

Exporting Quality

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The Background

In the United Kingdom statutes relating to legal aid can be traced back to the fifteenth century. Unsurprisingly, even then the problem had arisen as to how to fund the access to justice demands of those without the means to afford a private lawyer at the market rates of the time. Modern legal aid systems stem back to the aftermath of the Second World War but in the UK the different components of the legal aid system were phased in over a number of years because of a shortage of resources. In reality, there has probably never been a time where there was enough money to go round to finance access to justice in any community. Funders have always had to play catch-up as the demand from those seeking legal assistance and the demand for reasonable rewards from providers has grown. In an environment where the struggle for resources is a constant theme, it is perhaps not surprising that policymakers should ask themselves if the priorities which are selected for funding, or the programmes which are implemented, are the right ones, whether they are achieving what was intended and what has been their impact. Certainly, value for money for taxpayers in public expenditure has been a key goal for the UK Treasury for over 20 years. Publicly funded legal services were late to come into the frame.

Concerned by evidence that most legal aid firms in England and Wales (70%) did only a small proportion of the work (30%) and were, therefore, by definition 'dabblers' who were likely to be doing the work inefficiently, the English Legal Aid Board decided in 1993 to introduce optional contracting (franchising) for providers. In 2000, compulsory contracts were imposed and on several occasions since then the competitive tendering for contracts based on price has been proposed, only to be defeated politically on each occasion. Indeed, policymakers in the last twenty years have been attracted by the prospect of exclusive contracts in a wide range of

countries (England and Wales, Scotland, the USA, Australia, Canada and most recently in China), because of the potential that they offer in terms of efficiency gains and tackling instances of market failure.

The research community has responded to these pressures with a range of studies: some have looked at the economic case for legal aid (e.g. in terms of the merits of early intervention to prevent the cascade effect), others have sought to grapple with the thorny issue of assessing the efficacy of the outcomes achieved by legal aid lawyers, whilst others still, have focused on the setting and measuring of robust quality standards which can introduce a regime of continuous improvement in the provider community, or form part of legal aid contracts to prevent a 'race to the bottom' if competitive tendering on price is finally introduced. In 1993 Professor Avrom Sherr and Richard Moorhead from Liverpool University and Professor Alan Paterson from Strathclyde University were commissioned by the English Legal Aid Board to provide a report¹ on assessing and developing competence and quality in legal aid lawyers. At that time there was no reliable, verifiable model for such an assessment. This report drew on work in other disciplines to demonstrate the potential for file auditing methods for assessing quality, that performance was a continuum (at a time when quality in a professional context was seen as binary phenomenon), and the difficulties in identifying reliable proxies for quality in legal services. In 1998 the same team were again commissioned by the Legal Services Commission (LSC) to evaluate the quality of work done by lawyers and the 'not for profit' sector, who held the new legal contracts for civil work that had been allocated by the LSC. The research,² examined a range of quality measures including peer review, model clients, client satisfaction surveys and outcomes, and tested them against each other on a substantial scale for the first time in a legal context. The fieldwork and analysis established the reliability and validity of peer review (with appropriate criteria, marking frameworks and training of assessors) demonstrating that it was likely to be the best available means for assessing the quality of legal work. The Legal Services Commission (LSC) accepted the 2001 report's

¹ Sherr, A., Moorhead R. and Paterson A., (1994) *Lawyers- The Quality Agenda* (London: HMSO/ The Legal Aid Board)

² A. Sherr et al., *Quality and Cost* (London: The Stationery Office, 2001)

recommendations on peer review and implemented a three year rolling programme in 2003 (using reviewers trained and monitored by the research team) of a sample of contract holders in all areas of civil and criminal work in England and Wales. Peer Review in Criminal cases was then undertaken and tested as part of the Evaluation of the Public Defender Service in England and Wales in 2005-6 by Lee Bridges, Ed Cape, Paul Fenn, Anona Mitchell, Richard Moorhead and Avrom Sherr.³ Peer Review has continued and been further developed to the present day under the aegis of Avrom Sherr now at Institute of Advanced Legal Studies, London University. Although only a sample of firms and practitioners are reviewed in England and Wales, the peer review programme there conducted reviews of approximately 1,000 firms between 2008 and 2012.

