

# **The Quality of Defence**

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Both international treaties and conventions, and the majority of the world's constitutions pay formal lip service to government's obligations to provide accused persons with adequate legal representation. Nevertheless, in many cases such guarantees only exist on paper and effective mechanisms to ensure that defence conforms to minimum standards, are lacking.

In Chile, however, the last nine years have witnessed concrete advances. Law 19.718 that created the Public Criminal Defence Service established a fixed budget for monitoring and controlling the quality of defence provided by public defenders.

Two regulatory instruments were created. Firstly, The Defence Standards provide a list of directives that normalise both the technical aspects of legal defence and the way that public defenders should treat and attend to persons they are representing.

The Defence Standards are written by the National Defender who is charged with interpreting them and overseeing their application in particular cases. Nevertheless, given their generality, and the subjectivity with which they may be applied, the Standards are not a wholly adequate instrument for measuring the degree to which defenders fulfil their obligations.

Moreover, it is found that inspectors and external auditors generally base their evaluations on the Defence Standards which are regarded as a normative ideal against which the performance of individual defenders can be compared. Experience of this practice has, so far, not been positive. Instead of generating concrete guidelines that help to improve the quality of defence, inspections have tended to produce theoretical conclusions that are of little practical use.

The second evaluation mechanism consists of the revision of a small sample of cases by inspectors and auditors. As well as the defenders performance in court, their administrative capabilities, particularly their ability to keep case files in order and up to date, are assessed. This revision has not, so far, produced the concrete objective criteria for measuring defender's performance needed to generate

directives that would improve the quality of the defence services provided.

Both these instruments generate data on the formal fulfilment of the services provided by the National Defence Service. No link is made between the evaluation of the provision of these services and the concrete results in terms of the quality of the defence provided. So, in effect, the fulfilment of the defender's official obligations gives no assurance that he/she is providing a high standard of defence.

Furthermore, in most cases lawyers fulfil the criteria established in the Defence Standards or other institutional guidelines thereby meeting the requirements of the inspectors or auditors in accordance with constitutional law and thereby creating the impression that high quality public defence is being provided. However, these apparently objective results, do not, in reality, reflect, or permit measurement of, the quality of the service provided.

Before analysing specific proposals related to the quality of defence, it is necessary to establish what we, more or less objectively, understand to be a quality defence service. It is, however, not easy to assemble the necessary elements that allow us to distinguish between a correct and/or acceptable provision of legal defence and a provision that is above average or excellent.

It is generally accepted that a lawyer's obligations to their client are related to the diligence and efficiency with which legal tasks are carried out rather than with the concrete results obtained. Strictly speaking, a lawyer cannot guarantee the client a positive outcome because this depends on a third person: the judge. Nevertheless, it is reasonable to require that lawyers do their utmost to secure the best outcome in accordance with the interests of those they represent. To the degree that a given lawyer pursues this objective, we can conclude that they are providing a high quality service.

Inevitably, the problem with this definition is that it is difficult to determine "objectively" that a lawyer has effectively and diligently performed all the necessary and appropriate actions to achieve the most satisfactory result for the defendant.

Moreover, in accordance with our practical experience in Chile, we believe that it is necessary to differentiate between private and public defence, as public defenders' workloads often exceed that of private defenders. This is especially the case as they are required to have cases

in different courts with different judges and prosecutors. In fact, a necessary precondition for gauging the quality of a given defence service, is to be able to control for independent variables and thereby establish a valid basis for comparison. This is hard to do with private lawyers but not impossible with public defenders.

The fact that public defenders perform their work in local defence offices and always subject to the same jurisdiction means that their work is always performed in front of the same courts (and therefore the same judges) and the same prosecutors. This would appear to create a good basis for comparison between public defenders working in the same local defence office.

A second factor to bear in mind is the number of cases handled by a public defender. The consequences are twofold: On the one hand, since the amount of legal cases handled by a public defender is in the range of 300, this means that it is possible to measure performance by looking at trends and means as compared to other professionals within their jurisdiction. This implies that we can judge performance based on results and compare these results with those of other lawyers who work in the same conditions and subject to the same demands.

For example, if there are 10 lawyers litigating in the same court and facing the same prosecutors, in a given year and once each lawyer has dealt with 700 cases, it should be possible to identify certain trends and establish which professionals are performing best based on the results achieved.

