

Legal Aid Franchising: Food For Thought or Production Line Legal Services?

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INTRODUCTION

The Victorian legal aid system has faced unprecedented change during the 1990s. The November 1994 release of the Report of the *Review of the Delivery of Legal Aid Services* saw the structure and performance of the Legal Aid Commission of Victoria (the 'LACV') strongly criticised. The LACV has now been replaced with a smaller management body called Victoria Legal Aid ('VLA'). VLA is run by a five member Board with three members nominated by the State government and the remaining two by the Commonwealth government.

The LACV had also instituted a range of reforms itself, this process having gained momentum following a steep decline in its financial position during 1991. Grants of legal assistance were dramatically curtailed in an effort to contain the LACV's accumulated debt to private lawyers for work already done for legally assisted clients.¹ These LACV-initiated changes were focussed on cutting services with little attention being paid to the way in which those services were being, or could be, delivered. During 1992, the LACV also comprehensively reviewed its structure with a restructure proposal being adopted by the Board of Commissioners in January 1993.

Seemingly as a response to the LACV's cost-cutting focus, the debate in relation to the provision of legal aid services began to broaden in 1993. Increased attention was paid to new ways in which services could be delivered and, significantly, to the notion of quality of service. Previously, discussion of service delivery issues tended to revolve around the appropriateness of the use of salaried lawyers and cost comparisons with respect to the handling of legal aid assignments.² Various mechanisms have recently been promoted as being capable of enhancing legal aid service quality. Several of these were examined by the LACV and are still being considered by VLA. The most significant of these service developments relates to the offering of legal aid 'franchises' to suitable service providers.

Despite the broadening of the debate, concerns still exist as to the strength of the commitment to the improvement, or at least maintenance, of service

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¹ At July 1990, the accumulated debt was \$3.1 million. By July 1991, it was \$5.4 million. The major debt reduction step taken was to reduce the budget for grants of assistance for 1991/92 from 36 000 to 30 000. Had the LACV not taken steps in late 1991, it was forecast that the accumulated debt would have been \$8.5 million by July 1992: J Giddings, 'Legal Aid in Victoria: Cash Crisis' (1993) 18 *Alt LJ* 130, 132.

² For an example of the focus of previous study, see G Meredith, *Legal Aid Cost Comparison — Salaried and Private Lawyers* (1983). This research study was commissioned by the Commonwealth Legal Aid Council.

quality. Such concerns are heightened by the possible incompatibility of the dual objectives attributed to some such service changes; namely reducing cost and improving quality. There are also difficulties involved in defining, measuring and monitoring legal quality and competence. These difficulties are exacerbated by the disparate nature of the interests of the various legal aid stakeholders. A further concern exists that even if the advocates of change are committed to service quality improvement, governments, the major funders of legal aid,³ may choose to adopt only those aspects of these developments which will result in cost savings, while discarding those aspects designed to improve service quality.

This article reviews developments in the United Kingdom ('UK') in relation to franchising and then considers their implications for legal aid service delivery in Australia. The article's Australian focus is on Victoria, the state which has shown the greatest interest in these and similar service developments.⁴

FRANCHISING — WHAT IS IT?

Legal aid franchising involves particular service providers being given additional functions and benefits,⁵ what might be described as preferred supplier status, in return for their agreement to meet a range of requirements above those which must be met by other service providers. In particular, franchising involves a legal aid authority delegating to private legal practitioners its function of assessing applications for legal assistance. A client can have their application for legal assistance considered by the solicitor they see rather than the application having to be sent to the legal aid authority for assessment.

In the UK, franchising has been described as the most significant development in legal aid since the 1945 report of the Rushcliffe Committee on Legal Aid and Legal Advice.⁶ Franchising has also been viewed as possibly

³ In 1992/93, \$175.5 million of the \$251.9 million combined income of Australian Legal Aid Commissions came from Commonwealth and State government grants: see Access to Justice Advisory Committee, *Access to Justice — An Action Plan* (1994) 233.

⁴ In November 1994, the Legal Aid Commission of Queensland ('the LACQ') issued a discussion paper, *The Tendering of Assigned Matters*. Tendering has been introduced by the LACQ for Magistrates Court duty lawyer work: see H Fordham, 'Legal Aid: Rostering to Tendering' (1995) 15 *Proctor* 6. There are also instances (some longstanding) of Legal Aid Commissions contracting out work without use of a 'competitive' process to determine the successful contractor. The arrangements between both the LACV and the Legal Aid Commission of New South Wales and provincial Law Associations for the provision of Magistrates Court duty lawyer services are examples of such a process: see M Cramsie, 'Contracting For Legal Aid: The Australian Experience' (1994) *Legal Aid in the Post-Welfare State Society - Proceedings of the International Conference on Legal Aid, April 13th-16th 1994, The Hague/Amsterdam* 381.

⁵ A Sherr, R Moorhead, A Paterson, *Lawyers — the Quality Agenda, Volume 1* (1994).

⁶ R Smith, Director of the Legal Action Group, 'Franchising's "Running Sore"' (June 1993) *Legal Action* 4. For a brief outline of the main recommendations of the Rushcliffe Committee, see Legal Action Group, *A Strategy for Justice* (1992) Legal Action Group 4-5.

leading to 'an entirely new conceptualisation of legal service delivery which is a hybrid of public service and private practice models'.⁷

The Legal Aid Board of England and Wales (the 'LAB') has defined franchising as

a system of non-exclusive contracting whereby solicitors and others might enjoy certain benefits and exercise certain delegated powers if they met criteria of competence and efficiency.⁸

That definition is likely to run into problems particularly in relation to the issue of exclusivity.⁹ In other commercial contexts, franchising has related very clearly to the exclusive use of some item of property, generally a brand name, within a certain geographic area. The franchisee generally pays for this exclusive right. Another difficulty relates to which groups, apart from solicitors, would be able to participate. Will non-lawyers be able to participate? Why only solicitors and not barristers?

I would suggest the following definition may be more useful:

A system of special arrangements made with eligible service providers for the delivery of legal aid services, including delegation of the power to grant legal assistance.

At present, it has not been proposed either in Victoria or the UK that a solicitor must hold a franchise to be able to do legal aid work, although this may occur in the future. However, the special benefits which will become available to franchisees will encourage solicitors to seek to participate in such a scheme. To date, the focus of franchising, both in the UK and Victoria, has been on solicitors rather than barristers. Solicitors tend to be the first point of contact for prospective legal aid applicants and much of their work is file-based in contrast to the court or tribunal-based advocacy work of barristers. The LACV has observed that the nature of barristers' work is such that practice management and competency standards may not be easily applicable.¹⁰

In return for these additional powers, practitioners must address a range of issues raised in practice management standards designed to ensure that a certain level of quality of service is provided to legal aid clients. Franchise holders also have to agree to increased file-based monitoring of their performance. If franchising can be shown to enhance the delivery of legal services, it is likely that the benefits will be felt beyond the legal aid system. The mechanisms developed to measure quality will be applicable across a significant part of the legal services market.

Legal aid franchising arrangements are most advanced in the UK where, during August 1994, the LAB entered into more than 1000 franchising contracts with solicitors' offices, advice agencies and law centres.¹¹ The LAB

⁷ Sherr et al, op cit (fn 5) 105.

⁸ Editorial, (April 1993) *Legal Action* 3.

⁹ Sherr et al, op cit (fn 5) 13-15.

¹⁰ Legal Aid Commission of Victoria, *Eligibility to Handle Legally Assisted Cases* (April 1994) 12 (referred to hereafter as 'LACV, Eligibility').

¹¹ Legal Aid Board, Press Release: *Legal Aid Franchising Launched*, 1 August 1994.

requires franchisees to submit to audits of their work on the files of legally assisted persons in return for greater powers and preferential payment arrangements.

The LACV commenced a 12 month Franchising Pilot Project on 5 November 1994. Following a period seeking input on the draft report from the pilot franchisees, a final report was presented to the VLA Board in June 1996. The VLA Board has deferred any decision relating to the introduction of franchising until January 1997. Six selected law firms¹² were given the power to grant legal assistance in summary criminal cases. The pilot was developed following consideration of comments received in response to a discussion paper released in August 1993,¹³ and focused primarily on the ability of the private practitioners involved satisfactorily to apply the various guidelines and tests used by the LACV in assessing applications for assistance. The pilot did not involve any monitoring of the standard of legal work performed by either solicitors or barristers on legal aid files. The Pilot concluded in early December 1995. A Final Audit Report will be prepared during March and April 1996.

Interestingly, in the UK, criminal law has been described as 'the one area where it is generally agreed ... that there is little benefit in having a franchise'.¹⁴ It appears that this description is based on the view that the relatively large volumes of cases and quick case turnover involved in summary crime would make it more expensive for a practitioner to comply with the quality requirements which a franchise would entail.¹⁵

The grant-administration focus of the existing Victorian franchising pilot appears to have been prompted by concerns regarding the expensive nature of the LACV's function of assessing applications for legal assistance and assigning and monitoring the progress of successful applications. In 1993, the Victorian Auditor-General produced a special report on the LACV in which the assignment process was described as 'complex, unwieldy and uneconomic, with significant duplication of effort and record keeping. The assignment process adds approximately 20 per cent to the average cost of a case.'¹⁶ The LACV also addressed this issue within its own salaried specialist legal practices by delegating to senior caseworkers the power to grant legal assistance. Salaried solicitors had this power delegated to them on a trial basis in March 1994 and continuation of the delegation was approved in October

¹² Balmer & Associates Pty, Cahills, McCarthy McGuinness & Co, Paul A Vale Pty, Peter J Jacobs and Tyler Tipping & Woods.

¹³ Legal Aid Commission of Victoria, *Franchising Discussion Paper* (1993).

¹⁴ F Bawdon, 'The Birmingham Pilot' (May 1993) *Legal Action* 7.

¹⁵ Other possible explanations are that the operation of legal advice in custody arrangements pursuant to the *Police and Criminal Evidence Act* 1984 (Eng) results in defendants continuing to use the lawyer (not necessarily a franchise holder) who attends at the police station to advise them or that those defendants who have previously had contact with the criminal justice system are likely to have already established a relationship with a particular practitioner.

¹⁶ Auditor-General of Victoria, *Special Report No 28, Legal Aid Commission of Victoria* (1993) 35. It is arguable that this added expense relates not only to the initial assigning of an assisted matter to a private practitioner, but also to the important quality-oriented function of reviewing the merits of applications and then monitoring the process of assisted matters.

