold competence to excellence.[105] Sherr *et al* came to the view that:

> "As far as can be ascertained by an experiment of this nature, the transaction criteria appear to do the job of monitoring levels of competence, broadly in line with the experts' evaluations where they are congruent."[106]

If peer review was to be developed, "...a detailed and systemised method of assessment for use by peers such as transaction criteria would still have to be developed which would limit the subjectivity of response to tolerable levels of disagreement. In effect some form of checklisting would probably have to be adopted".[107] Without such criteria peer review simply provides an egg stamp of achievement of a particular grading of

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[101] Ibid.
[102] Id, 17.
[103] Ibid. The scale went from Non-performance (0) to Excellence (4).
[104] Id see Chapter 6.
[105] Id, 57.
[106] Id 83.
[107] Id, 59.

competence and fails to convey what the practitioner might do to achieve a higher level.[108] The use of peer review with agreed assessment criteria may possibly provide "...a useful means of understanding higher levels of quality or dealing with particularly specialised areas of work".[109] Given that a stated objective of franchising is to improve quality of service, work should continue towards determining whether there is a role for peer review in assessing those higher levels of quality where the existing transaction criteria are of limited value.

(f) Assessment Input From Clients

Clients appear likely to play an increasingly significant role in assessing legal aid services. The move towards "renegotiating professionalism"[110] and the assessment of legal service quality by use of mechanisms like transaction criteria which can be operated by non-lawyers will enable clients and possibly other interested parties to take a greater role in this area. It is interesting to note the very strong client focus of the Total Quality Management philosophy which seeks to build business practices around meeting the needs of a particular set of clients with a view to adapting to those needs as quickly and flexibly as possible.[111] An increasing number of private law firms are adopting such quality assurance mechanisms.

The LAB's researchers conducted an assessment of the personal injuries law work of eight law firms using five different performance indicators: cost; success; file audit using transaction criteria; client satisfaction; and delay in handling cases.[112] When correlation tests were run on all these variables, only one statistically highly significant correlation was found, namely a firm's score on the transaction criteria file audit showed a significant positive correlation with client satisfaction. This clearly indicates the value of client involvement in quality assessment.

In encouraging assessment input from legal aid clients, it will be important to consider means to overcome the practice of image management by lawyers. Drummond considers:

> "The psychology of impression management explains why the most successful lawyers are not necessarily the most brilliant or hardworking. What counts is not technical competence but the ability to inspire confidence... The ability

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[108] Id, 84.
[109] Id, 83.
[110] Paterson, *Professionalism*, at 132.
[111] A very general outline of TQM and related quality issues is provided in R Howell, *et al*, *Quality Management for Legal Practice*, Sydney: Law Book Company, 1994.
[112] R Moorhead, A Sherr & A Paterson, "Judging on Results? Outcome Measures: Quality, Strategy and the Search for Objectivity", (1994) 1 *Int J of the Legal Profession*, 191, at 203-4.

> to inspire confidence is even more important in the legal profession because technical competence is difficult to judge."[113]

The value of input from clients is reduced by lawyers using such techniques to enhance their reputation with their clients, often by blaming other lawyers and the system for any delays. Clients may think well of their lawyer but poorly of the system.[114] Of course, similar concerns exist about the use of similar practices influencing other assessment forms, including those which are file based such as transaction criteria audits.

(g) File Supervision and Handling

Mechanisms will be needed to ensure that all staff within a franchised organisation will have the standard of their work monitored internally as well as by the legal aid authority. To date, there has been significant resistance on the part of lawyers to the prospect of their work being subject to such scrutiny. Whether franchising arrangements are able to facilitate such scrutiny will be a real test of their effectiveness. The UK Law Society has resisted LAB moves for mandatory file reviews whereby all practitioners handling legal aid files would need to have those files reviewed by another lawyer. The Law Society has argued that any such reviews should relate only to the management requirements in the franchising specification and that review of legal work should only be mandatory for those caseworkers who are not themselves qualified to act as a franchising supervisor.[115]

Franchising arrangements will need to incorporate review of the adequacy of internal supervision of work standards. A benchmark will be required which sets how often all franchise-related files[116] should be reviewed by someone other than the person who has conduct of the file. Such arrangements will not be suitable for sole practitioners and some alternative mechanism, such as additional external monitoring, will be needed. The nature of the supervision will also be important. The LAB's researchers encountered one legal aid practice, using branch offices supported by a central litigation unit, where four partners claimed to review, either monthly or every six weeks, 1200 files in a morning.[117] The comprehensiveness of such supervision, involving spending on average less than one minute on each file, must be seriously questioned.