In 2003, Alan Paterson's work for the Scottish Legal Aid Board (SLAB) demonstrated that file based peer review was a viable quality measurement process for Scottish public defenders⁴ and in 2005 peer review was extended to all 700 or so civil legal aid firms and 1,200 practitioners in Scotland, through a partnership between the Law Society of Scotland (LSS), SLAB and the Scottish Government. In the first cycle five randomly selected files per registered practitioner were reviewed over a three year period or cycle with 25% of files double marked to ensure marker consistency. In 2011 following an in depth review the decision was taken to extend the third civil cycle to 6 years in which every civil firm and practitioner's files would be assessed, to focus particularly on poorer performing firms and to review a much larger range of files for practitioners working in areas of law with vulnerable clients (e.g. mental health and immigration cases), together with the existing review of all civil practitioners. Finally, in 2011 SLAB, LSS and the Scottish Government decided to implement a peer review programme to assess the work of all 550 criminal law firms and 800 criminal legal aid practitioners in Scotland over a six year cycle.

Results

The purpose of the quality assurance programme for legal aid providers is not to covertly reduce the supply base, but to demonstrate the quality floor that exists in the

³ Evaluation of the Public Defender Service in England and Wales, TSO, 2007

⁴ Paterson, A., "Peer Review and Quality Assurance" 13 (2007) *Clinical Law Review* 757

profession and to gradually raise overall standards. The programme has established that errors in legal advice, professional negligence or professional misconduct are relatively uncommon in Scotland. In particular, examples of misconduct, money-laundering or abuse of the legal aid scheme have been very unusual, although privately charging a client who is covered by legal aid is not that uncommon. The most typical causes of fails have been:

- Delays in taking action or applying for legal aid
- Poor communication with clients relating to the operation of the costs rules for legally aided persons
- Poor file notes of phone calls or interviews
- No terms of engagement letters⁵ on file

A recent examination of several months of civil data confirmed that these were indeed the biggest areas of weakness by the profession. Thus the criteria which most often attracted a fail mark from reviewers were those relating to the failure to send appropriate terms of engagement letters to clients (14.5%), and to explain the costs rules in legal aid cases (the clawback provisions)⁶ (4.5%). Interestingly, these were also the criteria which most frequently attracted a grade of 'C'⁷ (14.8% and 13,7%). Thus almost one third of files appear to lack an appropriate letter of engagement and around one in five files lacks a satisfactory explanation of the clawback rules. Other criteria that did badly in terms of fail or 'C' grades were those relating to delay, and failing to send in an appropriate legal aid account. On the other hand the data also showed that the lawyers in civil legal aid cases are generally good at communicating with their clients, with other parties and in their fact finding. The evidence further suggests that the programme is raising standards. In the first cycle 10% of files failed the initial review compared with 9% in the second cycle. However, in the second cycle a tougher standard was imposed to pass and in the

⁵The LSS requires law firms to send a 'terms of engagement' letter to their clients at the outset, setting out what the firm will do for the client, which lawyer will be responsible for the work, what the cost or the basis of charging will be and what to do in the event that the client is dissatisfied with the service provided by the lawyer.

⁶In Scotland, legal aid is a grant towards the cost of the client's lawyer if the case is unsuccessful, but if the assisted party wins the case, then legal aid becomes a loan and the client may find that they are having to pay for the cost of their lawyer from their winnings in the case (the clawback).