1994.¹⁷ Further, the LACV-initiated *Project 2000* has resulted in increased efficiency of administrative processes with particular emphasis on the assignments function.¹⁸

GOVERNMENT EXPECTATIONS

There is a clear expectation on the part of the Victorian government that initiatives including franchising and competitive tendering will be introduced by the LACV in the near future. The *Legal Aid Commission Act 1978* has been amended to facilitate these developments. During her second reading speech in relation to the *Legal Aid Commission (Amendment) Bill 1994*, the Victorian Attorney-General, Jan Wade, referred to the LACV's process for assessing applications for assistance as,

complex and uneconomic with significant duplication of effort. Solicitors spend a great deal of unpaid time communicating with the commission and the commission expends significant resources in dealing with the applications.¹⁹

OTHER VICTORIAN DEVELOPMENTS

The merits and likely impact of franchising are contingent on whether such an initiative is introduced in conjunction with other initiatives such as competitive tendering of cases and restrictions on the eligibility of practitioners to handle legal aid work. As such, the LACV's position on these potential reforms will now be outlined.

Tendering Out of Significant Cases

In August 1994, the LACV approved a policy requiring open tendering of certain 'significant cases'.²⁰ This policy applies to the work of both solicitors and barristers. The LACV anticipated that fewer than five such cases would be identified each year. Criteria have been adopted to assist the identification of significant cases. The criteria are:

- (1) The anticipated cost of the case — a threshold of \$30 000 in anticipated solicitor's costs is used;
- (2) the anticipated quantum of damages — the example given is of potential damages of \$500 000 in a medical negligence case;

¹⁷ See Legal Aid Commission of Victoria, *Memorandum to Commissioners from Liz Gray regarding Assignments Pilot* (October 14 1994).

¹⁸ Legal Aid Commission of Victoria, *16th Statutory Annual Report 1994/95*, 20-1.

¹⁹ *Parliamentary Debates*, Legislative Assembly (Vic), March 31 1994, 777.

²⁰ Legal Aid Commission of Victoria, *Memorandum to Commissioners from Peter Gandolfo regarding Tendering Significant Cases* (12 August 1994).

(3) cases which by their very nature are unique or extraordinary — the recent case involving the Department of Health and Community Services and the Children of God group is used as an example;²¹ and

(4) cases of particular public interest — product liability cases.

This appeared to be the clearest indication yet of the LACV's intention to make use of its market strength to reduce the cost of representation in major cases. However, at the time of writing, no case has yet been designated as significant. A period of 15 months without any such designations suggests either that the LACV is not strongly committed to this change or that the criteria require revision if the policy is to have any effect. The merits of tendering out are far stronger in relation to major one-off cases involving either very novel legal issues or very substantial legal aid expenditure or both. It will be important to monitor any attempts to extend application of such a process to other cases.

In the UK, the Law Society of England and Wales, and others have been very uneasy about the possible linking of competitive tendering to franchising.²² The Lord Chancellor has fuelled the Law Society's concerns with references to the possible future introduction of such tendering and to franchises being exclusive in nature. The Lord Chancellor has also indicated that while he has no firm proposals for the introduction of competitive tendering in conjunction with franchising, he is 'interested in exploring the possibility of developing mechanisms which would enable firms to compete on price against an agreed quality standard.'²³ By contrast, the LAB has stated repeatedly that it has no plans to introduce competitive tendering.²⁴ Franchising has been promoted as furthering the dual objectives of reducing service costs and increasing service quality. Given the very strong emphasis on cost reduction which underpins competitive tendering, any linking of these two initiatives is likely to result in cost reduction becoming the paramount objective sought to be achieved through such developments. Moorhead, Sherr and Paterson have observed that 'the possibility of competitive tendering increasingly emphasises a conflict between the [legal] profession's role as protector of standards and the economic imperative of staying in business.'²⁵

²¹ This well publicised case involved applications being made by the Victorian Department of Community Services to the Childrens Court for protection orders in relation to children of members of the Children of God group. Various related applications were made to the Supreme Court by parents of the children in relation to the actions of the Department of Community Services.

²² See J A Holland, 'Franchising of Legal Aid in England and Wales' (June 1994) *International Legal Practitioner* 47.

²³ Legal Aid Board, *Annual Report 1993/94*, 35.

²⁴ See *Legal Action* (March 1993) 4, (May 1993) 4, & (June 1993) 7.

²⁵ R Moorhead, A Sherr & A Paterson, *Franchising: Assessing the Quality of Legal Aid Lawyers?* (paper presented at the Conference on Law and Legal Services, Low Wood, England, July 1993).

Restricting Eligibility to Handle Legally Assisted Cases

The LACV released a discussion paper²⁶ in April 1994 which considered the introduction of limitations on the right of solicitors to handle legal aid cases. Solicitors would have to comply with certain Practice Management Standards²⁷ in order to continue to have the right to handle legal aid cases. Unfortunately, the discussion paper assumed that franchising arrangements would be introduced following the Pilot. It also failed to grapple with the difficult issue of quality assurance mechanisms for the work of barristers. In the more than 12 months since responses were received, the LACV has so far failed to follow them up.²⁸ This is unfortunate given that the introduction of threshold Practice Management Standards is one initiative which relates more to quality concerns than cost.

It is important to encourage initiatives which seek to ascertain and measure the quality of services provided to legally assisted persons, both by lawyers and non-lawyers, and then to take steps to improve the quality of such services. Franchising is by no means the only mechanism available and attention needs to also be paid to other mechanisms. One of the difficulties involved in arrangements such as franchising is that it remains unclear whether the dual objectives of reducing cost and improving service quality can be achieved simultaneously. Franchising should be introduced only if it is established that it will not reduce service quality. There is clearly potential for the quality banner to be flown to justify the introduction of what amount to cost-cutting mechanisms.

It has been suggested that the greatest value in articulating a detailed set of quality measures will be that of engendering an open debate on the nature and detail of legal work and how that work should be carried out.²⁹ If those involved approach the issue from this perspective, the potential for improving legal aid service delivery will be significantly enhanced.

SETTING THE SCENE FOR LEGAL AID FRANCHISING

As well as altering the manner of legal aid service delivery, franchising will involve a major change in the relationship between legal aid authorities and the private legal profession. This can be seen as part of the change in the broader relationship between governments and the legal profession. The Victorian government is seeking to fundamentally alter the existing regulation of

²⁶ LACV, *Eligibility*, op cit (fn 10).

²⁷ The Discussion Paper proposed that the standards cover such issues as processes for handling complaints, supervision and review of files, availability of legal reference material and keeping clients informed of progress. The criteria outlined were those which had been used for the UK Legal Aid Board franchising scheme.

²⁸ See Legal Aid Commission of Victoria, *Memorandum to Operations Committee from Acting Director of Family Law (Cathy Lamble) regarding Specialist Panels* (15 September 1995). Ms Lamble notes that the LACV had 'never completed a detailed analysis of responses or presented a final report to the Board.'

²⁹ Sherr et al, op cit (fn 5) xvi.

the legal profession.³⁰ The Commonwealth government's *Justice Statement*, launched in May 1995, has expressed a strong commitment to reform of the legal profession³¹ following reports from, among others, the Access to Justice Advisory Committee³² and the Trade Practices Commission.³³

If franchising is to succeed in providing better quality services to legal aid recipients at a lower cost to the legal aid authorities and the government, this will require private practitioners to be more accountable to the authorities than ever before. The relationship between legal aid recipients and legal aid authorities is also likely to change. Substantial work will be required to determine what it is that should be done by lawyers, and others, when they are acting for a legally assisted person.

Whose Interests are to be Considered? Are Any Of Them Paramount?

It is important to recognise the different players who should be (or who will insist on being) considered in any decision-making process regarding franchising. Who should decide what is provided by whom, to whom, at what price and with what conditions attached? Having determined whose interests must be considered, what relative weightings should be given to each such interest group? Travers observes that there

has as yet been little empirical research on the complex relationship which might exist between professionals, their employers and different consumer groups in a period of rapid institutional change. The problem for quality assurers lies in how far to take account of the subjective and sometimes conflicting understandings of what constitutes a good service which are held by different groups of professionals and clients.³⁴

It has also been noted in the UK that 'the difficulty presented by having a public service mediated by participants in a private market is exacerbated by the Lord Chancellor's Department's increasing control over remuneration'.³⁵

The following groups need to be considered:

The Clients

The views of those who receive services from the legal aid system need to be taken into account when assessing the performance of that system. In the past, the charitable nature of legal aid encouraged the notion that recipients should be thankful for whatever assistance they received. There is now a greater

³⁰ See Department of Justice, *Reforming the Legal Profession: Report of the Attorney-General's Working Party on the Legal Profession* (August 1995); and the *Legal Practice Bill* 1996.

³¹ Attorney-General's Department, *The Justice Statement* (May 1995) Ch 3.

³² Access to Justice Advisory Committee, op cit (fn 3) Part III.

³³ Trade Practices Commission, *Study of the Professions — Legal* (1993).

³⁴ M Travers, 'Measurement and Reality: Quality Assurance and the Work of a Firm of Criminal Defence Lawyers in Northern England' (1994) 1 *International Journal of the Legal Profession* 173, 176-7.

³⁵ Moorhead et al, op cit (fn 25) 8.

recognition of the value of consumer input in the assessment of services. Blake describes reforms arising from this greater recognition as

an attempt to introduce a different method of accountability [in the provision of public services], not just through the traditional constitutional structures, many of which have been 'captured' by the professions that provide the service, but through a bottom-up customer orientated approach.³⁶

In the legal aid context this awareness of clients has no doubt been heightened by the moves of legal aid commissions ('LACs') to increase their revenue by requiring greater contributions from assisted persons towards the legal costs incurred on their behalf. Income derived by Australian LACs from client contributions more than doubled between 1987/88 and 1992/93, from \$18.5 million to \$40.3 million.³⁷ The LACV continues to generate more revenue from client contributions than any other LAC, with contributions in 1993/94 totalling \$10.686 million, 13.8% of total revenue.³⁸ For 1994/95, contributions received fell to \$8.328 million, 11.2% of total revenue.³⁹ The LACV attributed this fall to the reduction in assisted family and civil law cases since 1991/92. Such cases tend to generate larger contributions and do so over a longer time frame.

Despite some acknowledgment of an increasing role for clients in assessing the legal aid system, the ability of clients to make informed decisions about the legal aid service they receive continues to be called into question. Sherr, Moorhead and Paterson have stated:

It is surely unrealistic to expect most clients to be able to assess the depth and currency of their lawyer's legal knowledge or their skills as negotiators, mediators or advocates, let alone their management skills and motivational skills. This is not to deny that client satisfaction can be a valuable performance indicator for lawyers so far as it goes — it is just that it cannot normally go all that far — at least on its own.⁴⁰

The LACV quoted the above statement in its discussion paper regarding eligibility to handle legally assisted cases in the context of the significance which should attach to the right of a legally aided client to choose the solicitor they want to handle their case.⁴¹ The operation of the solicitor of choice principle has been seen as enabling some quality control by the client. In Victoria, with its mixed system of legal aid service delivery involving salaried and private solicitors, preservation of this principle has been crucial to the ability of

³⁶ A Blake, 'Publicly Funded Legal Services in England and Wales: Policy and Administration in the 21st Century' (1994) Unpublished Paper, 10.

³⁷ Access to Justice Advisory Committee, *op cit* (fn 3) 233.