The involvement of more than one caseworker on a file will also need

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113 H Drummond, "What Makes a Successful Lawyer?", (1993) 143 *New LJ* 23.
114 National Consumer Council, op cit, 16.
115 "Legal Aid Franchising", (13 July 1994) Paper prepared for consideration by the Courts and Legal Services Committee of the Law Society of England and Wales, 7.
116 It would, of course, be appropriate for such a system to also be used for all legal work.
117 Sherr et al, *Quality*, 91.

to be monitored. Sherr *et al* observe that "...(h)aving more than one caseworker involved in a case may provide opportunities for natural quality checks on each other's work as well as cross-fertilisation of ideas" but note that "shared work can also give rise to greater problems of negligence".[118] A system which provides for file responsibility to be retained by one practitioner while encouraging regular discussion of files with colleagues would appear to encourage cross-fertilisation of ideas while minimising the likelihood of tasks not getting done.

Problems of this type can be very significant with lengthy and complicated cases when the person handling the file leaves the practice and the file is assigned to a junior staff member because the partners already have substantial caseloads. Such a staff member is unlikely to have had any previous dealings with the client, may not understand the client's concerns and may therefore fail to keep in contact with the client.[119] A further difficulty can arise from a lack of clarity as to the particular tasks which different staff are responsible for on any given file. Such uncertainty can easily lead to important tasks being left undone.

(h) Making Legal Aid Routine

The use of a checklist approach to ensure that stipulated transaction criteria are met has been criticised as likely to "standardise and routinise legal practice" and "will encourage practitioners to place undue emphasis on file maintenance (or even to cheat) rather than concentrating on doing a good job."[120] Goriely notes that:

> "Despite the protests of the traditionalists, routinisation is not new to legal aid work. It was first identified by Bridges *et al* in 1975 who found a limited number of firms undertaking a high volume of legal aid work on a strictly routinised basis."[121]

There have also been concerns expressed that the better performed deliverers of legal aid services will be restrained by overstandardising of their work.[122] Paterson and Sherr refer to the possibility that specialist civil legal aid lawyers performing at competence-plus who rely on cross-subsidisation to balance their books, may in future provide only a thresh-

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[118] Id, 64.

[119] See Id, 49 where it is noted that, during the Birmingham Franchising Pilot, only 50% of relevant files were clients informed of why there was a need for a second lawyer to be involved in their case.

[120] A Paterson, "Quality Assurance and Measuring Professional Competence: Are we trying to Square the Circle?", (July 1993) Paper presented at the Conference on Law and Legal Services, Low Wood, England.

[121] Goriely, op cit 163.

[122] Sherr et al, *Quality* 106.

old competence level of service because that is all that they have to do and all they are being paid to do.[123]

In their findings from the Birmingham Pilot, Sherr *et al* indicate that routinising is already a significant factor in legal aid work. They outline a lengthy list of significant omission rates for quite fundamental pieces of information such as not advising how long divorce proceedings would take (39%) or that the legally assisted client would have to make a contribution towards costs (26%-36%). The duty of legal aid clients to report a change in their circumstances did not appear to have been advised in 50%-68% of the family law cases assessed as part of the pilot.[124] Of course, it is not possible to say that these pieces of information were not provided to clients in all of these cases. However, it can be said that there was nothing on the files to indicate that the information had been provided.[125]

Sherr *et al* also noted that practitioners did not appear to have a coherent strategy for handling cases and that:

> "A ritualised process whereby certain, often reactive, set steps in procedure were taken without giving much strategic thought to the cases before them seemed to be the dominant approach. Thus the majority of case-handling appeared to consist of non-vigilant decision making processes."[126]

Abel also refers to large caseloads as a pressure towards routinisation of legal aid work, along with the reactive nature of many clients and their failure to seek assistance soon after a problem arises.[127]

In answer to such concerns, Sherr *et al*, as the architects of the LAB's transaction criteria have responded that the franchised firms will not be forced to adopt a checklist approach (although the franchise auditors will use checklists). They suggest that those firms which do use a checklist as a post-interview review are less likely to overlook relevant considerations in advising on a case.[128] Further, they note that clients are likely to be dissatisfied with interviews which are conducted in a mechanistic manner and client feedback will act to minimise this routinisation.[129] The transaction criteria are also updatable and difficulties related to over-inclusion (elements which can legitimately be ignored) and under-inclusion (due to some aspects of a case not being capable of objective articulation and assessment) of elements required in achieving threshold competence will be monitored and the criteria amended as a result of

[123] A Paterson & A Sherr, "Quality, Clients and Legal Aid", (1992) 142 *New LJ* 783, at 784.
[124] Sherr et al, *Quality* 42.
[125] It should be noted that practitioners were given the benefit of any doubt in relation to whether an item was covered on the file.
[126] Sherr et al, *Quality*, 54.
[127] Abel, op cit, 575-576.
[128] Sherr et al, *Quality*, 24.
[129] Id, 107.

ongoing consultations.[130] "It comes down to whether the risks are worth running in return for a better guarantee of quality for all clients of franchised firms."[131]