⁷'A'C' grade is awarded where the reviewer is unable to say from the material that is on the file whether or not the criterion has been complied with.

third cycle the threshold has been raised again. The proportion of special reviews (triggered by serious concerns) reduced from 2% of firms in the first cycle to 0.5% of firms in the second and the number of firms taken to final review decreased from 3% to 2%. Further evidence of quality improvement stems from the fact that practitioners and files received a higher proportion of distinction grades in the second cycle (15.9% of practitioners and 11.6% of files as compared with 13.7% of practitioners and 10.2% of files in the earlier cycle). Even the profession has come to accept the value of the programme. Although they were suspicious of the motives of the Government and SLAB in pushing for the introduction of peer review civil legal aid lawyers this has now largely dissipated. Thus a survey of Scots lawyers in 2013 showed that 84% of respondents had a positive or neutral opinion on whether the QA scheme was an effective way of ensuring quality. Indeed, many firms have found that the approach to files and cases which is embodied in peer review can, with advantage, be applied to their other, non-legal aid, cases.

Exporting Quality

Largely through exposure at international legal aid conferences such as the ILAG conferences in 2005 and 2007, peer review began to attract attention outside the United Kingdom. The UK model was demonstrated or piloted in Ontario, Finland, Northern Ireland, Moldova, the Netherlands and New Zealand. The Netherlands were quick to express an interest and an initial visit in 2008 led to a pilot peer review programme in mental health cases in 2009 and one in social welfare in 2012. However, the programme was stalled by a court ruling on client privacy and confidentiality,⁸ which has only recently been resolved. Ironically, whilst client confidentiality prevented peer review of Dutch lawyers' files, it did not inhibit Dutch notaries from implementing compulsory peer review in 2009. Again in 2009 and 2011 peer review from the UK was demonstrated and piloted in Finland and piloted in Moldova in 2011. Interestingly, in South Africa exposure to UK style peer review at ILAG conferences led to them to consider its implementation back home. However,

⁸ Problems with client confidentiality have arisen in a number of jurisdictions, since the external peers will be looking at the files of a client who they are not acting for. The two main techniques which have been used to get round the problem are (a) client consent to peer review on the legal aid application form or (b) changing the legal aid legislation.

concerns over cost and potential inconsistencies between peer reviewers in different parts of the country led them to implementing a file review regime using an in-house audit team of lawyers.⁹ A range of files are selected at random and as in the UK an assessment is made of the files and an overall assessment of the practitioner's performance against set criteria or 'areas of risk' is made, with suggestions for improvement. As in the UK the system combines output and outcome measures of the lawyer's performance. Only 5% of practitioners reviewed fail, but the most common weaknesses are failing to keep clients informed of progressing the case, failing to record advice given to the client as to the merits of the case or of alternative procedures and failing to keep copies of all correspondence and important documents on the file. The smallness of the audit unit and the fact that its members are full time offers advantages in relation to assessor consistency as the Chilean Public Defender peer review programme has also discovered. However, there are also disadvantages. Full time reviewers struggle to keep up to date with changes in legal practice when they are no longer conducting actual cases, which is why all UK peer reviewers are required to have current experience of the area of work that they are reviewing.

In order to strengthen their system of peer review the South African audit team also looks at court performance. This is something that the UK programmes have sought to develop for some time but have always been defeated by the logistical problems caused by cases being cancelled or postponed at the last minute. The Chilean solution has been to rely on recordings of court performances and the South African unit is looking at using the same approach, because of the logistical problems they have encountered in viewing court performances. In the UK however, the preference is to see whether digital recordings of courts might become available. A further innovation in South Africa is to set different targets in terms of assessment scores for different levels of practitioner. This is an approach which is set to be adopted in England and Wales in the Quality Assurance Scheme for Advocates (QASA). The scheme is being implemented by the Legal Services Board (LSB) to raise advocacy standards in the English and Welsh criminal courts. It sets four levels of advocacy standards with assessments being required to move from one level to the next.