³⁸ Legal Aid Commission of Victoria, *15th Statutory Annual Report 1993/94*, 54.

³⁹ Legal Aid Commission of Victoria, *16th Statutory Annual Report 1994/95*, 50.

⁴⁰ Sherr et al, *op cit* (fn 5) 10.

⁴¹ LACV, *Eligibility*, *op cit* (fn 10) 8.

the private legal profession to maintain the share of legal funds which are paid to its members.⁴²

It is disconcerting that the notion of client input has been limited to this choice of practitioner, which takes place before any service is provided to the client. Input from clients has not been sought in relation to any post-assistance analysis of the quality of service received.

Consumer input must be given a significant role in the process of evaluating the performance of legal aid service providers. In May 1993, Gillian Bull from the UK National Consumer Council expressed concern about the lack of priority given to the notion of user feedback in the franchising transaction criteria which the LAB was developing: 'One major problem seems to be the emergence of a mind-set that argues that clients are just not able to judge the quality of legal work.'⁴³

Research in the UK has indicated that there are significant positive correlations between client satisfaction and low rates of non-compliance by solicitors with the largest section of the assessment criteria used for research purposes during the Birmingham franchising pilot. It was stated that there is 'an important congruence between the lawyer's fact gathering and the client's satisfaction.'⁴⁴ Gillian Bull has also suggested that consumers need access to information about what standards to expect, and about those attained, before they can make sensible comments.⁴⁵ It will, of course, be difficult to make such information available in an accessible form. While aware of its limits, Sherr, Moorhead and Paterson consider that it 'would be plainly perverse for a system to promote quality which took no account of the client's viewpoint on the quality of service'.⁴⁶ To date, there has been no similar acknowledgment from the LACV of the need for client input.

As well as individual legal aid recipients having an input into assessing the services provided to them, client views should also be sought during the process of setting the standards to be expected from service providers. The diverse nature of legal aid clients means that substantial work will be required in devising mechanisms to obtain such input. Abel observes that 'the only thing that some recipients of legal aid share is a common legal problem'⁴⁷ and that 'the clientele of legal aid does not lend itself to organisation'.⁴⁸ In the USA, Tull has referred to the use of 'client councils serving as liaisons with the client community and providing input regarding a program's policies and operation is a role that is largely missing'.⁴⁹

⁴² See s 10(e)(ii) of the *Legal Aid Commission Act 1978* (Vic) which required that regard be had by the LACV to the desirability of an assisted person being entitled to select a practitioner whom he wishes to act for him when determining work allocation guidelines.

⁴³ Smith, *op cit* (fn 6) 4.

⁴⁴ Moorhead *et al.*, *op cit* (fn 25) 19.

⁴⁵ Smith, *op cit* (fn 6).

⁴⁶ Sherr *et al.*, *op cit* (fn 5) 107.

⁴⁷ R Abel, 'Law Without Politics: Legal Aid Under Advanced Capitalism' (1985) 32 *UCLA Law Review* 497.

⁴⁸ *Id* 474, 496.

⁴⁹ J Tull, 'Implications of Emerging Substantive Issues for the Delivery System for Legal Services for the Poor' (May 1990) 24 *Clearinghouse Review* 17, 20.

The Legal Aid Authorities

There is significant value in having a strong legal aid authority which is independent of government. Apart from being able to initiate research on areas of importance to legal aid, such authorities can play an important role in brokering between the other participants in the system, resisting calls from government to reduce expenditure if this would create difficulties for legal aid clients, and breaking down unreasonable resistance from the private legal profession to reforms to the legal aid system. The LAB is better placed than Australian legal aid authorities to play the role of the independent broker as it cannot be seen as arguing the case for use of its own salaried legal service.

Of course, if legal aid authorities are strong and independent they will 'inevitably touch upon [issues of accountability and legitimacy of service providers] and it will cause a tension between them, their sponsoring Department and the professional service providers'.⁵⁰ The independence of Victoria Legal Aid ('VLA') is seriously undermined by s 12M of the *Legal Aid Commission (Amendment) Act 1995* which gives the Attorney-General power to direct VLA in relation to performance of its functions or exercise of its duties, and any policies, priorities or guidelines of VLA.

It must also be determined whether any franchise type arrangements which are introduced for the private legal profession should also apply to the salaried staff employed by LACs. LAC management may well feel it will be easier to gain private practitioner acceptance of franchise arrangements if similar mechanisms are used for salaried legal aid staff. The use of franchising and competitive tendering arrangements for salaried staff would be problematic as the failure of the salaried legal practice to obtain a franchise or tender for any one period would have dramatic consequences in that the practice would have to be dismantled. Harden describes such competitive tendering as possibly being a sudden death process for in-house units.⁵¹ If its tender was unsuccessful, a salaried practice would, by its very nature, be unable to take on non-legal aid work with a view to maintaining operations until the next round of franchises or tenders is decided.

Further, there are significant differences between the types of services provided by salaried and private lawyers which will create difficulties for the introduction of such mechanisms in a manner which will enable meaningful cost and quality comparisons to be made.⁵² As there is no salaried legal aid service in the UK, it is not possible to draw on any LAB experience. In the United States, a requirement that program grants by the Legal Services Corporation be awarded on a competitive basis was introduced by Congress in 1988. Singsen has suggested that the use of competition in awarding such

⁵⁰ Blake, *op cit* (fn 36) 9.

⁵¹ I Harden, *The Contracting State* (1992) 18.

⁵² The Commonwealth Government is seeking to establish a National Costing Model based on findings outlined in the June 1995 report, *Cost Comparison Project: Final Report* prepared by former LACV Director, Andrew Crockett.

grants is likely to prove expensive and destructive.⁵³ He notes that there is a lack of a consumer based market for legal services for the poor and that the clients of legal services programs are 'no more than third party beneficiaries'⁵⁴ of transactions between programs (as sellers of services) and the Legal Services Corporation (as buyer).

The Private Profession

Developments such as franchising have the potential to cause a major change in the workings of the legal profession. Moves toward improved accountability and greater control will be perceived as a threat to the profession's independence. Abel refers to the profession being in the 'contradictory position of seeking economic benefits while resisting state interference'.⁵⁵ Hill has observed that there has been an assumption that professional autonomy has been important in enabling professionals 'to limit the extent to which they are required to play social control roles, but may it not rather be the case that it limits the extent to which the laity can control the professionals?'⁵⁶ Of course, legal aid authorities would face enormous difficulties in attempting to implement such reforms without at least acquiescence from the legal profession.

The quite divergent views held by its members create difficulties for the organised legal profession in its attempts to present a united position on legal aid issues. Moorhead refers to franchising in the UK as possibly being crucial to the development of a salaried legal sector. He then notes that such a development 'would present the Law Society with an obvious and urgent case of its membership's interests requiring protection'.⁵⁷ He also considers that 'any suggestion that the salaried sector will also employ solicitors who will also constitute part of the membership is unlikely to cut much ice'.⁵⁸ Abel points to conflicting views being taken by private practitioners specialising in legal aid cases and those with more general practices. The profession has tended to support generalist lawyers by seeking to have legal aid programs structured so that they spread demand equally among lawyers.⁵⁹

Franchising presents a challenge to this support of generalist solicitors doing legal aid work and it has been asked whether it will

⁵³ G Singen, 'The Role of Competition in Making Grants for the Provision of Legal Services to the Poor' (1991) 1 *Pub Int L J* 57, 62. While Singen's argument is concerned with the operation of salaried legal aid programs which are independent of, but funded by, the legal aid authority (as in the case of Community Legal Centres in Australia) the analysis is still relevant given the significant number of staff employed by many of the independent programs in the USA.

⁵⁴ *Id* 65.

⁵⁵ Abel, *op cit* (fn 47) 498.

⁵⁶ M Hill, *The State, Administration and the Individual* (1976) 142.

⁵⁷ R Moorhead, 'A Strategy for Justice' (February 12, 1993) 143 *New Law Journal* 211.

⁵⁸ *Ibid*.

⁵⁹ Abel, *op cit* (fn 47) 559.

spell the end of legal aid work by the sole practitioner and the two/four partner firms who provide the bulk of high street legal services. And if not, how can the smaller firms cope or compete and, indeed, will they want to?⁶⁰

Blake suggests that this trend towards specialised legal aid solicitors will also impact upon barristers, particularly in the criminal law field. He considers that, 'ultimately, it is likely that all advocacy will be undertaken from within these [specialist] firms or by criminal advocates attached to them.'⁶¹ With this increasing legal aid specialisation, a small number of legal firms are becoming increasingly dependent on legal aid as a revenue base and this may see franchising better able to be used as a lever to control the rate of cost increases by pushing such firms to alter their methods of working to become more productive.⁶²

Perhaps surprisingly, the LIV has, to date, paid little attention to the potentially adverse consequences which franchising might have for some of its members, particularly generalist practitioners, and has viewed the proposed reforms simply as a mechanism to increase the private profession's share of the legal aid market. No attention appears to have been paid to the possibility that some practitioners will lose the ability to take on legal aid work. The LIV responses to LACV discussion papers on franchising and competitive tendering have not raised any concerns of this nature. It may be that this lack of any expression of concern reflects the concentration of the LIV on the range of recent government reviews of the legal profession as well as the limited significance of legal aid to the private profession.

In the UK, the LAB has taken 'a user-friendly'⁶³ approach to franchising, initially setting standards low, with the emphasis on fostering a co-operative approach to compliance.⁶⁴ Even so, the Law Society threatened to boycott the Birmingham franchising pilot and then, until July 1994, was advising members not to enter into franchise arrangements until the Society's concerns in relation to a number of issues were addressed. The level of scrutiny involved in the monitoring process used to assess the work performed by franchised firms will be crucial in shaping the attitude of private practitioners. However, the monitoring process will also be crucial in assuring the quality of service which legal aid clients receive.

The Government

Inevitably, the fact that the major part of legal aid funding comes from government will mean that the expectations and priorities of government play a major role in the development of legal aid policy. The independence of the

⁶⁰ H Hodge, 'Nasty and Significant Changes' (November 6, 1992) 142 *New Law Journal* 1532.

⁶¹ Blake, *op cit* (fn 36) 24.

⁶² *Id* 4.

⁶³ The significance of the legal profession is illustrated by the fact that user refers to the lawyer rather than the client.

⁶⁴ R Smith, 'Transaction criteria: the face of the future' (February 1993) *Legal Action* 9.

LACV to determine what types of cases should receive priority in the granting of legal assistance has been significantly compromised by reforms introduced by the Victorian Government. Firstly, in May 1993 judges were given power to order the LACV to provide assistance for criminal trial defendants in certain circumstances.⁶⁵ This power had little impact upon the LACV as it was not exercised in any major trial situation which would have involved the allocation of substantial resources. Further, as noted earlier,⁶⁶ the independence of the new VLA is seriously undermined by s 12M of the *Legal Aid Commission (Amendment) Act 1995*.

