ENGLAND AND WALES

Quality and Criminal Legal Aid in England and Wales

Due to the high costs of legal aid in England and Wales, the government and the legal profession have each taken steps to assure quality. ***Roger Smith***[†] *describes the main features.*

More is spent in England and Wales on legal aid in both criminal and civil matters than in any other country, per head of population. The total spent in 2002 through the two main channels of aid—the Criminal Defence Service (the term for criminal legal aid since April 2001) and the Community Legal Service—was £1.8bn (U.S. $3bn). Expenditure on criminal legal aid in 2002 was £508m in the lower criminal courts and £536m in the higher courts, a total of £1044m (U.S. $1.8bn). The population of England and Wales is around 52 million.

As a result, the government and its institutions are concerned about value for money. Recent changes are intended to secure that aim. Three elements of the current system of quality assurance may prove interesting to those from other jurisdictions:

a) Accreditation of individual lawyers and legal service providers;

b) Requirements, largely set by the professional bodies themselves, as to how an office should be run and organized;

c) Direct testing of work undertaken on files, initially by a method involving "transaction criteria" (a checklist approach to essential elements in handling a case) but increasingly now involving peer review.

The development of contracts for legal aid providers

With expenditure on criminal legal aid at such high levels, it is unsurprising that the quality of services has arisen as an issue over the last decade or so. From its beginnings in 1950 until 1989, legal aid was administered by the Law Society, the professional association that represents and regulates solicitors (who, with barristers, together constitute the English legal profession). The Law Society took relatively little interest in quality. However, a major increase in concern with quality came when the administration of legal aid was transferred by the Legal Aid Act 1988 from the Law Society to a Legal Aid Board. The new Board was what is known as a "Quasi-independent national government organization" or Quango. In other words, the board was given statutory responsibility for managing the legal aid budget, decision-making in individual cases, and implementing policy; but was otherwise independent of government, save that ministers appointed its members and it had to report on its spending. The Board has since been replaced by a Legal Services Commission (LSC) which is legally the same—created by statute, independent in its decision-making, appointed by the relevant government

minister and bound to follow the guidelines of government policy.

The government requested the Legal Aid Board to concern itself not only with "existing targets and indicators of performance" for legal aid administration but also to look at legal aid practice itself from the perspective of performance. The Board was, of course, in a position to do this in a way that was not possible for the professional body, the Law Society, which was hampered by its representative role. Responding to the challenge, the Board developed the idea of "preferred suppliers," a concept taken from the private sector. It wanted to identify a rather smaller group of practitioners than it had inherited to whom it would give preferential terms and with whom it would work in partnership to set and maintain certain standards for work that was paid for by the board.

"Franchising"

Originally, the Board intended the relationship between itself and providers to be voluntary. However, it used confusing but rather prescient terminology. The board developed in the late 1980s and early 1990s the idea of "franchises"—agreements between itself and the solicitors with which it dealt. Franchisees would be given certain advantages in return for meeting certain standards. The Board explained in an early document:

> ...franchising involves identifying those who can satisfy criteria of competence and reliability, assisting and encouraging them by freeing them from some of the restrictions now applying to legal aid.[1]

In other words, a provider who held a franchise would have the advantage of certain devolved powers and be able to approve certain levels of action that would otherwise have to be agreed by the Board.

The Board was very much influenced by the then fashionable notion of "total quality management" and began, for example, producing lists of the reference books that it required legal aid firms to have in their library and prescribing other "inputs" or conditions on staff training and the like. It soon became clear, however, that more was required to ensure that cases undertaken actually reached a sufficiently high level of quality.

Bad publicity for the profession

Another cause for interest in the quality of legal work in criminal cases came from a major academic study, the results of which were published in 1994 as *Standing Accused—the Organisation and Practices of Criminal Defence Lawyers in Britain*.[2] This was based on one of the largest observational studies of practitioners ever conducted. Its findings were damning. The research revealed that much work was actually undertaken by non-lawyers—paralegals—and that many defense lawyers rarely took the initiative in the running of their cases, being content to respond to the evidence provided by the prosecution. The study was particularly critical of the conduct of solicitors and their representatives in police stations, where it suggested, effectively, that lawyers were doing very little for their clients.