(i) Reliability of Transaction Criteria

Sherr *et al* concluded that "given appropriate training, assessors with at least undergraduate legal knowledge can apply detailed checklists...with a high degree of consistency".[132] Comparisons were made of the omission rates assessed by two auditors using the transaction criteria and it was found that there was an overall level of agreement of 94% for personal injury cases and 93% for family cases. The results were viewed as indicating an increasing confidence in the use of transaction criteria and in their robustness as a monitoring tool.[133]

This assessment of levels of agreement may in fact understate the level of disagreement as it appears to assume that the omissions noted by the auditors relate to the same individual criteria. It is possible that 20% omission rates assessed by each of two auditors in relation to a particular file could involve each auditor in finding the same omissions on, say, 10% of the criteria with each finding omissions not detected by the other auditor on a further 10% of the criteria. While this would not disclose any difference between the auditors omission rate assessments, there would be a real level of disagreement of 30%.

(j) The Future - Using Outcome Measures

The LAB has indicated an interest in using the outcome obtained in cases as a measure of the quality of the service provided.

> "Although there will inevitably be differences on individual cases, it may be possible to define a statistical relationship between outcomes, cost and levels of compliance [with transaction criteria] which will allow effective comparison between firms to be made."[134]

Clearly, significant work will be required if accurate outcome measures are to be established. Travers refers to lawyers and clients not

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130 Sherr et al, *Quality*, 24.
131 A Sherr, R Moorhead & A Paterson, "Transaction Criteria: Back to the Future", (April 1993) *Legal Action* 7.
132 Sherr et al, *Quality*, 88.
133 Id, 47.
134 A Sherr, R Moorhead & A Paterson, (1994) *Lawyers - The Quality Agenda, Volume 2*, at 12.

assessing quality of work in terms of a simple relationship between process and outcome, rather:

> "...they regularly make a practical calculation of the relationship between outcome, and such variables as their own skill and tactics, the strength of the prosecution case, the legal issues involved, the tactics of the other side."

Further, Travers found "it was often unclear after a case, what precisely had been responsible for a particular outcome".[135]

The importance of developing outcome measures will be increased if the advocacy work of barristers continues to be viewed as being of such a nature that "practice management and competency standards may not be easily applicable".[136] A range of outcome measure studies have been conducted in the UK and USA over the past 20 years with many of these conducted in the late 1970's.[137] In an important UK study in 1977, Baldwin and McConville assessed criminal law cases where defendants pleaded guilty at the Birmingham Crown Court. Many of the defendants told the researchers that they had been persuaded to plead guilty after consultations with their barristers. Two expert assessors then examined the prosecution files in each case and concluded that in 21% of cases there was insufficient evidence to prove guilt beyond reasonable doubt while in some cases the evidence was so thin as not to have justified the bringing of a prosecution in the first place.[138]

A first draft of outcome measures in criminal, family and personal injury law was released in July 1994 for practitioner information purposes.[139] For criminal law matters, the measurement headings were time taken (number of days before trial that brief to counsel was delivered and conference with a client took place), advice given at the police station (whether given by phone or in person and by whom), offence seriousness, nature of violence involved, financial loss caused, vulnerability of the victim and then the sentence imposed.

These draft outcome measures are very broad, covering client characteristics, practitioner conduct and the result of hearings. In the UK, one suggested consequence of a practitioner failing such outcome measures is quite radical in that it proposes that lawyers would forfeit their franchise if they conducted and lost an expensive case.[140] Such a consequence would no doubt rightly encounter great professional opposition and

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[135] M Travers, "Measurement and Reality: Quality Assurance and the Work of a Firm of Criminal Defence Lawyers in Northern England", (1994) 1 *Int J of the Legal Profession* 173, at 184.

[136] Legal Aid Commission of Victoria, (1994) *Eligibility to Handle Legally Assisted Cases*, at 12.

[137] See Sherr et al, *Quality*, 8-10 and National Consumer Council, op cit, 13-14.

[138] Sherr et al, *Quality*, 9.

[139] Id, 10.

[140] D Bevan, T Holland & M Partington, "Organising Cost-Effective Access to Justice", (July 1994) *Social Market Foundation Memorandum No.7*, at 16.

would also provide a significant disincentive to franchisees taking on cutting edge and test case work. I have argued earlier that these are the sorts of cases which legal aid authorities should be actively seeking to target.

The LAB has stated that outcome measures will only be introduced if analysis confirms that they are a valid quality assurance tool. Further, the July 1994 amendments to the Franchising Specification state that outcome measures will not be introduced as mandatory requirements for firms which already have a franchise until after 1 August 1999. A different date of 1 August 1996 has been set as the earliest possible date for introducing outcome measures for those firms granted a franchise after the outcome measure system is put in place.[141] The UK Law Society considers that "...it seems unlikely that in practice any new measures will be introduced on anything like that (1 August 1996) time scale".[142]

The architects of the LAB's transaction criteria acknowledge that "...the criteria are not exhaustive as they do not measure all facets of a lawyer's skill..." and that "(t)hey do not extend to the level of sophistication necessary to assess complex legal judgements".[143] The criteria also appear more useful in assuring the threshold competence of a service provider rather than enabling a distinction to be drawn between different service providers at higher levels of the quality continuum.