The Commonwealth Government had become increasingly frustrated with the limited legal aid funding available to people with family or civil law problems because of the drain on legal aid from criminal cases. In 1993/94, 70% of Victorian legal aid approvals were in criminal cases, overwhelmingly involving State laws. The *Justice Statement*,⁶⁷ launched by the Prime Minister, Paul Keating, in May 1995, committed the Commonwealth government to additional expenditure of \$158 million over 4 years in a range of areas with a strong focus on family law issues and legal aid. The Commonwealth's concern was expressed in the *Justice Statement* as follows:

While the Government recognises that anyone accused of a serious criminal matter needs representation, providing assistance in criminal matters cannot always be at the expense of legal assistance in other matters. These legal problems have different, but equally serious, consequences for the people concerned.⁶⁸

An additional \$24 million was provided in the *Justice Statement* to Legal Aid Commissions over the next 4 years for family and civil cases. Ongoing additional funding will only be provided to those Commissions which 'reassess their service delivery priorities'⁶⁹ and which 'develop programs that address the Commonwealth's goal in bringing about real reform in the way in which services are delivered'.⁷⁰ It is clear the Commonwealth government was seeking to apply pressure for LACs to divert legal aid funds away from criminal cases. Such divergent views from different tiers of government as to legal aid priorities create significant difficulties for LACs in formulating policy on areas of law which should be targeted. VLA has received \$1.2 million from the Commonwealth government to increase grants of legal assistance in family, civil and human rights matters and extend telephone advice services for the 1995/96 financial year.

In the UK, there have been difficulties caused by the Lord Chancellor taking a different approach to franchising type developments to that of the LAB. Glasser refers to genuine difficulties for a small government depart-

⁶⁵ Section 360A of the *Crimes Act 1958* (Vic) as introduced by s 27(2) of the *Crimes (Criminal Trials) Act 1993* (Vic). For a discussion of this provision, see J Giddings, 'Legal Aid in Victoria: Cash Crisis' (1993) 18 *Alt L J* 130, 133, and J Lynch, 'Section 360A and the Dietrich dilemma' (1993) 67 *LIJ* 838

⁶⁶ See fn 50 and related text, *supra*.

⁶⁷ Attorney-General's Department, *The Justice Statement* (May 1995).

⁶⁸ *Id* 103.

⁶⁹ *Ibid*.

⁷⁰ *Ibid*.

ment, like the Lord Chancellor's Department, which has a large component, such as legal aid, in its budget:

Its room to manoeuvre is not great. It has to try to meet treasury demands for restrictions in public expenditure, in respect of a largely demand led service, whilst, at the same time, trying to satisfy the Department's clients.⁷¹

To date, similar concerns about exclusivity have not been raised in Victoria. Both the Commonwealth and Victorian governments have endorsed the concepts of legal aid franchising and competitive tendering. However, the franchising pilot is still running and tensions may arise if VLA is seen as taking too long to implement franchising on a wider scale or if the costs of effectively monitoring such a scheme are such as to jeopardise its financial viability.

Exclusivity

There has been strong opposition from the Law Society in the UK to any suggestions that franchised firms should have exclusive rights to handle legal aid cases in a given geographic area. The LAB has stated on several occasions that it has no plans to introduce exclusivity. However, the Lord Chancellor has stated: 'I can envisage that, in some areas and for some types of work, only accredited firms ... might be eligible to do legal aid cases.'⁷² This stance is linked to the prospect of competitive tendering in that it is likely that firms will only be prepared to negotiate to do legal aid work at a cheaper rate per case if they can be assured of a certain volume of such work. The price reductions which would most likely result from competitive tendering might well make legal aid work too marginal for many firms.⁷³

In the UK, the National Consumer Council has stated that it 'would be very concerned if non-specialists were prevented from carrying out certain types of legal aid work. This would severely reduce consumers' access to help under the legal aid scheme.'⁷⁴ The introduction of quality assurance mechanisms could further discourage general practitioners from continuing to handle legal aid cases. This would result in increasing specialisation with more legal aid cases being handled by small partnerships designed to deal with large volumes of legal aid work. It should be noted that there have already been problems for firms operating under new models designed to optimise income from legal aid work. In the UK, a Liverpool firm, Deacon Goldrein Green, was established in 1985 making use of a 'hub and spoke' case management system whereby small branch offices were supported by a central administration with a view to handling large volumes of work. The firm collapsed in October 1994 with

⁷¹ C Glasser, *Financing Legal Aid: Obstacles and Opportunities*, Law Society Conference Paper (1988).

⁷² Letter to 'The Times' from the Lord Chancellor dated 22 January, 1993 quoted in 'Legal Aid Moves' (February 1993) *Legal Action* 4.

⁷³ H Hodge, *op cit* (fn 60) 1532.

⁷⁴ National Consumer Council, *Professional Competence in Legal Services: What is it and How do you Measure it?* (February 1990) 9.

debts of more than 4.5 million pounds sterling.⁷⁵ Sherr, Moorhead and Paterson noted that the main problem for legal firms structured along these lines was that they seemed to face a 'crippling' working capital requirement.⁷⁶

It is also likely that a range of practical concerns will be raised by legal aid clients in relation to having to use the services of an exclusive legal aid franchisee. There will be clients who have had long-term dealings with a particular solicitor and with whom they will have developed a relationship of trust. They will quite naturally want to continue to use that solicitor. One way in which such a preference of a legal aid client for a non-franchised solicitor might be accommodated would be through a 'special circumstances' exception whereby the client would be given the opportunity to justify why the exclusivity principle should be waived in their particular case.

Such a 'special circumstances' exception currently operates in relation to the LACV's Criminal Law Legal Assistance Guideline 7 which regulates the allocation of committals and criminal trials between the LACV's Criminal Law Division and private practitioners. By reason of Guideline 7.1, such cases 'shall normally be handled by officers of the Commission if there are officers available and able to carry out the work'.⁷⁷ Despite this, cases can be allocated to private practitioners in several circumstances, including that special circumstances exist that would justify such an allocation. The types of special circumstances envisaged are where the practitioner has an intimate knowledge of the case, has acted for the assisted person before or has a particular expertise in the relevant legal area.⁷⁸

Further difficulties may arise for clients in relation to exclusive franchises in terms of gender related difficulties. It is not unreasonable for a woman seeking advice in relation to a legal matter which has involved, for example, her having been assaulted by a man to want to consult a female solicitor. There is currently no indication that such difficulties would be considered in the process of assessing applications for any exclusive franchises awarded in the future. Such situations would at least need to be viewed as a 'special circumstance' warranting the waiving of the exclusivity principle. Further, allowance would need to be made for situations where a conflict of interest could arise with the exclusive franchisee being unable to assist both husband and wife in a matrimonial case or two co-accused in a criminal trial. Of course, the more exceptions that exist in relation to the exclusive rights of the franchisee, the less economically attractive the arrangement will be to the holder of the rights.

One suggested measure which would have the effect of providing a half-way house between exclusivity and the existing system would be that of offering clients who choose to consult a lawyer who does not hold a franchise only a

⁷⁵ E Gilvarry, 'Liverpool Firm Collapse Rocks Legal Community' (1994) 91 *Law Society Gazette* 3; and J Bezzano, 'Paying for Legal Aid' (January 1995) *Legal Action* 9.

⁷⁶ Sherr et al, op cit (fn 5) 91.

⁷⁷ Legal Aid Commission of Victoria, *Legal Aid Commission Handbook* (6th ed, December 1993) 2-19.

⁷⁸ Id Guideline 7.3, 2-19 — 2-20.

contribution towards their legal costs.⁷⁹ Unfortunately, such a mechanism would result in the additional expense being imposed on the client which is unlikely to be appropriate given the financial circumstances of legally assisted persons.

The LAB has referred to another rationale for introducing exclusivity, albeit on a very limited basis. If it were demonstrated that there was no coverage of a particular area of law in a certain geographic area, the possibility of an exclusive contract might be used as an inducement for a firm or agency to provide a service to cover that area of law.⁸⁰ To date this has not occurred.

The LACV suggested a further change to service delivery which has some similarities to exclusive franchising in the form of the establishment of specialist panels to deal with certain types of complex cases.⁸¹ The examples cited of complex cases were complex drug or fraud trials and medical negligence actions. One of the three ways in which it was proposed that work could be allocated to members of such special panels was that individual significant cases could be offered by tender to the panel members. This raises two significant matters:

(1) Would such a system require referral of cases to the particular practitioner within a firm with expertise in the relevant area rather than simply to the firm itself? Should there be a requirement that the 'expert' practitioner handle the matter personally or would a supervision requirement be sufficient? No such requirement has been used in the past. Obviously, a monitoring mechanism would also need to be devised so that the LACV could be assured that the skills of the expert/specialist were, in fact, utilised.

(2) How would a practitioner become a member of a specialist referral panel? The LACV has suggested that accreditation as a specialist by the Law Institute of Victoria could qualify a practitioner for the specialist panel.⁸² The UK National Consumer Council has stated that 'it is important that quality tests developed for one purpose (such as helping clients who want to find specialists) are not used for a completely different purpose (such as excluding firms from legal aid).'⁸³ It should be noted that there are extensive legal aid areas for which accreditation is not currently available. Accreditation was unavailable in relation to criminal law, the subject area for the LACV franchising pilot, until late 1995.

Complex cases may require very particular expertise which would not necessarily be held by specialists accredited in the relevant legal field under the LIV's scheme, which has been developed with a more general objective in mind. It would be useful for the VLA to also require panel members to have a significant level of understanding of the operations of the VLA. If such

⁷⁹ G Bevan, T Holland, & M Partington, *Organising Cost-Effective Access to Justice*, Social Market Foundation Memorandum No 7 (July 1994), 16.

⁸⁰ S Orchard, 'The Board's agenda' (June 1993) *Legal Action* 7.

⁸¹ LACV, *Eligibility*, op cit (fn 10) 11.

⁸² LACV, *Franchising Discussion Paper*, op cit (fn 13).

⁸³ National Consumer Council, op cit (fn 74) 9.

specialist panels are to work effectively, substantial preparatory work will have to be done by the VLA to devise meaningful measures of expertise.

A Review of Developments in the United Kingdom

The LAB has moved much further along the service delivery innovation path than any of its Australian counterparts. In part, this is a consequence of the very substantial resources devoted to legal aid in the UK. In 1993/94, net expenditure on legal aid in the UK was 1.02 billion pounds sterling.⁸⁴ The LAB was only established in 1989, after four decades of the private profession controlling legal aid funds provided by the government. Despite eligibility levels for legal aid in the UK having fallen significantly since the election of the Thatcher government in 1979,⁸⁵ entitlement to legal aid services is more certain there than in Australia. In the UK, if a person meets the eligibility criteria set by parliament then legal aid services will be provided to them. A combination of tight type-of-case guidelines, merit tests and stringent means tests have been used by Australian LAC's to artificially suppress demand for legal aid.

