

■ *The justice debate: facing the future*

Auditing the auditors – new approaches to quality

Karen Mackay

The business of quality

In the past decade, public services have been learning lessons – both good and bad – from business. Public services now have performance targets, business plans and strategies. Concepts of quality, customer care and client satisfaction have been introduced and the language of public services has changed: we are getting used to being called customers rather than patients or passengers. These trends have been particularly prominent in the legal aid field, where the buzzwords of quality, franchising and auditing have become second nature to solicitors and advice agencies, who are learning to think of themselves as ‘suppliers’.

Though the business model for public services may have delivered some efficiencies and improvements, it also has drawbacks. It cannot address the fact that consumers of public services are often reluctant users and do not usually have a choice in the services they use. Therefore, competition is not a factor that drives up quality or drives down price, as is the case with most private, non-monopoly businesses. Consumer input in publicly funded services is weak because it is not the end user who pays. The power of the consumer is further weakened because the user is often not sufficiently knowledgeable to judge the quality of the service s/he receives. So other pressures are needed to maintain or drive up quality and keep price under control.

Who should be responsible for setting standards and controlling and enforcing quality in publicly funded legal services? In the past it was the providers themselves, both individually and collectively. Individual providers had a great deal of power over the scope of the work undertaken under public funds. In parts of the country, lack of providers meant that some areas of law – mainly social welfare law, such as housing – were not available under legal aid and its administrators had no means

of controlling what kind of work was done and where, or the standard or level to which it was done.

The professional and regulatory bodies have been the collective arbiters and enforcers of standards. However, they have not been seen to do a good job. There is a long-standing perception that the Law Society has erred on the side of the profession in investigating complaints and its regulatory mechanisms are largely ‘after the event’. In other words, something has to go wrong before the society can try to put it right. Until recently, the legal profession has been slow to recognise that there is a problem with the quality of work of many of its members, and it has tended to be reactive rather than pro-active in setting standards. However, on the positive side, there are virtues in the role of the professional bodies in determining quality because it ensures a degree of independence from funders. This remains an important protection for users.

Controlling the standards

The role of professional bodies as the determiner of standards is in question because of the perception that they have not been effective. The Lord Chancellor has made it explicit that, if the society does not improve its performance on complaints handling, it will be restricted in the use that it can make of practising certificate funds. Behind this lies a not very veiled threat that if the society cannot get its regulatory house in order, it may find itself stripped of that role altogether.

Other bodies are also, to a greater extent, involved in defining and regulating standards for legal services. The Legal Services Ombudsman has watched over the society’s complaints handling for close to a decade, and the Office of the Immigration Services Commissioner (OISC) is the first independent body created specifically to control the quality of legal services in a particular area of

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law. The society's dominance as the determiner of quality standards for the profession is also being challenged by the new regime of franchising and contracts. The Legal Services Commission's (LSC) relationship to providers has fundamentally shifted the focus of control in publicly funded services. The LSC can set standards via contracts and increasingly it is moving away from the original franchise standard that was based on the society's practice management standards.

Measuring quality

The whole thrust of the LSC's approach to quality is based on management systems. The franchise, and now contract standard, Legal Aid Franchise Quality Standard (LAFQAS),¹ is based on the industry model of Total Quality Management. Although the LAFQAS approach has brought some welcome improvements in the running of firms and a change in the management culture of legal practices, its shortcomings are becoming increasingly apparent. Franchising has been repeatedly criticised for not providing an effective measure of the quality of legal services. The only element of franchising which looks at the actual legal work being done, the transaction criteria, do not provide any real test of quality because they cannot be used to assess whether the right advice was given or the best legal strategy pursued. The audit process alone is not robust enough to detect poor performance. This was demonstrated by a number of immigration firms which were awarded a contract and where the society subsequently intervened. Indeed, the LSC's own independent researchers on the criminal block contract pilot project expressed dismay that the audit process could not detect low quality services, saying 'doubts arise from the research about the adequacy of the LSC's auditing of firms under franchising as a means of ensuring minimum quality standards'.²

The intention to develop a range of measures to assess various aspects of the quality of legal services has not materialised. Originally, it was proposed that outcome measures, client satisfaction surveys, peer review and evaluations of risk assessment would be developed and form a basket of measures that would give a greater, more in-depth picture of the quality of legal services. Outcome measures were intended to assess whether firms were getting the right result for their clients but, even for cases with a quantifiable result, it proved that there were too many variables and attempts to develop them have not been pursued further. Similarly, attempts to

develop client satisfaction surveys have foundered on the difficulties of devising questions that produce responses which can be analysed. Peer review is one of the few means of gauging quality that has commanded any support from commentators and practitioners. However, it has been deemed too expensive by the LSC to be used routinely.