While there are clearly limitations on the use of transaction criteria, they still involve a major step, or series of steps, along the path of devising an effective mechanism for measuring the quality of legal aid work. If both the limitations of such an approach and the importance of on-going development of the criteria are recognised, transaction criteria are likely to provide a significant advance in measuring quality in this area. There will be considerable caution on the part of the private legal profession regarding acceptance of such an assessment regime and this has the potential to slow or compromise the introduction of such a system.

Monitoring Compliance

Just as the past has seen insufficient attention paid to the quality of legal aid services, efforts to monitor performance and service quality have been limited. Moves towards giving private legal practitioners power to grant legal assistance will make it essential that a system be implemented to monitor use of this power. While moves to increase performance monitoring with a view to assuring an appropriate level of service should not

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[141] Legal Aid Board, (July 1994) *Franchising Specification Amendments*, 11.

[142] *Legal Aid Franchising*, Paper prepared for consideration by the courts and Legal Services Committee of the Law Society of England and Wales meeting on 13 July 1994, at 13.

[143] Sherr et al, *Quality*, 87.

be seen as dependent on the introduction of franchise arrangements, franchising presents a good opportunity for an increased emphasis on monitoring.

Greater monitoring of the existing methods of service delivery will be needed to determine the level of service currently provided with a view to future improvement. Without assessment of pre-franchise performance, it will be difficult to establish whether any such new arrangements have improved performance. When practitioners, in the process of obtaining the right to grant assistance, agree to meet certain quality standards they must be held to such agreements. If the legal aid system goes one step further and combines franchising with competitive tendering for blocks of legal aid cases,[144] quality monitoring will be even more important. Tightening the requirements which practitioners must currently meet to obtain the right to do legal aid work, without the introduction of franchising, would be a significant first step towards ensuring the quality of service provided.[145]

The LACV had considered the issue of the quality of duty lawyer services during a detailed review of such services conducted in 1986. Concerns had been raised in particular in relation to the standard of some duty lawyer services provided by private practitioners. The review team called for further work to be done on evaluating the existing schemes by a team comprising senior LACV duty lawyers and a nominee of the relevant section of the Law Institute of Victoria.[146] The proposed evaluation was to be followed by annual re-evaluation with input being sought from a range of persons including "...magistrates, court staff, police and other providers of services at courts".[147] Interestingly, no reference was made to seeking input from the clients of duty lawyer services.

Unfortunately, the evaluation and subsequent re-evaluations have not taken place. Former LACV Director, Andrew Crockett considers there has been a lack of review of duty lawyer services provided and that there has been a lack of enforcement of the contracts which the LACV has with local Law Associations for the provision of these services.[148] One positive

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[144] In August 1994, the LACV introduced a policy requiring open tendering of significant cases. The VLA may consider extending this policy to cover blocks of cases. In the UK, the LAB has consistently stated that it has no plans to introduce competitive tendering but its stance has been undermined by comments from the Lord Chancellor, Lord Mackay, regarding the possible future introduction of such tendering and to franchises which are exclusive in nature. See 'Legal Aid Moves' (February 1993) *Legal Action*, 4, R Smith, 'Clarifying Objectives' (April 1993) *Legal Action*, 4 and 'Franchising Fears Continue' (May 1993) *Legal Action*, 4.

[145] In March 1994, the LACV distributed a discussion paper, *Eligibility to Handle Legally Assisted Cases*. Having received 5 responses to the paper by June 1994, the LACV had never completed a detailed analysis of those responses or presented a final report to the Board. See Memorandum to Operations Committee regarding Specialist Panels to Handle Legally Assisted Cases from Cathy Lamble, 15 September 1995.

[146] Legal Aid Commission of Victoria, (1986) *Duty Lawyer Review*, at 29.

[147] Id, 30.

[148] Crockett, op cit.

initiative arising from this review was the introduction of an accreditation system for duty lawyers, including salaried staff.[149] Crockett viewed this initiative as having improved service quality.[150]

(a) Objectives of Monitoring

It is important that the objectives of the monitoring process are clearly articulated. If the monitoring takes a client focus, the objectives will include minimising the incorrect use of the powers which have been devolved to the franchisee and that the services delivered are of at least the quality which has been stipulated as required. The system will need to be developed with a view to file-based assessment of the actual performance of service providers rather than simply relying on assurances from providers as to the systems they have in place. Unfortunately, the LACV's franchising pilot concerned itself more with very general practice management standards rather than looking at the introduction of file-based assessment except in relation to the assignments function, that is, by applying the income and assets means tests and assessing client contributions.