The need to rein in the escalating costs of legal aid was a major reason for the establishment of the LAB. Unfortunately for the Board, UK legal aid expenditure continued to increase by an annual average of 21.6% over the five year period to 1993/94.⁸⁶ This increased pressure from the Lord Chancellor's Department for introduction of measures to limit costs. Further, the private profession in the UK is more reliant on legal aid as a source of revenue than in Australia. In 1991/92, legal aid accounted for 11.8% of the gross income of UK solicitors⁸⁷ while the figure for Australian lawyers was estimated at around 5% in 1987.⁸⁸ The difference in the levels of reliance on legal aid has widened significantly as a result of the continuing increases in legal aid expenditure in the UK at levels which have not been matched in Australia.⁸⁹

The UK private profession continues to dominate legal aid service delivery due to the absence of a salaried legal sector and has sought to maintain its existing monopoly on the most favourable terms possible. It has therefore been very vigilant in monitoring developments in the franchising area, particularly in the context of the possible introduction of competitive tendering.

The concept of legal aid franchises in the UK has been said to have undergone a 'complete metamorphosis' since it was first mooted in the late 1980s.⁹⁰ Franchising was first thought of as a mechanism for enabling agencies which

⁸⁴ Legal Aid Board, op cit (fn 23) 1.

⁸⁵ See Legal Action Group, *A Strategy for Justice* (1992) 24-6; and P Smith, 'Reducing Legal Aid Eligibility Criteria' (November 1992) 142 *New Law Journal* 1653.

⁸⁶ Blake, op cit (fn 36) 2.

⁸⁷ The Law Society, *Annual Statistical Report* (1993) Table 7.10.

⁸⁸ J Basten, 'Legal Aid and Community Legal Centres' in *Winds of Change: 24th Australian Legal Convention Papers* (1987) 150.

⁸⁹ Total revenue of Australian Legal Aid Commissions increased from \$190.3 million in 1988-89 to \$251.9 million in 1992-93, a total increase of 24.5% over a four year period.

⁹⁰ Bawdon, op cit (fn 14) 7.

did not employ lawyers to be involved in legal aid service delivery.⁹¹ To date, virtually all of the work in this area has focussed specifically on the private legal profession and attempting to establish how the quality of legal work can be assessed. The LAB is now conducting a pilot project in relation to the use of a franchising system for provision of services by the advice sector, details of which are outlined later in this article.⁹²

The LAB engaged respected academics⁹³ to conduct major research in this area. The researchers were involved in the preparation of a set of detailed 'transaction criteria', mechanisms to be used in assessing the quality of work performed by lawyers. Transaction criteria are sets of small elements of particular types of legal aid cases which would be expected to be covered by a competent lawyer. The quality assessment was to be done by way of review of the lawyer's file for any particular matter.

The original transaction criteria were published in 1992⁹⁴ and covered 9 areas of legal aid practice, namely crime, family law, employment, housing, debt, personal injury, welfare benefits, immigration, and consumer and general contract. A revised and expanded set of transaction criteria were published in mid-1994.⁹⁵ The LAB also commissioned the production of a Franchising Specification, the first edition of which was released in mid-1993. The Specification sets out in significant detail the processes to be followed in dealings between the LAB and franchise holders.

Benefits to Franchisees

There has also been substantial activity in trying to prepare firms for franchising with the idea being promoted on the basis that it will involve benefits for firms in areas including:

(1) Administrative savings — franchised firms receive the power to grant legal aid in certain types of cases. One of the major sticking points between the LAB and the UK Law Society has been whether franchisees will be paid in any cases where they exercised the relevant power incorrectly. It appears that the Law Society have been successful in this regard with the Franchising Specification being altered in July 1994 to provide that the LAB will not disallow, on legal merits grounds, decisions to exercise devolved powers unless the decision was ultra vires.⁹⁶

(2) Financial incentives — accounts will be paid more quickly for franchised firms. The post-grant of assistance waiting period before professional costs can be claimed has been reduced. There have been some problems with these incentives due to the Lord Chancellor setting some legal aid fees at levels

⁹¹ S Orchard, 'Focus on Franchising' (August 1994) *Legal Aid Focus* 1.

⁹² See text as fns 67-71 supra.

⁹³ Professor Avrom Sherr and Richard Moorhead from Liverpool University, Centre for Professional and Business Law, and Professor Alan Paterson from University of Strathclyde.

⁹⁴ A Sherr, R Moorhead, and A Paterson, (1992) *Transaction Criteria*.

⁹⁵ A Sherr, R Moorhead, and A Paterson, (1994) *Lawyers — The Quality Agenda, Volume 2*.

⁹⁶ Amendments to Franchising Specification, as outlined in Legal Aid Board, (August 1994) *Legal Aid Focus* 5.

below those local legal aid scales which are fixed by District Court judges and which apply in non-franchise situations.⁹⁷ The LAB has signalled that it wants to see 'an increase in preferential payment terms between franchised and non-franchised firms; not to penalise the non-franchised firms but to encourage them to become franchised.'⁹⁸ This could be described as a distinction without a difference. Certainly, the practical effect for non-franchised firms is the same.

(3) Marketing advantages — franchised firms will be able to promote their firm as having accreditation from the LAB. The publicity material produced by the LAB for the launch of franchising on August 1 1994 refers to 'LEGAL AID FRANCHISE: A QUALITY SERVICE, Approved by The Legal Aid Board'. It is questionable whether publicity of this nature should be encouraged when the focus of the LAB's franchising specifications has been limited to the establishment of management systems and there have been significant limitations placed on the use of transaction criteria in assessing the work done on individual files.⁹⁹ The advertising advantage has been viewed by solicitors firms as the strongest incentive for participating in franchising.¹⁰⁰

The LAB appears to have clearly recognised the importance of cooperation from the private legal profession if franchising arrangements are to be successfully implemented. Lengthy time periods have been allowed for trialing of initiatives and the LAB has taken account of Law Society concerns when formulating policy. Initially, both the LAB and the Law Society took a more confrontationist approach on the franchising issue. The Birmingham franchising pilot was threatened by a Law Society boycott and was only saved by quiet diplomacy following a war of words which, at its peak, had considerable rancour.¹⁰¹

While further frustration has been¹⁰² and continues to be¹⁰³ expressed at the introduction of franchising, the LAB approach has been flexible enough to see significant progress made without derailing the entire process. The LAB also consulted extensively with a wide range of consumer and professional organisations¹⁰⁴ and this is likely to have broadened the support base for its initiatives. Further, the LAB has established a fairly broad based Franchising Advisory Committee which will play an essentially monitoring role.¹⁰⁵

The involvement of the legal profession has forced the LAB to think in terms of relatively lengthy timelines for the introduction of franchising, particularly in relation to the use of transaction criteria in the audit process. The

⁹⁷ A Crockett, *Notes of Visit to Firm of Anton Gold Leaman Muirhead* (19 April 1994).

⁹⁸ Legal Aid Board, (August 1994) *Legal Aid Focus* 2.

⁹⁹ See amendments made to para 7.30, *Franchising Specification*, as outlined in (August 1994) *Legal Aid Focus* 12–13.

¹⁰⁰ Sherr et al, op cit (fn 5) 116.

¹⁰¹ Editorial, 'The Boycott That Never Was' (June 1990) *Legal Action* 3.

¹⁰² R Smith, 'Clarifying Objectives' (April 1993) *Legal Action* 9; S Harman, 'Franchising: the Preliminary Audit Experience' (January 1994) *Legal Action* 8; and C Pigott, 'Franchising: Audit Pains, Problems and Predictions' (February 1994) *Legal Action* 21.

¹⁰³ L Clements, 'In Whose Interests?' (October 1994) *Legal Action* 6; and S Harman, 'A Worthwhile Carrot?' (October 1995) *Legal Action* 8.

¹⁰⁴ Legal Aid Board, *Franchising Specification* (1993) 1.

¹⁰⁵ Id 3–4.

LAB has agreed that the rates of compliance with transaction criteria required of franchisees will be increased 'only to assure the required level of quality and not to restrict arbitrarily the number of franchised organisations'.¹⁰⁶ Further, there was to be no such increases before 1 August 1996.

The Birmingham Pilot

A franchising pilot was established in the West Midlands city of Birmingham in May 1990.¹⁰⁷ Twenty-six of the 41 applicants were granted franchises in at least one of the nine available areas of legal work. The franchisees included five advice agencies, not all of which employed a solicitor. The Law Society initially threatened to boycott the pilot, prompted by the 'extreme frustration' of legal aid practitioners, especially in relation to the low level of legal aid lawyers' incomes in comparison with the rest of the profession. While this frustration was caused by matters other than franchising, the LAB was described as having left itself open to criticism due to a seeming unwillingness to explain and debate the franchising concept in public.¹⁰⁸

It has been suggested that many firms applied for a pilot franchise contract for 'defensive strategic' reasons, rather than because of any of the proposed incentives. The scheme was seen as having the potential to 'eventually evolve into something more closely resembling what is understood by the term "franchise" in other businesses',¹⁰⁹ in other words, a scheme involving exclusive rights to a product name.

Reactions to the pilot were fairly mixed. Surprise was expressed at the high number of refusals of franchise applications. None of the 19 applicants for an employment law franchise was successful. The housing law and consumer law fields each had only one successful applicant.¹¹⁰ One franchisee in the debt law area found the franchising experience '100 per cent positive'. Simon Johnson, general manager of the Money Advice Service Birmingham Settlement, stated that 'the running of the franchise and the delegated powers have been so beneficial in enabling us to maximise our income from green form work.'¹¹¹

Detailed research¹¹² was conducted on the work of all applicants over a six month period prior to the granting of franchises as well as on a continuing basis with those firms which were granted franchises. The monitoring related to three forms of information:

(1) consideration of the office's basic systems of work and management structure;

¹⁰⁶ LAB, *op cit* (fn 104) para 7.30, as amended by July 1994 amendments set out in (August 1994) *Legal Aid Focus* 13. This should be contrasted with the view of the LAB's researchers that 'as knowledge of the criteria grows, the acceptable omission rate applicable to the criteria will change': Sherr et al, *op cit* (fn 5) 86.

¹⁰⁷ Sherr et al, *op cit* (fn 5) Ch 1.

¹⁰⁸ Editorial, 'The Boycott That Never Was' (June 1990) *Legal Action* 3.

¹⁰⁹ Bawdon, *op cit* (fn 14) 7-8.

¹¹⁰ *Id* 7.

¹¹¹ *Id* 8.

¹¹² The research remit is set out as Appendix 1 in Sherr et al, *op cit* (fn 5).

(2) review of the quality of work (in the form of bills and applications for aid) submitted by offices to the LAB; and

(3) review of the quality of advice and assistance given to clients.

The monitoring involved review of client files by both practising lawyers and non-practising auditors as well as seeking input from assisted clients. Transaction criteria were used to assess the standard of the legal work performed. The analysis revealed certain areas of concern with advice on costs being a consistent problem.¹¹³ The pilot was used to further develop the existing transaction criteria and then provide feedback to franchisees with a view to them improving their standard of service.