Raising standards by encouragement

The adverse publicity about the standards of solicitors and their representatives during police station interrogations led the Law Society to take action. It sought to encourage solicitors to raise their standards. In particular, it published books setting out best practice for solicitors in criminal cases. The first, *Active Defence*, is now into its second edition.[3] The idea behind it is suggested by its title—defense lawyers must take the initiative, rather than always being responsive to the prosecution. At significant milestones in a case, they must

- "... analyse and take stock of the information obtained so far;
- "... consider the implications of this information for both the prosecution and the defence;
- "... make decisions about the actions to be taken in consequence, particularly defence investigation."[4]

In addition, the Law Society published *Criminal Defence: a Good Practice Guide in the Criminal Courts*, now also in its second edition. The guide's advice is extremely detailed on practical issues that can easily be overlooked, such as the importance of keeping a record when a solicitor attends a police station to be present during the interrogation of a client.[5]

Raising standards by accreditation

The Law Society had independently developed the idea of accreditation schemes to assure the quality of solicitors working in areas like mental health and with children, where concerns had been raised about the quality of work. These schemes also operated to some degree as advertisements for practitioners to publicize their accredited status. Facing attacks on its members' work in police stations, it devised a special accreditation scheme, initially for solicitors' representatives who attended police stations.

The police station duty solicitor scheme—which provides access to a lawyer for anyone who has been arrested and is detained in a police station—has now been extended so that it covers both solicitors and their representatives. The qualification scheme for membership is linked to an accreditation scheme for those who appear in the magistrates' (lower) criminal courts. Together, these form two parts of a "Criminal Litigation Accreditation Scheme (Stage one)." (An advanced "stage two" does not yet exist.) This is likely the most detailed accreditation scheme anywhere run by a representative body of the legal profession regulating the quality of its own members' criminal work. For example, to attain the Police Station Qualification, a candidate has to keep a portfolio of work which covers five cases "in which the candidate has personally advised and assisted a client at the police station when no other solicitor or representative was present."[6] The portfolio is marked as pass or fail by an agency which has been approved by the Law Society as an assessor. The candidate then has to pass a "critical incidents test" which includes a tape of an interrogation where the candidate has to show how and why s/he would intervene. There is a similar structure for the Magistrates Court Qualification

involving a portfolio of short notes on 20 cases and more detailed notes on five. This is then followed by an interview and advocacy assessment.

The Criminal Litigation Accreditation Scheme

Applicants for the Law Society accreditation scheme take a course run by providers and approved by the Law Society, and then take a practical examination where the candidate listens to a tape of an interrogation and has to indicate where and why he or she would intervene. It must be remembered that the legal system of England and Wales is an adversarial one with the defense and the prosecution/police very much feeling and acting as different parties. This may be different in other countries. Underlying the scheme is a set of three competences: knowledge—of the relevant law; skills—such as intervention in an interrogation; and standards.

The professional body—the Law Society—therefore plays a number of roles in relation to the encouragement of quality among practitioners. These go significantly beyond simple representation of their interests and the basic regulation of training to include setting and maintaining standards of qualification and training.

Beyond franchising to contracts

The government Legal Aid Board was never convinced that action by the legal professional bodies would provide a sufficient guarantee of quality of service. So it proceeded to develop a set of its own standards. The first version was known as the Franchising Quality Assurance Specification (LAFQAS) and came into effect in 1993. The Legal Services Commission, which took over from the Board in 2000, developed a whole family of standards for different types of work—including for non-legal organizations giving only advice. In April 2002, it brought all the standards together under a "Quality Mark" scheme. LAFQAS then became the Specialist Quality Mark. To obtain the Specialist Quality Mark, a firm must meet certain standards in relation to its organization. A provider needs to get the Specialist Quality Mark in order to have a contract. Officials are sent from the Commission to each firm before grant of a contract to check for compliance.

The terms of the Specialist Quality Mark are based on standards devised by the Law Society at the urging of the Legal Services Commission.[7] These represent a set of standards for running an efficient office. It is not enough for procedures to be in place; they must also be written down and demonstrably operational. Practitioners have grumbled about the bureaucracy this involves, but a number will privately concede that their business has improved by reconsidering their procedures.