If the focus is on the interests of the legal aid authority, a significant objective will be the minimisation of the incorrect use of devolved powers in those instances which could have a significant financial impact on legal aid. During Reagan's presidency, with the United States administration seeking to reduce legal aid expenditure, the Legal Services Corporation (LSC) was seen to move away from attempting to monitor quality towards monitoring designed to ascertain whether local programs had violated particular rules or regulations. Singsen, a former Vice President of the LSC states:

> "The monitoring effort sought to establish a basis for reducing program funding, disciplining program leadership or demonstrating to the Congress that the local services programs were out of control and should be defunded entirely. It treated questions of quality, effectiveness or value of output as essentially irrelevant".[151]

[149] Legal Aid Commission of Victoria, (1986) *Duty Lawyer Review*, at 27.
[150] Crockett, op cit.
[151] G Singsen, "The Role of Competition in Making Grants for the Provision of Legal Services to the Poor", (1991) 1 *Public Interest L J* 57, at 73.

(b) The Process of Monitoring

The process of monitoring whether a practitioner has done what they should have done on a file can be approached in a variety of ways. Feedback from interested parties such as clients as well as from more independent sources, including other lawyers, can be used. Dummy clients who present at a series of legal offices with the same problem can also be used. Of course, the limited contact which many clients have with the legal system may make such a mechanism more suited to making comparisons between practices than to determining whether work on particular files is of a satisfactory standard. Further, use of dummy clients is impractical for assessing ongoing services, such as litigation, rather than the obtaining of one-off information. While strong ethical views have been expressed in relation to the inherent dishonesty of researchers involved in programs involving dummy clients, Sherr *et al* note that the public has been "...prepared to accept them for testing out garage repair services, and it has been used to assess the quality of will drafting".[152]

The use of input from third parties should also be explored. Sherr *et al* refer to a range of third parties who are in a position to assess the work of lawyers on a daily basis. Their list includes court clerks, judges, public record keepers and taxation masters.[153] Such individuals were said to "...frequently reject or comment unfavourably on the quality of the documentation supplied to them by lawyers"[154] and yet only rarely have they been prepared to take systematic positive steps to improve service quality. A 1990-1991 Victorian study found that Magistrates considered that the quality of legal representation provided in their Courts had improved as a result of substantial increases in jurisdiction. Criticisms were made of some lawyers who acted in Magistrates Court cases. "One view was that the court 'is a training ground for young lawyers. It is also unfortunately a repository of lawyers who will never be properly trained.'"[155] More detailed information of this kind could be very useful to legal aid authorities.

A further third party source of information which would significantly contribute to the evaluation and monitoring process are the legal professional standards and discipline bodies. Legal aid authorities will find it useful to utilise whatever progress has been made by such bodies in assessing quality issues. While the LAB liaised with the UK Solicitors Complaints Bureau regarding franchise applicants,[156] no similar contact was made in Victoria by the LACV in relation to its franchising pilot.

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[152] Sherr et al, *Quality*, 11.
[153] Id, 9.
[154] Ibid.
[155] R Douglas and K Laster, "What Magistrates Really Think of Lawyers", (1992) 66 *Law Institute J* 1100.
[156] Sherr, Moorhead and Paterson, op cit 74-75.

Site visits, whether or not they are unannounced, are also likely to form a major part of any effective monitoring system. The LACV franchising pilot included quarterly site visits of which the participating firms receive three days' notice. There is little literature on the use of random, unannounced site visits. Such visits are likely to be greeted with hostility from the private profession, and further are not likely to provide relevant file-based information beyond that which could be obtained through well organised pre-arranged visits provided the files to be audited are randomly selected. The Law Institute of Victoria conducts random audits of legal practices to monitor compliance with trust account requirements. The Institute's power to attend unannounced to audit a practice's trust account is rarely invoked. Solicitors are generally given up to three weeks and no less than three days notice of any impending audit. Solicitors running mortgage practices are audited, on average, once every three years while others are audited each five to six years.[157]

In the UK, a supportive approach has been adopted, involving practitioners in a cooperative effort to improve the quality of legal aid services. The LAB's researchers advised:

> "It is the strong advice and recommendation of the researchers that acceptance and satisfaction of the criteria by the practitioners may be better obtained through a supportive, rather than policing, approach...The system of transaction criteria is intended to include the supportiveness of the detail in the development of competent work."[158]

The Quality Assurance Criteria used by the LACV for its franchising pilot included requirements regarding appointment of a franchise representative, documented supervision arrangements, financial, personnel and case file management systems, procedures for documenting advice given and action taken, client care and complaints processes and availability of legal reference material.[159] The emphasis was on the existence of procedures. Unfortunately, the appropriateness of, and level of day to day compliance with, the procedures was not considered in any depth.