The franchisees were given the power to grant certain types of legal aid as well as receiving preferential payment arrangements. The LAB, in determining franchise applications, took account of a range of office management related issues including independence, non-discrimination, opening hours, interview facilities, office accessibility, community language facilities, referral policies and outreach sessions. Further, to gain a franchise in any category, an office had to have someone capable of becoming a welfare benefits supervisor or undertake to have someone within the office gain welfare benefits knowledge within two years.¹¹⁴

The LAB has indicated that it

considers it important that all caseworkers/advisers have the ability to recognise a potential welfare benefits problem in all franchised categories of work they are dealing with, even if they are not qualified to give detailed advice on it.¹¹⁵

One unfortunate consequence of this emphasis on welfare benefits advice has been that Citizens Advice Bureaux have encountered a loss of experienced staff in this area to solicitors firms which are seeking a franchise.¹¹⁶

The LAB also emphasised other matters in an attempt to improve legal aid service quality. Concern was expressed at the fact that firms involved in criminal legal aid were not maintaining files as they would in a civil case and this has led to a requirement that organisations seeking a crime franchise must comply with detailed file management requirements set out in the Franchising Specification.¹¹⁷ Client complaints also received attention with requirements that all formal complaints be recorded centrally and that a sample of complaints be audited to ascertain whether appropriate corrective action has been undertaken. Such requirements may have the important effect of altering the prevailing culture surrounding legal aid work. However, they will also test the preparedness of service deliverers to continue to do legal aid work at relatively low levels of remuneration while having to discharge additional file management obligations.

The pilot also considered the assessment of legal work by both clients and

¹¹³ Id 42.

¹¹⁴ Id 1.

¹¹⁵ LAB, *op cit* (fn 104) para 3.10.

¹¹⁶ M Stock and D Beale, 'Legal Aid, Franchising and the Public Advice Sector' (June 1994) *Legal Action* 7.

¹¹⁷ LAB, *op cit* (fn 104) paras 3.62-3.69.

practising lawyers. Client input was obtained by way of a questionnaire mailed out to all those people who had received a relevant legal aid service from a franchised office. Such input was viewed as most valuable in the area of assessing the lawyers' communication/client-handling skills as well as detailing their perception of the service received.¹¹⁸ Delay was the major cause of dissatisfaction with 50% of clients surveyed believing that their case was taking too long. Again, the lawyers' explanation of costs was an area of significant concern. The perception of franchise holders that the main advantage of a franchise was in its use as a marketing tool was called into question by the finding that 62.5% of franchised business was gained by recommendation either from friends, colleagues or an official body.¹¹⁹

The pilot researchers found peer review to be less reliable than an assessment based on transaction criteria. On some files, peer assessments based on a five point continuum from non-performance to excellence,¹²⁰ varied from threshold competence to excellence.¹²¹ Other difficulties with peer review which were identified were the expense involved and 'other factors such as reputation, or the peer's willingness to handle a case in a way which suits both lawyers, or which conforms to a highly subjective assessment of what constitutes quality work [which] come into play.'¹²²

Looking To The Advice Sector

The LAB commenced a 12 month franchising pilot in January 1995 to assess whether non-solicitors, working without the supervision of a solicitor, can and should be delivering legally aided services funded by the LAB.¹²³ The UK has an extensive citizens advice sector comprising 712 main bureaux with 733 linked outlets. There are 26 000 people involved in the Citizens Advice Bureaux service, 90% of them volunteers.

There are indications that the legal profession considers it may no longer be able to provide a quality service for particular types of typical legal aid work due to cost considerations. Abel states that 'the profit margin on publicly subsidised work is so low that a solicitor can make a living only by increasing volume.'¹²⁴ If the warranty of quality which supports the legal profession's monopoly can no longer be said to apply to such areas, the monopoly is no longer justifiable on this basis. Hopefully, the LAB's pilot will provide information on whether non-lawyers can provide a service of appropriate quality in such circumstances.

Research from the pilot will consider the effect of franchising arrangements on the agencies and others, the benefits, disadvantages and value which could be obtained from extending franchising in this fashion. A key feature of the pilot will be the provision of block funding rather than funding on a case-

¹¹⁸ Sherr et al, op cit (fn 5) 49.

¹¹⁹ Id 52.

¹²⁰ See text as fns 72-6 supra.

¹²¹ Sherr et al, op cit (fn 5) 57.

¹²² Id 17.

¹²³ Stock and Beale, op cit (fn 116) 6.

¹²⁴ R Abel, *The Legal Profession in England and Wales* (1988) 307.

by-case basis. Block funding has been associated with competitive tendering and this prospect will be greeted with hostility from lawyers concerned that similar arrangements may be introduced for all franchisees. It has been suggested that some Citizens Advice Bureaux will not apply for franchises due to concerns that this would jeopardise their recurrent local authority funding.¹²⁵

The LAB is apparently mindful of the scope for cash-strapped local authorities to withdraw funding and has therefore released a policy statement setting out its position with a view to assisting agencies in dealing with funders. There would also be concern on the part of agencies to ensure that any change in the mix of their funding did not see them forced into providing greater advice services at the expense of non-advice community development activities.

One franchise issue of particular interest with advice agencies is that of supervision of the advice provided. The Birmingham Citizens Advice Bureau participated in the Birmingham franchising pilot and encountered a number of problems, one of which was LAB concern over the supervision arrangements for such a large number of volunteers (70, of whom 11 would be interviewing at any one time). This issue will no doubt receive close attention during the pilot.

What Level of Quality?

The attention paid to the issue of what is the appropriate standard of quality of service to be provided to assisted persons will increase as a result of the franchising debate. Efforts to date in this area have been hampered by a lack of clear definitions of quality and the related concept of competence in relation to both legal aid services and legal services generally. The lack of a clear definition of what constitutes 'quality' raises the further dilemma that there is no authoritative yardstick which can be used to determine the accuracy of any measures devised for the purpose of assessing the quality of legal work. 'Such measures of quality as exist are contingent on the assessors' (clients or peers) notions of what constitutes quality and these remain largely subjective and unarticulated.'¹²⁶

This lack of clarity has been exacerbated in the legal aid franchising debate by the varied use of the related notion of competence. While in the UK, competence has been used to refer to particular levels on a continuum of quality, literature from the USA appears to refer to competence as a continuum. The franchise researchers for the LAB have moved from referring to a competence continuum in 1990¹²⁷ to a quality continuum since 1992.¹²⁸

The setting of the level of quality to be required of all service providers will have significant implications for the various parties interested in legal aid.

¹²⁵ Stock and Beale, *op cit* (fn 116) 7.

¹²⁶ Sherr et al, *op cit* (fn 5) 81.

¹²⁷ National Consumer Council, *Professional Competence in Legal Services* (1990) 5.

¹²⁸ A Sherr, R Moorhead, and A Paterson, *Franchising Legal Aid, Final Report* (September 1992) 34; and Sherr et al, *op cit* (fn 5) 19.

Tull refers to the current usage of the term 'high quality' as involving 'a far higher standard than lawyers are generally held to and may in reality be chimerical'.¹²⁹ Garth, in what Sherr, Moorhead and Paterson describe as a seminal article,¹³⁰ expresses concern that a uniformly high setting of the required level of competence will significantly reduce access to services as it assumes that 'all practitioners ... are supposed to perform at the level of corporate lawyers with deep pocket clients'.¹³¹ The reference to a uniformly high level of competence indicates that Garth is referring to a similar concept to that which Sherr et al refer to as quality.

The connection between costs and quality will be very important. As is currently the case, the reliance of legal aid on government funds means that there is potential for the quality of services provided to be lowered in financially difficult times. The Chief Executive of the LAB, Steve Orchard, has described cost as 'the most visible quality element in privately-funded legal services.' Orchard has also asked, 'can clients, whether legally aided or not, ignore the cost involved? Of course not.'¹³²

An alternative strategy which a legal aid funder could adopt to control costs would be to tackle the average cost of legally assisted cases. However, the private profession would be most reluctant to accept any reductions in remuneration and might only accept such a change if it were coupled with a recognition that a lower quality of service would be acceptable.

In the UK, Sherr, Paterson and Moorhead have suggested a quality continuum for legal services:

- *Excellence
- *Competence-Plus
- *Threshold Competence
- *Inadequate Professional Services
- *Non-Performance

Paterson and Sherr identified a level between threshold competence and competence-plus as the critical level below which franchised firms could not fall. A higher standard had the potential to endanger access through pushing up cost. Excellence is an aspirational standard whereas threshold competence relates to the extreme lower limit of service quality which the community will tolerate. It is important to consider whether the level of quality expected has been set too low and also whether there is a need for more than five steps on a continuum which runs from non-performance to an aspirational standard.

It has been suggested that it may be possible to confer additional franchise benefits on those achieving higher levels of work quality. This would require development of mechanisms which can accurately discern subtle differences in quality levels. Concern has been expressed that the levels of quality which are set will act as ceilings rather than floors. It was suggested that cost competition pressures could result in practitioners currently operating above the

¹²⁹ Tull, *op cit* (fn 49) 212.

¹³⁰ Sherr et al, *op cit* (fn 5) 6.

¹³¹ B Garth, 'Rethinking the Legal Profession's Approach to Collective Self-Improvement: Competence and the Consumer Perspective' (1983) *Wisconsin Law Review* 639-40.

¹³² S Orchard, 'The Board's agenda', *op cit* (fn 80) 7.

basic level having to reduce their quality in order to retain their legal aid contract.¹³³

Steve Orchard has described the franchising regime as an 'attempt to set a quality floor, not a ceiling as [Legal Action Group] suggests, from which it is possible to make rational cost comparisons.'¹³⁴ The debate regarding floors and ceilings fails to deal with the fundamental question of 'how solid are the foundations?' In this context, the foundations relate to the level of funding provided by government, the accuracy of the mechanisms used to measure quality and the level of monitoring carried out to ensure that the stipulated standards are met.

The question of who decides what quality of service is to be provided is a difficult one. No doubt, the private legal profession will say that funds must be provided to ensure that an excellent service can be provided to all who require it. Any suggestion of a lesser level of service will be met with antagonism from all quarters except perhaps the funders. Any service level less than excellence may be viewed as acknowledging that legal aid provides a second rate service. It must of course be remembered that the overwhelming majority of users of the legal system (who do not qualify for legal assistance) cannot afford a top-level service. Cost pressures will, to a large extent, dictate the quality of service they receive. Only the very wealthy can make use of 'top of the range' services as they are the only ones who would not find the legal costs of a major piece of litigation economically crippling.