Moving on the quality debate

The quality debate seems to have stalled. Although quality marks are proliferating for various services in the Community Legal Service, such as generalist advice, telephone helplines and websites, they are all based on the LAFQAS standard and take management systems as a proxy for quality of service. Given the doubts about the robustness of the LSC's auditing and the increasing bureaucratic burden of the current quality standard for contract holders, it is time to move beyond LAFQAS. It will take time to develop new quality measures and there is unlikely to be a single answer. A variety of sources should be involved in this development work and the results must have the confidence of the users, providers and funders of the service. This raises the question of which agency should be responsible for developing new quality measures.

It is no longer appropriate for the LSC to have the dual roles of being the sole arbiter of quality for legally aided services and of awarding contracts. The possibility for conflict between these roles is too great, and there is a danger that the factors that drive quality standards for legal aid work will gradually be determined by the paymaster without sufficient regard to the needs of clients or the expertise of providers. The case for this separation of roles is growing as the size and complexity of legal aid increases and as the LSC expands its remit, for example taking on responsibility for all criminal legal aid.

The Law Society, although late in developing quality mechanisms, has made some valuable contributions. Its specialist panels, such as those for child-care work and for mental health review tribunal representation, are widely respected and have been incorporated into the LSC's quality standard. However, legal aid work now extends beyond members of the professions and it is doubtful that the society or the Bar Council could deliver on broad quality standards for publicly funded work.

There are increasingly strong arguments for the creation of a separate body to take an overview of quality issues in legal aid.

Given the number of players in legal aid, there is no longer any one organisation with a monopoly of wisdom or with the ability to carry everyone with them. The OISC provides a potentially interesting model for a body concerned with the quality and regulation of legal services, but the OISC is limited to immigration services and it is too early to assess its effectiveness and whether its role of setting and enforcing standards is achievable.

The role of overseeing the development of quality measures for legally aided work should not be divorced from other aspects of the administration and the quality of the legal aid scheme overall. The services provided must be considered in conjunction with their availability and the administration of legal aid. Quality and access cannot be separated; good services are of little value if they are not readily available. The legal aid scheme would not be fulfilling its purpose – to make certain that people of limited means do not suffer injustice – if it did not ensure proper access to services. Similarly, the quality of legal aid administration cannot be separated from the standard of service that the end user receives. The good administration of legal aid is important in facilitating access to justice: a wrongly calculated eligibility test could lead to someone being excluded from legal aid. Mishandled decisions on the grant of legal aid can be challenged but can lead to vital time being lost in the preparation of a case, and poor administrative decisions can mean that applications are not being made within specified time limits. Incorrect decisions on applications for legal aid are time-consuming and expensive for all concerned.

Since the creation of the Legal Aid Board in 1988, there has been no independent overview of the administration of legal aid. The Legal Aid Advisory Committee, which was an independent commentator on the administration of legal aid, was abolished shortly after the board was established. The then Lord Chancellor took the view that the members of the board would provide him with sufficient advice on how the legal aid scheme was working. Currently the Parliamentary Ombudsman provides a limited mechanism for people with a complaint about the LSC. However, the ombudsman's role is limited to dealing with individual complaints rather than to take an overview of how the administration is operating. The LSC has in-house procedures for challenging refusals of legal aid or for resolving disputes about contracts or franchises and, of course, there is always the last resort of the courts. Though these checks provide means for some redress in

individual matters, there are no mechanisms for examining the overall operation of the LSC, of identifying systemic problems and looking at the quality of its work.

The case for an independent inspectorate

It is no longer satisfactory for the LSC to police itself and its systems. It is also increasingly anomalous for a non-governmental public body, which is responsible for administering a system of the size of the legal aid scheme, not to have some form of independent oversight. A comparison with the other agencies within the criminal justice system is instructive. Legal aid represents 7.5 per cent of expenditure in the criminal justice system, compared with the magistrates' courts and the Crown Prosecution Service (CPS), which each account for 2.5 per cent of the criminal justice system's budget. The work of these agencies, like all others in the criminal justice system, is subject to independent inspection.

The size of the legal aid budget, the complexity of the legal aid scheme, the LSC's role in awarding contracts and setting and monitoring contract standards and the LSC's expanded remit in taking on responsibility for criminal legal aid all contribute to the argument for establishing an independent body to oversee the legal aid scheme. Independent inspectorates operate across a range of public sector services, and most are concerned with the issue of quality. For example, the Magistrates' Courts Inspectorate states in its mission statement that its purpose is to 'promote improved quality of service, efficiency and effectiveness throughout the magistrates' courts service'. Other inspectorates have among their aims the promotion of good practice. It is curious that there has been no move from government to establish an independent watchdog for legal aid. Arrangements for monitoring the operation of the LSC were established in the Access to Justice Act 1999, but these consist of the LSC reporting to parliament on its own operation and have no element of independent oversight.