⁹ See Brian Nair, 'Legal Quality and Outcomes' Paper delivered at the ILAG conference in June 2013 in the Hague

However, the assessors are all to be judges. Whilst this helps to overcome logistical problems it also brings some drawbacks. First, the judges are not peers, second, there are concerns that requiring judges to assess lawyers appearing before them will alter the relationships between lawyers and judges and may even undermine the independence of the lawyers appearing in such cases. The latter concerns have led to legal challenges.¹⁰ However, equally problematic is the fact that to cater for human variations in generosity of marking in peer review it is normally necessary to use a proportion of double marking and/ or to monitor the markings of the different reviewers, providing feedback as to variations between them. The current proposals for QASA contain no such safeguards.

The latest jurisdiction to use the UK experience of peer review in their quality assurance programme is China. Since 2012, legal aid quality assessment work which adopted aspects of English and Scottish peer review methods has been piloted in some provinces by the National Legal Aid Centre (NLAC) for China. In 2014, the scope of the pilot was enlarged to 32 provinces. By adopting the independent peer review system, NLAC encouraged the pilot provinces to establish specified legal aid quality standard/criteria, and marking systems, based on the ten indicators of NLAC, which regulate the professional conduct and enhance the management of legal aid quality. Interestingly, the provinces were given a considerable measure of latitude in developing their own approach to peer review of files. Although the standard practice is for the files to be marked by three reviewers working together, the number of criteria and the marking system has varied with each province. Some have used as few as ten criteria, others have used many more. Typically, files were marked out of 100% with set numbers of marks for different elements in the case or transaction. Generally speaking, however, the reviewers received far less training than the three to four days which is the norm in the UK. Perhaps for this reason concern has been expressed over marker consistency in the Chinese pilots. More crucially, because China is a Civilian System as opposed to the Adversarial system of the UK, lawyers in China are considerably less pro-active than their UK counterparts and Chinese legal aid files contain very little correspondence with clients or with the other side. Not only do the judiciary take a more active role in

¹⁰ *R (on the application of Lumsdon) v. Legal Services Board* [2014] EWHC 28 (Admin)

cases, they are also generally the impetus behind efforts to encourage mediation, arbitration or settlement in cases. Moreover, since Chinese litigants do not pay for the other side's lawyer if they lose and court fees are low and legal aid is free to those who receive it, the incentives on a plaintiff to settle rather than see what the judge awards are not high. All of this was recognized in the Chinese pilot programmes, which probably explains why a significant minority of Chinese criteria are formal in nature (relating to the composition and presentation of the file). However, in early 2015 the decision was taken to introduce UK style peer review with criteria modelled on those from the UK (and Scotland in particular) and the Scots marking system, in two pilot provinces, Henan and Shanxi, funded by the China –EU Access to Justice programme. Following a training session for 26 peer reviewers led by Professors Paterson and Sherr in Henan in March 2015 further exercises using the modified UK criteria took place with 100 files in Henan and 100 in Shanxi in May 2015. At the end of June Professors Paterson and Sherr will return to Beijing to train another 26 reviewers and to provide refresher training to the original 26 reviewers who were trained in March. Not the least interesting element in the process is the need to find ways of developing and applying UK style criteria in a manner that makes sense in a Chinese context. Inevitably the UK criteria contain embedded within them aspects of a more Adversarial culture and one that is considerably more client-centred than currently prevails in China. This has influenced the training of the new reviewers in China, to take account of the unfairness of marking Chinese files against culturally different criteria. Indeed, before the next phase in the new pilots can be begun there will have to be a period in which the relevant legal aid lawyers are exposed to the tenets of client- centered lawyering and to the requirements of the new set of criteria.

The interest in quality assurance and peer review in particular in Chinese legal aid circles is impressive, putting to shame not a few jurisdictions in the West. There is a recognition in China that for legal aid services to be provided in accordance with the goals of the system much will depend on the quality of the services. So in this sense, the problem of case quality goes to the core of the legal aid system. There is a recognition also that the legal aid quality management and assurance system in China is still in its infancy. Lessons can be learned from the experience of peer

review from the United Kingdom, but these lessons will have to be tempered by awareness of the cultural differences between China and the UK.