Measuring Quality

The following potential means of assessment of the standard of legal work have been suggested by Sherr, Moorhead and Paterson:¹³⁵

(1) Input Measures — These measures 'endeavour to gauge competency from qualifications eg type of degree, bar examination scores, attendance at continuing legal education courses or from the practitioner's status in the legal community'.¹³⁶

(2) Structural Measures — These indirect measures focus on the resources and structures available to those working in the organisation, from library and reference material to staff supervision and training to client complaints. Ultimately, the value of such measures is limited by the fact that they relate to matters which 'only facilitate competence in its other aspects, they do not ensure it'.¹³⁷

(3) Process Measures — These look directly at what lawyers actually do on legal aid files. They focus more directly on performance and 'can be applied to the complete range of lawyering, including fact gathering, legal analysis, strategy formation and execution, follow through, client handling, interviewing,

¹³³ Editorial, 'Franchising: A New Agenda' (April 1993) *Legal Action* 3.

¹³⁴ S Orchard, op cit (fn 80).

¹³⁵ Sherr et al, op cit (fn 5) Ch 2.

¹³⁶ Id 7.

¹³⁷ Ibid.

counselling, negotiation, mediation, litigation and practice management.¹³⁸ The transaction criteria adopted by the LAB are process measures.

(4) Outcome Measures — These look at the tangible 'results' of a lawyer's work and as such, 'may provide a better approximation of "real" quality.'¹³⁹ While outcome measures may be an obvious method of assessing legal service quality, 'they are among the hardest to implement'.¹⁴⁰

The use of a checklist approach to ensure that stipulated transaction criteria are met has been criticised as likely to 'standardise and routinise legal practice' and 'will encourage practitioners to place undue emphasis on file maintenance (or even to cheat) rather than concentrating on doing a good job.'¹⁴¹ A comparison has been made with criticisms levelled at police station custody records: 'What will happen is that practitioners will adjust procedures. Reality becomes what is on paper rather than what actually happens.'¹⁴²

In answer to such concerns, the architects of the transaction criteria have responded that the franchised firms will not be forced to adopt a checklist approach (although the franchise audits are based on the use of such checklists). Further, they suggest that those firms which do use a checklist approach are less likely to overlook relevant considerations in advising on a case. 'It comes down to whether the risks are worth running in return for a better guarantee of quality for all clients of franchised firms.'¹⁴³

Monitoring Compliance

Any system which gives private practitioners power to grant legal assistance must incorporate a system which monitors the use of this power. If, in the process of obtaining the right to grant assistance, practitioners undertake to meet certain quality standards, they must be held to such undertakings. If the system goes one step further and involves practitioners in competitive tendering for blocks of legal aid cases, quality monitoring will be even more important.

The review process used for assessing compliance in the UK franchising pilot included several facets.¹⁴⁴ Selected client files were reviewed to ascertain whether the various transaction criteria were met. The reviewing officers also provided their view as to the 'intrinsic worth' of the work done on the file. Client views were considered by way of interviews and a questionnaire. Further, there was a peer review by a lawyer experienced in the relevant field.

¹³⁸ A Paterson, 'The Renegotiation of Professionalism' (1994) 1 *International Journal of the Legal Profession* 131-2.

¹³⁹ Sherr et al, *op cit* (fn 5) 9.

¹⁴⁰ Paterson, *op cit* (fn 138).

¹⁴¹ A Paterson, 'Quality Assurance and Measuring Professional Competence: Are We Trying To Square The Circle?' (paper presented at the Conference on Law and Legal Services, Low Wood, England, July 1993).

¹⁴² R Smith, 'Transaction Criteria: The Face of the Future' (February 1993) *Legal Action* 9, 11.

¹⁴³ A Sherr, R Moorhead, and A Paterson, 'Transaction Criteria: Back to the Future' (April 1993) *Legal Action* 7.

¹⁴⁴ R Moorhead, A Sherr, and A Paterson, 'Franchising: Assessing the Quality of Legal Aid Lawyers?' (paper presented at the Conference on Law and Legal Services, Low Wood, England, July 1993) 10-12.

To use a comprehensive system of this nature on an ongoing basis would without doubt be very expensive. It might well jeopardise the financial viability of franchising arrangements in that the Legal Aid authorities might find the audit costs outweigh the benefits from franchising.

The expense involved in a detailed process is not yet clear. The LAB was said to be reckoning that the audit of one file would take 40 minutes.¹⁴⁵ This would result in either a very time-consuming audit process or a process which based its assessment of a franchised firm on perhaps less than a dozen files. The LACV estimated that 20 files could be audited per day by a team of two including a legal officer.¹⁴⁶ This amounts to 45 minutes per file and was based on the experience of the LACV's internal audit section in auditing files in regional offices. This internal audit experience has not involved the measurement of a wide range of aspects of the quality of legal services and has concentrated on administrative matters such that the time required to perform a comprehensive review may have been underestimated.

The frequency of the audits will also be important. The fact that file audits will not take place until work on a file has finished means that all such monitoring will be 'after the event'. If a firm is providing inadequate services, this will not be detected until the next audit. The LAB has referred to the first post-franchise audit taking place 6 to 12 months after the contract is made and then at approximately 12 month intervals thereafter.¹⁴⁷ It is certainly arguable that, at least to begin with, audits should take place more frequently until it is clear that practitioners are meeting the specified quality levels.

Legal Aid authorities are likely to take a softer line which seeks to make the system more user-friendly. The Quality Assurance Criteria proposed by the LACV for its franchising pilot included requirements regarding appointment of a franchise representative, documented supervision arrangements, financial, personnel and casefile management systems, procedures for documenting advice given and action taken, client care and complaints processes, and availability of legal reference material.¹⁴⁸ The emphasis was on the existence of procedures. Unfortunately, the appropriateness of the procedures was not considered in any depth.

There is little point to having such standards in place unless resources are provided to monitor whether or not those standards are being met. What is the point of a law firm documenting an elaborate complaints procedure if the procedure is routinely ignored by staff? This issue is clouded by the fact that Legal Aid authorities have given very little emphasis to quality assurance in the past. The issue of the appropriateness of adoption of quality assurance measures needs to be separated from that of the appropriateness of franchising. One theoretical (although highly unlikely) outcome of current quality

¹⁴⁵ R Smith, *op cit* (fn 142) 9, 11.

¹⁴⁶ Legal Aid Commission of Victoria, *Franchising — Delegating to Private Practitioners the Power to Grant Legal Assistance* (December 1993) 23.

¹⁴⁷ LAB, *op cit* (fn 104) 48.

¹⁴⁸ Legal Aid Commission of Victoria, *Franchising — Summary Criminal Case Pilot* (December 1993) 10-13.

assurance and franchising developments would be a move to greater quality assurance but without the franchising system.

Review of LACV Franchising Developments — Lessons From the UK

With VLA soon to embark on the process of assessing the LACV's franchising pilot, it will be valuable if VLA can also adopt the strengths and learn from the weaknesses of the LAB's work and experience in this area.

There are a range of difficulties with the nature of the LACV's franchising pilot. Unlike in the UK, where the LAB reviewed the standard of work of franchise applicants for the six months prior to the franchises being offered, the LACV did not undertake any pre-pilot monitoring. The unfortunate consequence of this is that there will not be any data available against which to compare the performance of franchisees in their compliance with the guidelines for exercise of the devolved powers. The selection of pilot participants was based on information provided by applicants which was not then verified by the LACV.

Further, the pilot was of a limited nature, focussing on the administration of legal assistance in the form of the function of assigning grants of legal assistance. The pilot did not consider the quality of the legal work performed by franchisees. It was therefore inappropriate for LACV Chairman, Peter Gandolfo, to assert recently, that developments such as the summary criminal case franchising pilot place the LACV 'in a position to become an even more efficient and productive establishment in the immediate future'.¹⁴⁹

The LACV has also failed to follow the lead of the LAB in terms of using franchising to alter the nature of the services provided by those organisations involved with legal aid clients. In the UK, franchisees have been required to develop expertise in the provision of advice on welfare benefits. 'Given the economic circumstances of many legal aid clients, welfare benefits advice is an important adjunct to legally aided advice and assistance.'¹⁵⁰ In the UK, even where the franchisee does not hold or apply for a specific welfare rights franchise, it must have at least one employee suitably qualified to recognise the need for welfare benefits advice.¹⁵¹

The LAB also included requirements to prevent franchisees from discriminating on grounds of race, sexual orientation, religion or disability in deciding whether to accept instructions from clients, instructing counsel or in the provision of services.¹⁵² The LACV has not incorporated any such requirements. Other factors which could have usefully been incorporated into the assessment process include the extent of linkages between franchisees and local community-based organisations and the ability of staff of franchisees to speak community languages other than English.

To date, there have been no proposals from the LACV to involve legal aid

¹⁴⁹ Legal Aid Commission of Victoria, *op cit* (fn 39) 1. See also: the references to the pilot at page 24 of the Annual Report; and Legal Aid Commission of Victoria, *Draft Invitation to Tender — Summary Criminal Case Franchising Pilot* (September 1994) 3.

¹⁵⁰ Sherr et al, *op cit* (fn 5) 26.

¹⁵¹ LAB, *op cit* (fn 104) para 3.9.

¹⁵² *Id* para 3.29.

clients in assessing the legal services they receive. The LAB now appears to recognise clearly the value of feedback obtained from clients, and interested UK consumer groups will no doubt hold the LAB to its assurance that clients will participate in the evaluation process.¹⁵³ Criticism can also be levelled at the LACV's approach to consultation which was limited to forwarding discussion papers to a range of organisations and seeking written comments on such papers. The LACV would have been better served by actively seeking comments and views from a wide range of organisations, in much the same way as the LAB.¹⁵⁴ The LACV also could have established an advisory body similar to the LAB's Franchising Advisory Committee, which includes representatives from the National Consumer Council, the LAB's Access Committee, the Law Society and the Advice Services Alliance as well as the LAB's franchising researchers.¹⁵⁵ The advent of VLA, with its five member board comprised of only Government nominees, reduces the likelihood of valuable input being provided by outside bodies.

The LACV also needs to establish mechanisms which can be used to process appeals by legal aid applicants against refusals by franchisees to grant them assistance. Where an applicant is unhappy with a decision of a member of the LACV's salaried staff, reconsideration can be sought firstly from another staff member and then the refusal can be further appealed to a Legal Aid Review Committee.¹⁵⁶ Detailed memoranda are prepared by LACV staff for the use of the Committee in determining such appeals. Whether responsibility for this task will be given to the franchisee has not yet been satisfactorily resolved. If this responsibility is given to franchisees, how will it be monitored and will the franchisee be paid for such work? If they are expected to perform this task but are not paid for it, this might result in practitioners granting assistance in borderline cases with a view to avoiding preparation of documentation for the Review Committee.

The use by the LAB of a volume criteria in determining franchise applications is of particular interest in the Victorian context. The LAB required practitioners to have a substantial legal aid caseload before they would devolve significant powers to those practitioners.¹⁵⁷ The interest of the LACV in tightening the requirements for eligibility to be a member of the Legal Aid Panel could see such volume criteria assume considerable importance. At present, all a solicitor must do is complete a form indicating their preparedness to be on the Panel. Barristers do not even need to do this; the signing of the Bar Roll means the barrister is deemed to be a member of the Panel. No requirements as to volume of legal aid cases handled have ever been used in Victoria.

