

SESSION 5

The Mixed Model

Piloting the mixed model in New Zealand: objectives, design, implementation and evaluation

**By Frances Blyth
Manager Strategic Development
Legal Services Agency
Wellington, New Zealand**

1 Introduction

New Zealand's pilot criminal in-house legal service, the Public Defence Service pilot, has been in operation for a year. The PDS is New Zealand's first in-house (staff) service, providing criminal defence services at the two major courts in the Auckland region.¹

This paper outlines the process of development of the PDS, where the service sits in the New Zealand legal aid system, our aspirations for the PDS, its objectives and how we are evaluating the service. The paper starts with a brief discussion of international moves towards the mixed model, and suggests that the benefits of the mixed model might also be achieved through a mix of different contracting models.

2 International Comparisons

An overview of some of the jurisdictions involved in ILAG shows that there is considerable variation in the use of in-house services and external contracting²

¹ The Auckland region, situated in the north of New Zealand, is the largest metropolitan area in the country, with a total population of 1.4 million people.

² Usually called *judicare*, although this generally connotes a fee per matter or case, which is only one model of contracting for services.

to deliver legal aid services. The traditional method of delivery of services usually reflects specific historical events or situations in the development of the legal aid system in each jurisdiction. Conversely, the progressive testing of in-house models in many jurisdictions (and some testing of contracting models) is likely to be driven by common objectives, such as improvements in access to justice, value for money and organisational understanding of how to improve the system³.

It is possible for variations in definitions to confuse an understanding of the benefits of different models. For example, in Seattle, Washington, lawyers known as public defenders work not for the State, but for one of four not-for-profit agencies, each of which holds a bulk contract (negotiated yearly) to deliver a certain quantity of criminal services. In New Zealand, the in-house PDS pilot effectively holds a similar bulk contract to deliver a specific quantity of criminal services.

The "make" or "buy" distinction may therefore be a less useful way to

³ What is known in public management terminology as organisational learning and to economists as a response to the principle-agent problem.

distinguish approaches than it may seem. It may be that the design of either approach effects costs and outcomes as much as the choice of whether to make or buy. Critical issues could include whether or not there is a fee per case, but also the wider nature of the contractual relationship, including the funding mechanism, as well as operational issues such as how casework is managed within an office.

There is a range of options in the design and operation of in-house services. These can resemble models associated with the private supply of legal services or can be more akin to welfare or social service provision.

Where jurisdictions have traditionally delivered in-house services, their delivery model is often simplified, resembling social service provision, such as civil and family legal aid services in the Republic of Ireland. Our neighbours, the Legal Aid Commissions of Australia, have long since delivered under the mixed model. In-house services in Australia are generally set up to make the most of the benefits of the in-house model, even to the extent that legal aid granting and legal service delivery are in some States integrated into the one delivery model.

Where in-house services resemble private models of delivery, they may have recently replaced that model and comparisons may be sought. For example, the Legal Aid Commission of England and Wales has established the Public Defender Service, now nearing the end of a three-year pilot period. A major aim of this service is to establish clear comparisons between staff and contracted models of provision, which has influenced its design, set-up and operations. As part of the evaluation of the PDS of England and Wales, detailed data comparing costs and outcomes between contracted and salaried delivery will be reviewed.

Just as in-house services differ, there is a range of external contracting options available and some may be better suited to different situations or desired

outcomes. For example, bulk contracting the provision of specialised services in a metropolitan area, such as refugee services in a major city, to specialised suppliers, may have identifiable quality benefits for the client, as well as delivering cost benefits for the funder.

Although new approaches to contracting do exist in some jurisdictions, for example in higher cost criminal cases, generally, there is more evidence of a trend towards the introduction of in-house services than towards alternative forms of contracting.

In South Africa, legal aid provision has progressively moved from a full *judicare* model to an entirely in-house model over recent years, with a range of legal services now provided by 44 centres around the Republic.

Legal Aid Ontario is an example of a relatively recent newcomer to the mixed model, having established a Refugee Law Office in 1994 and Family Law Offices in 1999. In addition, LAO is modeling staff criminal law offices in three sites. Each service has specific objectives related to local service issues and is subject to an independent evaluation against these specific objectives.

In Scotland, salaried criminal legal aid services have been available for seven years from the Public Defence Solicitors' Office in Edinburgh, with two further offices opening in 2004 in Glasgow and Inverness. In order to facilitate a research evaluation of the PDSO, cases were initially assigned to the service but since 2000 the service has been required to attract its own clients. Following the initial research, maintaining PDSO as part of a mixed system has become a formal part of the overall policy direction in Scotland. Research and analysis continues to be carried out to compare delivery by public defence and private solicitors. The siting of each office allows specific service delivery approaches to be tested.