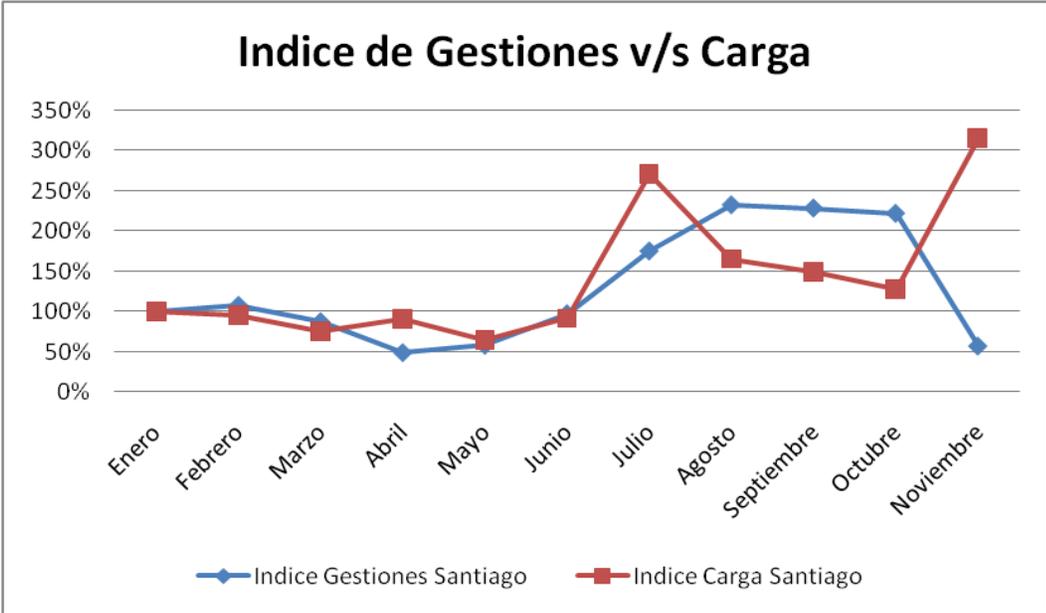
However, one variable that does need to be factored into the analysis is "workload". Workload can be quantified by adding the number of cases handled by each public defender and the amount and nature of non-litigation work handled by a public defender, such as administrative tasks required by the National Defence Service: For example; filings cases into SIGDP, attending legal clinics, prison visits, meetings and workshops etc...

We therefore have an indicator that accounts of almost all the defender's activities and can measure the quality of the service provided while taking account of the number of work-related activities that each defender has to perform.

Using data contained on the SIGDP database, we can show that the attention that a defender can dedicate to each case is proportional to his/her workload. Data analysis shows clearly how the number of

procedures performed on each case is negatively proportional to the number of cases dealt with by a lawyer in a given period. That is to say, when a defender has a reasonable caseload he/she can perform the procedures necessary to provide quality defence. The procedures in question involve, case investigation, the review of investigations carried out by others and the recollection of evidence.

When workload increases, the number of procedures carried out on each case falls dramatically. This inevitably results in defenders having to improvise during hearings and when cases end in oral trials. Figure I cross tabulates workload with the number of procedures carried out per case.



The marked increase in workload during October coincided with the termination of the contacts held by private chambers that provided services to the National Defence Service. The corresponding fall in the number of procedures performed per case is evident.

## II. Basis for Measuring Quality

Once the effects of workload have been considered, we need to establish a framework for the analysis of the defence service provided. Though various elements could be considered here, we believe that it is best to work with two main pillars. These are:

1. Training and evaluation systems for defenders
2. Computer system

The evaluation and training systems must permit comparison between different professionals' skills and technical abilities. This means that, before developing general and uniform training programs, it is necessary to evaluate the abilities and skills of each of the professionals, in order to establish separate training policies depending upon the needs of each professional. This allows us to both establish effective training programs and also to improve institutional quality control because the results of the training will directly affect the performance of the individual professional.

It is not possible to evaluate something that can't be measured. Indeed, the development of performance guidelines, training programs or case distribution will not be done efficiently if we are not able to identify specific needs and weak areas.

A condition *sine qua none* of any system that aims to provide a quality service is to be able to permanently measure and evaluate the performance of the operatives, in this case the defenders. Such evaluation must be based on performance indicators that concretely and objectively reflect the main guidelines established by the institution for the efficient provision of the service.

This implies that a computer system is needed that can process all the data relevant to the provision of defence services. The more specialised and complete the computer system, the better the quality of the data provided by it. This in turn should translate into better and more efficient institutional guidelines and policy formulation.

It is imperative that a list of indicators is drawn up that covers all elements vital to the provision of a quality defence service. Once data is collected in relation to these indicators, it should be possible to establish institutional guidelines and policies that will improve the quality of the service provided.

Without leaving aside the quality control mechanisms established by law, in Chile attention has focused on the need to create systems that can measure the fulfilment of goals and objectives pertaining to given indicators across time. This, once differences in the uniformity of the technical skills of the service providers and the workload of defenders has been accounted for.

All the factors mentioned above should allow for the application of uniform performance indicators. Data collected in relation to these should, in turn, aid the generation of policies that achieve the goal of providing a service that both the institution and the users consider at least satisfactory and, it is hoped, of high quality.