(c) The Need for Resources

There is little point having quality standards in place unless substantial resources are provided to monitor whether those standards are being met. For example, without regular audits, the fact that staff of a law firm pay

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[157] Telephone interview, Jan King, Lay Observer, 7 December 1994.

[158] Sherr, Moorhead and Paterson, op cit 102.

[159] Legal Aid Commission of Victoria, (December 1993) *Franchising - Summary Criminal Case Pilot*, at 10-13.

little or no attention to the client complaints procedure, outlined in the firm franchise application, is unlikely to be detected. There is little point in requiring assurances regarding the existence of such procedures if no real effort is made to ensure that firms do what they say.

The LAB was said to be reckoning that the audit of one file would take 40 minutes.[160] This would result in either a very time-consuming audit process or a process which based its assessment of a franchised firm on perhaps less than a dozen files. The LACV estimated that twenty files could be audited per day by a team of two including a legal officer.[161] This amounts to an audit time of 45 minutes per file and was based on the experience of the LACV's internal audit section in auditing files in regional offices. This experience has not involved the measurement of a wide range of aspects of the quality of legal services and has concentrated on administrative matters such that the time required to perform a comprehensive review may have been underestimated.

The LACV acknowledged that the introduction and administration of quality assurance standards would require substantial resourcing by the Commission and practitioner.[162] Of course, the more expensive the monitoring, the less attractive franchise initiatives will be in cost terms. It may be that adequate monitoring would make such schemes uneconomical resulting in their implementation only if there existed a strong commitment to improving service quality. The LACV suggested that monitoring costs are such that it would only be cost-efficient to administer a quality assurance scheme for firms which handle a significant number of legal aid cases.[163] Cost should not be the only consideration where such a scheme would contribute to improving the quality of services provided.

The frequency of the audits will also be important. The fact that file audits will not take place until work on a file has finished means that all such monitoring will be after the event. If a firm is providing inadequate services, this will not be detected until the next audit. The LAB has referred to the first post-franchise audit taking place six to twelve months after the contract is made and then at approximately twelve month intervals thereafter.[164] If the LACV's franchising pilot results in the introduction of franchise arrangements, the current planning involves audits taking place on an annual basis.[165] The LACV pilot involved quarterly audits

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[160] R Smith, "Transaction Criteria: The Face of the Future", (February 1993) *Legal Action* 9, at 11.

[161] Legal Aid Commission of Victoria, (December 1993) *Franchising - Delegating to Private Practitioners the Power to Grant Legal Assistance*, at 23.

[162] Legal Aid Commission of Victoria, (April 1994) *Eligibility to Handle Legally Assisted Cases*, at 10.

[163] Ibid.

[164] Legal Aid Board, (July 1993) *Franchising Specification*, at 48.

[165] Legal Aid Commission of Victoria, (December 1993) *Franchising - Delegating to Private Practitioners the Power to Grant Legal Assistance*, at 17. Although not expressly stated, this audit frequency is implicit in the cost calculations contained in Appendix C of the Discussion Paper.

but these focussed on the function of granting legal assistance rather than the quality of the legal work performed on the file. It is also arguable that where a firm fails to achieve higher levels of performance over time and remains at a level close to threshold competence, it should be subjected to more regular monitoring with a view to ensuring that legal aid clients do not receive less than the appropriate standard of service.

The commitment of substantial resources will need to be ongoing. Franchise arrangements will require regular and detailed monitoring. As Sherr *et al* have stated:

> "Vigilance in [the use of transaction criteria] and ingenuity in developing a plurality of systems is likely to be important to the further development and refinement of notions of competence. Within the context of franchising, such work is an imperative if quality is to be protected against the desire to minimise costs."[166]

(d) Audits - The UK Experience

While audits based on transaction criteria have not yet been introduced by the LAB, draft criteria were tested extensively during the Birmingham Pilot. The review process used for assessing compliance during the pilot also involved an auditor's assessment of the intrinsic worth of the work done on the file, peer review and consideration of client views by way of interviews and a questionnaire. To use such a comprehensive review system on an ongoing basis would without doubt be very expensive. The LAB has clearly signalled its intention to move towards reliance on a transaction criteria based audit.

The LAB has put in place a structure which is designed to make the franchise and audit process as unthreatening as possible. This commences with a Self-Assessment Audit Check List designed to enable the franchise applicant to gauge whether they are likely to meet the various management and other requirements. This is followed by a Preliminary Audit conducted by the LAB's Liaison Manager which uses a similar checklist. The applicant then has its performance monitored for up to six months in relation to a range of matters including use of the devolved powers, average costs charged per case and refusal and rejection rates for submitted applications.[167] Only if this monitoring produces satisfactory results will a franchise be granted. If this monitoring makes it clear that the standards are not being met, the LAB's Liaison Manager may, after consultation, extend the monitoring period for up to a further three months.