¹⁵³ See fn 40 supra and relevant text.

¹⁵⁴ LAB, op cit (fn 104) 1.

¹⁵⁵ Id 3-4.

¹⁵⁶ Legal Aid Review Committees comprise five members, all of whom are independent of the LACV. They are nominated by organisations including the Law Institute of Victoria, the Collective of Self Help Groups and the Federation of Community Legal Centres. See *Legal Aid Commission Act 1978* (Vic) Part VI. There are three such Committees currently operating.

¹⁵⁷ Sherr et al, op cit (fn 5) 73.

In its eligibility discussion paper, the LACV noted that the refusal rate on applications for legal assistance was significantly lower for those firms which did large amounts of legal aid casework. For firms which handled between 251 and 500 legally assisted cases in 1992/93, only eight per cent of total applications submitted were refused. For firms which handled between one and five legally assisted cases over the same period, the refusal rate was 62%. The LACV described these refusal rates as an indicator of how efficiently firms handle legal aid cases.¹⁵⁸ This may be correct but it is also possible that firms which do very little legal aid work, in fact provide a good quality legal service to legally assisted clients but do not know enough about the LACV to avoid submitting inappropriate applications for assistance.

While there are significant differences between the Australian and UK legal aid systems, the UK experience in franchising provides valuable information to Australian legal aid authorities. To date, the LACV's approach has involved embracing franchising but without tackling the range of important issues raised by the concept. Franchising may have a greater impact in the UK than in Australia as a result of the relatively large dependence of lawyers on legal aid funding and the lack of a large salaried legal sector. While the LAB has made substantial progress towards introducing a franchising system, moves either to expand the system or link it with other initiatives such as competitive tendering will no doubt receive a hostile response from the private legal profession.

The LAB's emphasis on quality related issues such as provision of welfare benefits information and increasing the accessibility of services is very promising. To date, the LACV has not taken such a direction and it will need to do so if it is to illustrate that its purposes in considering franchising include improvement of service quality rather than being dominated by cost reduction concerns.

CONCLUSION

At least in the short term, the possible move to having private legal practitioners holding legal aid franchises raises more issues than it resolves. The debate on the merits of franchising provides an opportunity for those interested in legal aid to tackle difficult issues such as:

- (1) What is quality in a legal aid sense?
- (2) Is legal aid service quality different in any way from general legal service quality?
- (3) Does this type of quality differ from competence?
- (4) What level of quality is appropriate for legal aid clients?
- (5) However quality is defined, can it be measured? and
- (6) How can legal aid authorities ensure that service providers perform to the standards specified?

A further important threshold issue relates to the extent of the commitment

¹⁵⁸ LACV, *op cit* (fn 10) 17.

of governments, both State and Commonwealth, to the legal aid system. Without sufficient funds to ensure that those in significant need of assistance receive appropriate services, changes to the way services are provided will have only a small impact.

The issues raised by the notions of defining, measuring and monitoring service quality are very complex and of significance across all types of legal services. Legal aid quality has certain aspects which require particular emphasis. The mission statement which VLA has inherited from the LACV refers to the provision of 'high quality [services] in a responsible, fair and sensitive manner', and to 'promoting the reform of laws and procedures which inhibit justice.' Legal Aid authorities need to encourage forms of service delivery which will see a strategic approach taken to legal aid problems as distinct from relying entirely on the traditional casework approach taken by private practitioners. This important aspect of legal aid services has not received sufficient attention to date in the franchising debate. Franchising is likely to have the effect of increasing the specialisation of practitioners handling legal aid cases. If this in turn encourages those practitioners to take a broad approach to using the law to the benefit of the general legal aid client community rather than remaining focussed on individual clients, this will be a positive outcome.

There is a need to use a broad definition of legal aid quality rather than using a more narrow construction such as that of competence which focuses solely on the capacity to perform certain legal tasks to a specified minimum standard. Clients are likely to feel more satisfied if their legal advice is received from someone who has good interviewing skills, dedication to their work and good organisational skills at an office which is easily accessible. Of course, it is very difficult to measure such characteristics in an objective fashion. Legal aid clients will need to play a central role in assessing these aspects of the performance of service providers. It may be that these characteristics are indicative of a greater likelihood of a service provider providing an appropriate level of service as measured by other means. In this respect, it is important to note the positive correlation between client satisfaction and the service provider's performance as measured by way of a transaction criteria audit.¹⁵⁹

It is important to avoid the idea that there is some kind of 'exclusive nexus' between the introduction of franchising and improvements in the assessment and monitoring of service quality. Moves towards greater quality assurance are not dependent on the implementation of franchising. There are also other mechanisms which could be used to attempt to improve the quality of service provided. Moves to limit the eligibility of legal practitioners to handle legal aid work by requiring them to show an ability to achieve a certain standard of performance need to be explored further. Improvements may also be made by encouraging the involvement of specialist non-lawyers working in the advice sector in those legal aid areas where they have expertise. Such areas include

¹⁵⁹ See fn 42 supra and related text.

welfare rights, tenancy and mental health, all of which should be viewed as legal aid priorities.

In part, the future of franchising and any other attempts to monitor and hopefully improve the quality of legal aid services will depend on the economic issue of how significant is legal aid revenue to the private legal profession. Will solicitors, and ultimately barristers, be prepared to continue to handle legal aid work if the quality of service required is firstly articulated and then increased while per case remuneration declines in real terms? The potential to use franchising as a lever to achieve changes to work practices¹⁶⁰ is dependent on having service providers who will stay in the legal aid system rather than saying that they will turn their attention to other types of work. The UK profession's greater reliance on legal aid funds may well make it more accepting of such developments than its Australian counterpart.

The development of transaction criteria which can be used as the basis of quality audits is probably the most controversial aspect of franchising. Legal practitioners have questioned both the criteria which have been developed and, more fundamentally, the validity of using such a scheme to measure quality. To be successful, a system based on transaction criteria will need time to develop and be accepted by those service providers whose performance it will measure. It should also be noted that transaction criteria audits could be introduced without franchising. Franchising could be described as the carrot, in terms of financial and marketing advantages, being used to gain acceptance from the profession of greater accountability requirements, in the form of compliance with the criteria.

It is important to recognise the limitations of transaction criteria. They will not be able to measure all aspects of quality. As the LAB's researchers have stated:

All sides recognise that the definition of quality promoted by franchising is not complete. Whilst the standards under Franchising should lead to improvement, and this may extend beyond the particular issues addressed by the standards themselves, to encourage firms towards satisfying limited quality assurance standards could divert their resources away from other aspects of 'quality' which remain important but unmeasured. Focusing on specific aspects of legal work could, of course, have this effect, and this suggests the importance of a broad approach.¹⁶¹

It is easy to criticise the use of transaction criteria on a range of fronts, such as that they do not accurately measure quality, and are too inflexible. It could further be said that there is no guarantee that the level of service provided to legal clients will improve despite the substantial resources devoted to development of the transaction criteria system and the resources which will be required to maintain the system.

Despite this, it is important to give credit to the LAB for its work in this area. The LAB has taken a long term view in deciding on the need to improve

¹⁶⁰ Blake, *op cit* (fn 36) 4.

¹⁶¹ R Moorhead, A Sherr and A Paterson, 'Judging on Results? Outcome Measures: Quality, Strategy and the Search for Objectivity' (1994) 1 *International Journal of the Legal Profession* 191-92.

the systems for providing legal aid, and the conduct of the Birmingham pilot and publication of major pieces of research indicate that considerable care has been taken to seek to ensure that the system will work.

Goriely has suggested:

The logic of professionalism is that when two or more lawyers are gathered together they tend to demand more — that more facts are noted and more rules applied. Thus as transaction criteria develop they are likely to become longer and more complex. They are therefore a potentially effective counterweight to pressure from government to lower standards.¹⁶²

To date, the private legal profession has not taken such a view in relation to transaction criteria. However, if the transaction criteria system develops further and is acknowledged by practitioners as being 'here to stay' this may see the profession push for criteria which justify the performance of very detailed work on legal aid files. This would bring the profession into conflict with those who are seeking to use the franchising system to reduce unit costs.

It is still too early to tell whether the franchising scheme in the UK will succeed. The granting of franchises is currently based on management criteria rather than transaction criteria and, when the transaction criteria are introduced, the required compliance rates have been set quite low (65%). Further, the LAB may face difficulties in raising the required rates in the future due to resistance from the profession. The complete lack of coverage of the work of barristers within the franchising scheme also makes it difficult to assess the value to legal aid in general of such initiatives.

The LACV's franchising pilot will not provide sufficient information to enable informed decisions to be made on whether to introduce more general franchising. There has been a general lack of preparation for the pilot in terms of establishing its goals and the manner of assessment to be used. The consideration of franchising in Victoria arose principally from the desire to reduce the 20 cents in every legal aid dollar being spent on the assignments function. There is clearly a strong desire on the part of a number of interested parties, including government, to see the pilot succeed so that broader franchising arrangements can be introduced.

The limited nature of the legal aid budget in Victoria, and elsewhere, means that there will always be strong cost concerns running through debates regarding the delivery of legal aid services. Garth has quite clearly highlighted the unit cost — access to the system trade-off, and this will make it difficult for legal aid authorities to require increasing standards of quality without increasing remuneration. Tull refers to the need to provide 'legal work of consistent quality sufficient to accomplish the goals of clients and the program, and to meet the standards of the profession. To spend scarce resources to produce quality which exceeds this standard arguably would misallocate

¹⁶² T Goriely, 'Debating the Quality of Legal Services: Differing Models of the Good Lawyer' (1994) 1 *International Journal of the Legal Profession* 159, 167.

scarce resources'.¹⁶³ He further states that the standard required to accomplish these goals 'and in no case do less than competent work ... may be very high indeed'.¹⁶⁴

Apart from the interest of government in cost reduction, the enthusiasm for use of cost based measures is increased by the fact that costs are far easier to define than many of the terms discussed in this thesis. Blake, a member of the LAB from 1988–1993, has stated the LAB 'can properly be criticised if franchising is not pursued as part of an overall strategy,... but is highjacked for other purposes'.¹⁶⁵ Unfortunately, it will be cold comfort for legal aid recipients if such an opportunity for 'proper criticism' of the LAB eventuates.

It is unlikely that the range of issues discussed in this article will be satisfactorily resolved. Certainly the diverse interests of the various parties interested in the franchising debate are by no means entirely compatible. The franchising debate has seen the review of a wide range of legal aid issues, many of them being raised for the first time. If the focus on providing services which meet the needs of legal aid clients can be maintained, this will mean that the debate surrounding franchising, if not franchising itself, has been beneficial.

¹⁶³ J Tull, 'Assessing Quality and Effectiveness in Legal Services Programs for the Poor' (1994) 1 *International Journal of the Legal Profession* 211, 213.

¹⁶⁴ *Ibid.*

¹⁶⁵ Blake, *op cit* (fn 36) 19.