Despite these developments, the provision of legal aid services by external providers remains the mainstay for now for all but a few jurisdictions. This may reflect the relative novelty of the in-house service model in many jurisdictions and the need to evaluate and prove the value of these services before investing in them further. It may indicate a wish to provide the legal aid recipient with choice, perhaps because of a view that this in itself encourages quality. It may also be a sign of the practical difficulties and the costs of in-house service coverage in more sparsely populated areas. In addition, it may be indicative of the difficulties jurisdictions have experienced piloting the move away from the traditional use of private lawyers.

3 The PDS Pilot Within the Criminal Legal Aid System in New Zealand

In New Zealand, criminal legal aid is available to fund legal services provided by approved lawyers ("listed providers"). Defendants are eligible for legal aid if they cannot afford to pay for their own lawyer and where it is "in the interests of justice" for aid to be granted. Defendants can choose a lawyer with the appropriate experience from the "list of providers" if they have a preference for a particular lawyer and if not the Agency assigns them an appropriate listed provider.

In the fiscal year ended June 2004, the Legal Services Agency made 40,391 grants of criminal legal aid in New Zealand. Of these, 7,856 grants were made for matters heard in the Auckland and Manukau Courts, representing 21% of all grants of criminal legal aid.

Although the number of grants of legal aid remains stable, the cost of criminal

legal aid is increasing in New Zealand⁴. This is driven largely by increases in the cost of defending serious charges, especially drug charges, but is also influenced by new procedural requirements.

There are 276 listed providers delivering criminal legal aid services in the wider Auckland area, serving a population of 1.4 million. About 60% of these listed providers operate on their own (not in firms). This is a significantly higher proportion than in the rest of the country.

The PDS operates from two offices, one in the central Auckland CBD, close to the Auckland Court and one close to the Manukau Court in south Auckland, situated beside the local Community Law Centre. Manukau is one of the country's fastest growing areas. It has the most ethnically diverse population in New Zealand, and the highest number of people living in poverty.

Under an agreement with the Minister of Justice, the PDS can be assigned up to one third of all cases at both courts. The service is building up to this proportion of assignments over the first year and will average 29% of all assignments all cases at both courts in the first year. In the first year (to the end of June 2005), the service will have been assigned over 2000 cases, with over 90% of these being summary cases, less serious cases heard by a judge. In addition, the service will have attended 1500 Duty Solicitor hours, providing free advice and representation to defendants for their first appearance at court (most will later be granted legal aid)⁵.

At present, between the two PDS offices, the Public Defender oversees 12 lawyers (including two senior lawyers), two law clerks, three support staff and a

⁴ There is no cap on the legal aid spend in New Zealand. Although a set amount is appropriated each year for legal aid, based on Agency forecasts, spending may exceed this level if demand is higher than forecast.

⁵ Apart from the PDS lawyers, all Duty Solicitors are contracted listed providers.

business manager. At full strength, the Public Defender is planned to have a staff of 18 lawyers including 4 senior lawyers.

The PDS Pilot is the subject of an evaluation to be carried out over four and a half years by a research team contracted through Victoria University of Wellington.

4 Feasibility Study for the Pilot

The Legal Services Agency carried out a feasibility study in 2002 into the wider options to add value to the existing judicare model. The feasibility study considered alternative contracting options as well as a high level analysis of the cost benefit of in house family and criminal services.

The study found that family and criminal in-house services and bulk funding by contract, were all feasible at some courts and were capable of meeting broad objectives around improved value for money and system flexibility. The study concluded there would be less business risk in running an in-house criminal service as the first option to test. The study used current legal aid payments for cases in the Auckland and Manukau Courts (broken down into detailed matter types) as the basis for financial comparison. The study made assumptions about case mix, the salaries of lawyers and the costs of setting up and operating offices.

A consultation exercise late in 2002 indicated that the legal profession had a range of concerns about in-house services. These were largely around the way such a service might be set up, the concern being that the Agency might give preferential treatment to in-house cases and a concern that an in-house service might compromise the independence of its lawyers.

In March 2003 the Minister of Justice announced approval for further consultation over detailed planning for an in-house criminal defence service pilot to be established to provide

services at the Auckland and Manukau courts.

The Legal Services Act 2000 specifically provides for the delivery of legal aid services by salaried staff of the Legal Services Agency. The Act specifies conditions for the operation of pilot plans including:

- consultation during the establishment with local lawyers and the community
- the determination of a maximum caseload for the pilot
- that legal aid services must be available outside the pilot (that is, that clients must still be able to access private legal aid lawyers) and
- that private legal aid lawyers must still be able to offer their services to clients

The Agency's analysis showed that a criminal defence service could be feasible at a number of courts or clusters of courts throughout the country. The combination of the Auckland and Manukau courts was chosen for a number of reasons, mostly relating to the advantages of a large case throughput at these courts. This means the opportunity for economies of scale for the PDS, whilst still leaving a significant caseload for private legal aid lawyers.