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[166] Sherr, Moorhead and Paterson, op cit, 111.

[167] Legal Aid Board, (1993) *Franchising Specification*. See Section 6 and amendments to the Specification outlined in *Legal Aid Focus*, August 1994.

A pre-contract audit then takes place. The process to be used is set out in detail with considerable responsibility being placed upon the LAB's Liaison Manager to follow the prescribed format.[168] Evidence will be sought in relation to all the Franchising Specification requirements both in terms of inspecting the system documentation and asking questions as to the workings of the various requisite systems[169] in practice.

The LAB's 'practitioner-friendly' approach is also illustrated by the basic rules to be used for such monitoring.[170] The benefit of the doubt is to be given to the practitioner if there is any uncertainty regarding whether a relevant item has been covered. Further, proof of each item on the criteria is not required beyond reasonable doubt. Any trace of the item is enough. Items do not have to be covered on a document generated by the practitioner. It is sufficient if the item is covered by a document generated by someone else so long as the document is on the file.

Ultimately, transaction criteria will be used to monitor both franchise applicants and franchise holders. "A random sample of files will be selected for audit. The transaction criteria will be applied to the files to determine the levels of compliance with the criteria."[171] The audit will look for either systematic sets of omissions (a piece of essential information not recorded on a majority of audited files) or large numbers of non-systematic omissions. Arguably, a large number of non-systematic errors raises greater concerns about the standard of service. It would be difficult to devise a system of remedial action to tackle omissions covering a wide range of criteria. Systematic errors, on the other hand, can be targeted quite specifically such that the service provider will be aware of precisely what improvements are required. It should be considered whether the omission rate deemed to be initially acceptable should be higher for systematic errors than for non-systematic errors. If such differentiation were introduced, there would need to be a recognition that once identified as a problem, practitioners would be able to quickly take remedial action so that the omission rate would quickly fall.

(e) Appeals, Arbitration, Suspension and Termination

The LAB agreed to the establishment of an appeal process following consultation with the UK Law Society. This process was set out in the

[168] Legal Aid Board, (1993) *Franchising Specification*, Section 7.

[169] Id, Section 3. Systems are required for matters including welfare benefits advice, forward planning, management structure, file management, financial management, people management, client care and complaints, office manuals, legal reference materials and franchise forms.

[170] Sherr, Moorhead and Paterson, op cit 101.

[171] Id, 43.

Franchising Specification[172] and it applied to refusal, suspension and termination of franchises and suspension of devolved powers.[173] Following further discussions with the Law Society an arbitration process (essentially a second appeal mechanism) was introduced.[174]

The LAB placed significant limitations on the matters which could be raised on appeal. Arguments regarding the validity of any requirement imposed upon applicants/franchisees or the validity of the auditing and monitoring processes cannot be considered. Appeals will be considered if they relate to incorrect conduct of an audit, incorrect monitoring information or if there was a refusal to accept a reasonable explanation of why a non-compliance should be disregarded or treated as being of a minor nature.[175] The fact that this section of the Franchising Specification was not altered in the July 1994 amendments suggests that the Law Society is satisfied with the appeal grounds. However, it is possible that pressure will be applied to broaden the grounds once practitioners have experienced the appeal process. Transaction criteria have been devised as a measure of matters which are a proxy for legal service quality. Allowing the appropriateness or applicability of individual criteria to be questioned would undermine the entire system of transaction criteria based on performance measurement.

Appeals are determined by a member of the LAB as the sole decision-maker. This member is advised by nominees of either the Law Society or the Advice Services Alliance depending on whether the appellant is from the legal or advice sector. A National Consumer Council representative is also invited as an adviser, a quality assurance official from the LAB may also be present.[176]

The arbitration mechanism enables a franchise holder or applicant whose appeal has been unsuccessful to enter a binding arbitration process which will "provide for the making of findings as to whether or not the appeal body's decision was right".[177] The arbitration process has been designed to be completed within three months and the LAB agreed to limitations on its suspension and termination powers while appeal or arbitration proceedings are on foot. The LAB will only suspend or terminate a franchise which is the subject of arbitration if it believes this is 'urgently required to protect the legal aid fund, clients or the Board's interests'.[178]

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[172] Id, Section 8.
[173] Id, 43.
[174] Legal Aid Board, (August 1994) *Legal Aid Focus*, 13.
[175] Classification of a non-compliance as minor rather than major could be significant as it is only major non-compliance which can result in refusal, termination or suspension of a franchise. See Legal Aid Board, (1993) *Franchising Specification*, Sections 5 & 7 (with July 1994 amendments as set out in Legal Aid Board, (August 1994) *Legal Aid Focus*).
[176] Legal Aid Board, (1993) *Franchising Specification*, 45.
[177] Id, (New paragraph 8.12(c)(I) as set out in Legal Aid Board, (August 1994) *Legal Aid Focus*).
[178] Id, 14.