Transaction criteria and auditing client files

In addition, as it devised franchising, the Legal Aid Board sought to find some way of measuring the quality of solicitors from an examination of their files. What it wanted was a process by which a non-qualified auditor could inspect files and come to some sort of preliminary judgment on how well the work had been done. To do this

the Board employed academics to advise them on quality measures that had been tried in other jurisdictions and might work in England and Wales. The academics advised the use of what they called "transaction criteria."[8] These are "a series of points and questions that a trained observer checking the file after the event would use to evaluate what was done and the standard to which it was done."[9]

The idea behind the transaction criteria is that each of a series of questions could be answered by a trained lay person, from looking at the case file.[10] This does depend on a theoretical leap—that good lawyers keep good notes—and the transaction criteria have been criticized from this perspective. However, their use has undoubtedly allowed at least an initial judgment to be made of effective quality. The researchers were always clear about what level of quality was acceptable: "a competence threshold" which was "not perfection." In management jargon, they sought "fitness for purpose." The criteria are organized so that scores attained can be expressed as percentages.

The Legal Services Commission, like the Legal Aid Board before it, has a statutory right to inspect legal aid files, overriding professional privilege. The auditor selects a small random sample of files and gives them a score. The firm passes the audit only if every file scores above the pass mark. A larger sample may be requested if some files pass and others fail.

The transaction criteria are very closely related to the detailed breakdown of procedures laid out above. They are, however, somewhat rough and ready. The Commission is now exploring other ways to judge quality, including sending staff incognito into firms to explore how they are treated ("mystery shoppers") and, notably, peer review. The Commission, like the Board, had been slow to implement peer review because of the assumed cost. However, peer review was initially implemented in relation to immigration and asylum work, where the government was concerned that some practitioners were conspiring with their clients to abuse procedures. Two practitioners, selected for their excellence, visit a firm where a question of quality has arisen and produce a reasoned analysis of a sample of cases.

The reduced numbers of legal aid providers means that peer review is much more practicable than previously. Requirements in relation to quality are incorporated within providers' contracts—and any practitioner wishing to undertake legally aided criminal work must have a contract and, in effect, be of a certain size and competence. As of March 31, 2003, there were 2,900 providers supplying services for the Criminal Defence Service.[11]

Public defender offices

Legal aid in England and Wales is still overwhelmingly provided by lawyers in private practice. There is an experiment involving eight small public defender offices, but their contribution to legal aid provision has been relatively minor to date. They do, however, give the Legal Services Commission direct insight into the work undertaken by lawyers. They are expected to act to the same quality criteria as private practice. Two

additional safeguards are designed to protect the independence of lawyers employed in public defender offices. A code of conduct for salaried employees gives some guarantee of independence. In addition, a Commissioner who is also a leading private practitioner has a role as the professional head of the service outside the strict management structure and can, thus, be used by a member of staff facing any kind of professional issue.

Conclusion

The English legal profession and its legal aid system have elements of uniqueness. It is an adversarial system; there is a split legal profession; jury trials, which are expensive, are a major part of the structure; there are lay judges in the lower courts; legal aid is well established. With all the usual caveats about comparing legal aid schemes in different cultures and contexts, the main lessons from the English experience would appear to be:

- Itemization of best practice and the resulting checklists represent a way in which best practice can be captured, encouraged and monitored.
- The identification of best practice should be undertaken by practitioners and academics working together, so that the standards have a wide degree of credibility.
- The value of an independent body, in our case the Legal Services Commission, to administer legal aid, separate from both the government and the legal profession.

Notes

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1 Legal Aid Board, *Second Stage Consultation on the Future of the Green Form Scheme 1989*, Para 21.

2 M McConville, J Hodgson, L Bridges, A Pavolvic, *Standing Accused—the Organisation and Practices of Criminal Defence Lawyers in Britain*, Clarendon Press, 1994.

3 R. Ede and E. Shepherd, *Active Defence*, Law Society, 2000.

4 R. Ede and A. Edwards, *Criminal Defence: a Good Practice Guide in the Criminal Courts*, Law Society, 2002, p.37.

5 Ibid. p.61.

6 Law Society, *Criminal Litigation Scheme, Assessment and Accreditation Procedures*, para 3.1.2. Online at http://www.lawsociety.org.uk.

7 There is a separate quality scheme for barristers, not discussed in this paper because it is likely to prove confusing in any jurisdiction which does not have a split profession like the United Kingdom's.

8 A. Sherr. R. Moorhead and A. Paterson, *Lawyers—the Quality Agenda, Volumes One and Two*, Legal Aid Board, 1994.

9 *Annual Report* 1991-92, Legal Aid Board, HC50, HMSO, 1992, p.24.

10 An example list of transaction criteria questions is available on the Justice Initiative website, http://www.justiceinitiative.org.

11 *Annual Report*, Legal Services Commission 2002-3, HC743, HMSO, 2003.