In addition, the early intention was for the PDS to demonstrate quality in all aspects of service delivery. To facilitate this, the PDS should operate a large enough team of lawyers to facilitate a strong culture of teamwork, supervision and professional development.

Based on the feasibility work, the Minister agreed that the PDS could be assigned by the Legal Services Agency up to one third of all legal aid assignments at the Auckland and Manukau courts.

In New Zealand defendants granted legal aid can seek to be assigned to an appropriately qualified listed lawyer of their choice. If they do not have a preferred lawyer they are assigned a lawyer by the Agency. Nationally about 60% of assignments are to a preferred lawyer.

Under the agreement with the Minister, defendants in Auckland and Manukau would continue to be able to choose their lawyer, which could be the PDS, or would be assigned from a roster to either a private lawyer or the PDS. It was also agreed that not more than 50% of roster assignments made by the Agency would be to the PDS, another protection for the private lawyer caseload.

These approaches were designed to meet the statutory requirements around protecting access by private legal aid providers to this work, as well as provide a certain minimum level of assignments for the PDS. At the time of the design, under 30% of assignments at the Auckland and Manukau courts were to preferred lawyers. This would ensure that the PDS could access one third of all assignments before it had developed its own preferred provider base.

Based on these assignment parameters, the Agency maintained consultation with the Auckland District Law Society throughout the detailed design phase over policy and process options being considered. Over time, the concerns of the local lawyers became focused on the effect of the pilot on their livelihood.

The Agency also engaged with local community law centres and Maori and Pacific Island community representatives over the PDS design. These groups were enthusiastic about the ability of the proposed service to meet local needs and to work closely with local communities.

5 Objectives of the PDS Pilot

The objectives of the PDS pilot were established early in 2002. The primary objective of the PDS is to:

- provide high quality, consistent, independent, value for money services to legally aided persons

In addition, the PDS aims to:

- improve system flexibility and provide opportunities to test different approaches to meeting cultural and other needs of clients
- collect benchmarking information to improve the Agency's understanding of issues facing private practice lawyers when providing legal aid services to the public
- provide opportunities to test new and innovative approaches to the management of legal services, and to encourage the development of areas of expertise

These objectives have shaped the pilot design and its role within New Zealand's existing judicare system.

The PDS is to demonstrate a superior level of professional leadership. In the end, if the fiscal cost of this is too high, the future of the pilot may be questioned.

Whilst there is no doubt that the success of the service will be measured on its financial performance, the formal objectives are intentionally heavily focused on meeting needs, responsiveness and reducing barriers to access, innovation in approaches and the opportunity to develop expertise.

The pilot provides an important opportunity to collect information about the effort and resources required to deliver quality services and about what might influence the level of quality of

service delivery. However, unlike in England and Wales, the New Zealand PDS has not been set up on a strictly competitive basis with the private profession – this was not the intention. Instead, we are seeking to make the most of a mixed model system.

6 Service Design

Translating the outcome vision for the PDS and the formal objectives into an operational service design took an operational team nine months from August 2003.

Under the business case developed in 2003 to seek an investment decision by the Government, the pilot is forecast to have “repaid” set-up costs by year four (2007) and be making savings over the cost of private legal aid for the same mix of cases.

The funding mechanism for the PDS has influenced the design of a number of aspects. The mechanism is a bulk transfer from the legal aid appropriation each year to fund the PDS. Although not a formal objective of the PDS, the funding mechanism offers a valuable experience of a bulk contract with one provider for the delivery of a set volume of services.

In line with the objectives and supported by the funding mechanism, the Agency largely designed business processes that take advantage of the relationship between the Agency and the PDS. Wherever possible, transactions and processes that occur in the assignment of cases to private legal aid providers have been replaced by simplified systems. The most fundamental changes are that the assignments are allocated to the Public Defender each day, not to individual lawyers within the PDS and the quantum of aid for an assignment to the PDS is not established by the Agency.

Against these advantages, the PDS is subject to constraints and costs that a private provider may not face, such as a requirement to operate financial,

information management and other accountability systems appropriate for a State agency.

7 Implementation of the PDS Pilot

The newly appointed Public Defender and PDS Business Manager worked alongside the establishment team for six months on final design work on business processes and systems. These included internal processes relating to financial and other business systems as well as assignment and case management processes. Processes for transactions between the Agency and the PDS were also established.

During the establishment period, the concerns of the local lawyers about the effect of the pilot’s caseload became a major issue, leading to exchanges of legal opinions about the legality of the proposed pilot and the prospect of legal action by the local District Law Society and the Criminal Bar Association to stop the pilot development.