### **III: Data Collection and Analysis**

As stated above, the notion of quality defence implies a number of variables that jointly make up an above average standard of service that achieves concrete objective results in keeping with the client's expectations.

In order to measure, and thereby determine whether a given service is high quality, it is necessary to identify indicators that can be controlled and/or evaluated. Indicators are objective conceptual measures that represent actions or objectives that form part of a coherent legal defence strategy in a given case. The individual indicators need to be formulated in such a way that high performance over the whole range is automatically indicative of the provision of a high quality defence service.

The indicators can relate to administrative work and/or concrete results. Administrative indicators measure the defender's performance in all tasks other than participation in hearings or oral trials. Result indicators measure the defenders practical performance be it in hearings, oral trials or in the Court of Appeal. Below we list examples of these indicators.

#### **Administrative Indicators:**

- No. of cases handled
- No. of cases finalised
- No. of on-going cases
- No. of clients in preventative custody

- No. of cases where the investigative deadlines has expired
- No. of dormant cases
- No. of experts requested
- No. of SIAR requests
- No. of requests to the research unit:
  - Questions relating to jurisprudence
  - General questions
  - Recourse request
  - Doctrinal question
- Prison visits
- Participation in legal clinics
- Participation in training courses
- Performance in hearings
- Disciplinary proceedings

### **Results indicators:**

- Oral trial acquittals
- Oral trial convictions
- Sentences greater than that requested by the prosecution
- Sentences less than that requested by the prosecution
- Acquittals in quick trials
- Convictions in quick trials
- Quick trial sentence with 395
- Convictions in abridged trials
- Acquittals in abridged trials

Two data collection instruments are used to obtain data on these indicators. Though contents are similar, the two differ with respect to the data collected and their utility, or effect, in the short or long run.

Firstly, the Administration Reports are used. These are filed weekly or monthly and contain quantitative data that is easy to collect and analyse for each defender on a daily basis. These reports are a good source of up-to-date data that allow defenders who are not performing administrative tasks satisfactorily to be identified.

The Administrative Reports contain quantitative data on the following:

- Computers errors report
- Expert testimony DRMN
- Prison visits

- On-going cases
- Dormant cases
- Closed case procedures
- Promptness in filing cases in SIGDP
- Cases where legal deadlines have passed and clients are imprisoned
- Cases filed without investigative deadlines stated

To give an example, the data presented in the following table refers to "Prison Visits":

## 1. PRISON VISITS February, 2009

### 1.1. Fulfilment of obligations by Defence Offices: February 15, 2009

Defence Offices	Fulfilment of obligation in percentages		
	Visits December	Visits in January	Visits February 15
Criminal Defenders (Z3N/08)	78%	85%	76%
Colina	91%	99%	90%
Legal Criminal Defence (Z2N/08)	96%	88%	93%
Lo Prado	58%	80%	97%
Legal Criminal Defence S.A. (Z5N/07)	100%	94%	99%
Baginsky and Rojas Ltd (Z5N/07)	100%	100%	100%
Legal Criminal Defence S.A. (Z1N/07)	100%	100%	100%
Legal Criminal Defence S.A. (Z3N/07)	100%	98%	100%
Legal Criminal Defence S.A. (Z4N/08)	98%	99%	100%
Defence and Justice (Z3N/08)	92%	98%	100%
Legal Defence Ltd (Z1N/08)	100%	100%	100%
Central Station	95%	93%	100%
Nexum Ltd (Z1N/08)	98%	100%	100%
Ñuñoa	99%	98%	100%
Salinero and co. Ltd.	98%	100%	100%
Santiago	96%	93%	100%
Las Condes	100%	95%	-
<b>Sub total</b>	<b>93%</b>	<b>94%</b>	<b>96%</b>

**1.2. Breakdown for local defenders** (Visits February 15, 2009):

<b>Defender</b>	<b>Did not visit</b>	<b>Visited</b>	<b>Total visits programmed</b>	<b>% Fulfilment</b>
Solange Navarro Morales	4	15	19	79%
Cristian Mardones Flores	1	7	8	88%
Gonzalo Rodriguez Herbach	1	8	9	89%
Néstor Mauricio Pérez Aguayo		7	7	100%
María Celeste Jiménez Riveros		4	4	100%
Carlos Garcia Marin		6	6	100%
Claudio Angel Aspe Letelier		2	2	100%
Mario Palma Navarrete		3	3	100%
Andrés Rojas Román		6	6	100%
Carolina Alliende Kravetz		3	3	100%
Elizabeth Susana Hauway Tirado		6	6	100%
Alejandra Lobos Chamorro		5	5	100%
Francisco Javier Maragano Uribe		13	13	100%
Mario Andres Vargas Cocina		7	7	100%
Gabriel Carrion Calderon		15	15	100%
Mario Quezada Vargas		2	2	100%
Pablo Andrés Rubio Meneses		14	14	100%
Octavio Sufán Farias		6	6	100%
Pablo Andrés Sanzana Fernández		15	15	100%
Renato Javier Gonzalez Caro		14	14	100%
Pablo Dario Antonio Munizaga Fernandez		7	7	100%
Helmuth Vargas Rosa		2	2	100%
Ricardo Flores Tapia		8	8	100%
Jorge Sebastian Villalobos Arriaza		6	6	100%
Washington Fernandez Gonzalez		7	7	100%
Lisette Rodriguez Escobar		7	7	100%
Marcela Araya Acuña		5	5	100%
<b>Sub total</b>	<b>6</b>	<b>200</b>	<b>206</b>	<b>97%</b>