The establishment of a legal aid inspectorate would be timely. The main role of such a body could be threefold: to encourage the development of quality standards for legal aid work; to oversee the administration of legal aid; and to monitor access to justice. The function of overseeing the quality of administrative work of the inspected organisation is common to most inspectorates. Checking the quality of the work of legal aid offices and monitoring the quality of their decision-making could

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**Karen Mackay, Director,
Legal Action Group.**

Previously head of the Legal Services Team at the Law Society, with responsibility for legal aid policy. Before joining the Law Society, she worked at the Federation of Independent Advice Centres and Threshold Housing Advice Centre.

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lead to much needed improvements in the administration of legal aid and to a more efficient and cost-effective service for the providers and users of the service. Day to day administration has been ignored for too long and the main business of legal aid – processing applications – has become the Cinderella of the service. There should be some oversight of the consistency and correctness of decision-making. For example, we do not know how consistent decision-making is under the new Funding Code or the accuracy rates for calculations of legal aid eligibility or the statutory charge. It seems incontrovertible that given the administration costs of the legal aid scheme – which are in the region of £70 million – there should be some oversight into whether its administrators get it ‘right first time’.

An ever more important function of the LSC is the award and auditing of contracts. Monitoring this aspect of the LSC’s work would be vitally important for the proposed watchdog, as it touches on both the quality of and access to legally aided services. The work of this aspect of the LSC’s function is two-fold: monitoring contract awards and assessing access to services. The process for awarding contracts must be fair and open with proper appeal mechanisms. The development and application of the rules that guide the award of contracts should also be monitored to ensure that they are fair and proportionate and do not discriminate against any particular organisations, such as small firms.

This monitoring must take place alongside an assessment of whether sufficient criminal and civil work contracts have been awarded to ensure access to legal services. This should be a key role for an independent inspectorate. Information about the award of contracts is publicly available, but the lack of information about the size of individual contracts makes it difficult to assess capacity in any given area. This, in turn, makes it difficult to assess the extent to which the LSC is meeting its priorities, as set out in regional plans. Equally, nothing is known about the numbers of people failing to access services because of inadequate contract capacity or lack of contractors.

A third, and equally important, role for the inspectorate would be to facilitate the creation of quality standards for legal aid work. Rather than developing standards itself, the inspectorate could bring together those with some expertise, such as legal academics, leading practitioners and the professional bodies.³ It would not be for the inspectorate to take over the auditing role of LSC – this should clearly remain with it – but the inspectorate would need

to have powers to assess whether the standards used by LSC are effective. In doing so, it may end up directly inspecting services from contract holders. A similar role is played by the CPS Inspectorate, which assesses the advocacy performance of crown prosecutors. However, it would not be for the inspectorate to make decisions about individual contract holders, but to examine whether standards can be enforced effectively.

Aside from these main tasks, there would be scope for an inspectorate to cover other areas, such as monitoring new services like the public defenders offices or to undertake thematic reviews as do many other inspectorates. For example, the Chief Inspector of Prisons has carried out thematic reviews into suicides in prison, young prisoners and women in prison. Opportunities for joint working with other inspectorates would also exist; for example, the inspectorates in the criminal justice system have produced joint reports on issues such as case-work information which has suggested improvements in the management of information across all the bodies working in that system.

The role of a legal aid watchdog would be multi-faceted and further debate is needed to define its role. Yet, at the core of any such body there should be a mission to improve the quality of the legal aid scheme for all the parties with an interest – clients, funders and providers – as well as the taxpayer.

Legal Action Group has been calling for the creation of a legal services commission since the 1970s. This was seen as having a wider role than simply administering legal aid. It was envisaged it would also take an overview of the provision of legal services. LAG also called for the establishment of an independent inspectorate of legal services which was proposed to go alongside the wider role of the LSC.⁴ The LSC with an expanded role now exists. It is time for an independent legal aid inspectorate to be established.

¹ LAFQAS sets standards for financial management, personnel management, file review and supervision, business planning and client care. These standards are set out in some detail and are audited by the LSC annually.

² Lee Bridges et al, *Quality in Criminal Defence Services: A Report on the Evaluation of the Legal Service Commission’s Pilot Project on Contracting Criminal Legal Advice and Assistance*, LSC, August 2000.

³ This idea of a ‘quality council’ was first put forward by the researchers of the criminal contracts pilot project, but referred only to criminal work. This paper is proposing that it should extend to all legal aid work.

⁴ *A Strategy for Justice*, LAG, 1992.