(f) Effect of Non-Compliance

The consequences of non-compliance with a franchise agreement need to be substantial so as to encourage a compliance culture amongst franchise holders. In the UK, the logo produced for use by the first franchise holders refers to 'A Quality Service, Approved by the Legal Aid Board'. The LAB clearly has a major stake in ensuring that a quality service is provided. While the detection of instances of major non-compliance can result in loss of franchise entitlements, it is doubtful that this is sufficient penalty on its own in some situations. There may be instances where it is appropriate to preclude a franchised firm which provides a poor quality of service from being able to do legal aid work in the future.

The VLA uses the system for investigating complaints in relation to the provision of legal aid services established by the LACV. Such matters are referred to the Investigations Officer who works with, among others, the Practitioners Panel Committee, a Standing Committee of Directors to which the Board has delegated functions related to removing practitioners from the panel able to do legal aid work. Additional resources will need to be provided if the Investigations Officer is to take action in relation to breaches by franchisees. The special nature of franchise arrangements suggests that the established complaints investigation system and policies relating to removal of practitioners will require revision to cover the additional obligations which go with the benefits which franchisees receive.

Harden has referred to the notion of "public service compensation"[179] which gives consumers a right to damages where published standards of service are not met by providers of publicly funded services. In effect, this would create individual rights analogous to those enjoyed under a contract by providing a means for individuals to enforce performance of the service, or obtain damages. While such an initiative would be strongly resisted by the legal profession, the increasing reliance by governments on contracts to regulate provision of services to and by third parties is likely to strengthen the case for such changes. It should be noted that both the Victorian Solicitors' Board and the UK Solicitors Complaints Board have power to order solicitors to remit or repay fees and to put right mistakes free of charge.[180]

A further issue arises as to the relationship between performance monitoring by the LACV and the disciplinary functions of the Law Institute of Victoria (LIV). In the past, concerns have been expressed at the lack of weight given by professional associations to breaches of practice standards in relation to legal aid issues.[181] Again, the special nature of

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[179] Harden, op cit, 60.

[180] In Victoria, the Solicitors Board or its Registrar have similar powers under s38Z(1), *Legal Profession Practice Act 1958*. For the UK, see Sherr, Moorhead and Paterson, op cit, 97.

[181] See A Evans, "Minimising Complaints?" (1989) 14 *Legal Service Bulletin* 128.

franchise arrangements may mean that the LIV should impose more substantial sanctions where complaints are made out on legal aid files handled by franchisees.

Conclusion

This article has outlined a wide range of matters which require consideration in any attempt to assess the quality of service being provided to users of the legal aid system. These matters are complicated, both in terms of their conceptualisation and their application to real situations. The historical independence of the legal profession and the nature of legal aid work have meant that there has been limited consideration of legal aid service quality. Legal aid is different from other forms of legal services in that the party paying the lawyer is not the party receiving the service. There is not even a theoretical negotiation between the service provider and recipient as to the level of service quality to be provided. This arguably makes external quality assurance more significant in relation to legal aid than for other legal services.

The prospect of changing the manner of the delivery of legal aid services, including the imposition of quality standards upon service providers, presents legal aid authorities with the opportunity to consider these issues in a manner capable of having a broad impact across much of the general market for legal services. Before measures can be put in place to maintain or, where appropriate, raise the quality of legal aid services, it will be necessary to identify the level of quality at which those services are currently provided. To date, efforts have been hampered by a lack of clear definitions of quality and the related concept of competence in relation to both legal aid services and legal services generally.

Far more detailed planning is required from the VLA in relation to what information it will seek from franchisees if, as is likely, it introduces broad-based franchising. The nature of information sought, the methods of collection and the consequences of failure to comply with franchise agreements all need to be considered thoroughly. To date, serious consideration of these matters by the VLA and its predecessor, the LACV, has been conspicuously absent. A fine line needs to be negotiated between seeking to maintain support from the private legal profession but at the same time implementing a rigorous system which will achieve the objective of improving service quality. In the UK, the LAB has adopted a user-friendly approach to franchising. The LAB's relationship with the profession will no doubt be tested as the role played by transaction criteria audits increases as well as by the development of attempts to measure performance by case outcome.

Competition-driven regimes have only limited value in situations where there is no real market for the good or service in question. A legal

aid system which seeks to implement competition along with measures to safeguard quality is vulnerable to manipulation by government. Government may take what they like of the system (the competition) and discard the rest (the safeguards). In the franchising context, detailed monitoring of the performance of franchisees represents the major safeguard available to help ensure that franchising fulfils its stated objective of improving service quality. This will require the allocation of substantial resources on an ongoing basis with a view to fine-tuning and updating the transaction criteria or whatever other quality measure is used. This will of course reduce the appeal of franchising from a cost-reduction perspective but it will result in a far greater likelihood of franchising actually resulting in service improvements.