The Agency undertook an analysis of the current assignment profiles for local lawyers to identify those whose caseload might be most affected. In addition, an audit of the existing assignment practices was carried out to establish the basis of existing assignment levels. To ease concerns, the Agency agreed to new limits on the PDS caseload during the first year of operation.

Recruitment of PDS lawyers was undertaken early in 2004, with most of the lawyers appointed from outside the Auckland area. The calibre of applicants at all levels varied considerably. The final team appointed was notable for the variety and depth of previous work experience and its wide ethnic mix.

During April 2004, the new PDS lawyers attended a comprehensive four-week training course developed by the Public Defender.

The Agency has developed a formal Statement of Service covering the PDS

that sets out the Agency's expectations of and undertakings in respect of the PDS. The Statement (which can be found on www.lsa.govt.nz) covers the parameters of the services to be provided by the PDS, the relationship between the Agency and the PDS and the professional obligations of PDS lawyers including a specific Code of Conduct.

The PDS took on its first legal aid assignments on 3 May 2004.

8 Evaluation of the PDS Pilot

Under the Legal Services Act 2000, the PDS Pilot evaluation must address

- the extent to which the pilot complies with the statutory conditions⁶
- the effect of the pilot on other parts of the justice system, such as court processes, other schemes and the legal profession

The Minister of Justice must table the evaluation in the House of Representatives within six months of receipt of the report.

The Agency established an evaluation advisory group (EAG) late in 2003 to oversee the evaluation set up and implementation. The EAG comprises representatives of Ngati Whatua, the iwi (local tribe) of the Auckland isthmus, the Ministries of Justice and Pacific Island Affairs, the Auckland District Law Society, the New Zealand Law Society, the Criminal Bar Association and the

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Legal Services Agency, as well as an independent researcher.

The EAG assisted with the development of a research specification⁷ for the research evaluation and the selection of the successful research team. It has also overseen the finalisation of the full research plan and advised on approaches to gathering information.

The evaluation plan for the PDS can be found on www.lsa.govt.nz

The evaluation is to be carried out over four and a half years, with the final report due in December 2008. An implementation report will be available at the end of June 2005, which will include the results of initial interviews regarding intervention logic and implementation issues, as well as the proposed impact evaluation design and methodological details for client surveys.

9 Results to Date

Possibly the biggest challenge for the Agency over the past year in respect of the PDS has been the development of our new relationship with the service, for example, finding the balance between the interests of the PDS and the wider interests of the Agency, where these are not aligned. An example of this is a desire on the part of the PDS to reduce its share of Duty Solicitor work, compared with the Agency's wish to have PDS staff demonstrate better practices to the private lawyers.

Another main challenge for the Agency continues to be our relationship with private legal aid providers in the Auckland region. Some lawyers in particular are openly antagonistic towards the Agency over the PDS.

⁷ Lee Bridges and the evaluation team for the Legal Aid Commission's Public Defender Service in England and Wales generously agreed to peer review the research specification and provided valuable comments.

During its first year, the PDS has established its credibility within the wider justice sector. Initial feedback as part of the implementation phase of the formal PDS evaluation from Judges, Courts, Police and Corrections has been positive and in some cases highly complimentary. Improved approaches to case management being implemented by the Public Defender are discussed in a recent New Zealand Law Commission report proposing reforms to pre-trial processes⁸

However, interviews with private legal aid lawyers in Auckland and Manukau, also undertaken as part of the PDS evaluation, indicate they are not confident in the ability of the PDS to be a cost effective service. They are also sceptical of PDS quality and whether the PDS can better meet the needs of clients.

As discussed earlier in this paper, the PDS can be assigned up to half of the cases where a preferred lawyer has not been nominated. With the arrival of the PDS, the level of preferred lawyers sought in the Auckland and Manukau courts has increased by over 20% to 50% of all assignments, presumably in direct response to the challenge that the PDS poses. The PDS is now beginning to build up its own preferred lawyer status, but the lack of available roster assignments means the PDS has not achieved the forecast percentage of assignments over its first year.

It was always expected that the PDS advantage over private legal aid lawyers in terms of cost would be in its ability to effectively manage large quantities of low-level cases. It is clear already that PDS lawyers want the satisfaction of more serious cases and are seeking greater assignment of these than originally modelled.

Most of the more serious cases the PDS has been assigned have not yet reached trial, but will do so over the coming months. This will challenge the caseload management systems of the pilot and

the financial planning model, as well as the mettle of its lawyers.

We are confident in the ability and the commitment of the PDS lawyers to deliver high quality, client-oriented services. We await the ongoing assessment of the costs of this, as well as evidence of benefits for the overall mixed model system. Finally, we look forward to the contribution the PDS can make to our understanding of the nature and role of quality in publicly funded legal services.

⁸ In draft only at the time of writing.