**1.3. Breakdown for privately contracted lawyers** (Visits February 15, 2009):

<b>Defender</b>	<b>Did not visit</b>	<b>Visited</b>	<b>Total visits programmed</b>	<b>% Fulfilment</b>
Felipe Alejandro Moraga Marinovic	14		14	0%
Paz Del Pino Navea	13	9	22	41%
Paola Torres Padilla	6	6	12	50%
Bárbara Patricia Antivero Pinochet	1	8	9	89%
Marcela Valenzuela Calderon	1	17	18	94%
Marisol Corvalán Guerrero		9	9	100%
Others				100%
<b>Sub total</b>	<b>35</b>	<b>743</b>	<b>778</b>	<b>96%</b>

From this data it is easy to identify those defenders who have not fulfilled their prison visit obligations. Regular visits are an essential part of the provision of quality defence because they facilitate communication and the exchange of information between defenders and clients.

The second data collection instrument employed is the Defence Quality Report. These contain data on administrative indicators and on concrete results. They provide data on defenders whose performance is sub-standard and are useful for long term planning. Once analyzed, data can be used for six monthly or annual strategic plans designed to improve the performance of underachieving defenders.

Defence Quality Reports contain a large amount of quantitative data on the performance of individual defenders. Data include: the number of open, finalized, and filed cases; number of clients in preventative custody; cases where the investigative deadline has expired and cases where no action has been taken in the last 60 days; number of experts requested and the number of SIAR requests made. Furthermore, data on the number of acquittals achieved in oral trials, quick trials, and abridged trials; the sentences handed down in oral and abridged trials; and sentences shorter than those requested by the prosecution are included. Participation in legal clinics and workshops is also quantified along with data on the number of requests made by the defender for information relating to doctrine, jurisprudence and the resolution of doubts. There is also qualitative data on lawyer's performance in hearings and quantitative data on unscheduled visits to clients in custody. Finally, the reports show if the defender has been subject to disciplinary action.

The following table displays data on acquittals in oral trials achieved by defenders from the "Mega Local de Lo Prado" Defence Office near Santiago is shown. The data comes from the Defence Quality Report for the second semester of 2008.

**Table nº 14: Percentage of Acquittals in Oral Trials**

Alejandra Lobos	0%
Bernardita Alvarado	8%
Carlos Cordero	11%
Catherine Paolini	0%
Cristián Mardones	53%
Cristián Medina	0%
Francisco Maragaño	22%
Gonzalo García	17%
Gonzalo Rodriguez	10%
Guillermo Aguilera	17%
Jorge Fuentealba	0%
Jorge Moraga	43%
Karina Reyes	4%
Marcela Vargas	19%
Mario Vargas	35%
Pablo Iturrieta	11%
Pablo Rivera	18%
Paula Quinteros	0%
Paulina Aracena	0%
Renato Gonzalez	62%
Rodrigo Molina de la Vega	0%
Rodrigo Molina Rillón	33%
Silverio Fuentes	14%

Number of Acquittals	Total number of trials
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0	5
1	12
1	9
0	3
8	15
0	5
4	18
4	23
1	10
1	6
0	0
3	7
1	23
4	21
6	17
2	18
2	11
0	15
0	1
13	21
0	20
3	9
6	43

It is easy to see how different public and private defenders pleading in the same oral tribunal have obtained very different results.

The reports described above provide objective concrete data that, when analyzed systematically and efficiently, allow for ongoing control of the level of fulfilment of the performance indicators by defenders. In our view, the totality of these indicators constitute a good measure of defender's performance and allow judgment as to whether the service provided is perceived as satisfactory by the client.

The contents of these databases should be dually analyzed and corresponding measures adopted by Specialised Technical Help Units that offer defenders the relevant training, legal clinics, jurisprudence and doctrinal consultancy etc.. Such a strategy should reduce the competence and ability gaps that exist between different defenders. In this way, it is hoped that all practicing defenders can provide a services that corresponds to a uniformly high standard.